



U.S. Department  
of Transportation  
**Federal Highway  
Administration**

1200 New Jersey Ave., SE  
Washington, D.C. 20590

In Reply Refer to: HCR-20  
DOT# 2021-0065

March 5, 2021

(b) (6)

San Bernardino, CA 92408

(b) (6)

**Subject:** Acknowledgment of Complaint #2021-0065

Dear (b) (6),

This letter acknowledges the Federal Highway Administration (FHWA) Office of Civil Rights received your complaint against the California Department of Transportation (Caltrans), which alleged violations that may be related to Title VI of the Civil Rights Act of 1964 (Title VI) and its implementing regulations, including Title VI regulations administered by the United States Department of Transportation (49 C.F.R. Part 21) and the Federal Highway Administration (23 C.F.R. Part 200). Your complaint was received by this office by email on March 2, 2021.

This complaint has been assigned to Erik Lacayo, FHWA Title VI Analyst – Office of Civil Rights. Mr. Lacayo will keep you informed regarding the status of your complaint. You may contact him at 202-913-3926 or via e-mail at erik.lacayo@dot.gov.

Please be advised that no one may intimidate, threaten, coerce, or engage in other discriminatory conduct against anyone because he or she has either taken action or participated in an action to secure rights protected by the civil rights requirements that we enforce. Any individual alleging such harassment or intimidation may file a complaint with the FHWA. Any questions or concerns that you have regarding the complaint process and your rights can be discussed with Mr. Lacayo.

Sincerely,

*Nichole McWhorter*

Nichole McWhorter  
Title VI Team Leader  
Office of Civil Rights

cc: Vincent Mammano, Division Administrator, FHWA California Division Office  
Paul Schneider, Deputy Division Administrator, FHWA California Division Office  
Scott Carson, Civil Rights Specialist, FHWA California Division Office  
Jim Esselman, Senior Attorney-Advisor, FHWA Office of Chief Counsel  
Irene Marion, Director, Departmental Office of Civil Rights  
Yvette Rivera, Associate Director, Equal Employment Opportunity Programs Division,  
Departmental Office of Civil Rights  
Barbara Dougherty, Deputy Director, Departmental Office of Civil Rights  
Irene Rico, Associate Administrator, Departmental Office of Civil Rights

STATE OF CALIFORNIA  
DEPARTMENT OF TRANSPORTATION

## REQUEST FOR QUALIFICATIONS NOTICE

NUMBER 08A3201

Read carefully as the following revisions have been made to this document:

- On 2/26/19, Section I, General Information, Paragraph F, regarding fee and escalation was revised.
- On 10/2/18, Section I, General Information, Paragraph E, regarding financial documents was revised.

**Note:** Questions concerning this Request for Qualifications (RFQ) must be submitted in writing to the attention of Michelle Nelson at michelle.nelson@dot.ca.gov. Questions must be received no later than 10 calendar days after RFQ advertisement. Consultants contacting the District or Division directly seeking information about this RFQ will be disqualified from consideration in the selection process.

Proposers are advised that Caltrans has established a federally mandated overall annual DBE goal comprising both race neutral and race conscious elements to ensure equal participation of DBE groups specified in 49 CFR 26.5. In compliance with 49 CFR 26, Caltrans set a contract goal for DBEs participating in this solicitation expressed as a percentage of the total dollar value of the resultant Agreement. The DBE participation goal for this solicitation is eleven percent (11%). See section I.H. in this RFQ for requirements.

**I. GENERAL INFORMATION**

- A. Caltrans is soliciting Statements of Qualifications (SOQs) from qualified firms that may lead to the award of a contract for on-call Right of Way Engineering Services. In submitting your Statement of Qualifications (SOQ), you shall comply with the instructions found herein. In addition to those programs that are specified in this solicitation, prospective consultants are encouraged to consider programs that are available, such as those for the use of small businesses, disadvantaged businesses, disabled veteran businesses, new emerging firms, and other businesses covered by State and Federal programs.
- B. The estimated contract amount is \$616,800.00 - \$1,002,300.00.

- C. The estimated contract term is three (3) years.
- D. Interviews will be held in San Bernardino on July 13, 2020. Confirmation letters will be sent to those firms short-listed.
- E. The most highly qualified consulting firm will be required to submit an electronic copy of the financial documents listed on the appropriate Financial Documents Submittal Checklist available on the [A&E Contract Information](#) website. The most highly qualified consulting firm will be notified of their selection and receive instructions for the electronic submission financial documents.

The most highly qualified consulting firm must submit a complete financial documents package no later than four (4) days after notification of selection. The prime consultant must submit the complete financial documents package in order for Caltrans to have the information necessary to engage in negotiations. The prime consultant is solely responsible for timely and complete submission of financial documents on behalf of the entire proposed team; financial documents will not be accepted from proposed subconsultant firms. Failure to submit a complete financial documents package by the specified due date may result in termination of negotiations with the most highly qualified consulting firm.

- F. Negotiations will be held with the top-ranked firm in San Bernardino during the week of July 20, 2020. The fee for profit shall be 10.1 percent, and the escalation shall be as follows:

Period	Escalation
05/28/2020 – 05/28/2021	0%
05/29/2021 – 05/29/2022	1.5%
05/30/2023 – 09/08/2023	3.0%

Notes:

- 1. Partial year will only occur on the last year of the contract term. All other periods are full years.
  - 2. Increases to the loaded billing rates after contract execution is not authorized for any reason per Article IV, Section 17 and Article XVI, Section 6 of the California Constitution.
- G. The scheduled date to complete cost negotiations and submit final cost proposal is September 1, 2020.
  - H. Disadvantaged Business Enterprise Program

1. This solicitation and resultant Agreement is financed in whole or in part with federal funds and therefore subject to Title 49, Code of Federal Regulations, Part 26 (49 CFR 26) entitled "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs." To ensure equal participation for Disadvantaged Business Enterprise (DBE) groups specified in 49 CFR 26.5, Caltrans specifies a contract goal for DBE participation. The required goal for DBE participation in this solicitation is not less than eleven percent (11%).
  2. Only participation by certified DBEs will count toward the contract goal for this solicitation. In order to count toward a contract goal, a firm must be certified as a DBE by the California Unified Certification Program (CUCP) and possess the work codes applicable to the type of work the firm will perform on the Agreement by the SOQ submittal due date. For a list of work codes, go to [Office of Civil Rights](#) website.
  3. It is the proposer's responsibility to verify that the DBE firm is certified as a DBE by the specified SOQ submittal due date and time. For a list of DBEs certified by the CUCP, go to [Office of Civil Rights](#) website.
  4. A DBE must perform a commercially useful function (CUF) for the type of work it will perform on the Agreement as provided in 49 CFR 26.55(c)(1)-(4). A DBE performs a CUF when it is responsible for the execution of a distinct element of the work of the Agreement and is carrying out its responsibilities by actually performing, managing, and supervising the work involved.
  5. See "Statement of Qualifications Submittal Instructions and General Contract Process Information" for detailed information and references to the required forms. Required forms will be made a part of the Agreement. Failure to meet the DBE goal or Good Faith Effort requirements and provide required DBE participation at due date and time of SOQ submittal may result in the SOQ submittal being rejected as non-responsive.
- I. Federal and/or State prevailing wage rates may apply. This requirement, if applicable, will be specified in the draft Agreement. See SOQ Submittal Instructions, Section I., H. regarding the California Department of Industrial Relations (DIR) Consultant/Contractor Registration Program on the [A&E Contract Information](#) website.
  - J. Caltrans does not guarantee, either expressly or by implication, that any work or services will be required under any contract issued as a result of this RFQ.
  - K. A Pre-award or Post-award Audit will be performed on any contract issued as a result of this RFQ.

- L. Contract boilerplate can be obtained on the [A&E Contract Information](#) website

## II. SCOPE OF WORK/DELIVERABLES

The work to be performed for this RFQ is described in the Scope of Work/Deliverables, and is hereby incorporated as Attachment 1.

## III. CONFLICT OF INTEREST

- A. Conflicts of interest may occur due to direct or indirect financial or business interests in the work to be performed or in any real property acquired for such project. Conflicts of interest can include, but are not limited to, past, existing or planned activities or because of relationships with other persons or firms. If there is a conflict of interest, the proposed team, including both the prime consultants and subconsultants, and individual employees of team members would actually or potentially be unable to render impartial assistance or advice to Caltrans. The proposer's objectivity or availability in performing the contract work may be impaired due to actual or potential conflicts of interest.
- B. If the proposed team determines that any actual or potential conflicts of interest exists, it must identify and describe in detail each conflict of interest to Caltrans, using the Disclosure of Potential Conflict of Interest Form, which can be found on the [A&E Contract Information](#) website. Along with the description of the actual or potential conflicts of interest, the proposed team shall also offer measures to avoid, neutralize, or mitigate all listed conflicts. The list of conflicts, including conflicts that apply to individuals as well as firms, and the mitigation measures on the Disclosure of Potential Conflict of Interest Form must be submitted as a separate section in the Statement of Qualifications. Disclosure of information will not disqualify a proposed team from competing for a contract. The existence of actual or potential conflicts of interest will be used as a criterion to evaluate team availability during the evaluation and selection process. Caltrans reserves the right to terminate negotiations with the first selected firm and begin negotiations with the next selected firm or to cancel the procurement prior to execution if Caltrans learns that the selected team failed to disclose any actual or potential conflicts, which it knew or should have known about, or if the proposed team provided or omitted information on the disclosure form that results in the information being false or misleading.
- C. After award, conflict of interest guidelines and policies shall continue to be monitored and enforced by the Caltrans Contract Manager. Additional information about Conflict of Interest issues can be found in the SOQ Submittal Instructions and General Contract Process

Information document (Section V. Post Government Employment Restrictions and Section VI. Conflict of Interest Concerning Consultant(s)) found on the [A&E Contract Information](#) website. The State and Federal contract boilerplates on DPAC's website also contain information on conflict of interest issues (Exhibit D) and can be found on the [A&E Contract Information](#) website.

- D. The prime consultant and subconsultants may be proposed on SOQs for other Caltrans A&E on-call contracts; however, the Caltrans Contract Manager may prohibit work on specific projects where Caltrans determines that a conflict of interest exists.

#### IV. SUBMISSION OF STATEMENTS OF QUALIFICATIONS (SOQs)

- A. **IMPORTANT:** Download "Statement of Qualifications Submittal Instructions and General Contract Process Information" dated (**Rev. 04/15/19**) from the [Procuring A&E Contracts](#) website. Failure to follow these instructions may result in rejection of your SOQs.
- B. SOQ Package Submittal Instructions

**Read instructions below carefully. You will be required to submit an electronic SOQ file to Sacramento.**

1. The electronic submission of a single unprotected (i.e. not password protected) PDF file of the SOQ is required. The electronic submittal will be accepted until **3:00 p.m.** on **June 29, 2020**. Hard copies of the SOQs are **NOT** required. Fax copies or copies transmitted by email will not be allowed.

You will be required to create a Novell Filr account with Caltrans. Send an email message to the Contract Analyst, Michelle Nelson, at [michelle.nelson@dot.ca.gov](mailto:michelle.nelson@dot.ca.gov) containing the information listed below for a link and instructions to complete the self-registration page and submit the SOQ electronically.

- Your firm's name
- Your email address
- The solicitation number for which you would like to submit an SOQ

The file name shall include the contract number, consultant name (max. 25 characters) separated by an underscore (\_), ending with the ".pdf" extension.

Example A: 50A0694\_JohnDoeConsulting.pdf  
Example B: 50A0694\_aaa1234engineer.pdf

2. SOQ submittals will be considered non-responsive if the electronic submittal is not received by the date and time specified in this RFQ.

C. Request for RFQ Copies

Copies of this RFQ may be obtained on the [Cal eProcure](#) website.

## **SCOPE OF WORK/DELIVERABLES**

### **Right of Way Engineering Services** for Caltrans, Division of Right of Way, District 8 **On-Call Contract**

#### **RIGHT OF WAY ENGINEERING SERVICES**

##### **A. Purpose of Work**

The consultant must perform Right of Way Engineering Services, on an “as-needed” basis to support the California Department of Transportation (Caltrans), Division of Right of Way, District 8. The Caltrans contract manager will assign specific work to the consultant to perform professional and technical services required for Right of Way Engineering Support Services, on an “as-needed” basis to support Department of Transportation (Caltrans) in the development and construction of proposed Caltrans transportation facilities. The Caltrans Contract Manager shall assign specific work to the Consultant through the issuance of Task Orders describing in detail the services to be performed through issuing task orders describing the services to be performed. The consultant must only perform work assigned in an authorized task order. This contract does not guarantee that a task order will be issued.

The consultant for this contract must perform the services above after the contract authority for contract 08A2871 is exhausted. The consultant must plan accordingly to meet the timing of and the volume of work load needs.

##### **B. Location of Work**

The work must be performed on projects to improve the State transportation system throughout the counties of San Bernardino and Riverside in California. The specific location within the above-described geographical limits of the work to be performed must be identified in each task order. It may become necessary for Caltrans, Division of Right of Way, District 8, projects to extend into another adjoining District /County line. Certain projects may also require studies/work that extends into adjacent counties adjoining Caltrans' District outside of the boundary of Caltrans' District 8. In such instances, the project work must not extend more than a 30-mile radius from the District/County, Division of Right of Way, District 8 geographic boundary.

Conventional Land Surveying Support Services such as field work, preparation and

maintenance of field survey documents, including compiling and maintaining survey field notes and field drawings, and providing other field survey documents to Caltrans projects are excluded from this contract.

C. Required Services

1. Under an authorized task order, the consultant must provide Right of Way Engineering services within the geographical jurisdiction of this contract set forth in the “Location of Work” section, including all necessary personnel, material, transportation, lodging, instrumentation, and the specialized facilities and equipment to satisfy all appropriate agencies and required to ensure compliance with all federal, state, and local statutes, laws, codes, regulations, policies, procedures, ordinances, standards, specifications, performance standards, and guidelines, applicable to the consultant's services and work product.
2. Provided in Attachment A is a list of proposed Caltrans projects; Division of Right of Way, District 8, however, this list is not exclusive and it constitutes no commitment that the projects will be initiated or completed or work assigned to the consultant. Caltrans reserves the right to add or delete from this list of projects that are within the geographical jurisdiction of this contract set forth in “Location of Work” section within the Division of Right of Way, District 8’s jurisdiction.
3. Caltrans intends to utilize this contract to complete a specific piece of work if it is within the geographical jurisdiction of this contract set forth in the “Location of Work” for each of the projects in this contract utilizing the services described in this Scope of Work (SOW) and as described in a task order. Caltrans may find it necessary to create a separate contract (or contracts) that involves a specific project in this contract and includes part of the work in this contract. Caltrans reserves the right to procure A&E services involving the listed projects or unlisted projects (within the geographical jurisdiction of this contract set forth in “Location of Work” Section) involving in whole or in part the same work using a project-specific agreement if the schedule to complete performance of the specific project extends beyond the term of this contract or the cost exceeds the dollar balance remaining in the contract after accounting for amounts due to the consultant for work previously performed and for work scheduled to be performed in executed task orders.

Should a project-specific agreement be procured under these provisions, the parties mutually agree that, under Exhibit D, Section III, Termination of this Contract, Caltrans must terminate for convenience the portion of the contract that includes the common SOW identified in the project specific agreement per Exhibit D, Section III, Termination of this Contract. Such partial termination for convenience must be processed by amendment to this contract. Unless otherwise required by law, regulation, or Caltrans policy or procedure, the consultant may compete for these project specific contracts.

4. In this contract is a list of proposed classifications for which services are anticipated to be needed by Caltrans during the term of this contract; however, this list is not exclusive if the classification perform Right of Way Engineering Services. Caltrans reserves the right to add/or delete personnel classifications from this list. Consultant personnel will work under the general direction of a Caltrans supervisor.
  - i. Project Surveyor
  - ii. Survey Technician
  - iii. Survey Assistant
  
5. When any of these positions are needed, the approximate range for the number of positions are:
  - a. Project Surveyor 1-2.
  - b. Survey Technician 1-3.
  - c. Survey Assistant 1-3.

The numbers shown above are approximate. The exact number and classification of consultant staff will be specified in the task order.

6. At the sole discretion of Caltrans, the consultant may have to provide the required services on safety projects, emergency projects, emergency storm damage projects, excess parcel assessments, or other current/future transportation projects, including minor projects not listed above, except for those specially excluded

above, within the geographical jurisdiction of this contract set forth in “Location of Work” Section.

7. The potential projects may vary in scope and size, and may encompass any improvement for the State transportation system including, but not limited to, roadway rehabilitation, widening and/or realignment of existing facilities, relocation of existing facilities, and construction of new facilities. The project location, project limits, purpose, expected results, project deliverables, period of performance, project schedule, and SOW to be performed must be described in each task order.
8. Consultant must be available, on two days’ written notice:
  - a. To meet with Caltrans; to participate in internal Project Development Team (PDT) meetings or other Caltrans meetings.
  - b. To provide technical expertise on an “as-needed” basis.
9. Maintaining a stable work force is essential to the successful completion of Caltrans, Division of Right of Way, District 8, work. The consultant must implement a personnel retention plan.

D. Workplan Standards Guide (WSG) Codes

Task orders are based on the Caltrans WSG. The latest WSG is found in the Guide to Project Delivery WSG, which is available from the Caltrans’ Publication Unit and on the Internet at <http://www.dot.ca.gov/hq/projmgmt/guidance.htm>. The WSG references the WBS categories, which are potential and related work activities applicable to this contract. The WSG references WBS categories which present the potential and related work activities that the consultant may have to perform. All revisions to the current version of the WBS must apply during the life of this contract.

The WBS activities below applicable to this Contract are limited to those set forth below:

- |           |                                   |
|-----------|-----------------------------------|
| 160.20.25 | Existing Records                  |
| 160.20.35 | Land Net Map                      |
| 160.20.40 | Right of Way Engineering Products |

160.20.60	Engineering Surveys
185.10.60	Engineering Surveys
220.05.05	Existing Records
220.10	Land Net Map
220.15	Right of Way Maps
220.15.05	Appraisal Maps
220.15.95	Other Maps
220.20	Acquisition Documents
220.20.05	Deeds
220.20.15	Resolution of Necessity Package
220.25	Documents to convey property rights
220.25.05	Director's deed package
220.25.95	Other deeds and documents
255.35.10	Construction Staking Package
255.70	Right of Way Engineering Products
270.66	Technical Support
300.05.10	Filed Monumentation Record of Survey
300.10	Trial Exhibits and Testimony
300.25	Relinquishment and Vacation Maps
300.30	Deed Package for Excess Land Transactions
300.35	Right of Way Record Map

The consultant must not work on any projects in the planning phase (K-Phase), and the consultant will not be reimbursed for any work performed during this phase of a project.

E. General Personnel Requirements

1. The consultant's personnel must be capable, competent, and experienced in performing the work in this contract with minimal instruction. Personnel skill level must match the specific job classifications, as set forth or in the consultant's cost proposal, attachment 2 and task complexity. The consultant's personnel must

be knowledgeable about, and comply with, all federal, state, and local laws and regulations.

2. The consultant must submit a written request and obtain the Caltrans CM's prior written approval for any substitutions, additions, alterations, or modifications to the consultant's originally proposed personnel and project organization, as depicted on the proposed consultant's organization chart or the consultant's cost proposals. The substitute personnel must have the same job classification, as set forth or in the consultant's cost proposal, attachment 2, not exceed the billing rate, and meet or exceed the qualifications and experience level of the previously assigned personnel, at no additional cost to Caltrans.
3. The Consultant Contract Manager shall coordinate the Right of Way Engineering Support Services related matters and Consultant's operations under this Contract Agreement with the Caltrans Contract Manager.
4. In responding to Caltrans' task order and in consultation with the Caltrans contract manager and the Caltrans task order manager, the Consultant contract manager must identify the specific individuals proposed for the task and their job assignments. The consultant must provide documentation that proposed personnel meet the minimum qualifications as required by this contract.
5. The consultant's personnel must typically be assigned to and remain on specific Caltrans projects/deliverables until completion and acceptance of the project/deliverables by Caltrans. Personnel assigned by the consultant must be available at the start of a task order and after acceptance of the project/deliverable by Caltrans.
6. After the Caltrans contract manager's approval of the consultant's personnel proposal and finalization of a task order, the consultant may not add or substitute personnel without the Caltrans contract manager's prior written approval.
7. Resumes containing the qualifications and experience of the consultant's and sub-consultant's personnel, which include existing, additional, and substitute personnel, and copies of their minimum required certifications, must be submitted to the Caltrans contract manager for review before assignment on a project or task order. The resume and copies of current certification for each candidate must be submitted to the Caltrans contract manager within one week of receiving the request.

8. The Caltrans contract manager or Caltrans task order manager may interview the consultant's personnel for the qualifications and experience. The Caltrans contract manager's decision to select the consultant's personnel will be binding to the consultant and its sub-consultants. The consultant must provide adequate qualified personnel to be interviewed by the Caltrans contract manager or Caltrans task order manager within one week of receiving the request.
9. The Caltrans task order manager will evaluate the adequacy (quality and quantity) of the work performed by the consultant's personnel, and determining whether the deliverables satisfy the acceptance tests and criteria. The Caltrans contract manager consulting with the Caltrans task order manager may reject any consultant personnel determined by the Caltrans contract manager to lack the minimum qualifications. If the level of performance is below expectations, the Caltrans contract manager may direct the consultant to immediately remove consultant personnel from the project specified in a task order and request another qualified person be assigned as needed. The substitute personnel must meet the qualifications required by this contract for performance of the work as demonstrated by a resume and copies of current certifications submitted by the consultant. Substitute personnel must receive prior written approval from the Caltrans contract manager. Invoices with charges for personnel not pre-approved by the Caltrans contract manager for work on the contract and for each task order must not be reimbursed.
10. The consultant must not remove or replace any existing personnel assigned to task orders without the prior written consent of the Caltrans contract manager. The removal or replacement of personnel without the written approval from the Caltrans contract manager will violate the contract and may cause termination of the contract per Exhibit D, Section III, Termination of the Contract.
11. When assigned consultant personnel is on approved leave and required by the Caltrans contract manager, the consultant contract manager must provide a substitute employee until the assigned employee returns to work from the approved leave. The substitute personnel must have the same job classification, as set forth in the consultant's cost proposal, attachment 2, not exceed the billing rate, and meet or exceed the qualifications and experience level of the previously assigned personnel, at no additional cost to Caltrans. Substitute personnel must

receive prior written approval from the Caltrans contract manager to work on this contract.

12. Other project personnel not identified on the consultant's cost proposal, must also satisfy minimum qualifications for assigned task orders. Caltrans' prior written approval is required for all personnel not identified on the consultant's organization chart or the consultant's cost proposals before providing services under this contract.
13. The consultant is responsible to provide fully trained personnel to efficiently perform the work. The consultant's personnel may be asked to attend certain special training if recommended by the Caltrans contract manager. On such occasions, with the approval of the Caltrans contract manager, Caltrans will compensate the consultant for the consultant's actual cost for time spent in training only. All other costs, fees, and expenses associated with the training, including any transportation costs and training fees, must be the consultant's responsibility.
14. In location(s) where the consultant personnel is expected to work for extended period(s) of time, the consultant must either relocate the personnel or strive to hire local persons.

F. Right of Way Engineering Personnel Requirements

1. The consultant, including the prime consultant and all sub-consultants, must throughout the life of the contract, retain within its firm, a staff of people properly licensed and certified under the laws of the State of California and qualified to perform all aspects of the required work described in this contract and all work specified in a task order with any emergencies that may arise during the life of this contract. The consultant must be prepared to provide additional personnel during the period performance of this contract to accommodate the work.

2. Consultant Contract Manager

The consultant contract manager must coordinate work-related matters and consultant's operations under this contract with the Caltrans contract manager in coordination with the Caltrans task order manager.

The consultant contract manager must be a Professional Land Surveyor or pre-January 1, 1982 Registered Civil Engineer licensed in the State of California and be in good standing with the California State Board of Professional Engineers, Land Surveyors, and Geologists (BPELSG) during the contract period.

The consultant contract manager must have a minimum of five years of responsible experience performing the duties as a contract manager for similar Right of Way Engineering Services contracts. The consultant contract manager must be knowledgeable about all Caltrans policies and procedures. The consultant contract manager must be an employee of the prime consultant.

Besides other specified responsibilities, the consultant contract manager must handle all matters related to the consultant's personnel, sub-consultants, Right of Way Engineering services work, and consultant's and sub-consultants' operations including, but not limited to:

- a. Ensuring that deliverables are acceptance tested and that criteria are specific, measurable, attainable, realistic and time-bound; and that the deliverables satisfy the acceptance tests and criteria.
- b. Supervising, reviewing, monitoring, training, and directing the consultant's and sub-consultants' personnel.
- c. Assigning qualified personnel to complete the required task order work as specified on an "as-needed" basis in coordination with the Caltrans contract manger and Caltrans task order manager.
- d. Administering personnel actions for consultant personnel and ensuring appropriate actions taken for sub-consultant personnel.
- e. Maintaining and submitting organized project files for record tracking and auditing.
- f. Developing, organizing, facilitating, and attending scheduled coordination meetings, and preparation and distribution of meeting minutes.

- g. Implementing and maintaining quality control procedures to manage conflicts, insure product accuracy, and identify critical reviews and milestones.
  - h. Assuring that all applicable safety measures are in place.
  - i. Providing invoices in a timely manner and providing monthly contract expenditures.
  - j. Reviewing invoices for accuracy and completion before billing to Caltrans.
  - k. Managing sub-consultants.
  - l. Managing overall budget for the contract and provide report to the Caltrans contract manager.
  - m. Monitoring and maintaining required DBE or DVBE involvement.
  - n. Ensuring compliance with the provisions in this contract and all specific task order requirements.
  - o. Knowledge, experience, and familiarity with prevailing wage issues and requirements in State of California.
3. Consultant Task Order Manager

For each task order, the consultant must provide a consultant task order manager to coordinate the consultant task order operations with the Caltrans contract manager in coordination with the Caltrans task order manager.

The consultant task order manager must be accessible to the Caltrans contract manager in coordination with the Caltrans task order manager during normal Caltrans working hours that task order work is underway.

The consultant task order manager (who may not be the consultant contract manager) must be assigned to conduct, or direct the conduct of, all work assigned under a single task order. The consultant task order manager must be a

Professional Land Surveyor or a pre-January 1, 1982 Registered Professional Civil Engineer licensed in the State of California and be in good standing with the BPELSG during the Contract period. The consultant task order manager must be the primary contact for the assigned task order and be available for communication with Caltrans.

4. Consultant Personnel and Team Member Qualifications.  
The consultant team member must be capable of assisting the consultant contract manager in all aspects of the required work. The consultant team member's required professional qualifications must be identified in each task order.
5. In this contract, a person authorized to review and approve consultant Right of Way Engineering deliverables in place of the consultant task order manager must be called the consultant land surveying responsible person. The consultant land surveying responsible person, must be a Professional Land Surveyor or a pre-January 1, 1982 Registered Professional Civil Engineer licensed in the State of California and be in good standing with the BPELSG during the contract period.
6. All deliverables under this contract not fully approved by Caltrans bearing the signature of the consultant land surveying responsible person who is no longer employed by the consultant or its sub-consultants, must be replaced with deliverables under this contract bearing the signature of a qualified replacement consultant land surveying responsible person currently employed by the consultant or its sub-consultants. In such an event, no additional time will be allowed or cost reimbursed to the consultant without the prior written approval of the Caltrans contract manager.
7. All of the consultant's work must be conducted under the direction of the consultant contract manager who must have the experience as described in this contract. All deliverables under this contract requiring the consultant land surveying responsible person's signature, must be produced by the responsible consultant personnel having appropriate experience, and must be signed by a consultant land surveying responsible person.
8. Project Surveyor  
  
Project Surveyor must fulfill one of these licensing requirements and be in good standing with the BPELSG during the Contract period.

- a. A Professional Land Surveyor licensed in the State of California.
- b. A pre-January 1, 1982, Registered Professional Civil Engineer licensed in the State of California.

Project Surveyor: The duties of the project surveyor in the office include, but are not limited to: prepare survey requests and supporting information for the field survey; analyze, reduce and/or adjust field survey data to produce maps, reports, digital terrain models, project control maps, and related documents to determine property and right of way boundaries; and, research public records from counties, cities, utility companies, and other agencies to produce, signs and seals, documents and maps defining the existing location of, acquisition of, and disposal of State Right of Way, including but not limited to: legal descriptions, acquisition deeds, resolutions of necessities (Condemnation), land net maps, appraisal maps, relinquishment or vacation maps, federal application maps, final record maps and Record of Survey Maps.

9. Land Surveying Assistants

The Land Surveying Assistants must fulfill one of the following requirements:

- a. A degree (Associate, Bachelors, Masters, or higher) in land surveying or surveying engineering from an ABET accredited institution (College or University) and a minimum of two years of qualifying experience in land surveying.
- b. Possession of a valid Land Surveyor-in-Training certificate issued or accepted by the BPELSG, and a minimum of two years of qualifying experience in land surveying.

The land surveying assistants to the project surveyor must be capable of assisting in all required and associated office land surveying work, able to perform difficult survey and complex professional land surveying work involving duties in the office with little direct supervision. Duties include, but are not limited to, assist office chief or project surveyor in preparing right of way maps using Computer-Aided Design (CAD), maintaining right of way records and geospatial information systems, research and compile a wide variety of data from public records, geospatial information systems and other sources using both manual and computerized processes, and survey support.

10. Land Surveying Technicians

The land surveying technicians must work under the direction of a Professional Land Surveyor licensed in the State of California or a pre-January 1, 1982 Registered Professional Civil Engineer licensed in the State of California and be in good standing with the BPELSG. The land surveying technicians must fulfill one of these criteria:

- a. The equivalent of a two-year college degree, preferably with an emphasis in mathematics and engineering and a minimum of one year of qualifying experience in land surveying.

The land surveying technicians must be capable of assisting in all required office land surveying services work.

11. The consultant must have personnel with documented and demonstrated expertise and experience in the fields of Geographic Information Systems (GIS) and geodetic survey control.

G. Consultant Availability and Work Hours

1. The typical workday includes all hours worked as identified in the task order or as directed by the Caltrans contract manager. Unless otherwise specified in a task order or directed by the Caltrans contract manager, the normal work week must comprise forty (40) hours.
2. If Caltrans determines that the work cannot be performed during normal business hours or the work is necessary at off hours to avoid danger to life or property, the consultant's operations may be restricted to specific hours during the week. Night work may be required on projects involving high traffic areas. Changes in hours or schedules must be documented by amendment of task orders. Any shift differential rate pay must be reimbursed under the Department of Industrial Relations (DIR) determination.
3. The Caltrans contract manager in coordination with the Caltrans task order manager, must provide advance notice of one working day(s)/24 hours if the consultant's services are not required, or if reassignment of personnel is required. If Caltrans fails to provide the required advance notice and the consultant

personnel are not required, Caltrans must provide a maximum of four hours compensation.

4. During the contract period, the Caltrans task order manager and/or contract manager may reassign a consultant's employee from a project or an office with low activity to assist on another project or office with high activity. The consultant contract manager will be notified at least two working days prior to this reassignment.

#### H. General Requirements

1. The consultant must prepare the required deliverables, backup documents, and other items required by this contract according to requirements of this contract and applicable Caltrans Manuals for the work.
2. The consultant's timesheet/invoices/expenses must be subject to the consultant contract manager's review and the approval of the Caltrans contract manager before submitting timesheets, invoices, or expense reimbursement requests for payment.
3. The consultant must begin the required work within two working days after receiving a fully executed task order and issuing the Notice to Proceed from the Caltrans contract manager to the consultant contract manager or on the date specified in the task order. Some work, however, may require consultant personnel to mobilize within 24-hours of notifications. Once the work begins, the work must be prosecuted/performed diligently until all required work has been completed to the satisfaction of the Caltrans contract manager or Caltrans designee task order manager.
4. The work must not be performed when conditions prevent a safe and efficient operation, and must only be performed with written authorization by Caltrans.
5. The consultant contract manager, consultant task order manager, and key personnel must be accessible to the Caltrans contract manager and the Caltrans

task order manager during normal Caltrans working hours or after hours as required by the Caltrans contract manager.

6. The consultant contract manager may direct the consultant's employees to work overtime to meet task order schedules at the request of the Caltrans contract manager or task order manager. All overtime must be pre-approved by the Caltrans contract manager. Overtime must be worked only when directed in writing by the Caltrans contract manager and specifically required by the task order, and must only be paid to persons covered by the Fair Labor Standards Act.
7. All consultant personnel must sign a confidentiality and nondisclosure agreement.
8. The consultant may disclose no information to third parties without prior written approval of the Caltrans contract manager.
9. The consultant must only provide incidental non-A&E services, such as Computer Aided Drafting & Design (CADD) support, GIS support, office support, and meeting support, provided (a) such services are necessary for completing the A&E tasks and/or deliverables performed by the consultant described in executed task orders and covered by the work in this contract and (b) the rendering of the services is approved in advance by the Caltrans contract manager. These incidental services must only be provided to support the consultant's personnel performing A&E services, tasks, and deliverables on this contract. The contract amount spent on such incidental services must be relatively minor when compared to the professional A&E services performed. The consultant must not be paid or reimbursed for any incidental non-A&E services provided to Caltrans unless provided in the fashion described in this contract and included in the executed task order. The consultant ensures that task orders only include any incidental non-A&E services.
10. Incidental training services may be provided only if the training involves the specific work product of this agreement. Such incidental training services are permitted, but only if:
  - a. The training involves the specific work product created under this agreement (and does not involve general A&E training and is not the work product of a previous agreement); and

- b. The total aggregate cost of all training under this agreement does not exceed 10% of the total authority of the agreement; and
  - c. The training is an incidental task within the agreement and not the purpose for entering this agreement.
11. The consultant must include the Caltrans contract manager or task order manager in written communications to other Caltrans personnel for any clarification on work.

I. Coordination

- 1. For each task order, the consultant must carry out instructions received from the Caltrans task order manager. If an instruction or direction is unclear to the consultant, the consultant must ask the Caltrans task order manager to clarify the instruction or direction.
- 2. The foregoing paragraph does not relieve the consultant of professional responsibility during the performance of this contract. Where the consultant believes a better standard solution to a task being performed or an issue being addressed is possible, the consultant must promptly notify the Caltrans contract manager and task order manager of these concerns, with the reasons therefore. However, Caltrans must make all final decisions on the consultant's activities and investigations.
- 3. The consultant must work closely with the Caltrans contract manager and the Caltrans task order manager identified in the task order.
- 4. The consultant must have the capability to send to and receive from Caltrans' digital electronic mail system and file transfer protocol system including, but not limited to, attachments for word processing, photographs, spreadsheets, and databases.
- 5. Caltrans must not reimburse the consultant for costs to relocate its personnel to the service area of this contract. Caltrans must not reimburse the consultant for per diem costs, unless preapproved by the Caltrans contract manager. Caltrans must not reimburse the consultant for out-of-state travel without prior written approval from the Caltrans contract manager.

6. The consultant must obtain the Caltrans contract manager's approval prior to making presentations at non-Caltrans sponsored conferences or workshops for any services provided under this contract.
7. Caltrans must not incur costs beyond the funding commitments in the contract and each task order. If the consultant anticipates that funding for work will be insufficient to complete work, the consultant must promptly notify the Caltrans contract manager.

J. General Equipment Requirements

1. The consultant or its sub-consultants must incorporate no materials or equipment of a single or sole source origin without the advance written approval of Caltrans.
2. The consultant may claim reimbursement for providing equipment or supplies. However, such claimed costs must comply with 48 Code of Federal Regulation (CFR), Chapter 1, Part 31 (Federal Acquisition Regulation - FAR cost principles) and 2 CFR, Part 200, and follow the consultant's company-wide allocation policies and charging practices with all clients including federal government, state governments, local agencies, and private clients.

K. Equipment Requirements

1. Office Equipment and Supplies (Consultant's Office):

The consultant must have and provide adequate office equipment and supplies to complete the work required by this contract. Such equipment and supplies must include, but not be limited to:

- a. Office supplies.
- b. Computers with software, printers, plotters, fax machines, calculators, data collectors and their necessary attachments and accessories.
- c. Data processing systems, software packages, reference materials, or other tools, including hardware and software, used in providing transportation land surveying deliverables.

- d. The consultant must provide a computer system for each person working under a task order that meets the Caltrans current specifications. Qualified Caltrans information technology personnel must install required software. Caltrans reserves the right to provide the computer system if beneficial to Caltrans' interest.
- e. Reference material, or other tools, used in providing deliverables.
- f. Caltrans must purchase no hardware, software, or other equipment (including, but not limited to, batteries, paper, and office supplies) that may be required for the consultant to perform work required in this contract. The Caltrans contract manager must approve any consultant's request for digital electronic connections and compatibility with current Caltrans Windows-based networks and programs in writing prior to the use and/or installation of any electronic hardware and/or software.
- g. In-house printing, reproduction, and delivery services.
- h. Computer Aided Drafting equipment and software capable of producing land surveying maps, drawings, and documents in the Caltrans approved format (Microstation, CaiCE, AutoCAD Civil 3D ArcGIS).

2. Field Equipment and Supplies:

Consultant must have and provide adequate field tools, instruments, equipment, materials, supplies, and safety equipment to complete the required field work and that meet or exceed Caltrans specifications per the Caltrans Manuals. The tools, instruments, equipment, materials, supplies, and safety equipment required for each consultant field personnel must include, but not be limited to, the following, if required by the task order:

- a. Sufficient vehicles suitable for the work to be performed and terrain conditions of the project sites. Vehicles must be fully equipped with all necessary tools, instruments, equipment, materials, supplies, and safety equipment required for the efficient operation of the consultants' field personnel. Each vehicle must have a load carrying capacity of 1500 pounds of materials and equipment. Each vehicle must have sufficient ground clearance to safely maneuver through highway construction sites while fully loaded with equipment and materials. Each vehicle must have overhead flashing amber light(s), visible from all sides (360 degrees), with

a driver control switch; fire extinguisher; and first aid kit. Vehicles without side windows must not be used. Each vehicle must be equipped to meet Caltrans safety requirements.

- b. A laptop computer or tablet with software.
  - c. Cell phone with “Hot Spot” capabilities
  - d. Hand tools including but not limited to; shovels, gloves, measuring tape, sledge hammer, clip board, calculator, peg book for the requested field personnel work.
  - e. All necessary safety equipment including fire extinguisher, hard-soled safety footwear, white hard hats, eye protection, hearing protection, and American National Standards Institute (ANSI) 107-2004 or higher Class II garment for the requested field work to be performed safely and efficiently within operating highway and construction zone environments.
  - f. Necessary miscellaneous tools, non-consumables, and supplies including, but not limited to, hammers, and shovels.
  - g. Traffic cones, at a minimum 25, for traffic control as necessary. Such cones must be 28 inches, minimum, in height.
  - h. Traffic control devices (including signs, sign bases, flags, and hand held signs) as required to perform the requested field personnel work.
3. The consultant must provide all necessary tools, instruments, equipment, materials, supplies, and safety equipment required to perform the work identified in each task order and this contract accurately, efficiently, and safely. The consultant’s personnel must be fully trained in using such necessary tools, instruments, equipment, materials, supplies, and safety equipment. The consultant must not be reimbursed separately for tools of the trade, which may include, but not be limited to, the above-mentioned equipment.

L. Standards

1. All work/services under this contract must be performed under all federal, state, and local statutes, laws, codes, regulations, policies, procedures, ordinances, standards, specifications, performance standards, and guidelines, including the latest Caltrans regulations, policies, procedures, manuals, standards, specifications, performance standards, directives, guidelines, handbooks, guidance documents, forms, templates, policy memo, methodologies, and other informational or directive publications, including compliance with FHWA and State guidelines for implementing those requirements; and any permits, licenses, agreements or certifications that apply to specific task orders; the terms and conditions of this contract; and current Caltrans Manuals and any future revisions. Work not covered by the “Manuals” must be performed as specified in the task order. If no standards exist, task orders may call for developing new standards, so long as these standards do not conflict with the requirements, or amend the Scope Of Work under of this contract.
  - a. The consultant obtains, at its expense, all necessary manuals, reference documents, and other materials.
  - b. Caltrans Manuals may be purchased from the Publication Distribution Unit. The publications staff may be reached at (916) 263-0822, and the center is at these address:

State of California  
California Department of Transportation  
Publication Distribution Unit  
1900 Royal Oaks Drive  
Sacramento, CA 95815-3800
  - c. Manuals and documents that are not available from the Caltrans Publication Distribution Center or are not available from Caltrans’ internet web site may be requested from the Caltrans contract manager. Caltrans does not guarantee the availability of publications nor its internet web pages.
  - d. Caltrans’ regulations, policies, procedures, manuals, standards, specifications, performance standards, directives, guidelines, handbooks, guidance documents, forms, templates, policy memo, methodologies, and other informational or directive publications, are dynamic documents and subject to change. The consultant is responsible to verify that the latest version or update is used.

2. Manuals, Documents, and Websites

These manuals, documents and links to internet sites are referenced in association with the work in this contract. The list is not all-inclusive, but should illustrate the reference material and sources of information.

- a. Caltrans' Internet Home Webpage:  
<http://www.dot.ca.gov/>
- b. Manual of Uniform Traffic Control Devices (MUTCD):  
California Manual on Uniform Traffic Control Devices:  
<http://mutcd.fhwa.dot.gov/>  
<http://www.dot.ca.gov/trafficops/engineering/>
- c. Caltrans Surveys Manual:  
[http://www.dot.ca.gov/hq/row/landsurveys/SurveysManual/Manual\\_TOC.html](http://www.dot.ca.gov/hq/row/landsurveys/SurveysManual/Manual_TOC.html)
- d. Caltrans CADD User's Manual:  
<http://www.dot.ca.gov/hq/oppd/cadd/usta/ppman/toc.htm>
- e. Caltrans Standard Plans and Standard Specifications:  
<http://www.dot.ca.gov/des/oe/construction-contract-standards.html>
- f. Caltrans Right of Way Manual:  
<http://www.dot.ca.gov/hq/row/rowman/manual/index.htm>  
<http://www.dot.ca.gov/hq/row>

3. Right of Way Engineering services and associated work performed by the consultant must conform to the California Land Surveyors Act. Business & Professions Code §§ 8700 et. seq. The consultant personnel in "Responsible Charge", as defined in the California Land Surveyors Act, must be a PLS licensed in the State of California or a pre-January 1, 1982, Registered Professional Civil Engineer licensed in the State of California and be in good standing with the BPELSG during the Contract period

M. Field Safety

Besides the requirements specified elsewhere in this contract, the following also must apply:

1. The consultant must maintain a working environment safe for project personnel and the public. The consultant's personnel must comply with all safety provisions of the Caltrans Safety Manual, Caltrans Surveys Manual, Caltrans Traffic Manual, and Caltrans Code of Safe Practices. The consultant must comply with all federal, state, and local Occupational Safety and Health Administration (OSHA) statutes, laws, codes, regulations, policies, procedures, ordinances, standards, rules, specifications, performance standards, and guidelines, and the safety instructions that Caltrans issues for performance of task order work, applicable to the work under this contract, regarding safety equipment and procedures (including, but not limited to, use and operation). Under no circumstance must the consultant's safety policies be less stringent than Caltrans.
2. The field work must not be performed when conditions prevent a safe and efficient operation, and must only be performed with written authorization by Caltrans.
3. The consultant must provide, at no cost to Caltrans, all safety equipment to perform the required services safely including, but not limited to: gloves, coveralls, sunscreen, insect repellents, fire extinguisher, hard-soled safety footwear, white hard hats, eye protection, hearing protection, and ANSI 107-2004 or higher Class II garment. The consultant's personnel must wear hard-soled safety footwear, white hard hats, eye protection, hearing protection (when applicable), and ANSI 107-2004 or higher Class II garment.
4. The consultant must provide, at no cost to Caltrans, appropriate safety training for all the consultant's and the sub-consultant's office, and field personnel, including training required for performing the work in an office setting or in the field to work on and near highways safely.
5. The consultant must be solely responsible for protecting health and safety of its personnel, sub-consultants, and Sub-consultant's personnel in performance of this contract.
6. Traffic Control

- a. If specified in the task order, Caltrans must provide traffic control to accomplish the work within Caltrans' right-of-way. When Caltrans is to provide traffic control, the consultant must request the traffic control before the work to obtain proper clearance. Limited work hours, night work or weekend work may be necessitated by the closure schedule approved by Caltrans for work on State freeways or highways. For work outside of Caltrans' right-of-way, the consultant must provide traffic control in coordination with the local jurisdiction and/or private owners.
- b. If the task order requires the consultant to provide traffic control or traffic control devices, the consultant must follow policy and procedures per the FHWA Manual on Uniform Traffic Control Devices (MUTCD) and the California Manual of Traffic Control Devices.

N. Orientation Provided by Caltrans

Caltrans may provide orientation regarding the requirements for this contract and each task order as deemed necessary by Caltrans. The orientation may comprise instructions on Caltrans procedures, practices, and requirements for the specific work to be performed and sharing of project related files and notes. However, if the orientation instructions conflict with the contract or task order requirements, the contract and the executed task order must prevail over any instructions provided.

O. Monitoring and Review Procedure

1. The Caltrans contract manager and task order manager will have the unilateral right, occasionally, or as requested by the consultant, to monitor and review the progress and processes of the consultant related to work performed under this contract.
2. The performance of the consultant contract manager, key personnel, and team must be evaluated by the Caltrans contract manager but no less frequently than annually, and at the expiration of the contract. Unsatisfactory reviews of specific consultant personnel may cause Caltrans requesting that they be replaced with new personnel. The consultant must immediately replace personnel with individuals whose qualifications at a minimum equal those of the personnel replaced at no additional cost to Caltrans. Evaluation includes, but not be limited to:

- a. Job performance.
- b. Quality of Work.
- c. Timely submittal of reports, invoices, daily diaries, and other required documents.
- d. Early detection of problems and timely resolutions.
- e. Requesting timely approval for personnel changes and travel expenditure.
- f. Responsiveness and ability to control costs.
- g. DBE or DVBE Participation.
- h. Conflicts of interest.

Poor performance and any negative evaluations may cause replacement of the consultant contract manager, key personnel, or any personnel; the need to replace key personnel must reflect adversely on the consultant's performance evaluation, and if warranted, may cause the termination of the contract per Exhibit D, Section III, Termination of the Contract.

3. The consultant must provide a monthly Task Order Summary Report detailing all work performed under each task order. This report should coincide with the dates covered by the monthly invoice period of performance. The report should be included with the invoice submittal.

P. General Materials to be provided by Caltrans

Materials (if deemed applicable, necessary, and when available from Caltrans) that may be furnished or provided by Caltrans and where listed in the individual task orders and this contract, are for the consultant's use only, must be returned at the end of the contract. The consultant must use the materials in the execution of the specific work described in the task order. These materials may include, but not be limited to:

1. Background or reference information for each task order.
2. Project special provisions, full-size and reduced-size sets of project plans, materials information handout, and construction contract and proposal, as necessary.
3. Caltrans standardized forms.

4. Background information, site topographic maps, as-built drawings, blank Caltrans plan sheet overlays, digital electronic seed files, cell libraries, right-of-way alignments and survey limits, areas where focused studies are needed, and Construction Contract Documents, as available, for each task order.
5. Litigation Guarantees and supporting documentation provided a title company.
6. Digital Electronic templates of task order formats.

Q. Right of Way Engineering Materials to be provided by Caltrans

1. Relevant and existing Caltrans documents, Caltrans right-of-way record data, survey maps, control, data, topographic maps, and planimetric maps, if any are available, that apply to the current project within the project limits.

Note: The consultant handles the return to Caltrans, in original condition, of all items provided for use under this contract. The consultant must replace, at the consultant's sole expense, all lost or damaged Caltrans data or materials.

R. Materials to be provided by the Consultant

Unless otherwise specified in this contract, the consultant must provide all materials to complete the required work under the delivery schedule and cost estimate outlined in each task order.

1. The consultant must provide to its Right of Way Engineering services personnel sets of the following that apply to the current project:
  - a. Standard Specifications.
  - b. Standard Plans.
  - c. Materials under section "Equipment Requirements".
2. When performing work within railroad company property, the consultant must obtain sufficient and/or adequate insurance coverage that must comply with the

railroad company's requirements when performing work within their jurisdiction. The insurance and types of coverage required by the railroad company may be above and beyond that required by Caltrans. The consultant may have to provide additional railroad liability insurance including, but not limited to:

- a. Commercial General Liability Insurance.
- b. Business Automobile Coverage Insurance.
- c. Worker Compensation and Employers Liability Insurance.
- d. Railroad Protective Liability Insurance.
- e. Umbrella or Excess Insurance.
- f. Pollution Liability Insurance.

S. Product Approval and Payment

1. Deliverables, backup documents, and other items produced by the consultant in the performance of this contract, must be subject to the approval and acceptance by the Caltrans contract manager or task order manager prior to invoicing and payment for these items.
2. All deliverables and tasks provided for acceptance under each task order must comply with the terms, covenants and conditions of this contract.
3. Upon completion of each deliverable or task, the Caltrans contract manager or task order manager must either accept or reject the completed work. In the event of non-acceptance due to errors, omissions, or non-compliance with the Caltrans Manuals, as revised by the time of the task order, or this contract, the consultant must remedy the errors, omissions, or non-compliance to the satisfaction of the Caltrans contract manager or task order manager at no cost to Caltrans prior to payment. Caltrans must withhold payment until the work is satisfactorily completed and approved by the Caltrans contract manager. Additional cost incurred to correct errors will not be compensated.
4. Caltrans must not pay the consultant for the consultant's work under this contract and the charges incurred by the consultant that ignores the requirements specified in this contract and to the task order, and such work must be corrected at the consultant's sole expense at no additional cost to Caltrans.

5. All reviews, inspections and approvals made prior to the final acceptance of deliverables or task orders are intended only to provide interim authorizations to proceed and do not constitute final approval of the deliverable or task order.
6. Notwithstanding any other provision, until final acceptance of a task order under the agreement, any acceptance or approval means approval to proceed, but it does not mean acceptance or approval of a deliverable or task, and, it does not reduce or eliminate any of contractor's duties or responsibilities under this agreement.

T. General Deliverables

All deliverables, developed under this contract, and subject to Exhibit D, sections XIX and XX, must be sent to Caltrans upon completion of each task order deliverable and with the acceptance/approval of the work by the Caltrans contract manager or task order manager. The consultant must retain a copy of all documents furnished to Caltrans until expiration of the contract.

Unless otherwise specified in the task order, the deliverables must conform to Caltrans current hardware and software platforms

1. The consultant must work in close liaison with the Caltrans contract manager and task order manager. Time is of the essence. Caltrans must exercise review and approval functions through the Caltrans contract manager or task order manager at key points, as specified in each task order. Milestone reviews must be performed with the Caltrans contract manager and task order manager for the specific performance, products, and deliverables in each task order.
2. The consultant must prepare a cost estimate showing task, subtask, personnel, personnel hours estimated for each task or subtask, and a schedule of deliverables.
3. All deliverables, backup documents, and other items required by this contract must be prepared on Caltrans standardized forms. Necessary forms will be provided by Caltrans for the consultant's use.
4. All deliverables, backup documents, and other items required by this contract must be submitted in both hardcopy and unprotected and modifiable digital electronic files in the Caltrans-approved forms and in the Caltrans-approved and designated digital electronic formats under the guidelines in this contract and each

task order. The unprotected and modifiable digital electronic files must include the responsible person's digital electronic signature and seal. The consultant must verify the latest version of software used prior to submittal.

5. At the end of each task order or when requested by the Caltrans task order manager, the consultant must also submit one unprotected and modifiable digital electronic copy of all deliverables, backup documents, and other items required by this contract in a specified digital device format. The file formats must be specified in each task order. Documentation must accompany each digital device indicating the contents of each file.
6. The Consultant personnel involved in preparation or review of deliverables, backup documents, and other items must be identified in the prepared or review report.
7. If the consultant fails to submit the required deliverables, backup documents, and other items required by this contract and any approved task order, Caltrans may withhold payment and/or terminate this Contract under the termination provisions of this contract per Exhibit D, Section III, Termination. If the contract is terminated, the consultant must, at Caltrans' request, return all materials recovered or developed by the consultant under the contract.
8. The consultant must prepare and update the Caltrans WBS in this contract for each task order issued by the Caltrans task order manager showing a deliverables schedule. The consultant must complete and meet the agreed upon schedule for each task order. Failure to complete the work based on the agreed upon schedule in the task order may cause termination of the task order or this contract. Caltrans may have work completed allowed by law, for which the consultant must be liable for any additional costs incurred by Caltrans to complete the work. Such costs may be deducted from amounts due to the consultant in pending or future invoices, or if the contract is terminated, may be recouped by any means allowed by law.
9. Deliverables specified in each task order must be delivered to the attention and address stated in each task order.
10. The Consultant must be capable of working in either English or Metric units.

11. All deliverables must be prepared in U.S. Customary English Units unless an exception is approved. The units to be used for deliverables must be addressed within individual task orders.
12. A task order may require the consultant to use software and digital electronic formats other than those stated in this contract as needed to accomplish the objectives of the task order.
13. Quality Control Plan:

Prior to the work, the consultant must prepare the quality control plan and the minimum standard of work quality and obtain approval from the Caltrans task order manager, in effect for every task order during the entire time the work is being performed under the contract. The consultant must complete the quality control plan and certify at completing work that all measures contained were satisfied. Caltrans must perform quality assurance on the quality control plan to assure that quality control was satisfied.

The Consultant's quality control plan must establish a process whereby:

- a. All deliverables are reviewed for accuracy, completeness, and readability before submittal to Caltrans.
- b. Calculations and plans are independently checked, corrected and re-checked.
- c. All job-related correspondence and memoranda are routed and received by affected persons and then filed in the task order file.
- d. Field activities are routinely verified for accuracy and completeness, such that any discovered deficiencies do not become systemic or affect the result of a task order deliverable.

The consultant must provide an outline of the quality control program before a specific task begins and must identify critical quality control reviews within each task order. The Caltrans task order manager must periodically request evidence that the quality control/quality assurance plan is functioning. All deliverables, backup documents, and other items required by this contract must be submitted to the Caltrans task order manager for review. The deliverables must be marked

clearly as being fully checked or unchecked, and that preparing the material followed the quality control plan established for the work. The Quality Control/Quality Assurance (QC/QA) plan must contain provisions for developing appropriate “checklists” to maintain product quality and control. These “checklists” must be delivered to the Caltrans task order manager with the QC/QA plan. The consultant must update these documents when directed by the Caltrans task order manager. Within 30 calendar days of the Notice to Proceed, the consultant must submit to the Caltrans task order manager or Caltrans designee a job specific QC/QA plan and staffing plan.

14. Subject to Caltrans review, approval, and acceptance, the consultant has total responsibility for and must verify the accuracy and completeness of the deliverables, backup documents, and other items required by this contract prepared by the consultant or its sub-consultants for the projects as specified in this contract and in each task order. All deliverables, backup documents, and other items required by this contract must be reviewed by Caltrans for conformity with project standards and the requirements in the task order and this contract. The deliverables, backup documents, and other items required by this contract are subject to Caltrans’ review, approval, and acceptance. Reviews by Caltrans do NOT include detailed review or checking of major components, quantitative calculations, related details or accuracy of information. The responsibility for accuracy and completeness of such items remains solely that of the consultant.
15. The Caltrans contract manager or task order manager must address all questions which may arise on the quality or acceptability of deliverables furnished and work performed for this Contract.
16. Prepare the deliverables, backup documents, and other items required by this contract under prevailing industry standards and in a form acceptable to the Caltrans contract manager or the Caltrans task order manager. These items must identify the preparer, the designated reviewers, and the criteria for acceptance. The deliverables must satisfy the Caltrans acceptance criteria and tests. The work product must be complete, of neat appearance, well-organized, technically and grammatically correct, independently checked for error, checked by designated reviewers (Caltrans and Consultant Personnel), dated, and must conform to industry standards and all Caltrans, State, and Federal Standards, Requirements, and Procedures. All deliverables must be approved by the Caltrans Contract Manager or Caltrans designee.

17. The minimum standard of appearance, organization, and content of deliverables, backup documents, and other items required by this contract, must be that of similar types produced by Caltrans and set forth in related Caltrans manuals.
18. Caltrans and the consultant must develop and agree to a schedule for the services and deliverables to be completed and delivered, and where appropriate, for acceptance criteria and acceptance tests that the services and deliverables must satisfy as a prerequisite for approval by Caltrans. All deliverables must satisfy the standards set forth in “Standards” section to be accepted for payment.

U. Right of Way Engineering Deliverables

1. The consultant must obtain written approval from Caltrans for all deliverables, backup documents, and other items required by this contract. If there are no Caltrans standardized forms, the format and content requirements for all deliverables, backup documents, and other items required by this contract must be specified in each task order.
2. All Right of Way Engineering services deliverables, backup documents, and other items required by this contract performed on computer must be delivered in Caltrans approved hardware and software formats. Specific deliverable file formats must be identified in the individual contract task orders.
3. All maps must be submitted in unprotected and modifiable digital electronic files in the Caltrans-approved and designated formats and must conform to Caltrans standards.
4. Survey points, lines, and monuments must be established, marked, identified and referenced, as required by Standards and Symbols for Photogrammetric Mapping, CADD Standards, task order, and the requirements in this contract.
5. Survey notes, drawings, calculations and other survey documents and information must be completed as required by the task order and the requirements in this contract.
6. The final results of all surveys must be delivered to Caltrans in the formats specified below:

- a. The HORIZONTAL CONTROL must be submitted in unprotected and modifiable digital electronic files in the Caltrans-approved and designated formats, and must conform to Caltrans standards. The digital electronic medium must follow the Caltrans computerized system. Also, an alpha/numeric hard copy point listing with adjusted California Coordinate System northings and eastings and descriptions must be submitted.
  - b. Other - As specified in the Task Order.
7. Caltrans role must be limited to technical oversight only and monitoring the Consultant's quality assurance program.
  8. Quality assurance must be required for Caltrans produced data or data produced by another consultant.

V. Conflict of Interest

1. All Right of Way Engineering services provided by the consultant and deliverables produced by the consultant must be free of any conflict of interest and must be subject to the approval and acceptance of the Caltrans contract manager. The consultant must inform the Caltrans contract manager of any 'perceived' conflict of interest when discovered.
2. The consultant must not receive compensation for any services or products in which the consultant is found to have a conflict of interest. In the event of non-acceptance due to discovery of conflict of interest, the consultant must provide replacement deliverables free of any conflict of interest prior to payment. If replacement deliverables are not possible, the consultant must not receive compensation for the deliverables containing conflict of interest. Examples of conflict of interest include, but not be limited to:
  - a. Providing Right of Way Engineering services for Caltrans on a particular project and providing any services for the construction contractor on the same project.

The above conflict of interest scenario is only an example of possible conflicts of interest for the services provided under this contract, but is not intended to describe all circumstances for potential or actual conflicts.

W. List of Abbreviated Terms

A&E (Architectural and Engineering)

BPELSG (California State Board of Professional Engineers, Land Surveyors, and Geologists)

CADD (Computer Aided Drafting & Design)

Caltrans (California Department of Transportation)

DBE (Disadvantaged Business Enterprise)

DPAC (Division of Procurement and Contracts)

DVBE (Disabled Veterans Business Enterprise)

FHWA (Federal Highway Administration)

GNSS (Global Navigation Satellite System)

GPS (Global Positioning System)

MUTCD (Manual of Uniform Traffic Control Devices)

OSHA (Occupational Safety and Health Administration)

OICR (Office Indirect Cost Rate)

PDT (Project Development Team)

PLS (Professional Land Surveyor)

SOW (Scope of Work)

WBS (Work Breakdown Structure)

WSG (Workplan Standards Guide)

X. Datum Requirements

1. Caltrans must designate the existing horizontal and vertical control monuments to be the basis of Consultant performed surveys and mapping. Caltrans must provide the California Coordinate System values for the horizontal control monuments and the elevation values for the vertical monuments. All bearings and distances must be on the California Coordinate System as based on the primary control furnished to consultant.
2. All surveying data and maps prepared by the consultant must conform to Sections 8801 through 8902 of the Public Resources Code. Distances and bearings shown must be grid and the maps and documents must show the datum and combination factor for surface conversion.

3. The task order must designate which epoch of the California Coordinate System is to be used for horizontal coordinate values.

ATTACHMENT A

EA	Project No.	Description of Work	County	Route	Begin PM	End PM
1J550	0818000070	Landnet/appraisal mapping	SBD	018	20.6	20.9
34770	0800000616	Monumentation mapping	SBD	058	R0.0	R12.9
0N972	0815000102	Monumentation mapping	SBD	395	35.5	39.1
1E610	0814000055	Monumentation mapping	SBD	062	41.0	41.5
0Q120	0800020125	Monumentation mapping	SBD	018	99.4	101
1E611	0818000175	Monumentation mapping	RIV	062	81.6	82.2
0N971	0815000101	Monumentation mapping	SBD	395	39.0	45.9
1G640	0816000046	Appraisal mapping and deeds	SBD	395	R3.9	49.0
1J270	0818000014	Appraisal mapping and deeds	SBD	247	0.0	23.0
1J680	0818000094	Appraisal mapping and deeds	RIV	060	13.3	19.2
1F730	0815000034	Monumentation/RS	SBD	215	2.4	3.0
1E060	0813000140	Monumentation/RS	SBD	018	97.0	99.5
1G520	0816000020	Monumentation/RS	SBD	018	100.9	115.9
1J280	0818000013	Appraisal mapping & deeds	SBD	083	7.6	11.1
1E840	0814000113	Monumentation/RS	SBD	062	29.3	33.6



STATE OF CALIFORNIA  
DEPARTMENT OF TRANSPORTATION

REQUEST FOR QUALIFICATIONS NOTICE

NUMBER 08A2868

**Read carefully as the following revisions have been made to this document:**

- On 4/7/17, Section I, General Information, Paragraph E, regarding financial documents was revised.
- On 4/7/17, the Note on this page regarding questions was revised.
- On 12/20/16, Section IV, Submission of Statements of Qualifications (SOQs), subsection 5, was revised to add requirement to create Novell Filr account and complete self-registration page prior to electronic SOQ submittal.
- On 9/16/16, “Statement of Qualifications Submittal Instructions and General Contract Process Information” was revised to add Standard Title VI/Nondiscrimination Assurances.
- On 9/16/16, all paragraphs containing DBE references were revised due to the DBE rule published 10/2/14 (49 CFR, Part 26)

**Note:** Questions concerning this Request for Qualifications (RFQ) must be submitted in writing to the attention of Jennifer Noakes at [jennifer.noakes@dot.ca.gov](mailto:jennifer.noakes@dot.ca.gov). Questions must be received no later than seven (7) calendar days after RFQ advertisement. Consultants contacting the District or Division directly seeking information about this RFQ will be disqualified from consideration in the selection process.

Proposers are advised that Caltrans has established a federally mandated overall annual DBE goal comprising both race neutral and race conscious elements to ensure equal participation of DBE groups specified in 49 CFR 26.5. In compliance with 49 CFR 26, Caltrans set a contract goal for DBEs participating in this solicitation expressed as a percentage of the total dollar value of the resultant Agreement. The DBE participation goal for this solicitation is twenty percent (20%). See section I.H. in this RFQ for requirements.

## I. GENERAL INFORMATION

- A. Caltrans is soliciting Statements of Qualifications (SOQs) from qualified firms that may lead to the award of a contract for Land Surveying Services-District 8. In submitting your Statement of Qualifications (SOQ), you shall comply with the instructions found herein. In addition to those programs that are specified in this solicitation, prospective consultants are encouraged to consider programs that are available, such as those for the use of small businesses, disadvantaged businesses, disabled veteran businesses, new emerging firms, and other businesses covered by State and Federal programs.
- B. The estimated contract amount is \$4,000,000 - \$6,500,000.
- C. The estimated contract term is three (3) years.
- D. Interviews will be held in San Bernardino, CA on November 28, 2017. Confirmation letters will be sent to those firms short-listed.
- E. The most highly qualified consulting firm will be required to submit an electronic copy of the financial documents listed on the appropriate Financial Documents Submittal Checklist available at: <http://www.dot.ca.gov/hq/dpac/aeinfo.htm>. The most highly qualified consulting firm will be notified of their selection and receive instructions for the electronic submission financial documents.

The most highly qualified consulting firm must submit a complete financial documents package no later than four (4) days after notification of selection. The prime consultant must submit the complete financial documents package in order for Caltrans to have the information necessary to engage in negotiations. The prime consultant is solely responsible for timely and complete submission of financial documents on behalf of the entire proposed team; financial documents will not be accepted from proposed subconsultant firms. Failure to submit a complete financial documents package by the specified due date may result in termination of negotiations with the most highly qualified consulting firm.

- F. Negotiations will be held with the top-ranked firm in San Bernardino, CA during the week of December 4, 2017.
- G. The scheduled date to complete cost negotiations and submit final cost proposal is December 11, 2017.

H. Disadvantaged Business Enterprise Program

1. This solicitation and resultant Agreement is financed in whole or in part with federal funds and therefore subject to Title 49, Code of Federal Regulations, Part 26 (49 CFR 26) entitled "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs." To ensure equal participation for Disadvantaged Business Enterprise (DBE) groups specified in 49 CFR 26.5, Caltrans specifies a contract goal for DBE participation. The required goal for DBE participation in this solicitation is not less than twenty percent (20%).
  2. Only participation by certified DBEs will count toward the contract goal for this solicitation. In order to count toward a contract goal, a firm must be certified as a DBE by the California Unified Certification Program (CUCP) and possess the work codes applicable to the type of work the firm will perform on the Agreement by the SOQ submittal due date. For a list of work codes, go to [http://www.dot.ca.gov/hq/bep/find\\_certified.htm](http://www.dot.ca.gov/hq/bep/find_certified.htm)
  3. It is the proposer's responsibility to verify that the DBE firm is certified as a DBE by the specified SOQ submittal due date and time. For a list of DBEs certified by the CUCP, go to: [http://www.dot.ca.gov/hq/bep/find\\_certified.htm](http://www.dot.ca.gov/hq/bep/find_certified.htm).
  4. A DBE must perform a commercially useful function (CUF) for the type of work it will perform on the Agreement as provided in 49 CFR 26.55(c)(1)-(4). A DBE performs a CUF when it is responsible for the execution of a distinct element of the work of the Agreement and is carrying out its responsibilities by actually performing, managing, and supervising the work involved.
  5. See "Statement of Qualifications Submittal Instructions and General Contract Process Information" for detailed information and references to the required forms. Required forms will be made a part of the Agreement. Failure to meet the DBE goal or Good Faith Effort requirements and provide required DBE participation at due date and time of SOQ submittal may result in the SOQ submittal being rejected as non-responsive.
- I. Federal and/or State prevailing wage rates may apply. This requirement, if applicable, will be specified in the draft Agreement. See SOQ Submittal Instructions, Section I., H. regarding the California Department of Industrial Relations (DIR) Consultant/Contractor Registration Program <http://www.dot.ca.gov/hq/dpac/aeinfo.htm>.

- J. Caltrans does not guarantee, either expressly or by implication, that any work or services will be required under any contract issued as a result of this RFQ.
- K. A Pre-award or Post-award Audit will be performed on any contract issued as a result of this RFQ.
- L. Contract boilerplate can be obtained at <http://www.dot.ca.gov/hq/dpac/aeinfo.htm>

## **II. SCOPE OF WORK/DELIVERABLES**

The work to be performed for this RFQ is described in the Scope of Work/Deliverables, and is hereby incorporated as Attachment 1.

## **III. CONFLICT OF INTEREST**

- A. Conflicts of interest may occur due to direct or indirect financial or business interests in the work to be performed or in any real property acquired for such project. Conflicts of interest can include, but are not limited to, past, existing or planned activities or because of relationships with other persons or firms. If there is a conflict of interest, the proposed team, including both the prime consultants and subconsultants, and individual employees of team members would actually or potentially be unable to render impartial assistance or advice to Caltrans. The proposer's objectivity or availability in performing the contract work may be impaired due to actual or potential conflicts of interest.
- B. If the proposed team determines that any actual or potential conflicts of interest exists, it must identify and describe in detail each conflict of interest to Caltrans, using the Disclosure of Potential Conflict of Interest Form, which can be found on the Caltrans website at <http://www.dot.ca.gov/hq/dpac/aeinfo.htm>. Along with the description of the actual or potential conflicts of interest, the proposed team shall also offer measures to avoid, neutralize, or mitigate all listed conflicts. The list of conflicts, including conflicts that apply to individuals as well as firms, and the mitigation measures on the Disclosure of Potential Conflict of Interest Form must be submitted as a separate section in the Statement of Qualifications. Disclosure of information will not disqualify a proposed team from competing for a contract. The existence of actual or potential conflicts of interest will be used as a criterion to evaluate team availability during the evaluation and selection process.

Caltrans reserves the right to terminate negotiations with the first selected firm and begin negotiations with the next selected firm or to cancel the procurement prior to execution if Caltrans learns that the selected team failed to disclose any actual or potential conflicts, which it knew or should have known about, or if the proposed team provided or omitted information on the disclosure form that results in the information being false or misleading.

- C. After award, conflict of interest guidelines and policies shall continue to be monitored and enforced by the Caltrans Contract Manager. Additional information about Conflict of Interest issues can be found in the SOQ Submittal Instructions and General Contract Process Information document (Section V. Post Government Employment Restrictions and Section VI. Conflict of Interest Concerning Consultant(s)) found at <http://www.dot.ca.gov/hq/dpac/aeinfo.htm>. The State and Federal contract boilerplates on DPAC's website also contain information on conflict of interest issues (Federal boilerplate language - Exhibit D, Section XXX, and State boilerplate language – Exhibit D, Section XXVIII) and can be found at <http://www.dot.ca.gov/hq/dpac/aeinfo.htm>.
- D. The prime consultant and subconsultants may be proposed on SOQs for other Caltrans A&E on-call contracts; however, the Caltrans Contract Manager may prohibit work on specific project(s) where Caltrans determines that a conflict of interest exists.

#### **IV. SUBMISSION OF STATEMENTS OF QUALIFICATIONS (SOQs)**

- A. **IMPORTANT:** Download “Statement of Qualifications Submittal Instructions and General Contract Process Information” from <http://www.dot.ca.gov/hq/dpac/enhancedprocessdocuments.htm> (Rev. 10/05/17). Failure to follow these instructions may result in rejection of your SOQs.
- B. SOQ Package Submittal Instructions

**Read instructions below carefully. You will be required to submit SOQ packages to Sacramento and District 8 (see items 1 and 3 below for required number of copies), as well as an electronic file to Sacramento. See paragraph B.5.**

- 1. Two (2) copies of the SOQ containing all the indicated information shall be submitted. Fax copies will not be allowed. SOQs will be

accepted until **3:00 p.m. on November 16, 2017**, and must be directed to:

State of California  
Department of Transportation  
Administration  
Division of Procurement and Contracts, MS 65  
1727 30<sup>th</sup> Street  
Sacramento, CA 95816-7006  
Attention: Jennifer Noakes  
Telephone: (916) 227 – 3216

2. If your SOQ package is hand-delivered, you must date and time stamp it immediately upon arrival. The date/time stamp machine is located in the lobby of the first floor to the right of the security guard station at the address noted above. Date/stamp one label for each SOQ package/box submitted. Ask the security guard to call the Division of Procurement and Contracts' reception desk at (916) 227-6000 to have your SOQ package picked up by Contracts' staff.
3. In addition, five (5) copies of the SOQ containing all indicated information shall be submitted to District 8. FAX copies will not be allowed. SOQs will be accepted until **3:00 p.m. on November 16, 2017**, and must be directed to:

State of California  
Department of Transportation  
District 8  
464 W. 4<sup>th</sup> Street, MS 645  
San Bernardino, CA 92401  
Attention: Maud Zahedi  
Telephone: (909) 383 – 5952

4. The SOQs must be submitted in a sealed package labeled as follows:
  - RFQ Number 08A2868
  - Submittal deadline **3:00 p.m., November 16, 2017**
  - “DO NOT OPEN”
5. In addition to the seven (7) copies of the SOQ requested in this section IV “Submission of Statements of Qualifications,” electronic submission of a single unprotected (i.e. not password protected) PDF

file of the SOQ is required. The electronic submittal will be accepted until **3:00 p.m. on November 16, 2017**.

You will be required to create a Novell Filr account with Caltrans. Send an email message to the Contract Analyst, Jennifer Noakes, at [jennifer.noakes@dot.ca.gov](mailto:jennifer.noakes@dot.ca.gov) containing the information listed below for a link and instructions to complete the self-registration page and submit the SOQ electronically.

- Your firm's name
- Your email address
- The solicitation number for which you would like to submit an SOQ

The file name shall include the contract number, consultant name (max. 25 characters) separated by an underscore (\_), ending with the ".pdf" extension.

Example A: 50A0694\_JohnDoeConsulting.pdf

Example B: 50A0694\_aaa1234engineer.pdf

6. SOQ submittals will be considered non-responsive if all copies, including electronic submittal, are not received in the specified locations by the date and time specified in this RFQ.

C. Request for RFQ Copies

Copies of this RFQ may be obtained at  
<https://caleprocure.ca.gov/pages/index.aspx>

## **SCOPE OF WORK/DELIVERABLES**

### **Land Surveying Services**

for Caltrans, Division of Construction, District 8

### **On-Call Contract**

#### LAND SURVEYING<sup>1</sup> SERVICES

##### A. Purpose of Work

The consultant must perform Land Surveying Services, on an “as-needed” basis to support the California Department of Transportation (Caltrans), Division of Construction, District 8. The Caltrans contract manager will assign specific work to the consultant to augment the Caltrans work force through issuing task orders describing the services to be performed. The consultant must only perform work assigned in an authorized task order. This contract does not guarantee that a task order will be issued.

The consultant for this contract must perform the services above after the contract authority for contract 08A2427 is exhausted (expected by December 31, 2017). The consultant must plan accordingly to meet the timing of and the volume of work load needs.

##### 1. Exclusion of Work.

The following work are excluded from this Contract:

- (a) Right of Way Engineering
- (b) Contract authority for contract 08A2427
- (c) Any services that are not related to the PID phase of the Caltrans project delivery process.

##### B. Location of Work

The work must be performed on projects to improve the State transportation system throughout the counties of San Bernardino and Riverside in California. The specific

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<sup>1</sup> Defined in section 8726 of the California Business and Professions Code

location within the above-described geographical limits of the work to be performed must be identified in each task order. It may become necessary for Caltrans, District 8, projects to extend into adjoining Districts 7, 12 and 11 County line. In such instances, the project work must not extend more than a 30-mile radius from the District 8 geographic boundary.

C. Required Services

1. Under an authorized task order, the consultant must provide land surveying services within the geographical jurisdiction of this contract set forth in the “Location of Work” section, including all necessary personnel, material, transportation, lodging, instrumentation, and the specialized facilities and equipment to satisfy all appropriate agencies and required to ensure compliance with all federal, state, and local statutes, laws, codes, regulations, policies, procedures, ordinances, standards, specifications, performance standards, and guidelines, applicable to the consultant's services and work product.
2. Provided in attachment 1A is a list of proposed Caltrans projects; Division of Construction, District 8, however, this list is not exclusive and it constitutes no commitment that the projects will be initiated or completed or work assigned to the consultant. Caltrans reserves the right to add or delete from this list of projects that are within the geographical jurisdiction of this contract set forth in “Location of Work” section within the Division of Construction, District 8’s jurisdiction.
3. Caltrans intends to utilize this contract to complete a specific piece of work if it is within the geographical jurisdiction of this contract set forth in the “Location of Work” for each of the projects in this contract utilizing the services described in this Scope Of Work (SOW) and as described in a task order. Caltrans may find it necessary to create a separate contract (or contracts) that involves a specific project in this contract and includes part of the work in this contract. Caltrans reserves the right to procure A&E services involving the listed projects or unlisted projects (within the geographical jurisdiction of this contract set forth in “Location of Work” Section) involving in whole or in part the same work using a project-specific agreement if the schedule to complete performance of the specific project extends beyond the term of this contract or the cost exceeds the dollar balance remaining in the contract after accounting for amounts due to the

consultant for work previously performed and for work scheduled to be performed in executed task orders.

Should a project-specific agreement be procured under these provisions, the parties mutually agree that, under Exhibit D, Section III, Termination of this Contract, Caltrans must terminate for convenience the portion of the contract that includes the common SOW identified in the project specific agreement per Exhibit D, Section III, Termination of this Contract. Such partial termination for convenience must be processed by amendment to this contract. Unless otherwise required by law, regulation, or Caltrans policy or procedure, the consultant may compete for these project specific contracts.

4. In this contract is a list of proposed staff personnel classifications for which services are anticipated to be needed by Caltrans during the term of this contract; however, this list is not exclusive if the classification perform Land Surveying Services. Caltrans reserves the right to add/or delete personnel classifications from this list.
  - i. Project Surveyor
  - ii. Survey Technician
  - iii. Survey Assistant
  - iv. Instrument Person
  - v. Rod Person
  - vi. Journeyman Chainman
  - vii. Apprentice Chainman
  
5. Consultant agrees that:
  - a. The Consultant Contract Manager or designee shall manage, instruct and supervise all Consultant employees and subcontractors, and shall not allow any other party to manage, instruct and supervise such parties.
  - b. Consultant shall employ and discharge its own employees and subcontractors.
  - c. Unless approved in writing by Caltrans Contract Manager, Consultant shall not hire employees or subcontractors to exclusively and only work on Caltrans matters. Consultant may hire employees and subcontractors for a specific Caltrans matter provided such party has the skills and knowledge to work on other matters and they are assigned to other matters from time to time.

- d. The work performed by Consultant, its employees and its subcontractors shall be a regular part of Consultant's regular and established business.
  - e. Consultant shall make all of its own business (including personnel) decisions and bear the risk for its decisions.
  - f. Consultant shall provide its own tools, equipment and supplies, and Consultant shall not rely on Caltrans to provide such tools, equipment and supplies. Notwithstanding the foregoing, Caltrans may, during the term of the Agreement, allow Consultant to access selected items of equipment; provide non-employee userids and related access to Caltrans computer systems to Consultant employees and subcontractors; and provide non-employee access cards and other such forms of identification to Consultant employees and subcontractors.
  - g. Consultant shall provide its own training to its employees and subcontractors, and Consultant shall not rely upon Caltrans to provide such training.
  - h. Consultant shall advise its employees and subcontractors of the foregoing contract terms that apply to them, and Consultant advise such employees and subcontractors to report to Consultant any apparent or actual breaches. Consultant shall relay any such reports to Caltrans' Contract Manager.
6. At the sole discretion of Caltrans, the consultant may have to provide the required services on safety projects, emergency projects, emergency storm damage projects, excess parcel assessments, or other current/future transportation projects, including minor projects not listed above, except for those specially excluded above, within the geographical jurisdiction of this contract set forth in "Location of Work" Section.
7. The potential projects may vary in scope and size, and may encompass any improvement for the State transportation system including, but not limited to, roadway rehabilitation, widening and/or realignment of existing facilities, relocation of existing facilities, and construction of new facilities. The project location, project limits, purpose, expected results, project deliverables, period of performance, project schedule, and SOW to be performed must be described in each task order.
8. Consultant must be available, on two days' written notice:

- a. To meet with Caltrans; to participate in internal Project Development Team (PDT) meetings or other Caltrans meetings.
  - b. To provide technical expertise on an “as-needed” basis.
9. Maintaining a stable work force is essential to the successful completion of Caltrans, Division of Construction, District 8, work. The consultant must implement a personnel retention plan.
10. The Consultant may be expected to spend time for extended assignments to perform A&E services at Caltrans offices. At the sole discretion and convenience of Caltrans, Caltrans may permit the Consultant to use office space, office equipment (such as copiers, printers and telephones) and furniture at various Caltrans (field) offices on a short term, temporary basis. Consultant will provide its own computers, office supplies, and work related materials. The Consultant, including its Sub-Consultants, shall include the Field Office Indirect Cost Rate in its cost proposals and use the Field Office Indirect Cost Rate in billing Caltrans for those personnel utilizing Caltrans’ (field) office facilities, and the cost rates will reflect the Consultant’s lower costs where Caltrans provides office space, office equipment and furniture. If the Consultant, including its Sub-Consultants, has no Field Office Indirect Cost Rate, it will develop and use a Field Office Indirect Cost Rate to reflect an equitable distribution of allowable costs to the contract (as specified in 48 CFR 31.203(f)). When working on-site in the Caltrans facilities, the Consultant shall adjust its hours to meet the business needs of Caltrans and shall generally work and be present during Caltrans business hours (which are 8:00 a.m. – 5:00 p.m.) The business hours can be adjusted in different task orders.

D. Workplan Standards Guide (WSG) Codes

Task orders are based on the Caltrans WSG. The latest WSG is found in the Guide to Project Delivery WSG, which is available from the Caltrans’ Publication Unit and on the Internet at <http://www.dot.ca.gov/hq/projmgmt/guidance.htm>. The WSG references the WBS categories, which are potential and related work activities applicable to this contract. The WSG references WBS categories which present the potential and related work activities that the consultant may have to perform. All revisions to the current version of the WBS must apply during the life of this contract.

The WBS activities below applicable to this Contract are limited to those set forth below:

100	Perform Project Management (Contract Management)
160.10.45	Utility Locations Determined for Preliminary Engineering
160.20.25	Existing Records
160.20.30	Land Net Surveys
160.20.35	Land Net Map
160.20.50	Control Surveys
160.20.55	Photogrammetric Maps and Products (See Note 1)
160.20.60	Engineering Surveys
160.20.65	As-Built Centerline Surveys
160.20.70	Pavement Surveys
160.30.10	Surveys and Mapping for Environmental Studies
185.10.50	Control Surveys
185.10.55	Photogrammetric Maps and Products (See Note 1)
185.10.60	Engineering Surveys
185.10.65	As-Built Centerline Surveys
185.10.70	Pavement Surveys
185.20.40	Utility Locations Determined for Design
220.05.05	Existing Records
220.05.10	Land Net Survey (See Note 2)
220.05.25	Monumentation Perpetuation Record of Survey
220.15.95	Other Maps
220.35.05	Flagged Right of Way (Includes Utilities)
220.35.10	Staked Right of Way
255.35.10	Construction Staking Package
255.35.20	Project Control for Construction
270.10.10	Construction Staking Package
270.10.20	Project Control for Construction
270.10.30	Existing Monument Perpetuation (See Note 2)
270.15.15	Slope Stakes

270.15.25	Rough Grade Stakes
270.15.30	Final Grade Stakes
270.15.35	Drainage and Minor Structure Stakes
270.15.50	Miscellaneous Stakes (Includes Utilities)
270.15.55	Photogrammetric Product for Construction (See Note 1)
270.15.60	Ground Stakes for Major Structure
270.15.65	Superstructure Stakes for Major Structure
270.22	Contract Administration
270.66	Technical Support
285.10.05	Field Surveys for Change Order
285.10.10	Staking for Change Order
285.10.15	Other Functional Support
300.05.05	Right of Way Monumentation Survey
300.05.10	Filed Monumentation Record of Survey
300.10	Trial Exhibits and Testimony

Note 1: The anticipated work for WBS code 160.20.55, 185.10.55 and 270.15.55 must be limited to field surveys and related office processing for aerial mapping control placement and positioning.

Note 2: This WBS code is to be used only for projects with no two (2) phase work.

The consultant must not work on any projects in the planning phase (K-Phase), and the consultant will not be reimbursed for any work performed during this phase of a project.

#### E. General Personnel Requirements

1. The consultant's personnel must be capable, competent, and experienced in performing the work in this contract with minimal instruction. Personnel skill level must match the specific job classifications, as set forth or in the consultant's cost proposal, attachment 2 and task complexity. The consultant's personnel must be knowledgeable about, and comply with, all federal, state, and local laws and regulations.

2. The consultant must submit a written request and obtain the Caltrans Contract Manager's prior written approval for any substitutions, additions, alterations, or modifications to the consultant's originally proposed personnel and project organization, as depicted on the proposed consultant's organization chart or the consultant's cost proposals. The Consultant personnel must have the same job classification, as set forth or in the consultant's cost proposal, attachment 2, not exceed the billing rate, and meet or exceed the qualifications and experience level of the previously assigned personnel, at no additional cost to Caltrans.
3. In responding to Caltrans' task order and in consultation with the Caltrans contract manager and the Caltrans task order manager, the Consultant contract manager must identify the specific individuals proposed for the task and their job assignments. The consultant must provide documentation that proposed personnel meet the minimum qualifications as required by this contract.
4. The consultant's personnel must typically be assigned to and remain on specific Caltrans projects/deliverables until completion and acceptance of the project/deliverables by Caltrans. Personnel assigned by the consultant must be available at the start of a task order and after acceptance of the project/deliverable by Caltrans.
5. After the Caltrans contract manager's approval of the consultant's personnel proposal and finalization of a task order, the consultant may not add, delete or substitute personnel without the Caltrans contract manager's prior written approval.
6. Resumes containing the qualifications and experience of the consultant's and sub-consultant's personnel, which include existing, and additional, personnel, and copies of their minimum required certifications, must be submitted to the Caltrans contract manager for review before assignment on a project or task order. The resume and copies of current certification for each candidate must be submitted to the Caltrans contract manager within one week of receiving the request.
7. The Caltrans contract manager or Caltrans task order manager may interview the consultant's personnel for the qualifications and experience. The Caltrans contract manager's decision to select the consultant's personnel will be binding to the consultant and its sub-consultants. The consultant must provide adequate

qualified personnel to be interviewed by the Caltrans contract manager or Caltrans task order manager within one week of receiving the request.

8. The Caltrans task order manager will evaluate the adequacy (quality and quantity) of the work performed by the consultant's personnel, and determining whether the deliverables satisfy the acceptance tests and criteria. The Caltrans contract manager consulting with the Caltrans task order manager may reject any consultant personnel who are determined by the Caltrans contract manager to lack the minimum qualifications. If at any time the level of performance is below expectations, the Caltrans contract manager may direct the consultant to immediately remove consultant personnel from the project specified in a task order and request that the Consultant provide another qualified person be assigned as needed. The Consultant personnel must meet the qualifications required by this contract for performance of the work as demonstrated by a resume and copies of current certifications submitted by the consultant. Consultant personnel must receive prior written approval from the Caltrans contract manager. Invoices with charges for personnel not pre-approved by the Caltrans contract manager for work on the contract and for each task order must not be reimbursed.
9. The consultant must not remove or replace any existing personnel assigned to task orders without the prior written consent of the Caltrans contract manager. The removal or replacement of personnel without the written approval from the Caltrans contract manager will violate the contract and may cause termination of the contract per Exhibit D, Section III, Termination of the Contract.
10. When assigned consultant personnel is on approved leave and required by the Caltrans contract manager, the consultant contract manager must provide a temporary substitute employee until the assigned employee returns to work from the approved leave. The Consultant personnel must have the same job classification, as set forth in the consultant's cost proposal, attachment 2, not exceed the billing rate, and meet or exceed the qualifications and experience level of the previously assigned personnel, at no additional cost to Caltrans. Consultant personnel must receive prior written approval from the Caltrans contract manager to work on this contract.
11. Other project personnel who are not identified on the consultant's cost proposal, must also satisfy minimum qualifications for assigned task orders. Caltrans' prior written approval is required for all personnel not identified on the consultant's

organization chart or the consultant's cost proposals before providing services under this contract.

12. The consultant is responsible to provide fully trained personnel to efficiently perform the work. The consultant's personnel may be asked to attend certain special training if recommended by the Caltrans contract manager. On such occasions, with the approval of the Caltrans contract manager, Caltrans will compensate the consultant for the consultant's actual cost for time spent in training only. All other costs, fees, and expenses associated with the training, including any transportation costs and training fees, must be the consultant's responsibility.
13. In location(s) where the consultant personnel is expected to work for extended period(s) of time, the consultant must either relocate the personnel or strive to hire local persons.

#### F. Land Surveying Personnel Requirements

1. The Consultant and all sub-consultants, shall throughout the life of the contract, retain within its firm, a staff of people properly licensed and certified under the laws of the State of California and qualified to perform all aspects of the required work described in this contract and all work specified in a task order with any emergencies that may arise during the life of this contract. The consultant must be prepared to provide additional personnel during the period performance of this contract to accommodate the work.

#### 2. Consultant Contract Manager

The consultant contract manager must coordinate work-related matters and consultant's operations under this contract with the Caltrans contract manager in coordination with the Caltrans task order manager.

The consultant contract manager must be a Professional Land Surveyor or pre-January 1, 1982 Registered Civil Engineer licensed in the State of California and be in good standing with the California State Board of Professional Engineers, Land Surveyors, and Geologists (BPELSG) during the contract period.

The consultant contract manager must have a minimum of five years of responsible experience performing the duties as a contract manager for similar Land Surveying Services contracts. The consultant contract manager must be knowledgeable about all Caltrans policies and procedures. The consultant contract manager must be an employee of the Consultant.

Besides other specified responsibilities, the consultant contract manager must handle all matters related to the consultant's personnel, sub-consultants, land surveying services work, and consultant's and sub-consultants' operations including, but not limited to:

- a. Ensuring that deliverables are acceptance tested and that criteria are specific, measurable, attainable, realistic and time-bound; and that the deliverables satisfy the acceptance tests and criteria.
- b. Supervising, reviewing, monitoring, training, and directing the consultant's and sub-consultants' personnel.
- c. Assigning qualified personnel to complete the required task order work as specified on an "as-needed" basis in coordination with the Caltrans contract manger and Caltrans task order manager.
- d. Administering personnel actions for consultant personnel and ensuring appropriate actions taken for sub-consultant personnel.
- e. Maintaining and submitting organized project files for record tracking and auditing.
- f. Developing, organizing, facilitating, and attending scheduled coordination meetings, and preparation and distribution of meeting minutes.
- g. Implementing and maintaining quality control procedures to manage conflicts, insure product accuracy, and identify critical reviews and milestones.
- h. Assuring that all applicable safety measures are in place.

- i. Providing invoices in a timely manner and providing monthly contract expenditures.
  - j. Reviewing invoices for accuracy and completion before billing to Caltrans.
  - k. Managing sub-consultants.
  - l. Managing overall budget for the contract and provide report to the Caltrans contract manager.
  - m. Monitoring and maintaining required DBE or DVBE involvement.
  - n. Ensuring compliance with the provisions in this contract and all specific task order requirements.
  - o. Knowledge, experience, and familiarity with prevailing wage issues and requirements in State of California.
3. Consultant Task Order Manager

For each task order, the consultant must provide a consultant task order manager to coordinate the consultant task order operations with the Caltrans contract manager in coordination with the Caltrans task order manager.

The consultant task order manager must be accessible to the Caltrans contract manager in coordination with the Caltrans task order manager during normal Caltrans working hours that task order work is underway.

The consultant task order manager (who may not be the consultant contract manager) must be assigned to conduct, or direct the conduct of, all work assigned under a single task order. The consultant task order manager must be a Professional Land Surveyor or a pre-January 1, 1982 Registered Professional Civil Engineer licensed in the State of California and be in good standing with the BPELSG during the Contract period. The consultant task order manager must be the primary contact for the assigned task order and be available for communication with Caltrans.

4. Consultant Task Order Lead person.

The consultant task order lead person (who may not be the consultant CM) must be assigned to conduct, or direct the conduct of, all work assigned under a single task order. The consultant task order lead person must be the primary contact for the assigned task order and be available for communication with Caltrans.

5. Consultant Personnel and Team Member Qualifications.

The consultant team member must be capable of assisting the consultant contract manager in all aspects of the required work. The consultant team member's required professional qualifications must be identified in each task order.

6. In this contract, a person authorized to review and approve consultant land surveying deliverables in place of the consultant task order manager must be called the consultant land surveying responsible person. The consultant land surveying responsible person, must be a Professional Land Surveyor or a pre-January 1, 1982 Registered Professional Civil Engineer licensed in the State of California and be in good standing with the BPELSG during the contract period.

7. All deliverables under this contract not fully approved by Caltrans bearing the signature of the consultant land surveying responsible person who is no longer employed by the consultant or its sub-consultants, must be replaced with deliverables under this contract bearing the signature of a qualified replacement consultant land surveying responsible person currently employed by the consultant or its sub-consultants. In such an event, no additional time will be allowed or cost reimbursed to the consultant without the prior written approval of the Caltrans contract manager.

8. All of the consultant's work must be conducted under the direction of the consultant contract manager who must have the experience as described in this contract. All deliverables under this contract requiring the consultant land surveying responsible person's signature, must be produced by the responsible consultant personnel having appropriate experience, and must be signed by a consultant land surveying responsible person.

9. Party Chiefs

Consultant Party Chiefs must fulfill one of the following requirements:

- a. A Professional Land Surveyor licensed in the State of California and be in good standing with the BPELSG.
- b. A pre-January 1, 1982, Registered Professional Civil Engineer licensed in the State of California and be in good standing with the BPELSG.
- c. An experienced surveyor/union-certified party chief/journeyman with a documented minimum of five years of field surveying experience who serves as chief under the direction and supervision of a person who is a Professional Land Surveyor licensed in the State of California or pre-January 1, 1982, Registered Professional Civil Engineer licensed in the State of California and be in good standing with the BPELSG. This direction and supervision must be provided in a manner and with a span of control and immediacy that enables the supervisor to be in “Responsible Charge” of the work as defined in the Business and Professions Code, Division 3, Chapter 15 (The Land Surveyors Act).

Party Chief: The duties of the survey party chief include, but are not limited to: plan, coordinate and direct the daily operations and/or assignments of a field survey party, oversees tailgate safety meetings every ten working days or more often as the work location requires, insures the survey party is working in a secure and safe manner; direct the survey party in procedures to be used in fieldwork that conforms with the Caltrans Surveys Manual; verify project datum and project control; check the accuracy of the survey data collected and construction stakes set; and produce a daily Field Surveys Party Report, which verifies the survey party time and project charges.

10. Consultant Project Surveyor

Project Surveyor must fulfill one of these licensing requirements and be in good standing with the BPELSG during the Contract period.

- a. A Professional Land Surveyor licensed in the State of California.
- b. A pre-January 1, 1982, Registered Professional Civil Engineer licensed in the State of California.

Project Surveyor: The duties of the project surveyor in the office include, but are not limited to: prepare survey requests and supporting information for the field survey; analyze, reduce and/or adjust field survey data to produce maps, reports, digital terrain models, project control maps, and related documents to determine property and right of way boundaries; and, research public records from counties, cities, utility companies, and other agencies to produce, signs and seals, final record maps and Record of Survey Maps.

11. Consultant Land Surveying Assistants

The Land Surveying Assistants must fulfill one of the following requirements:

- a. A degree (Associate, Bachelors, Masters, or higher) in land surveying or surveying engineering from an ABET accredited institution (College or University) and a minimum of two years of qualifying experience in land surveying.
- b. Possession of a valid Land Surveyor-in-Training certificate issued or accepted by the BPELSG, and a minimum of two years of qualifying experience in land surveying.
- c. An experienced surveyor with a documented minimum of four years of surveying experience who works under the direction and supervision of a Professional Land Surveyor licensed in the State of California or pre-January 1, 1982, Registered Professional Civil Engineer licensed in the State of California and be in good standing with the BPELSG.

The land surveying assistants to the party chiefs and project surveyor must be capable of assisting in all required and associated field and office land surveying work, able to perform difficult survey and complex professional land surveying work involving duties in the field or office with little direct supervision. Duties include, but are not limited to, assist party chief in construction staking, design, and right of way surveys, assist office chief or project surveyor in preparing right of way maps using Computer-Aided Design (CAD), maintaining right of way records and geospatial information systems, research and compile a wide variety of data from public records, geospatial information systems and other sources using both manual and computerized processes, and survey support.

12. Consultant Land Surveying Technicians

The land surveying technicians must work under the direction of a Professional Land Surveyor licensed in the State of California or a pre-January 1, 1982 Registered Professional Civil Engineer licensed in the State of California and be in good standing with the BPELSG. The land surveying technicians must fulfill one of these criteria:

- a. The equivalent of a two-year college degree, preferably with an emphasis in mathematics and engineering and a minimum of one year of qualifying experience in land surveying.
- b. A documented minimum two years of demonstrated experience acceptable to Caltrans in a land surveying services related field, under the direction of a Professional Land Surveyor licensed in the State of California.

The land surveying technicians must be capable of assisting in all required office and/or field land surveying services work.

13. Consultant Instrument person

The instrument person must be union certified as an instrument person or have a minimum six years of qualifying experience in land surveying. The instrument person reports to the party chief and must be capable of assisting the party chief in all required field and office surveying work.

14. Consultant Rod person

A rod person must have a minimum two years of qualifying experience in land surveying and may augment a party comprising at a minimum one party chief and one instrument person as the project task workload dictates, and as preapproved by the Caltrans contract manager.

15. Consultant Surveying Journeymen Chainman

The surveying journeymen chainman must be union certified as a journeyman or have a minimum four years of qualifying experience in land surveying. The

surveying journey man chainman to the party chief must be capable of assisting the party chief in all required field and office surveying work.

16. Consultant Apprentice Chainman

A surveying apprentice must have a minimum one year of qualifying experience in land surveying. The surveying apprentice may augment a party comprising at a minimum one party chief and one instrument person as the project task workload dictates, and as pre-approved by the Caltrans Contract Manager.

Compensation for the journeyman/apprentice chainman must be under the contract and supported by documentation from the Northern or Southern California Surveyors Joint Apprenticeship Committee and in compliance with the Division of Apprenticeship Standards (DAS). The apprentice chainman must be enrolled in the Northern or Southern California Surveyors Joint Apprenticeship Program and have union level certification for the level achieved.

17. The Consultant must have personnel with documented and demonstrated expertise and experience in the fields of Geographic Information Systems (GIS) and geodetic survey control.

18. Minimum Requirements for Consultant Survey Party Membership:

Unless otherwise specified in the task order, each survey party must comprise a party chief and up to three assistants, unless additional survey party members are required for safety. At a minimum, one assistant to the party chief must be capable of assuming temporary leadership of the survey party, absent a party chief, or in emergencies.

19. Consultant will provide Consultant surveyors of classification and numbers as specified in the task order. Consultant. Consultant surveyors assigned to a field crew will be provided the following by the consultant:

- Vehicle as specified in I.2.a of this contract.
- Hand tools including but not limited to hammers, shovels, digging bar, measure tape, and calculator.

- Safety equipment including by not limited to hard hat, ANSI 107-2004 or higher class II garment, safety glasses, hearing protection and hard soled work boots.
20. It is expected that most of the work (> 60%) must be completed as staff assistance working alongside Caltrans staff on a survey party or in an office, in which the consultant provides staff to assist the district's survey personnel.
  21. All staff assistance consultant personnel working in a Caltrans office or on a survey party must complete security and privacy awareness training each year (see <http://itsecurity.dot.ca.gov/training>).
  22. All staff assistance consultant personnel working in a Caltrans office or on a survey party must have a current certification of Defensive Driving Training and a current California Driver's License.

G. Consultant Availability and Work Hours

1. The typical workday includes all hours worked as identified in the task order or as directed by the Caltrans contract manager. Unless otherwise specified in a task order or directed by the Caltrans contract manager, the normal work week must comprise forty (40) hours.
2. If Caltrans determines that the Consultants services and work product need to be received outside of normal business hours (including instances where receipt is required to avoid danger to life or property), the Consultant's may be directed to provide its services and work product during specific hours during the week (including hours that are outside of normal business hours). Night work may be required on projects involving high traffic areas. Changes in hours or schedules must be documented by amendment of task orders. Any shift differential rate pay must be reimbursed under the Department of Industrial Relations (DIR) determination.
3. The Caltrans contract manager in coordination with the Caltrans task order manager, must provide advance notice of one working day(s)/24 hours if the consultant's services are not required, or if reassignment of personnel is required. If Caltrans fails to provide the required advance notice and the consultant

personnel are not required, Caltrans must provide a maximum of four hours compensation.

4. During the contract period, the Caltrans task order manager and/or contract manager may reassign a consultant's employee from a project or an office with low activity to assist on another project or office with high activity. The consultant contract manager will be notified at least two working days prior to this reassignment.

#### H. General Requirements

1. The consultant must prepare the required deliverables, backup documents, and other items required by this contract according to requirements of this contract and applicable Caltrans Manuals for the work.
2. The consultant's timesheet/invoices/expenses must be subject to the review of the Consultant Contract Manager and the subsequent review and the approval of the Caltrans Contract Manager before submitting timesheets, invoices, or expense reimbursement requests for payment.
3. The consultant must begin the required work within two working days after receiving a fully executed task order and issuing the Notice to Proceed from the Caltrans contract manager to the consultant contract manager or on the date specified in the task order. Some work, however, may require consultant personnel to mobilize within 24-hours of notifications. Once the work begins, the work must be prosecuted/performed diligently until all required work has been completed to the satisfaction of the Caltrans contract manager or Caltrans designee task order manager.
4. The work must not be performed when conditions prevent a safe and efficient operation, and must only be performed with written authorization by Caltrans.
5. The consultant contract manager, Consultant Task Order Manager, and key personnel must be accessible to the Caltrans contract manager and the Caltrans task order manager during normal Caltrans working hours or after hours as required by the Caltrans contract manager.

6. The Consultant Contract Manager may advise the Consultant's employees to work overtime to meet task order schedules at the request of the Caltrans Contract Manager or Task Order Manager. All overtime must be pre-approved by the Caltrans Contract Manager. Overtime must be worked only when directed in writing by the Caltrans contract manager and specifically required by the task order, and must only be paid to persons covered by the Fair Labor Standards Act.
7. All consultant personnel must sign a confidentiality and nondisclosure agreement.
8. The consultant may disclose no information to third parties without prior written approval of the Caltrans contract manager.
9. The consultant must only provide incidental non-A&E services, such as Computer Aided Drafting & Design (CADD) support, GIS support, utilities location support, traffic control, office support, field office support, and meeting support, provided (a) such services are necessary for completing the A&E tasks and/or deliverables performed by the consultant described in executed task orders and covered by the work in this contract and (b) the rendering of the services is approved in advance by the Caltrans contract manager. These incidental services must only be provided to support the consultant's personnel performing A&E services, tasks, and deliverables on this contract. The contract amount spent on such incidental services must be relatively minor when compared to the professional A&E services performed. The consultant must not be paid or reimbursed for any incidental non-A&E services provided to Caltrans unless provided in the fashion described in this contract and included in the executed task order. The consultant ensures that task orders only include any incidental non-A&E services.
1. Incidental training services may be provided only if the training involves the specific work product of this agreement. Such incidental training services are permitted, but only if:
  - a. The training involves the specific work product created under this agreement (and does not involve general A&E training and is not the work product of a previous agreement); and
  - b. The total aggregate cost of all training under this agreement does not exceed 10% of the total authority of the agreement; and

c. The training is an incidental task within the agreement and not the purpose for entering this agreement.

10. The consultant must include the Caltrans contract manager or task order manager in written communications to other Caltrans personnel for any clarification on work.

I. Coordination

1. For each task order, the consultant must carry out instructions received from the Caltrans task order manager. If an instruction or direction is unclear to the consultant, the consultant must ask the Caltrans task order manager to clarify the instruction or direction.

2. The foregoing paragraph does not relieve the consultant of professional responsibility during the performance of this contract. Where the consultant believes a better standard solution to a task being performed or an issue being addressed is possible, the consultant must promptly notify the Caltrans contract manager and task order manager of these concerns, with the reasons therefore. However, Caltrans must make all final decisions on the interpretation of the Consultant's instructions, directions, work product and outputs that are described in the task order. consultant's

3. The consultant must work closely with the Caltrans contract manager and the Caltrans task order manager identified in the task order.

4. The consultant must have the capability to send to and receive from Caltrans' digital electronic mail system and file transfer protocol system including, but not limited to, attachments for word processing, photographs, spreadsheets, and databases.

5. Caltrans must not reimburse the consultant for costs to relocate its personnel to the service area of this contract. Caltrans must not reimburse the consultant for per diem costs, unless preapproved by the Caltrans contract manager. Caltrans must not reimburse the consultant for out-of-state travel without prior written approval from the Caltrans contract manager.

6. The consultant must obtain the Caltrans contract manager's approval prior to making presentations at non-Caltrans sponsored conferences or workshops for any services provided under this contract.
7. The consultant must notify the Caltrans contract manager or Caltrans task order manager in writing a minimum one week before it begins any field work, unless the task order specifies some other notification date.
8. Caltrans must not incur costs beyond the funding commitments in the contract and each task order. If the consultant anticipates that funding for work will be insufficient to complete work, the consultant must promptly notify the Caltrans contract manager.

J. General Equipment Requirements

1. The consultant or its sub-consultants must incorporate no materials or equipment of a single or sole source origin without the advance written approval of Caltrans.
2. The consultant may claim reimbursement for providing equipment or supplies. However, such claimed costs must comply with 48 Code of Federal Regulation (CFR), Chapter 1, Part 31 (Federal Acquisition Regulation - FAR cost principles) and 2 CFR, Part 200, and follow the consultant's company-wide allocation policies and charging practices with all clients including federal government, state governments, local agencies, and private clients.

K. Land Surveying Equipment Requirements

1. Office Equipment and Supplies (Consultant's Office):

The consultant must have and provide adequate office equipment and supplies to complete the work required by this contract. Such equipment and supplies must include, but not be limited to:

- a. Office supplies.
- b. Computers with software, printers, plotters, fax machines, calculators, data collectors and their necessary attachments and accessories.

- c. Data processing systems, software packages, reference materials, or other tools, including hardware and software, used in providing transportation land surveying deliverables.
  - d. The consultant must provide a computer system for each person working under a task order that meets the Caltrans current specifications. Qualified Caltrans information technology personnel must install required software. Caltrans reserves the right to provide the computer system if beneficial to Caltrans' interest.
  - e. Reference material, or other tools, used in providing deliverables.
  - f. Caltrans must purchase no hardware, software, or other equipment (including, but not limited to, batteries, paper, and office supplies) that may be required for the consultant to perform work required in this contract. The Caltrans contract manager must approve any consultant's request for digital electronic connections and compatibility with current Caltrans Windows-based networks and programs in writing prior to the use and/or installation of any electronic hardware and/or software.
  - g. In-house printing, reproduction, and delivery services.
  - h. Computer Aided Drafting equipment and software capable of producing land surveying maps, drawings, and documents in the Caltrans approved format (Microstation, CaiCE, AutoCAD Civil 3D ArcGIS).
2. Field Equipment and Supplies:
- Consultant must have and provide adequate field tools, instruments, equipment, materials, supplies, and safety equipment to complete the required field work and that meet or exceed Caltrans specifications per the Caltrans Manuals. The tools, instruments, equipment, materials, supplies, and safety equipment required for each consultant field personnel must include, but not be limited to, the following, if required by the task order:
- a. Sufficient vehicles suitable for the work to be performed and terrain conditions of the project sites. Vehicles must be fully equipped with all

necessary tools, instruments, equipment, materials, supplies, and safety equipment required for the efficient operation of the consultants' field personnel. Each vehicle must have a load carrying capacity of 1500 pounds of materials and equipment. Each vehicle must have sufficient ground clearance to safely maneuver through highway construction sites while fully loaded with equipment and materials. Each vehicle must have overhead flashing amber light(s), visible from all sides (360 degrees), with a driver control switch; fire extinguisher; and first aid kit. Vehicles without side windows must not be used. Each vehicle must be equipped to meet Caltrans safety requirements.

- b. A laptop computer or tablet with software.
- c. Cell phone with "Hot Spot" capabilities
- d. Hand tools including but not limited to; shovels, gloves, measuring tape, sledge hammer, clip board, calculator, peg book for the requested field personnel work.
- e. All necessary safety equipment including fire extinguisher, hard-soled safety footwear, white hard hats, eye protection, hearing protection, and American National Standards Institute (ANSI) 107-2004 or higher Class II garment for the requested field work to be performed safely and efficiently within operating highway and construction zone environments.
- f. Necessary miscellaneous tools, non-consumables, and supplies including, but not limited to, hammers, and shovels.
- g. Traffic cones, at a minimum 25, for traffic control as necessary. Such cones must be 28 inches, minimum, in height.
- h. Traffic control devices (including signs, sign bases, flags, and hand held signs) as required to perform the requested field personnel work.
- i. Photo target templates.
- j. Leveling instruments and equipment:

- i. Self-leveling/Digital level or electronic bar code level rod capable of achieving the precisions stated in the Caltrans Surveys Manual.
  - ii. Suitable leveling rods for the work to be performed.
- k. A Total Station Survey System comprising:
- i. A digital electronic angle measuring instrument with a manufacturer's listed accuracy for the direct circle reading of the horizontal and vertical angles of three seconds or better.
  - ii. A digital electronic distance measurer with a manufacturer's listed accuracy of five-millimeters plus/minus three ppm or better.
  - iii. A digital electronic data collector capable of running Caltrans' surveys data collection and stakeout software.
  - iv. Prior to the commencement of the first Task Order for construction staking or topographic surveys, Consultant must have a data collector compatible and interchangeable with Caltrans' standard Trimble Data collector.
  - v. Total station survey system must be capable of producing reports sufficient for Quality Assurance.
- l. Dual frequency Global Positioning System (GPS)/Global Navigation Satellite System (GNSS) Equipment: GPS/GNSS equipment must be used when required by the Task Order or the CCM.
- i. GPS/GNSS receivers and antennas suitable for the specific survey.
  - ii. GPS/GNSS antennas with ground planes as specified in the Caltrans Surveys Manual.
  - iii. Fixed-height tripods as specified in the Caltrans Surveys Manual.

- iv. Real Time Kinematic (RTK) or Real Time Network (RTN) GNSS system equipment comprising a base station, base radio, and a rover unit.
  - m. Survey-grade terrestrial stationary laser scanning, and Survey grade mobile terrestrial laser scanning equipment as specified in the Caltrans Surveys Manual.
3. The consultant must provide all necessary tools, instruments, equipment, materials, supplies, and safety equipment required to perform the work identified in each task order and this contract accurately, efficiently, and safely. The consultant's personnel must be fully trained in using such necessary tools, instruments, equipment, materials, supplies, and safety equipment. The consultant must not be reimbursed separately for tools of the trade, which may include, but not be limited to, the above-mentioned equipment.

L. Standards

1. All work/services under this contract must be performed under all federal, state, and local statutes, laws, codes, regulations, policies, procedures, ordinances, standards, specifications, performance standards, and guidelines, including the latest Caltrans regulations, policies, procedures, manuals, standards, specifications, performance standards, directives, guidelines, handbooks, guidance documents, forms, templates, policy memo, methodologies, and other informational or directive publications, including compliance with FHWA and State guidelines for implementing those requirements; and any permits, licenses, agreements or certifications that apply to specific task orders; the terms and conditions of this contract; and current Caltrans Manuals and any future revisions. Work not covered by the "Manuals" must be performed as specified in the task order. If no standards exist, task orders may call for developing new standards, so long as these standards do not conflict with the requirements, or amend the Scope Of Work under of this contract.
- a. The consultant obtains, at its expense, all necessary manuals, reference documents, and other materials.
  - b. Caltrans Manuals may be purchased from the Publication Distribution Unit. The publications staff may be reached at (916) 263-0822, and the center is at these address:

State of California  
California Department of Transportation  
Publication Distribution Unit  
1900 Royal Oaks Drive  
Sacramento, CA 95815-3800

- c. Manuals and documents that are not available from the Caltrans Publication Distribution Center or are not available from Caltrans' internet web site may be requested from the Caltrans contract manager. Caltrans does not guarantee the availability of publications nor its internet web pages.
- d. Caltrans' regulations, policies, procedures, manuals, standards, specifications, performance standards, directives, guidelines, handbooks, guidance documents, forms, templates, policy memo, methodologies, and other informational or directive publications, are dynamic documents and subject to change. The consultant is responsible to verify that the latest version or update is used.

2. Manuals, Documents, and Websites

These manuals, documents and links to internet sites are referenced in association with the work in this contract. The list is not all-inclusive, but should illustrate the reference material and sources of information.

- a. Caltrans' Internet Home Webpage:  
<http://www.dot.ca.gov/>
- b. Manual of Uniform Traffic Control Devices (MUTCD):  
California Manual on Uniform Traffic Control Devices:  
<http://mutcd.fhwa.dot.gov/>  
<http://www.dot.ca.gov/trafficops/engineering/>
- c. Caltrans Surveys Manual:  
[http://www.dot.ca.gov/hq/row/landsurveys/SurveysManual/Manual\\_TOC.html](http://www.dot.ca.gov/hq/row/landsurveys/SurveysManual/Manual_TOC.html)
- d. Caltrans CADD User's Manual:

<http://www.dot.ca.gov/hq/oppd/cadd/usta/ppman/toc.htm>

e. Caltrans Standard Plans and Standard Specifications:  
<http://www.dot.ca.gov/des/oe/construction-contract-standards.html>

f. Caltrans Right of Way Manual:  
<http://www.dot.ca.gov/hq/row/rowman/manual/index.htm>  
<http://www.dot.ca.gov/hq/row>

3. Land surveying services and associated work performed by the consultant must conform to the California Land Surveyors Act. Business & Professions Code §§ 8700 et. seq. The consultant personnel in “Responsible Charge”, as defined in the California Land Surveyors Act, must be a PLS licensed in the State of California or a pre-January 1, 1982, Registered Professional Civil Engineer licensed in the State of California and be in good standing with the BPELSG during the Contract period

M. Field Safety

Besides the requirements specified elsewhere in this contract, the following also must apply:

1. The consultant must maintain a working environment safe for project personnel and the public. The consultant’s personnel must comply with all safety provisions of the Caltrans Safety Manual, Caltrans Surveys Manual, Caltrans Traffic Manual, and Caltrans Code of Safe Practices. The consultant must comply with all federal, state, and local Occupational Safety and Health Administration (OSHA) statutes, laws, codes, regulations, policies, procedures, ordinances, standards, rules, specifications, performance standards, and guidelines, and the safety instructions that Caltrans issues for performance of task order work, applicable to the work under this contract, regarding safety equipment and procedures (including, but not limited to, use and operation). Under no circumstance must the consultant’s safety policies be less stringent than Caltrans.
2. The field work must not be performed when conditions prevent a safe and efficient operation, and must only be performed with written authorization by Caltrans.

3. The consultant must provide, at no cost to Caltrans, all safety equipment to perform the required services safely including, but not limited to: gloves, coveralls, sunscreen, insect repellents, fire extinguisher, hard-soled safety footwear, white hard hats, eye protection, hearing protection, and ANSI 107-2004 or higher Class II garment. The consultant's personnel must wear hard-soled safety footwear, white hard hats, eye protection, hearing protection (when applicable), and ANSI 107-2004 or higher Class II garment.
4. The consultant must provide, at no cost to Caltrans, appropriate safety training for all the consultant's and the sub-consultant's office, and field personnel, including training required for performing the work in an office setting or in the field to work on and near highways safely.
5. The consultant must be solely responsible for protecting health and safety of its personnel, sub-consultants, and Sub-consultant's personnel in performance of this contract.
6. Traffic Control
  - a. If specified in the task order, Caltrans must provide traffic control to accomplish the work within Caltrans' right-of-way. When Caltrans is to provide traffic control, the consultant must request the traffic control before the work to obtain proper clearance. Limited work hours, night work or weekend work may be necessitated by the closure schedule approved by Caltrans for work on State freeways or highways. For work outside of Caltrans' right-of-way, the consultant must provide traffic control in coordination with the local jurisdiction and/or private owners.
  - b. If the task order requires the consultant to provide traffic control or traffic control devices, the consultant must follow policy and procedures per the FHWA Manual on Uniform Traffic Control Devices (MUTCD) and the California Manual of Traffic Control Devices.

N. Orientation Provided by Caltrans

Caltrans may provide orientation regarding the requirements for this contract and each task order as deemed necessary by Caltrans. The orientation may consist of a description of Caltrans procedures, practices, and requirements for the specific work to be performed

and sharing of project related files and notes. However, if the orientation instructions conflict with the contract or task order requirements, the contract and the executed task order must prevail over any descriptions provided.

O. Monitoring and Review Procedure

1. The Caltrans contract manager and task order manager will have the unilateral right, occasionally, or as requested by the consultant, to monitor and review the progress and processes of the consultant related to work performed under this contract.
2. The performance of the consultant contract manager, key personnel, and team must be evaluated by the Caltrans contract manager but no less frequently than annually, and at the expiration of the contract. Unsatisfactory reviews of specific consultant personnel may cause Caltrans requesting that they be replaced with new personnel. The consultant must immediately replace personnel with individuals whose qualifications at a minimum equal those of the personnel replaced at no additional cost to Caltrans. Evaluation includes, but not be limited to:
  - a. Job performance.
  - b. Quality of Work.
  - c. Timely submittal of reports, invoices, daily diaries, and other required documents.
  - d. Early detection of problems and timely resolutions.
  - e. Requesting timely approval for personnel changes and travel expenditure.
  - f. Responsiveness and ability to control costs.
  - g. DBE or DVBE Participation.
  - h. Conflicts of interest.

Poor performance and any negative evaluations may result in the request for replacement of the consultant contract manager, key personnel, or any personnel; the need to replace key personnel must reflect adversely on the consultant's performance evaluation, and if warranted, may cause the termination of the contract per Exhibit D, Section III, Termination of the Contract.

3. The survey party chief for each consultant's survey party must prepare a daily "Survey Party Report." The reports must be prepared on Caltrans-provided forms and must be prepared daily.
4. The office survey team leader for each consultant's office survey team must prepare a weekly "Office Survey Report." The report must be prepared weekly at the end of the week's work.
5. The consultant must provide a monthly Task Order Summary Report detailing all work performed under each task order. This report should coincide with the dates covered by the monthly invoice period of performance. The report should be included with the invoice submittal.

P. General Materials to be provided by Caltrans

Materials (if deemed applicable, necessary, and when available from Caltrans) that may be furnished or provided by Caltrans and where listed in the individual task orders and this contract, are for the consultant's use only, must be returned at the end of the contract. The consultant must use the materials in the execution of the specific work described in the task order. These materials may include, but not be limited to:

1. Background or reference information for each task order.
2. Project special provisions, full-size and reduced-size sets of project plans, materials information handout, and construction contract and proposal, as necessary.
3. Caltrans standardized forms.
4. If Permits to Enter onto private property are required to complete work identified in a task order, Caltrans will issue letters of the Intent to Survey for the identified properties. Caltrans will provide the consultant with Caltrans approved "Notice to Property Owners" door hangers.
5. Background information, site topographic maps, as-built drawings, blank Caltrans plan sheet overlays, digital electronic seed files, cell libraries, lane closure request forms, right-of-way alignments and survey limits, preliminary utility location

maps, areas where focused studies are needed, and Construction Contract Documents, as available, for each task order.

6. Digital Electronic templates of task order formats.

Q. Land Surveying Materials to be provided by Caltrans

1. Relevant and existing documents, right-of-way record data, survey maps, control, data, topographic maps, and planimetric maps, if any are available, that apply to the current project within the project limits.
2. Monument disks, plugs, tags, and marker posts.
3. “Daily Survey Party Report” forms.

Note: The consultant handles the return to Caltrans, in original condition, of all items provided for use under this contract. The consultant must replace, at the consultant’s sole expense, all lost or damaged Caltrans data or materials.

R. Materials to be provided by the Consultant

Unless otherwise specified in this contract, the consultant must provide all materials to complete the required work under the delivery schedule and cost estimate outlined in each task order.

1. The consultant must provide to its land surveying services personnel sets of the following that apply to the current project:
  - a. Standard Specifications.
  - b. Standard Plans.
  - c. Materials under section “Equipment Requirements”.
2. When performing work within railroad company property, the consultant must obtain sufficient and/or adequate insurance coverage that must comply with the railroad company’s requirements when performing work within their jurisdiction. The insurance and types of coverage required by the railroad company may be above and beyond that required by Caltrans. The consultant may have to provide additional railroad liability insurance including, but not limited to:

- a. Commercial General Liability Insurance.
- b. Business Automobile Coverage Insurance.
- c. Worker Compensation and Employers Liability Insurance.
- d. Railroad Protective Liability Insurance.
- e. Umbrella or Excess Insurance.
- f. Pollution Liability Insurance.

S. Product Approval and Payment

1. Deliverables, backup documents, and other items produced by the consultant in the performance of this contract, must be subject to the approval and acceptance by the Caltrans contract manager or task order manager prior to invoicing and payment for these items.
2. All deliverables and tasks provided for acceptance under each task order must comply with the terms, covenants and conditions of this contract.
3. Upon completion of each deliverable or task, the Caltrans contract manager or task order manager must either accept or reject the completed work. In the event of non-acceptance due to errors, omissions, or non-compliance with the Caltrans Manuals, as revised by the time of the task order, or this contract, the consultant must remedy the errors, omissions, or non-compliance to the satisfaction of the Caltrans contract manager or task order manager at no cost to Caltrans prior to payment. Caltrans must withhold payment until the work is satisfactorily completed and approved by the Caltrans contract manager. Additional cost incurred to correct errors will not be compensated.
4. Caltrans must not pay the consultant for the consultant's work under this contract and the charges incurred by the consultant that ignores the requirements specified in this contract and to the task order, and such work must be corrected at the consultant's sole expense at no additional cost to Caltrans.
5. All reviews, inspections and approvals made prior to the final acceptance of deliverables or task orders are intended only to provide interim authorizations to proceed and do not constitute final approval of the deliverable or task order.

6. Notwithstanding any other provision, until final acceptance of a task order under the agreement, any acceptance or approval means approval to proceed, but it does not mean acceptance or approval of a deliverable or task, and, it does not reduce or eliminate any of Consultant's duties or responsibilities under this agreement.

T. General Deliverables

All deliverables, developed under this contract, and subject to Exhibit D, sections XIX and XX, must be sent to Caltrans upon completion of each task order deliverable and with the acceptance/approval of the work by the Caltrans contract manager or task order manager. The consultant must retain a copy of all documents furnished to Caltrans until expiration of the contract.

Unless otherwise specified in the task order, the deliverables must conform to Caltrans current hardware and software platforms

1. The consultant must work in close liaison with the Caltrans contract manager and task order manager. Time is of the essence. Caltrans must exercise review and approval functions through the Caltrans contract manager or task order manager at key points, as specified in each task order. Milestone reviews must be performed with the Caltrans contract manager and task order manager for the specific performance, products, and deliverables in each task order.
2. The consultant must prepare a cost estimate showing task, subtask, personnel, personnel hours estimated for each task or subtask, and a schedule of deliverables.
3. All deliverables, backup documents, and other items required by this contract must be prepared on Caltrans standardized forms. Necessary forms will be provided by Caltrans for the consultant's use.
4. All deliverables, backup documents, and other items required by this contract must be submitted in both hardcopy and unprotected and modifiable digital electronic files in the Caltrans-approved forms and in the Caltrans-approved and designated digital electronic formats under the guidelines in this contract and each task order. The unprotected and modifiable digital electronic files must include the responsible person's digital electronic signature and seal. The consultant must verify the latest version of software used prior to submittal.

5. At the end of each task order or when requested by the Caltrans task order manager, the consultant must also submit one unprotected and modifiable digital electronic copy of all deliverables, backup documents, and other items required by this contract in a specified digital device format. The file formats must be specified in each task order. Documentation must accompany each digital device indicating the contents of each file.
6. The Consultant personnel involved in preparation or review of deliverables, backup documents, and other items must be identified in the prepared or review report.
7. If the consultant fails to submit the required deliverables, backup documents, and other items required by this contract and any approved task order, Caltrans may withhold payment and/or terminate this Contract under the termination provisions of this contract per Exhibit D, Section III, Termination. If the contract is terminated, the consultant must, at Caltrans' request, return all materials recovered or developed by the consultant under the contract.
8. The consultant must prepare and update the Caltrans WBS in this contract for each task order issued by the Caltrans task order manager showing a deliverables schedule. The consultant must complete and meet the agreed upon schedule for each task order. Failure to complete the work based on the agreed upon schedule in the task order may cause termination of the task order or this contract. Caltrans may have work completed allowed by law, for which the consultant must be liable for any additional costs incurred by Caltrans to complete the work. Such costs may be deducted from amounts due to the consultant in pending or future invoices, or if the contract is terminated, may be recouped by any means allowed by law.
9. Deliverables specified in each task order must be delivered to the attention and address stated in each task order.
10. The Consultant must be capable of working in either English or Metric units.

11. All deliverables must be prepared in U.S. Customary English Units unless an exception is approved. The units to be used for deliverables must be addressed within individual task orders.
12. A task order may require the consultant to use software and digital electronic formats other than those stated in this contract as needed to accomplish the objectives of the task order.
13. Quality Control Plan:

Prior to the work, the consultant must prepare the quality control plan and the minimum standard of work quality and obtain approval from the Caltrans task order manager, in effect for every task order during the entire time the work is being performed under the contract. The consultant must complete the quality control plan and certify at completing work that all measures contained were satisfied. Caltrans must perform quality assurance on the quality control plan to assure that quality control was satisfied.

The Consultant's quality control plan must establish a process whereby:

- a. All deliverables are reviewed for accuracy, completeness, and readability before submittal to Caltrans.
- b. Calculations and plans are independently checked, corrected and re-checked.
- c. All job-related correspondence and memoranda are routed and received by affected persons and then filed in the task order file.
- d. Field activities are routinely verified for accuracy and completeness, such that any discovered deficiencies do not become systemic or affect the result of a task order deliverable.

The consultant must provide an outline of the quality control program before a specific task begins and must identify critical quality control reviews within each task order. The Caltrans task order manager must periodically request evidence that the quality control/quality assurance plan is functioning. All deliverables, backup documents, and other items required by this contract must be submitted to

the Caltrans task order manager for review. The deliverables must be marked clearly as being fully checked or unchecked, and that preparing the material followed the quality control plan established for the work. The Quality Control/Quality Assurance (QC/QA) plan must contain provisions for developing appropriate “checklists” to maintain product quality and control. These “checklists” must be delivered to the Caltrans task order manager with the QC/QA plan. The consultant must update these documents when directed by the Caltrans task order manager. Within 30 calendar days of the Notice to Proceed, the consultant must submit to the Caltrans task order manager or Caltrans designee a job specific QC/QA plan and staffing plan.

14. Subject to Caltrans review, approval, and acceptance, the consultant has total responsibility for and must verify the accuracy and completeness of the deliverables, backup documents, and other items required by this contract prepared by the consultant or its sub-consultants for the projects as specified in this contract and in each task order. All deliverables, backup documents, and other items required by this contract must be reviewed by Caltrans for conformity with project standards and the requirements in the task order and this contract. The deliverables, backup documents, and other items required by this contract are subject to Caltrans’ review, approval, and acceptance. Reviews by Caltrans do NOT include detailed review or checking of major components, quantitative calculations, related details or accuracy of information. The responsibility for accuracy and completeness of such items remains solely that of the consultant.
15. The Caltrans contract manager or task order manager must address all questions which may arise on the quality or acceptability of deliverables furnished and work performed for this Contract.
16. Prepare the deliverables, backup documents, and other items required by this contract under prevailing industry standards and in a form acceptable to the Caltrans contract manager or the Caltrans task order manager. These items must identify the preparer, the designated reviewers, and the criteria for acceptance. The deliverables must satisfy the Caltrans acceptance criteria and tests. The work product must be complete, of neat appearance, well-organized, technically and grammatically correct, independently checked for error, checked by designated reviewers (Caltrans and Consultant Personnel), dated, and must conform to industry standards and all Caltrans, State, and Federal Standards, Requirements,

and Procedures. All deliverables must be approved by the Caltrans Contract Manager or Caltrans designee.

17. The minimum standard of appearance, organization, and content of deliverables, backup documents, and other items required by this contract, must be that of similar types produced by Caltrans and set forth in related Caltrans manuals.
18. Caltrans and the consultant must develop and agree to a schedule for the services and deliverables to be completed and delivered, and where appropriate, for acceptance criteria and acceptance tests that the services and deliverables must satisfy as a prerequisite for approval by Caltrans. All deliverables must satisfy the standards set forth in “Standards” section to be accepted for payment.

U. Land Surveying Deliverables

1. The consultant must obtain written approval from Caltrans for all deliverables, backup documents, and other items required by this contract. If there are no Caltrans standardized forms, the format and content requirements for all deliverables, backup documents, and other items required by this contract must be specified in each task order.
2. All land surveying services deliverables, backup documents, and other items required by this contract performed on computer must be delivered in Caltrans approved hardware and software formats. Specific deliverable file formats must be identified in the individual contract task orders.
3. All maps must be submitted in unprotected and modifiable digital electronic files in the Caltrans-approved and designated formats and must conform to Caltrans standards.
4. Survey points, lines, and monuments must be established, marked, identified and referenced, as required by Standards and Symbols for Photogrammetric Mapping, CADD Standards, task order, and the requirements in this contract.
5. Survey notes, drawings, calculations and other survey documents and information must be completed as required by the task order and the requirements in this contract.

6. All original survey documents resulting from this contract (including original field notes, data collector raw files, edits to field data, adjustment calculations, final results, and intermediate documents) must be delivered to Caltrans and must become the property of Caltrans. The consultant must retain a copy of all survey documents furnished to Caltrans. When the survey is performed with a Total Station Survey System, the original field notes must be a hard copy listing in a readable format of the data (observations) as originally collected and submitted by the survey party. The person in “Responsible Charge” of the survey must sign the listing.
7. The final results of all surveys must be delivered to Caltrans in the formats specified below:
  - a. The HORIZONTAL CONTROL must be submitted in unprotected and modifiable digital electronic files in the Caltrans-approved and designated formats, and must conform to Caltrans standards. The digital electronic medium must follow the Caltrans computerized system. Also, an alpha/numeric hard copy point listing with adjusted California Coordinate System northings and eastings and descriptions must be submitted.
  - b. The VERTICAL CONTROL must be submitted in unprotected and modifiable digital electronic files in the Caltrans-approved and designated format, and must conform to Caltrans standards. The digital electronic medium must follow the Caltrans computerized system. Also, an alpha/numeric hard copy benchmark listing with adjusted elevations and descriptions must be submitted.
  - c. The TOPOGRAPHIC DATA must be submitted in unprotected and modifiable digital electronic files in the Caltrans-approved and designated formats, and must conform to Caltrans standards. The digital electronic medium must follow the Caltrans computerized system as specified in the task order (CAiCE, AutoCAD Civil 3D). Also, hard copy drawings and an alpha/numeric hard copy listing must be submitted.
  - d. Other - As specified in the Task Order.
8. Caltrans role must be limited to technical oversight only and monitoring the Consultant's quality assurance program.

9. Quality assurance must be required for Caltrans produced data or data produced by another consultant.

V. Conflict of Interest

1. All land surveying services provided by the consultant and deliverables produced by the consultant must be free of any conflict of interest and must be subject to the approval and acceptance of the Caltrans contract manager. The consultant must inform the Caltrans contract manager of any 'perceived' conflict of interest when discovered.
2. The consultant must not receive compensation for any services or products in which the consultant is found to have a conflict of interest. In the event of non-acceptance due to discovery of conflict of interest, the consultant must provide replacement deliverables free of any conflict of interest prior to payment. If replacement deliverables are not possible, the consultant must not receive compensation for the deliverables containing conflict of interest. Examples of conflict of interest include, but not be limited to:
  - a. Providing land surveying services for Caltrans on a particular project and providing land surveying services for the construction contractor on the same project.

The above conflict of interest scenario is only an example of possible conflicts of interest for the services provided under this contract, but is not intended to describe all circumstances for potential or actual conflicts.

W. List of Abbreviated Terms

A&E (Architectural and Engineering)

BPELSG (California State Board of Professional Engineers, Land Surveyors, and Geologists)

CADD (Computer Aided Drafting & Design)

Caltrans (California Department of Transportation)

DBE (Disadvantaged Business Enterprise)

DPAC (Division of Procurement and Contracts)

DVBE (Disabled Veterans Business Enterprise)

FHWA (Federal Highway Administration)

GNSS (Global Navigation Satellite System)  
GPS (Global Positioning System)  
MUTCD (Manual of Uniform Traffic Control Devices)  
OSHA (Occupational Safety and Health Administration)  
OICR (Office Indirect Cost Rate)  
PDT (Project Development Team)  
PLS (Professional Land Surveyor)  
RTK (Real Time Kinematic)  
RTN (Real Time Network)  
SOW (Scope of Work)  
WBS (Work Breakdown Structure)  
WSG (Workplan Standards Guide)

X. Datum Requirements

1. Caltrans must designate the existing horizontal and vertical control monuments to be the basis of Consultant performed surveys and mapping. Caltrans must provide the California Coordinate System values for the horizontal control monuments and the elevation values for the vertical monuments. All bearings and distances must be on the California Coordinate System as based on the primary control furnished to consultant. The consultant must adjust the consultant performed surveys utilizing the designated control monument values. Exceptions need prior written approval from the Caltrans district survey engineer.
2. All surveying data and maps prepared by the consultant must conform to Sections 8801 through 8902 of the Public Resources Code. Distances and bearings shown must be grid and the maps and documents must show the datum and combination factor for surface conversion.
3. The task order must designate which epoch of the California Coordinate System is to be used for horizontal coordinate values.
4. The task order must designate the vertical datum to be used for elevations.

Y. Monument Markings

Monuments established by the consultant must be marked by the consultant with Caltrans-furnished disks, plugs, or tags. In addition, the consultant must identify State

furnished monuments by tagging or stamping the monuments with the license or registration number of the consultant's surveyor in "Responsible Charge" of the work.

List of Proposed Caltrans Projects  
RFQ No. 08A2868  
Attachment 1A

Page 1 of 1

EA	Project #	Location: Rte/PM	Project Description
0G900	0800020175	SBD 247 / 9.60 - 20.30	Widen Hwy. to 4-Lanes & add Left Turn Channelization at Intersections
0J460	0800000302	SBD 95 / 37.30	Widen Roadway and add Left-Turn pocket at Havasu Lake Rd.
34770	0800000616	SBD 58 / 0.00 - 12.90	Construct 4-lane expwy; Kramer Jct.
0G860	0814000132	SBD 40 / 105.3 - 105.6	Demolish and Reconstruct the John Wilkie SRRA (EB & WB)
1F690	0815000016	RIV 79 / 0.0 - 15.0	Mill and Overlay, Upgrade Dikes, ADA Curb Ramps, Guardrails
1F600	0814000257	RIV 79 / 25.65 - 26.40	Construct and Upgrade Existing Pedestrian Facilities to current ADA Standards
1F610	0814000258	SBD 15 / 71.6 - 75.0	Reconstruct and/or Upgrade Existing Curb Ramps to Current ADA Standards
0K123	0815000242	SBD 15 / 64.6 - 75.3	Rehabilitate Existing Mainline and Ramp Pavement
1C720	0813000003	SBD 15 / 96.1 - 124.3	Regrade Median Cross Slope
1F590	0814000256	RIV 74 / 36.9 - 43.6	Construct Sidewalks, Curb Ramps, Driveways and Other Pedestrian Facilities
1C850	0813000047	RIV 74 / 0.0 - 5.8	Widen lanes and Add Shoulders
1F141	0815000231	RIV 15 / 0.0 - 3.0	Replace Two Outside Lanes in Both Directions
1F142	0815000232	RIV 15 / 23.9-33.4	Slab replacement
1C380	0812000303	RIV 10 / 8.2 - 25.1	Pavement replacement, widen shoulders, ADA ramps
1E582	0816000073	SBD 95 / 17.0 - 17.5	Widen shoulders and install rumble strips
0Q120	0800020125	SBD 18 / 99.4 - 100.9	Widen SR 18 and construct raised curb median
0Q130	0800020212	SBD 62 / 1.9 - 7.6	Construct raised median curb
0R310	0812000027	RIV 74 / 11.7 - 14.3	Reconstruct sidewalks, curb ramps and driveways
0R300	0812000056	RIV 111 / 47.2 - 55.2	Reconstruct sidewalks and curb ramps
0R160	0812000029	SBD 40 / 50.0 - 75.0	Regrade median cross slope
1E610	0814000055	SBD 62 / 41.0 - 41.5	Widen shoulders and install rumble strips
1E460	0814000026	RIV 74 / 37.7 - 44.7	Construct raised median curb
0K291	0812000098	SBD 10 / 30.9 - 33.3	Lane Replacement
0N971	0815000101	SBD 395 / 39.0 - 45.9	Construct 4' median buffer and widen shoulder
0R120	0812000026	SBD 40 / 0.0 - 25.0	Regrade median cross slope
1E560	0814000050	SBD 247 / 39.5 - 40.0	Widen shoulders and install rumble strips
1E550	0814000049	SBD 127 / 28.0 - 28.5	Construct shoulders and install rumble strips
0N69U	0812000307	RIV 60 / 22.10 - 26.61	Construct truck climbing and descending lane both directions
0N670	0800000536	RIV 74 / 28.10 - 37.40	Construct raised median and left turn lanes
1C380	0812000303	RIV 10 / 8.20 - 25.10	Replace lanes
0L710	0800000431	SBD 142 / 3.87 - 5.74	Construct sidewalks and ADA upgrades
0F631	0813000220	SBD 395 / 11.2 - 16.6	Widen Hwy to 4-lanes
0R150	0812000025	SBD 40 / 75.0 - 100.0	Regrade median cross slope
0R142	0815000201	SBD 40 / 125.0 - 154.6	Regrade median cross slope
1G192	0816000194	RIV 91 / 7.40 - 15.60	Continuous access HOV lane
1F730	0815000034	SBD 215 / 2.40 - 3.00	Replace over crossing


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**SB-1266 Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006.** (2005-2006)

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**Senate Bill No. 1266**

CHAPTER 25

An act to add Chapter 12.49 (commencing with Section 8879.20) to Division 1 of Title 2 of the Government Code, relating to transportation, by providing the funds necessary therefor through an election for the issuance and sale of bonds of the State of California and for the handling and disposition of those funds, and declaring the urgency thereof, to take effect immediately.

[ Approved by Governor May 16, 2006. Filed with Secretary of State May 16, 2006. ]

LEGISLATIVE COUNSEL'S DIGEST

SB 1266, Perata. Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006.

Existing law provides various funding sources for transportation and related purposes.

This bill, subject to voter approval at the November 7, 2006, statewide general election, would enact the Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006 to authorize \$19.925 billion of state general obligation bonds for specified purposes, including high-priority transportation corridor improvements, State Route 99 corridor enhancements, trade infrastructure and port security projects, schoolbus retrofit and replacement purposes, state transportation improvement program augmentation, transit and passenger rail improvements, state-local partnership transportation projects, transit security projects, local bridge seismic retrofit projects, highway-railroad grade separation and crossing improvement projects, state highway safety and rehabilitation projects, and local street and road improvement, congestion relief, and traffic safety.

This bill would declare that it is to take effect immediately as an urgency statute.

Vote: 2/3 Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

**SECTION 1.** Chapter 12.49 (commencing with Section 8879.20) is added to Division 1 of Title 2 of the Government Code, to read:

**CHAPTER 12.49. The Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006**  
**Article 1. General Provisions**

**8879.20.** (a) This chapter shall be known as the Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006.

(b) This chapter shall only become operative upon adoption by the voters at the November 7, 2006, statewide general election.

**8879.22.** As used in this chapter, the following terms have the following meanings:

(a) "Board" means any department receiving an allocation of bond proceeds pursuant to this chapter.

(b) "Committee" means the Highway Safety, Traffic Reduction, Air Quality, and Port Security Committee created pursuant to Section 8879.27.

(c) "Fund" means the Highway Safety, Traffic Reduction, Air Quality, and Port Security Fund of 2006 created pursuant to Section 8879.23.

## **Article 2. Highway Safety, Traffic Reduction, Air Quality, and Port Security Fund of 2006 and Program**

**8879.23.** The Highway Safety, Traffic Reduction, Air Quality, and Port Security Fund of 2006 is hereby created in the State Treasury. The Legislature intends that the proceeds of bonds deposited in the fund shall be used to fund the mobility, safety, and air quality improvements described in this article over the course of the next decade. The proceeds of bonds issued and sold pursuant to this chapter for the purposes specified in this chapter shall be allocated in the following manner:

(a) (1) Four billion five hundred million dollars (\$4,500,000,000) shall be deposited in the Corridor Mobility Improvement Account, which is hereby created in the fund. Funds in the account shall be available to the California Transportation Commission, upon appropriation in the annual Budget Bill by the Legislature, for allocation for performance improvements on highly congested travel corridors in California. Funds in the account shall be used for performance improvements on the state highway system, or major access routes to the state highway system on the local road system that relieve congestion by expanding capacity, enhancing operations, or otherwise improving travel times within these high-congestion travel corridors, as identified by the department and regional or local transportation agencies, pursuant to the process in paragraph (3) or (4), as applicable.

(2) The commission shall develop and adopt guidelines, by December 1, 2006, including regional programming targets, for the program funded by this subdivision, and shall allocate funds from the account to projects after reviewing project nominations submitted by the Department of Transportation and by regional transportation planning agencies or county transportation commissions or authorities pursuant to paragraph (4).

(3) Subject to the guidelines adopted pursuant to paragraph (2), the department shall nominate, by no later than January 15, 2007, projects for the allocation of funds from the account on a statewide basis. The department's nominations shall be geographically balanced and shall reflect the department's assessment of a program that best meets the policy objectives described in paragraph (1).

(4) Subject to the guidelines adopted pursuant to paragraph (2), a regional transportation planning agency or county transportation commission or authority responsible for preparing a regional transportation improvement plan under Section 14527 may nominate projects identified pursuant to paragraph (1) that best meet the policy objectives described in that paragraph for funding from the account. Projects nominated pursuant to this paragraph shall be submitted to the commission for consideration for funding by no later than January 15, 2007.

(5) All nominations to the California Transportation Commission shall be accompanied by documentation regarding the quantitative and qualitative measures validating each project's consistency with the policy objectives described in paragraph (1). All projects nominated to the commission for funds from this account shall be included in a regional transportation plan.

(6) After review of the project nominations, and supporting documentation, the commission, by no later than March 1, 2007, shall adopt an initial program of projects to be funded from the account. This program may be updated every two years in conjunction with the biennial process for adoption of the state transportation improvement program pursuant to guidelines adopted by the commission. The inclusion of a project in the program shall be based on a demonstration that the project meets all of the following criteria:

(A) Is a high-priority project in the corridor as demonstrated by either of the following: (i) its inclusion in the list of nominated projects by both the department pursuant to paragraph (3) and the regional transportation planning agency or county transportation commission or authority, pursuant to paragraph (4); or (ii) if needed to fully fund the project, the identification and commitment of supplemental funding to the project from other state, local, or federal funds.

(B) Can commence construction or implementation no later than December 31, 2012.

(C) Improves mobility in a high-congestion corridor by improving travel times or reducing the number of daily vehicle hours of delay, improves the connectivity of the state highway system between rural, suburban, and urban areas, or improves the operation or safety of a highway or road segment.

(D) Improves access to jobs, housing, markets, and commerce.

(7) Where competing projects offer similar mobility improvements to a specific corridor, the commission shall consider additional benefits when determining which project shall be included in the program for funding. These benefits shall include, but are not limited to, the following:

(A) A finding that the project provides quantifiable air quality benefits.

(B) A finding that the project substantially increases the safety for travelers in the corridor.

(8) In adopting a program for funding pursuant to this subdivision, the commission shall make a finding that the program is (i) geographically balanced, consistent with the geographic split for funding described in Section 188 of the Streets and Highways Code; (ii) provides mobility improvements in highly traveled or highly congested corridors in all regions of California; and (iii) targets bond proceeds in a manner that provides the increment of funding necessary, when combined with other state, local or federal funds, to provide the mobility benefit in the earliest possible timeframe.

(9) The commission shall include in its annual report to the Legislature, required by Section 14535, a summary of its activities related to the administration of this program. The summary should, at a minimum, include a description and the location of the projects contained in the program, the amount of funds allocated to each project, the status of each project, and a description of the mobility improvements the program is achieving.

(b) One billion dollars (\$1,000,000,000) shall be made available, upon appropriation in the annual Budget Bill by the Legislature, to the department for improvements to State Route 99. Funds may be used for safety, operational enhancements, rehabilitation, or capacity improvements necessary to improve the State Route 99 corridor traversing approximately 400 miles of the central valley of this state.

(c) Three billion one hundred million dollars (\$3,100,000,000) shall be deposited in the California Ports Infrastructure, Security, and Air Quality Improvement Account, which is hereby created in the fund. The money in the account shall be available, upon appropriation by the Legislature and subject to such conditions and criteria as the Legislature may provide by statute, as follows:

(1) (A) Two billion dollars (\$2,000,000,000) shall be transferred to the Trade Corridors Improvement Fund, which is hereby created. The money in this fund shall be available, upon appropriation in the annual Budget Bill by the Legislature and subject to such conditions and criteria as the Legislature may provide by statute, for allocation by the California Transportation Commission for infrastructure improvements along federally designated "Trade Corridors of National Significance" in this state or along other corridors within this state that have a high volume of freight movement, as determined by the commission. In determining projects eligible for funding, the commission shall consult the trade infrastructure and goods movement plan submitted to the commission by the Secretary of Business, Transportation and Housing and the Secretary for Environmental Protection. No moneys shall be allocated from this fund until the report is submitted to the commission for its consideration, provided the report is submitted no later than January 1, 2007. The commission shall also consult trade infrastructure and goods movement plans adopted by regional transportation planning agencies, adopted regional transportation plans required by state and federal law, and the statewide port master plan prepared by the California Marine and Intermodal Transportation System Advisory Council (Cal-MITSAC) pursuant to Section 1760 of the Harbors and Navigation Code, when determining eligible projects for funding. Eligible projects for these funds include, but are not limited to, all of the following:

(i) Highway capacity improvements and operational improvements to more efficiently accommodate the movement of freight, particularly for ingress and egress to and from the state's seaports, including navigable inland waterways used to transport freight between seaports, land ports of entry, and airports, and to relieve traffic congestion along major trade or goods movement corridors.

(ii) Freight rail system improvements to enhance the ability to move goods from seaports, land ports of entry, and airports to warehousing and distribution centers throughout California, including projects that separate rail lines from highway or local road traffic, improve freight rail mobility through mountainous regions, relocate rail switching yards, and other projects that improve the efficiency and capacity of the rail freight system.

(iii) Projects to enhance the capacity and efficiency of ports.

(iv) Truck corridor improvements, including dedicated truck facilities or truck toll facilities.

(v) Border access improvements that enhance goods movement between California and Mexico and that maximize the state's ability to access coordinated border infrastructure funds made available to the state by federal law.

(vi) Surface transportation improvements to facilitate the movement of goods to and from the state's airports.

(B) The commission shall allocate funds for trade infrastructure improvements from the account in a manner that (i) addresses the state's most urgent needs, (ii) balances the demands of various ports (between large and small ports, as well as between seaports, airports, and land ports of entry), (iii) provides reasonable geographic balance between the state's regions, and (iv) places emphasis on projects that improve trade corridor mobility while reducing emissions of diesel particulate and other pollutant emissions. In addition, the commission shall also consider the following factors when allocating these funds:

(i) "Velocity," which means the speed by which large cargo would travel from the port through the distribution system.

(ii) "Throughput," which means the volume of cargo that would move from the port through the distribution system.

(iii) "Reliability," which means a reasonably consistent and predictable amount of time for cargo to travel from one point to another on any given day or at any given time in California.

(iv) "Congestion reduction," which means the reduction in recurrent daily hours of delay to be achieved.

(C) The commission shall allocate funds made available by this paragraph to projects that have identified and committed supplemental funding from appropriate local, federal or private sources. The commission shall determine the appropriate amount of supplemental funding each project should have to be eligible for moneys from this fund based on a project-by-project review and an assessment of the project's benefit to the state and the program. Except for border access improvements described in clause (v) of subparagraph (A), improvements funded with moneys from this fund shall have supplemental funding that is at least equal to the amount of the contribution from the fund. The commission may give priority for funding to projects with higher levels of committed supplemental funding.

(D) The commission shall include in its annual report to the Legislature, required by Section 14535, a summary of its activities related to the administration of this program. The summary should, at a minimum, include a description and the location of the projects contained in the program, the amount of funds allocated to each project, the status of each project, and a description of the mobility and air quality improvements the program is achieving.

(2) One billion dollars (\$1,000,000,000) shall be made available, upon appropriation by the Legislature and subject to such conditions and criteria contained in a statute enacted by the Legislature, to the State Air Resources Board for emission reductions, not otherwise required by law or regulation, from activities related to the movement of freight along California's trade corridors. Funds made available by this paragraph are intended to supplement existing funds used to finance strategies and public benefit projects that reduce emissions and improve air quality in trade corridors commencing at the state's airports, seaports, and land ports of entry.

(3) One hundred million dollars (\$100,000,000) shall be available, upon appropriation by the Legislature, to the Office of Emergency Services to be allocated, as grants, for port, harbor, and ferry terminal security improvements. Eligible applicants shall be publicly owned ports, harbors, and ferryboat and ferry terminal operators, which may submit applications for projects that include, but are not limited to, the following:

(A) Video surveillance equipment.

(B) Explosives detection technology, including, but not limited to, X-ray devices.

(C) Cargo scanners.

(D) Radiation monitors.

(E) Thermal protective equipment.

(F) Site identification instruments capable of providing a fingerprint for a broad inventory of chemical agents.

(G) Other devices capable of detecting weapons of mass destruction using chemical, biological, or other similar substances.

(H) Other security equipment to assist in any of the following:

(i) Screening of incoming vessels, trucks, and incoming or outbound cargo.

(ii) Monitoring the physical perimeters of harbors, ports, and ferry terminals.

(iii) Providing or augmenting onsite emergency response capability.

(I) Overweight cargo detection equipment, including, but not limited to, intermodal crane scales and truck weight scales.

(J) Developing disaster preparedness or emergency response plans.

The Office of Emergency Services shall report to the Legislature on March 1 of each year on the manner in which the funds available pursuant to this paragraph were expended for that fiscal year.

(d) Two hundred million dollars (\$200,000,000) shall be available, upon appropriation by the Legislature, for schoolbus retrofit and replacement to reduce air pollution and to reduce children's exposure to diesel exhaust.

(e) Two billion dollars (\$2,000,000,000) shall be available for projects in the state transportation improvement program, to augment funds otherwise available for this purpose from other sources. The funds provided by this subdivision shall be deposited in the Transportation Facilities Account which is hereby created in the fund, and shall be available, upon appropriation by the Legislature, to the Department of Transportation, as allocated by the California Transportation Commission in the same manner as funds allocated for those projects under existing law.

(f) (1) Four billion dollars (\$4,000,000,000) shall be deposited in the Public Transportation Modernization, Improvement, and Service Enhancement Account, which is hereby created in the fund. Funds in the account shall be made available, upon appropriation by the Legislature, to the Department of Transportation for intercity rail projects and to commuter or urban rail operators, bus operators, waterborne transit operators, and other transit operators in California for rehabilitation, safety or modernization improvements, capital service enhancements or expansions, new capital projects, bus rapid transit improvements, or for rolling stock procurement, rehabilitation, or replacement.

(2) Of the funds made available in paragraph (1), four hundred million dollars (\$400,000,000) shall be available, upon appropriation by the Legislature, to the department for intercity rail improvements, of which one hundred twenty-five million dollars (\$125,000,000) shall be used for the procurement of additional intercity railcars and locomotives.

(3) Of the funds remaining after the allocations in paragraph (2), 50 percent shall be distributed to the Controller, for allocation to eligible agencies using the formula in Section 99314 of the Public Utilities Code, and 50 percent shall be distributed to the Controller, for allocation to eligible agencies using the formula in Section 99313 of the Public Utilities Code, subject to the provisions governing funds allocated under those sections.

(g) One billion dollars (\$1,000,000,000) shall be deposited in the State-Local Partnership Program Account, which is hereby created in the fund. The funds shall be available, upon appropriation by the Legislature and subject to such conditions and criteria as the Legislature may provide by statute, for allocation by the California Transportation Commission over a five-year period to eligible transportation projects nominated by an applicant transportation agency. A dollar for dollar match of local funds shall be required for an applicant transportation agency to receive state funds under this program.

(h) One billion dollars (\$1,000,000,000) shall be deposited in the Transit System Safety, Security, and Disaster Response Account, which is hereby created in the fund. Funds in the account shall be made available, upon appropriation by the Legislature and subject to such conditions and criteria as the Legislature may provide by statute, for capital projects that provide increased protection against a security and safety threat, and for capital expenditures to increase the capacity of transit operators, including waterborne transit operators, to develop disaster response transportation systems that can move people, goods, and emergency personnel and equipment in the aftermath of a disaster impairing the mobility of goods, people, and equipment.

(i) One hundred twenty-five million dollars (\$125,000,000) shall be deposited in the Local Bridge Seismic Retrofit Account, which is hereby created in the fund. The funds in the account shall be used, upon appropriation by the

Legislature, to provide the 11.5 percent required match for federal Highway Bridge Replacement and Repair funds available to the state for seismic work on local bridges, ramps, and overpasses, as identified by the Department of Transportation.

(j) (1) Two hundred fifty million dollars (\$250,000,000) shall be deposited in the Highway-Railroad Crossing Safety Account, which is hereby created in the fund. Funds in the account shall be available, upon appropriation by the Legislature, to the Department of Transportation for the completion of high-priority grade separation and railroad crossing safety improvements. Funds in the account shall be made available for allocation pursuant to the process established in Chapter 10 (commencing with Section 2450) of Division 3 of the Streets and Highways Code, except that a dollar for dollar match of nonstate funds shall be provided for each project, and the limitation on maximum project cost in subdivision (g) of Section 2454 of the Streets and Highways Code shall not be applicable to projects funded with these funds.

(2) Notwithstanding the funding allocation process described in paragraph (1), in consultation with the department and the Public Utilities Commission, the California Transportation Commission shall allocate one hundred million dollars (\$100,000,000) of the funds in the account to high-priority railroad crossing improvements, including grade separation projects, that are not part of the process established in Chapter 10 (commencing with Section 2450) of Division 3 of the Streets and Highways Code. The allocation of funds under this paragraph shall be made in consultation and coordination with the High-Speed Rail Authority created pursuant to Division 19.5 (commencing with Section 185000) of the Public Utilities Code.

(k) (1) Seven hundred fifty million dollars (\$750,000,000) shall be deposited in the Highway Safety, Rehabilitation, and Preservation Account, which is hereby created in the fund. Funds in the account shall be available, upon appropriation by the Legislature, to the Department of Transportation, as allocated by the California Transportation Commission, for the purposes of the state highway operation and protection program as described in Section 14526.5.

(2) The department shall develop a program for distribution of two hundred and fifty million dollars (\$250,000,000) from the funds identified in paragraph (1) to fund traffic light synchronization projects or other technology-based improvements to improve safety, operations and the effective capacity of local streets and roads.

(l) (1) Two billion dollars (\$2,000,000,000) shall be deposited in the Local Streets and Road Improvement, Congestion Relief, and Traffic Safety Account of 2006, which is hereby created in the fund. The proceeds of bonds deposited into that account shall be available, upon appropriation by the Legislature, for the purposes specified in this subdivision to the Controller for administration and allocation in the fiscal year in which the bonds are issued and sold, including any interest or other return earned on the investment of those moneys, in the following manner:

(A) Fifty percent to the counties, including a city and county, in accordance with the following formulas:

(i) Seventy-five percent of the funds payable under this subparagraph shall be apportioned among the counties in the proportion that the number of fee-paid and exempt vehicles that are registered in the county bears to the number of fee-paid and exempt vehicles registered in the state

(ii) Twenty-five percent of the funds payable under this subparagraph shall be apportioned among the counties in the proportion that the number of miles of maintained county roads in each county bears to the total number of miles of maintained county roads in the state. For the purposes of apportioning funds under this clause, any roads within the boundaries of a city and county that are not state highways shall be deemed to be county roads.

(B) Fifty percent to the cities, including a city and county, apportioned among the cities in the proportion that the total population of the city bears to the total population of all the cities in the state, provided, however, that the Controller shall allocate a minimum of four hundred thousand dollars (\$400,000) to each city, pursuant to this subparagraph.

(2) Funds received under this subdivision shall be deposited as follows in order to avoid the commingling of those funds with other local funds:

(A) In the case of a city, into the city account that is designated for the receipt of state funds allocated for local streets and roads.

(B) In the case of an eligible county, into the county road fund.

(C) In the case of a city and county, into a local account that is designated for the receipt of state funds allocated for local streets and roads.

(3) For the purpose of allocating funds under this subdivision to cities and a city and county, the Controller shall use the most recent population estimates prepared by the Demographic Research Unit of the Department of Finance. For a city that incorporated after January 1, 1998, that does not appear on the most recent population estimates prepared by the Demographic Research Unit, the Controller shall use the population determined for that city under Section 11005.3 of the Revenue and Taxation Code.

(4) Funds apportioned to a city, county, or city and county under this subdivision shall be used for improvements to transportation facilities that will assist in reducing local traffic congestion and further deterioration, improving traffic flows, or increasing traffic safety that may include, but not be limited to, street and highway pavement maintenance, rehabilitation, installation, construction and reconstruction of necessary associated facilities such as drainage and traffic control devices, or the maintenance, rehabilitation, installation, construction and reconstruction of facilities that expand ridership on transit systems, safety projects to reduce fatalities, or as a local match to obtain state or federal transportation funds for similar purposes.

(5) At the conclusion of each fiscal year during which a city or county expends the funds it has received under this subdivision, the Controller may verify the city's or county's compliance with paragraph (4). Any city or county that has not complied with paragraph (4) shall reimburse the state for the funds it received during that fiscal year. Any funds withheld or returned as a result of a failure to comply with paragraph (4) shall be reallocated to the other counties and cities whose expenditures are in compliance.

### Article 3. Fiscal Provisions

**8879.25.** Bonds in the total amount of nineteen billion nine hundred twenty-five million dollars (\$19,925,000,000), exclusive of refunding bonds, or so much thereof as is necessary, are hereby authorized to be issued and sold for carrying out the purposes expressed in this chapter and to reimburse the General Obligation Bond Expense Revolving Fund pursuant to Section 16724.5. All bonds herein authorized which have been duly sold and delivered as provided herein shall constitute valid and legally binding general obligations of the state, and the full faith and credit of the state is hereby pledged for the punctual payment of both principal and interest thereof.

**8879.26.** The bonds authorized by this chapter shall be prepared, executed, issued, sold, paid, and redeemed as provided in the State General Obligation Bond Law (Chapter 4 (commencing with Section 16720) of Part 3 of Division 4), except subdivision (a) of Section 16727 to the extent that subdivision is inconsistent with this chapter, and all of the other provisions of that law as amended from time to time apply to the bonds and to this chapter and are hereby incorporated in this chapter as though set forth in full in this chapter.

**8879.27.** (a) Solely for the purpose of authorizing the issuance and sale, pursuant to the State General Obligation Bond Law, of the bonds authorized by this chapter, the Highway Safety, Traffic Reduction, Air Quality, and Port Security Committee is hereby created. For the purposes of this chapter, the Highway Safety, Traffic Reduction, Air Quality, and Port Security Committee is "the committee" as that term is used in the State General Obligation Bond Law. The committee consists of the Treasurer, the Controller, the Director of Finance, and the Secretary of the Business, Transportation and Housing Agency, or a designated representative of each of those officials. The Treasurer shall serve as the chairperson of the committee. A majority of the committee may act for the committee.

(b) The committee may adopt guidelines establishing requirements for administration of its financing programs to the extent necessary to protect the validity of, and tax exemption for, interest on the bonds. The guidelines shall not constitute rules, regulations, orders, or standards of general application.

(c) For the purposes of the State General Obligation Bond Law, any department receiving an allocation pursuant to this chapter is designated to be the "board."

**8879.28.** Upon request of the board stating that funds are needed for purposes of this chapter, the committee shall determine whether or not it is necessary or desirable to issue bonds authorized pursuant to this chapter in order to carry out the actions specified in Section 8879.23, and, if so, the amount of bonds to be issued and sold. Successive issues of bonds may be authorized and sold to carry out those actions progressively, and are not required to be sold at any one time. Bonds may bear interest subject to federal income tax.

**8879.29.** There shall be collected annually, in the same manner and at the same time as other state revenue is collected, a sum of money in addition to the ordinary revenues of the state, sufficient to pay the principal of, and interest on, the bonds as provided herein, and all officers required by law to perform any duty in regard to the collections of state revenues shall collect that additional sum.

**8879.30.** Notwithstanding Section 13340, there is hereby appropriated from the General Fund in the State Treasury, for the purposes of this chapter, an amount that will equal the total of the following:

(a) The sum annually necessary to pay the principal of, and interest on, bonds issued and sold pursuant to this chapter, as the principal and interest become due and payable.

(b) The sum which is necessary to carry out Section 8879.32, appropriated without regard to fiscal years.

**8879.31.** The board may request the Pooled Money Investment Board to make a loan from the Pooled Money Investment Account, in accordance with Section 16312, for purposes of this chapter. The amount of the request shall not exceed the amount of the unsold bonds which the committee has, by resolution, authorized to be sold for the purpose of this chapter, less any amount withdrawn pursuant to Section 8879.32. The board shall execute any documents as required by the Pooled Money Investment Board to obtain and repay the loan. Any amount loaned shall be deposited in the fund to be allocated in accordance with this chapter.

**8879.32.** For the purpose of carrying out this chapter, the Director of Finance may, by executive order, authorize the withdrawal from the General Fund of any amount or amounts not to exceed the amount of the unsold bonds which the committee has, by resolution, authorized to be sold for the purpose of carrying out this chapter. Any amounts withdrawn shall be deposited in the Highway Safety, Traffic Reduction, Air Quality, and Port Security Fund of 2006. Any money made available under this section shall be returned to the General Fund, plus the interest that the amounts would have earned in the Pooled Money Investment Account, from money received from the sale of bonds which would otherwise be deposited in that fund.

**8879.33.** The bonds may be refunded in accordance with Article 6 (commencing with Section 16780) of the State General Obligation Bond Law. Approval by the electors of this act shall constitute approval of any refunding bonds issued pursuant to the State General Obligation Bond Law.

**8879.34.** Notwithstanding any provisions in the State General Obligation Bond Law, the maximum maturity of any bonds authorized by this chapter shall not exceed 30 years from the date of each respective series. The maturity of each series shall be calculated from the date of each series.

**8879.35.** The Legislature hereby finds and declares that, inasmuch as the proceeds from the sale of bonds authorized by this chapter are not "proceeds of taxes" as that term is used in Article XIII B of the California Constitution, the disbursement of these proceeds is not subject to the limitations imposed by that article.

**8879.36.** Notwithstanding any provision of the State General Obligation Bond Law with regard to the proceeds from the sale of bonds authorized by this chapter that are subject to investment under Article 4 (commencing with Section 16470) of Chapter 3 of Part 2 of Division 4, the Treasurer may maintain a separate account for investment earnings, order the payment of those earnings to comply with any rebate requirement applicable under federal law, and may otherwise direct the use and investment of those proceeds so as to maintain the tax-exempt status of those bonds and to obtain any other advantage under federal law on behalf of the funds of this state.

**8879.37.** All money derived from premium and accrued interest on bonds sold pursuant to this chapter shall be transferred to the General Fund as a credit to expenditures for bond interest.

**SEC. 2.** Section 1 of this act shall become operative upon the adoption by the voters of the Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006, as set forth in Section 1 of this act.

**SEC. 3.** Notwithstanding Sections 13115 and 13117 of the Elections Code, the following measures shall be placed on the ballot for the November 7, 2006, statewide general election in the following order:

(a) Senate Constitutional Amendment No. 7 of the 2005–2006 Regular Session shall be placed first on the ballot and shall be designated as Proposition 1A.

(b) The Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006 shall be placed second on the ballot and shall be designated as Proposition 1B.

(c) The Housing and Emergency Shelter Trust Fund Act of 2006 shall be placed third on the ballot and shall be designated as Proposition 1C.

(d) The Kindergarten-University Public Education Facilities Bond Act of 2006 shall be placed fourth on the ballot and shall be designated as Proposition 1D.

(e) The Disaster Preparedness and Flood Prevention Bond Act of 2006 shall be placed fifth on the ballot and shall be designated as Proposition 1E.

**SEC. 4.** (a) Notwithstanding any other provision of law, all ballots of the November 7, 2006, statewide general election shall have printed thereon and in a square thereof, the words "Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006," and in the same square under those words, the following in 8-point type:

"This act makes safety improvements and repairs to state highways, upgrades freeways to reduce congestion, repairs local streets and roads, upgrades highways along major transportation corridors, improves seismic safety of local bridges, expands public transit, helps complete the state's network of car pool lanes, reduces air pollution, and improves anti-terrorism security at shipping ports by providing for a bond issue not to exceed nineteen billion nine hundred twenty-five million dollars (\$19,925,000,000)."

Opposite the square, there shall be left spaces in which the voters may place a cross in the manner required by law to indicate whether they vote for or against the act.

(b) Notwithstanding Sections 13247 and 13281 of the Elections Code, the language in subdivision (a) shall be the only language included in the ballot label for the condensed statement of the ballot title, and the Attorney General shall not supplement, subtract from, or revise that language, except that the Attorney General may include the financial impact summary prepared pursuant to Section 9087 of the Elections Code and Section 88003 of the Government Code. The ballot label is the condensed statement of the ballot title and the financial impact summary.

(c) Where the voting in the election is done by means of voting machines used pursuant to law in the manner that carries out the intent of this section, the use of the voting machines and the expression of the voters' choice by means thereof are in compliance with this section.

**SEC. 5.** This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order for the bond act in Section 1 of this act to be submitted to the voters at the November 7, 2006, statewide general election, it is necessary for this act to take effect immediately.

**State of California**

**GOVERNMENT CODE**

**Section 14838.1**

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14838.1. (a) In order to encourage the participation of small businesses in the construction, alteration, demolition, repair, or improvement, of the state's infrastructure, as provided in the infrastructure-related bond acts of 2006, each state agency awarding contracts financed with the proceeds of these bonds shall do all of the following:

(1) Establish a 25 percent small business participation goal in all contracts it financed with the proceeds of the infrastructure-related bond acts of 2006.

(2) Advertise all upcoming opportunities to bid on contracts for projects funded by the infrastructure-related bond acts of 2006, described in subdivision (c), in the California State Contracts Register and include in the advertisement an Internet link to information for prospective bidders, including, but not limited to, general bidding procedures and how to properly prepare a bid for those contracts.

(3) Provide information to California small businesses regarding training and technical assistance that is available to assist these small businesses in understanding and bidding on contracts for projects funded by the infrastructure-related bond acts of 2006, described in subdivision (c).

(b) For purposes of this section, "small business" has the same meaning as set forth in subdivision (d) in Section 14837.

(c) For purposes of this section, all of the following measures are deemed to be the infrastructure-related bond acts of 2006:

(1) The Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006 (Chapter 12.49 (commencing with Section 8879.20) of Division 1 of the Government Code).

(2) The Housing and Emergency Shelter Trust Fund Act of 2006 (Part 12 (commencing with Section 53540) of Division 31 of the Health and Safety Code).

(3) The Kindergarten-University Public Education Facilities Bond Act of 2006 (Part 69 (commencing with Section 101000) of the Education Code).

(4) The Disaster Preparedness and Flood Prevention Bond Act of 2006 (Chapter 1.699 (commencing with Section 5096.800) of Division 5 of the Public Resources Code).

(5) The Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal Protection Bond Act of 2006 (Division 43 (commencing with Section 75001) of the Public Resources Code).

(d) For the purposes of this section, "state agency" includes each agency provided for in Section 12800 and each state entity included in Section 10335.7 of the Public Contract Code in which the head of the agency is appointed by the Governor.

(e) This section does not require the expenditure of the proceeds of the sale of the bonds described in this section, except as permitted by the measure authorizing the issuance of the bond.

(f) On or before August 1, 2009, and annually thereafter, each state agency that has awarded any contract financed with the proceeds of the infrastructure-related bond acts of 2006 in the previous fiscal year shall report to the Director of General Services statistics comparing the small business and microbusiness participation dollars for contracts funded by these bonds to the total contract dollars for contracts funded by these bonds. If an agency did not meet its participation goal, then the agency shall include in its report a plan of action to meet its participation goal during the current fiscal year.

(Added by Stats. 2007, Ch. 611, Sec. 1. Effective January 1, 2008.)

**Bond 1B - THE HIGHWAY SAFETY, TRAFFIC REDUCTION, AIR QUALITY, AND PORT SECURITY BOND ACT**

	<b>Department</b>	<b>Bond Contract Dollars</b>	<b>DVBE Dollars</b>	<b>DVBE %</b>	<b>SB/MB Dollars</b>	<b>SB/MB %</b>
FY 2008-09	Transportation, Department of	\$40,000			\$40,000	100.00%
FY 2009-10	Transportation, Department of	\$155,397,629	\$3,210,019	2.07%	\$13,133,289	8.45%
FY 2010-11	Transportation, Department of	\$211,699,198	\$5,470,925	2.58%	\$4,975,898	2.35%
FY 2011-12	Transportation, Department of	\$559,599,929	\$4,712,537	0.84%	\$6,848,247	1.22%
FY 2012-13	Transportation, Department of	\$995,370,331	\$1,858,755	0.19%	\$100,067,425	10.05%
FY 2013-14	Transportation, Department of	\$102,678,594	\$723,876	0.70%	\$1,016,104	0.99%
FY 2014-15	Transportation, Department of	None Submitted				
FY 2015-16	Transportation, Department of	None Submitted				
		<b>\$2,024,785,681</b>	<b>\$15,976,112</b>	<b>0.79%</b>	<b>\$126,080,963</b>	<b>6.23%</b>
	<b>Bond 1B</b>	<b>\$19,925,000,000</b>				

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OFFICE OF BUSINESS & ECONOMIC  
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*'Flex your power'  
Be energy efficient'*

February 28, 2012

Mr. Vince Mammano  
Administrator, California Division  
Federal Highway Administration  
650 Capitol Mall, Suite 4-100  
Sacramento, CA 95814

Dear Mr. Mamano,

Effective February 28, 2011, the U.S. Department of Transportation (DOT), Office of the Secretary, issued Disadvantaged Business Enterprise (DBE) Program Improvements (Final Rule) (49 CFR Part 26 DBE Program Regulations, §26.39 subpart B). The purpose of this rule change is to encourage state programs that, by facilitating small business participation, augment race-neutral efforts to meet DBE goals. Therefore, the California Department of Transportation (Caltrans) hereby submits its proposed Fostering Small Business Participation Plan elements to be included in its DBE Program, an element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation.

This element is added to the DBE Program Plan dated October 2007. Upon submittal and subsequent approval by the appropriate DOT operating administration, Caltrans will provide an implementation plan to include activities, timelines, and deliverables.

If you have any questions or need further information, please contact Robert Padilla, Caltrans DBE Program Manager, at (916) 324-8384 or by e-mail at [Robert\\_Padilla@dot.ca.gov](mailto:Robert_Padilla@dot.ca.gov).

Sincerely,

A handwritten signature in black ink that reads 'Blanca Rodriguez'.

BLANCA RODRIGUEZ  
Acting Deputy Director  
Office of Business & Economic Opportunity

Enclosure

## **Fostering Small Business Participation Plan Caltrans Disadvantaged Business Enterprise Program Implementation**

Effective February 28, 2011, the U.S. Department of Transportation (DOT), Office of the Secretary, issued Disadvantaged Business Enterprise (DBE) Program Improvements (Final Rule) (49 CFR Part 26 DBE Program Regulations, §26.39 subpart B). The purpose of this rule change is to encourage state programs that, by facilitating small business participation, augment race-neutral efforts to meet DBE goals. Therefore, the California Department of Transportation (Caltrans) hereby submits its proposed Fostering Small Business Participation Plan elements to be included in its DBE Program, an element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation.

Specifically, Caltrans is required to actively implement DBE program elements that foster small business participation and augment its race-neutral efforts to meet its DBE goals. The program element could include items such as race-neutral small business set-asides and unbundling provisions. However, the small business certification that would be recognized by the Federal Highway Administration (FHWA) cannot be the result of self certification. The current small business certifications offered by the California Department of General Services (DGS) and the U.S. Small Business Administration (SBA) are self certifying thus making them ineligible to use on federal-aid contracts as a part of the current DBE program.

Furthermore, Caltrans lacks the resources to implement a Federal Small Business Certification program. It is also important to note that the state of California offers a Small Business Enterprise (SBE) and Disabled Veteran Business Enterprise (DVBE) certification program that Caltrans currently complies with on state-funded contracts. With that in mind, there are other ways Caltrans can help promote small business participation in federal-aid contracts by proposing the following measures:

### **Proposed Fostering Small Business Measures:**

- Develop criteria for unbundling large federal-aid contracts that allow for more subcontracting opportunities. Caltrans does currently unbundle large contracts when possible and appropriate; however, there is not formal criteria for this and such will need to be developed.
- Assign aspirational race-neutral DBE goals to federal-aid contracts. Currently, Caltrans administers a mixed component DBE program; it is not wholly race-neutral. Assigning aspirational race-neutral DBE goals to federal-aid contracts may increase participation of Hispanic American and Subcontinent Asian American contractors, whose participation counts toward the race-neutral portion of Caltrans overall DBE goal.

- Propose a pilot program that would increase DBE participation through incentivized DBE race-neutral participation on selected federal-aid highway construction projects. The incentive would be paid from a project's supplemental funds. For example, when a bidder meets the contract goal of a pilot-qualified project, the bidder could receive post award incentive payments paid by contract change order from the contractor's supplemental funds for any additional small business participation (under the federal definition) on the contract up to a specific dollar amount. The incentive would be based on a fixed markup to compensate the bidder for its efforts to identify, use, and assist a small business rather than a non-small business.
- Create a DBE Participation Committee, made up of Caltrans construction and consultant services staff, industry association representatives, and DBE and small business owners. The objective of the committee is to develop and implement measurable activities aimed at increasing DBE participation, foster partnership opportunities, and encourage innovative ideas that further improve DBE participation in Caltrans contracts.

**Fostering Small Business Participation elements currently in place:**

- Caltrans regularly hosts Mandatory Pre-Bid meetings for pre-selected projects to help promote SBE/ DVBE/DBE participation. These meetings provide an opportunity for prime contractors to meet potential subcontractors.
- District Small Business Liaisons (DSBLs) are Caltrans employees dedicated to assist prime contractors identify potential subcontractors through the CUCP (DBE) database.
- Workshops and networking opportunities, such as "Meet the Prime" events, are held statewide by individual Caltrans districts to increase potential contract opportunities for primes and subcontractors alike.
- "Mock Contracting Workshops" have been held in a number of districts over the years. These workshops assist small businesses to identify advertised projects, prime contractors, contract requirements, insurance, bonding, etc. In these workshops, the subcontractors learn from prime contractors what qualifications they seek in a subcontractor.
- DSBLs also assist subcontractors with the Caltrans Office Engineer Web site as a tool to locate prime contractors looking for help on specific contracts using the "Opt-in" feature.
- The Caltrans Office Engineer Web site not only includes contract advertisement but it also includes "Caltrans Connect," which is a tool that prime and subcontractors can use to be notified of projects being advertised in their area, download bid packets, and print project plans at no cost.

- The Caltrans Office of Engineer Web site also offers information on how a contractor can submit a responsive bid which can be of great use to those firms unfamiliar with bidding Caltrans projects.
- The "Contractor Information Table" located on the Office Engineer Web site also assists bidders by providing previous bid summaries, the CUCP database, and information on prevailing wage.
- The Office of Business & Economic Opportunity will soon provide DBE Supportive Services that will include one-on-one counseling and technical assistance to small businesses, including DBE firms and those firms that could potentially be certified DBE firms, and workshops on certification, bid submitting, marketing, outreach, and understanding government contracting, all at no cost.
- The Caltrans Mentor-Protégé Program, a construction-based mentor program in Districts 4, 7, and 11, as well as CalMentor, an A&E-based mentor program offered in Districts 4, 7, 11 and the Central Region, offer small disadvantaged businesses to pair with large prime contracting or consulting firms that have experience contracting with Caltrans. Depending on the size of each program, a prime can mentor up to two firms for a 12-18 month period, at which time the protégé graduates from the program with the real world experience in government contracting.

## Conclusion

Caltrans ultimately believes it would be best for DOT to issue guidance on the subject of Fostering Small Business Participation rather than create regulatory language. Many state departments of transportation recipients of federal-aid, like Caltrans, share similar challenges for improving its DBE program, such as, unstable funding sources and diminishing resources. That is not to suggest the improvements recommended are not needed or useful. In the case of Caltrans, there are four proposed measures listed above that were fashioned with efficiency and effectiveness in mind and are intended to build upon measures already in place. But there are other programmatic challenges.

First, the DOT asserts, in its Final Rule, that program provisions that help small businesses can also help DBEs. However, it would be helpful for the DOT to provide recipients with quantitative evidence of such assertion.

Second, the DOT further asserts that a program element that pulls together the various ways that a recipient reaches out to businesses and makes it easier for them to compete for DOT-assisted contracts will foster the objectives of the DBE program. This is not necessarily true. Without definitive data, it is difficult for Caltrans to agree that an element that fosters small business participation as race-neutral can assist recipients to meet its race-neutral portion of its overall DBE goal because only the participation of certified DBEs (Hispanic American and Subcontinent Asian American contractors) can be counted toward the recipients race-neutral portion of its overall DBE goal, not the participation of uncertified small businesses.

Third, a size standard for a qualified small business must be created and agreed upon by all recipients. Size standards for small businesses vary from state to state and can be confusing and impractical when applied to a federal program. Additionally, small business participants in this element may be required to be certified, a process that by most standards, is labor- and resource-intensive and would be unfeasible for Caltrans to implement at this time.

Notwithstanding previously stated challenges, Caltrans will continue to administer race-neutral small business measures currently in place and adopt the proposed measures that foster and increase small business participation in federal-aid contracts. Upon submittal and subsequent approval by the appropriate DOT operating administration, Caltrans will provide an implementation plan to include activities, timelines, and deliverables.

April 27, 2012

TO: Caltrans Statewide Small Business Council Members  
FROM: Lance Yokota, FHWA  
RE: **Q&A on SB set aside, Action Item #2, SBC Meeting Minutes, March 16, 2012**

Section 26.21(b)(2); 26.43; 26.51(b)

What actions should a recipient take before implementing a small business program on federally assisted projects as a race- and gender-neutral means of facilitating DBE participation in meeting the recipient's overall goal?(Posted - 7/15/09)  
Recipients are obligated to meet the maximum feasible portion of their overall goal through race- and gender-neutral means of facilitating DBE participation. See 49 CFR § 26.51.

Since the program was substantially revised in 1999, the Department has long recognized that race- and gender-neutral small business set aside programs may be an acceptable means of achieving the objective of § 26.51 without running afoul of the prohibition in § 26.43 against the use of set-asides or quotas. See related Q&A entitled "Does the rule's limitation on the use of set-asides apply to race-neutral small business set-asides?" A small business goals program is another example of a race- and gender-neutral program that may provide opportunities for DBEs and non-DBEs to fairly compete for federally assisted contracts.

If a recipient intends to implement a small business program as one means of achieving its annual overall DBE goal, the recipient must, pursuant to 49 CFR § 26.21(b)(2), submit to the appropriate operating administration for prior approval an amendment to its DBE program plan to identify the program as an initiative implemented to provide contracting opportunities to DBEs and other small businesses.

In amending the DBE program plan, the small business program does not replace the DBE program or otherwise operate as a substitute for the DBE program. It is simply another race- and gender-neutral tool that may offer additional contracting opportunities to DBEs. Recipients are not required to develop such a program.

When a recipient uses a small business program to achieve DBE participation, it may count only the participation of small businesses that are certified under 49 CFR Part 26 toward its annual overall DBE goal. Race- and gender-neutral DBE participation obtained through the small business program must be calculated by dividing the total dollars to DBEs through the small business program by the total federal dollars. Race- and gender-neutral DBE participation is not calculated as a percentage of the total small business program.

As required by 49 CFR § 26.51(d), a recipient is expected to establish DBE contract goals to meet any portion of the annual overall goal it is unable to meet through the small business program or other race-neutral measures.

A proposed DBE program plan amendment should, at a minimum, contain the following elements: 1. a detailed description of the small business program, its objectives, and how it is designed to operate (e.g., firm eligibility/size criteria and means of ensuring eligibility of participating firms);

2. assurance that the program is authorized under state law;
3. assurance that certified DBEs that meet the size criteria established under the program are presumptively eligible to participate in the program;
4. assurance that there are no geographic preferences or limitations imposed on any federally assisted procurement included in the program;
5. assurance that there are no limits on the number of contracts awarded to firms participating in the program but that every effort will be made to avoid creating barriers to the use of new, emerging, or untried businesses; and
6. assurance that aggressive steps will be taken to encourage those minority and women owned firms that are eligible for DBE certification to become certified.
7. assurance that the program is open to small businesses regardless of their location (i.e., that there is no local or other geographic preference).

As a condition of approval, operating administrations may, in consultation with the recipient, limit the size and type of federally assisted contracts that participate in the small business program to ensure effective competition based on the availability of small businesses in the particular industry or work code.

The operating administration may not approve the small business program if it conflicts with other relevant federal requirements, and it may rescind its approval if it determines that the program is being implemented in a way that creates a de facto DBE set aside in violation of § 26.43.

Implementation of the small business program is subject to periodic review by the operating administration of its effectiveness in helping the recipient meet its annual overall DBE goal. Approval may be rescinded if the program is ineffective.

The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR Part 26.

See [http://osdbu.dot.gov/DBEProgram/dbegna.cfm#26.21\(b\)](http://osdbu.dot.gov/DBEProgram/dbegna.cfm#26.21(b))

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*Flex your power!  
Be energy efficient!*

September 19, 2012

Mr. Vincent Mammano  
California Division Administrator  
Federal Highway Administration  
650 Capitol Mall, Suite 4-100  
Sacramento, CA 95814-4708

Dear Mr. Mammano:

In response to your August 16, 2012, review of the California Department of Transportation (Caltrans) Disadvantaged Business Enterprise (DBE) Program Small Business Participation Plan submitted to you on February 28, 2012, enclosed is the updated Caltrans DBE Small Business Element.

Per 49 CFR Part 26 DBE Program Regulations §26.39, this element is to be added to the DBE Program Plan, upon submittal and subsequent approval by the appropriate U.S. Department of Transportation operating administration. Caltrans will provide any additional information that is requested regarding the implementation plan to include: activities, timelines, and deliverables.

If you have any questions or need further information, please contact Ramon Carlos, Caltrans Acting DBE Program Manager, at (916) 324-6990 or by e-mail at [ramon\\_carlos@dot.ca.gov](mailto:ramon_carlos@dot.ca.gov).

Sincerely,

A handwritten signature in cursive script that reads "René Halverson".

RENÉ HALVERSON  
Assistant Director  
Office of Business and Economic Opportunity

Enclosure

cc: Malcolm Dougherty, Director, California Department of Transportation  
Ramon Carlos, Acting DBE Program Manager, California Department of Transportation

## **Fostering Small Business Participation Caltrans Disadvantaged Business Enterprise Program Implementation**

Effective February 28, 2011, the U.S. Department of Transportation (DOT), Office of the Secretary, issued Disadvantaged Business Enterprise (DBE) Program Improvements (Final Rule) (49 CFR Part 26 DBE Program Regulations §26.39 subpart B). The purpose of this rule change is to encourage state programs that, by facilitating small business participation, augment race-neutral efforts to meet DBE goals. Therefore, the California Department of Transportation (Caltrans) hereby submits its proposed Fostering Small Business Participation, an element to structure contracting requirements to facilitate competition by addressing small business concerns, taking all reasonable steps to eliminate obstacles to their participation.

Specifically, Caltrans is required to actively implement DBE program elements that foster small business participation and augment its race-neutral efforts to meet its DBE goals. The program element could include items such as the unbundling of major Federal-aid contracts to allow for increased subcontracting opportunities with small firms. The small business certification that would be recognized by the Federal Highway Administration (FHWA) cannot be the result of self certification. The current small business certifications offered by the California Department of General Services (DGS) and the U.S. Small Business Administration (SBA) are self certifying thus making them ineligible to use on federal-aid contracts as a part of the current DBE program.

Furthermore, Caltrans lacks the resources to implement a Federal Small Business Certification program. It is also important to note that the state of California offers a Small Business Enterprise (SBE) and Disabled Veteran Business Enterprise (DVBE) certification program that Caltrans currently complies with on State-funded contracts. With that in mind, there are other ways Caltrans can help promote small business participation in Federal-aid contracts by proposing the following:

### **Proposed Fostering Small Business Measure:**

- Caltrans proposes to unbundle large Federal-aid contracts to promote the use and provide more subcontracting opportunities to smaller industry firms. Unbundling could be done for those contracts that meet a specific size standard, provide an extensive amount of subcontracting opportunities, and the design sequence being broken up into different contracts would not have negative fiscal impact on the Department.

### **Fostering Small Business Participation elements currently in place:**

- Caltrans regularly hosts Mandatory Pre-Bid meetings for pre-selected projects to help promote SB/DVBE/DBE participation. These meetings provide an opportunity for prime contractors to meet potential subcontractors.
- District Small Business Liaisons (DSBLs) are Caltrans employees dedicated to assist prime contractors in identifying potential subcontractors through the CUCP (DBE) database.

- Workshops, networking opportunities, and events such as, “Meet the Primes,” are held statewide by individual Caltrans districts to increase potential contract opportunities for primes and subcontractors alike.
- “Mock Contracting Workshops” have been held in a number of districts over the years. These workshops assist small businesses in identifying advertised projects, prime contractors, contract requirements, insurance, bonding, etc. In these workshops, the subcontractors learn from prime contractors what qualifications they seek in a subcontractor.
- Free tools are made available to prime contractors and subcontractors alike, on the Caltrans website. From the “Opt-In” and “Primes Seeking Help” features on the Office Engineer (OE) webpage to assist in connecting primes and subcontractors on major contracts.
- The OE webpage also offers information on how a subcontractor can submit a responsive bid, which may be of great value to those firms without prior contracting experience with Caltrans.
- OBEO is currently working on three “DBE Supportive Services” contracts. These contracts will include one-on-one counseling and technical assistance to small businesses, including DBE firms that could potentially be certified DBE firms, and workshops on certification, bid submitting, marketing outreach, and understanding government contracting, all at no cost.
- The Caltrans Mentor-Protégé and CalMentor Programs are currently available in seven Caltrans districts. This program offers small disadvantaged businesses to pair with large prime contracting or consulting firms that have experience contracting with Caltrans. Depending on the size of each program, a prime can mentor up to two firms for a 12-18 month period, at which time the protégé graduates from the program with the real world experience in government contracting.

Caltrans will continue the small business measures currently in place and adopt the proposed measure that will foster and increase small business participation in Federal-aid contracts. Upon submittal and subsequent approval by the appropriate DOT operating administration, Caltrans will provide an implementation plan to include activities, timelines, and deliverables. Caltrans also commits to amending this plan as new measures for fostering small business arise.



## GOVERNMENT CODE - GOV

**TITLE 2. GOVERNMENT OF THE STATE OF CALIFORNIA [8000 - 22980]** ( *Title 2 enacted by Stats. 1943, Ch. 134.* )

**DIVISION 3. EXECUTIVE DEPARTMENT [11000 - 15986]** ( *Division 3 added by Stats. 1945, Ch. 111.* )

**PART 5.5. DEPARTMENT OF GENERAL SERVICES [14600 - 14985.11]** ( *Part 5.5 added by Stats. 1965, Ch. 371.* )

**CHAPTER 6.5. Small Business Procurement and Contract Act [14835 - 14847]** ( *Chapter 6.5 added by Stats. 1973, Ch. 1198.* )

**ARTICLE 1. General Provisions [14835 - 14843]** ( *Article 1 heading added by Stats. 1998, Ch. 917, Sec. 1.* )

As used in this chapter:

**14837.** (a) “Department” means the Department of General Services.

(b) “Director” means the Director of General Services.

(c) “Manufacturer” means a business that meets both of the following requirements:

(1) It is primarily engaged in the chemical or mechanical transformation of raw materials or processed substances into new products.

(2) It is classified between Codes 31 to 33, inclusive, of the North American Industry Classification System.

(d) (1) (A) “Small business” means an independently owned and operated business that is not dominant in its field of operation, the principal office of which is located in California, the officers of which are domiciled in California, and which, together with affiliates, has 100 or fewer employees, and average annual gross receipts of ten million dollars (\$10,000,000) or less over the previous three years, or is a manufacturer, as defined in subdivision (c), with 100 or fewer employees. Commencing January 1, 2019, the average annual gross receipts threshold shall be fifteen million dollars (\$15,000,000).

(B) For the purposes of public works contracts, as defined in Section 1101 of the Public Contract Code, and engineering contracts, as described in Section 4525, for public works projects, awarded through competitive bids or otherwise, “small business” means an independently owned and operated business that is not dominant in its field of operation, the principal office of which is located in California, the officers of which are domiciled in California, and which, together with affiliates, has 200 or fewer employees, and average annual gross receipts of thirty-six million dollars (\$36,000,000) or less over the previous three years. This subparagraph shall become operative on January 1, 2019.

(2) “Microbusiness” is a small business which, together with affiliates, has average annual gross receipts of two million five hundred thousand dollars (\$2,500,000) or less over the previous three years, or is a manufacturer, as defined in subdivision (c), with 25 or fewer employees. Commencing January 1, 2019, the average annual gross receipts threshold shall be five million dollars (\$5,000,000).

(3) (A) The director shall conduct a biennial review of the average annual gross receipt levels specified in this subdivision and may adjust that level to reflect changes in the California Consumer Price Index for all items.

(B) Commencing January 1, 2019, the director shall conduct the biennial review and make that adjustment. To reflect unique variations or characteristics of different industries, the director may establish, to the extent necessary, either higher or lower

qualifying standards than those specified in this subdivision, or alternative standards based on other applicable criteria.

(4) Standards applied under this subdivision shall be established by regulation, in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, and shall preclude the qualification of businesses that are dominant in their industry. In addition, the standards shall provide that the certified small business or microbusiness shall provide goods or services that contribute to the fulfillment of the contract requirements by performing a commercially useful function, as defined below:

(A) A certified small business or microbusiness is deemed to perform a commercially useful function if the business does all of the following:

(i) Is responsible for the execution of a distinct element of the work of the contract.

(ii) Carries out its obligation by actually performing, managing, or supervising the work involved.

(iii) Performs work that is normal for its business services and functions.

(iv) Is responsible, with respect to products, inventories, materials, and supplies required for the contract, for negotiating price, determining quality and quantity, ordering, installing, if applicable, and making payment.

(v) Is not further subcontracting a portion of the work that is greater than that expected to be subcontracted by normal industry practices.

(B) A contractor, subcontractor, or supplier will not be considered to perform a commercially useful function if the contractor's, subcontractor's, or supplier's role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of small business or microbusiness participation.

(e) "Disabled veteran business enterprise" means an enterprise that has been certified as meeting the qualifications established by paragraph (7) of subdivision (b) of Section 999 of the Military and Veterans Code.

*(Amended by Stats. 2017, Ch. 673, Sec. 3. (SB 605) Effective January 1, 2018.)*



**SB-1 Transportation funding.** (2017-2018)

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Date Published: 05/01/2017 02:00 PM

**Senate Bill No. 1**

**CHAPTER 5**

An act to amend Section 14526.5 of, to add Sections 14033, 14110, 14526.7, 14556.41, and 16321 to, to add Chapter 5 (commencing with Section 14460) to Part 5 of Division 3 of Title 2 of, to repeal Sections 63048.66, 63048.67, 63048.7, 63048.75, 63048.8, and 63048.85 of, and to repeal and add Section 63048.65 of, the Government Code, to add Section 43021 to the Health and Safety Code, to amend Section 99312.1 of, and to add Sections 99312.3, 99312.4, and 99314.9 to, the Public Utilities Code, to amend Sections 6051.8, 6201.8, 7360, 8352.4, 8352.5, 8352.6, and 60050 of, to add Sections 7361.2, 7653.2, 60050.2, and 60201.4 to, and to add Chapter 6 (commencing with Section 11050) to Part 5 of Division 2 of, the Revenue and Taxation Code, to amend Sections 2104, 2105, 2106, and 2107 of, to add Sections 2103.1 and 2192.4 to, to add Article 2.5 (commencing with Section 800) to Chapter 4 of Division 1 of, and to add Chapter 2 (commencing with Section 2030) and Chapter 8.5 (commencing with Section 2390) to Division 3 of, the Streets and Highways Code, and to amend Section 4156 of, and to add Sections 4000.15 and 9250.6 to, the Vehicle Code, relating to transportation, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[ Approved by Governor April 28, 2017. Filed with Secretary of State April 28, 2017. ]

**LEGISLATIVE COUNSEL'S DIGEST**

SB 1, Beall. Transportation funding.

(1) Existing law provides various sources of funding for transportation purposes, including funding for the state highway system and the local street and road system. These funding sources include, among others, fuel excise taxes, commercial vehicle weight fees, local transactions and use taxes, and federal funds. Existing law imposes certain registration fees on vehicles, with revenues from these fees deposited in the Motor Vehicle Account and used to fund the Department of Motor Vehicles and the Department of the California Highway Patrol. Existing law provides for the monthly transfer of excess balances in the Motor Vehicle Account to the State Highway Account.

This bill would create the Road Maintenance and Rehabilitation Program to address deferred maintenance on the state highway system and the local street and road system. The bill would require the California Transportation Commission to adopt performance criteria, consistent with a specified asset management plan, to ensure efficient use of certain funds available for the program. The bill would provide for the deposit of various funds for the program in the Road Maintenance and Rehabilitation Account, which the bill would create in the State Transportation Fund, including revenues attributable to a \$0.12 per gallon increase in the motor vehicle fuel (gasoline) tax imposed by the bill with an inflation adjustment, as provided, 50% of a \$0.20 per gallon increase in the diesel excise tax, with an inflation adjustment, as provided, a portion of a new transportation improvement fee imposed under the Vehicle License Fee Law with a varying fee between \$25 and \$175 based on vehicle value and with an inflation adjustment, as provided, and a new \$100 annual vehicle registration fee applicable only to zero-emission vehicles model year 2020 and later, with an inflation adjustment, as provided. The bill would provide that the fuel excise tax increases take effect on November 1, 2017, the transportation improvement fee takes effect on January 1, 2018, and the zero-emission vehicle registration fee takes effect on July 1, 2020.

This bill would annually set aside \$200,000,000 of the funds available for the program to fund road maintenance and rehabilitation purposes in counties that have sought and received voter approval of taxes or that have imposed fees, including uniform developer fees, as defined, which taxes or fees are dedicated solely to transportation improvements. These funds would be continuously appropriated for allocation pursuant to guidelines to be developed by the California Transportation Commission in consultation with local agencies. The bill would require \$100,000,000 of the funds available for the program to be available annually for expenditure, upon appropriation by the Legislature, on the Active Transportation Program. The bill would require \$400,000,000 of the funds available for the program to be available annually for expenditure, upon appropriation

by the Legislature, on state highway bridge and culvert maintenance and rehabilitation. The bill would require \$5,000,000 of the funds available for the program that are not restricted by Article XIX of the California Constitution to be appropriated each fiscal year to the California Workforce Development Board to assist local agencies to implement policies to promote preapprenticeship training programs to carry out specified projects funded by the account. The bill would require \$25,000,000 of the funds available for the program to be annually transferred to the State Highway Account for expenditure on the freeway service patrol program. The bill would require \$25,000,000 of the funds available for the program to be available annually for expenditure, upon appropriation by the Legislature, on local planning grants. The bill would authorize annual appropriations of \$5,000,000 and \$2,000,000 of the funds available for the program to the University of California and the California State University, respectively, for the purpose of conducting transportation research and transportation-related workforce education, training, and development, as specified. The bill would require the remaining funds available for the program to be allocated 50% for maintenance of the state highway system or to the state highway operation and protection program and 50% to cities and counties pursuant to a specified formula. The bill would impose various requirements on the department and agencies receiving these funds. The bill would authorize a city or county to spend its apportionment of funds under the program on transportation priorities other than those allowable pursuant to the program if the city's or county's average Pavement Condition Index meets or exceeds 80.

(2) Existing law creates the Department of Transportation within the Transportation Agency.

This bill would create the Independent Office of Audits and Investigations within the department, with specified powers and duties. The bill would provide for the Governor to appoint the director of the office for a 6-year term, subject to confirmation by the Senate, and would provide that the director, who would be known as the Inspector General, may not be removed from office during the term except for good cause. The bill would specify the duties and responsibilities of the Inspector General with respect to the department and local agencies receiving state and federal transportation funds through the department, and would require an annual report to the Legislature and Governor.

This bill would require the department to update the Highway Design Manual to incorporate the "complete streets" design concept by January 1, 2018. The bill would require the department to develop a plan by January 1, 2020, to increase by up to 100% the dollar value of contracts awarded to small businesses, disadvantaged business enterprises, and disabled veteran business enterprises, as specified.

(3) Existing law provides for loans of revenues from various transportation funds and accounts to the General Fund, with various repayment dates specified.

This bill would identify the amount of outstanding loans from certain transportation funds as \$706,000,000. The bill would require the Department of Finance to prepare a loan repayment schedule and would require the outstanding loans to be repaid pursuant to that schedule, as prescribed. The bill would appropriate funds for that purpose from the Budget Stabilization Account. The bill would require the repaid funds to be transferred, pursuant to a specified formula, to various state and local transportation purposes.

(4) The Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006 (Proposition 1B) created the Trade Corridors Improvement Fund and provided for allocation by the California Transportation Commission of \$2 billion in bond funds for infrastructure improvements on highway and rail corridors that have a high volume of freight movement and for specified categories of projects eligible to receive these funds.

This bill would deposit the revenues attributable to 50% of the \$0.20 per gallon increase in the diesel fuel excise tax imposed by the bill into the Trade Corridor Enhancement Account, to be expended on corridor-based freight projects nominated by local agencies and the state.

(5) Article XIX of the California Constitution requires gasoline excise tax revenues from motor vehicles traveling upon public streets and highways to be deposited in the Highway Users Tax Account, for allocation to city, county, and state transportation purposes. Existing law generally provides for statutory allocation of gasoline excise tax revenues attributable to other modes of transportation, including aviation, boats, agricultural vehicles, and off-highway vehicles, to particular accounts and funds for expenditure on purposes associated with those other modes, except that a specified portion of these gasoline excise tax revenues is deposited in the General Fund. Expenditure of the gasoline excise tax revenues attributable to those other modes is not restricted by Article XIX of the California Constitution.

This bill, commencing November 1, 2017, would transfer the gasoline excise tax revenues attributable to boats and off-highway vehicles from the new \$0.12 per gallon increase, and future inflation adjustments from that increase, to the State Parks and Recreation Fund, to be used for state parks, off-highway vehicle programs, or boating programs. The bill would allocate revenues from future inflation adjustments of the existing gasoline excise tax rate attributable to the nonhighway modes pursuant to existing law.

(6) Existing law, as of July 1, 2011, increases the sales and use tax on diesel and decreases the excise tax, as provided. Existing law requires the State Board of Equalization to annually modify both the gasoline and diesel excise tax rates on a going-forward basis so that the various changes in the taxes imposed on gasoline and diesel are revenue neutral.

This bill would eliminate, effective July 1, 2019, the annual rate adjustment to maintain revenue neutrality for the gasoline and diesel excise tax rates and would reimpose on that date the higher gasoline excise tax rate that was in effect on July 1, 2010, in addition to the increase in the rate described in (1) above that becomes effective on November 1, 2017.

Existing law, beyond the sales and use tax rate generally applicable, imposes an additional sales and use tax on diesel fuel at the rate of 1.75%, subject to certain exemptions, and provides for the net revenues collected from the additional tax to be transferred to the Public Transportation Account. Existing law continuously appropriates these and other revenues in the account to the Controller for allocation by formula to transportation agencies for public transit purposes under the State Transit Assistance Program. Existing law provides for appropriation of other revenues in the account to the Department of Transportation for various other transportation purposes, including intercity rail purposes.

This bill would increase the additional sales and use tax rate on diesel fuel by an additional 4%. The bill would continuously appropriate revenues attributable to the 3.5% rate increase to the Controller for allocation to transportation agencies for public transit purposes under the State Transit Assistance Program. The bill would require the revenues attributable to the remaining 0.5% rate increase to be continuously appropriated to the Transportation Agency for intercity rail and commuter rail purposes.

The bill would also allocate portions of the revenue from the new transportation improvement fee to the State Transit Assistance Program and to the Transit and Intercity Rail Capital Program. The bill would restrict expenditures of the fee revenues made available to the State Transit Assistance Program to transit capital purposes and certain transit services, and would require a recipient transit agency to comply with various requirements, as specified.

(7) Existing law provides for the state to receive certain compact assets, as defined, from designated tribal compacts relative to Indian gaming, and authorized the compact assets to be sold by the Infrastructure and Economic Development Bank to a special purpose trust in order to generate state revenues. Existing law designated certain of these revenues to be used to repay certain loans of transportation funds that were made to the General Fund.

This bill would delete the references to the special purpose trust and revise payments to various transportation accounts to be made from compact assets. The bill would repeal various other related provisions.

(8) Existing law creates the Traffic Congestion Relief Program and identifies various specific projects eligible to receive funding.

This bill would deem the Traffic Congestion Relief Program to be complete and final as of June 30, 2017, and would provide that projects without approved applications are no longer eligible for funding.

(9) Existing law requires the Department of Transportation to prepare a state highway operation and protection program every other year for the expenditure of transportation capital improvement funds for projects that are necessary to preserve and protect the state highway system, excluding projects that add new traffic lanes. The program is required to be based on an asset management plan, as specified. Existing law requires the department to specify, for each project in the program the capital and support budget and projected delivery date for various components of the project. Existing law provides for the California Transportation Commission to review and adopt the program, and authorizes the commission to decline and adopt the program if it determines that the program is not sufficiently consistent with the asset management plan.

This bill would require the commission, as part of its review of the program, to hold at least one hearing in northern California and one hearing in southern California regarding the proposed program. The bill would require the department to submit any change to a programmed project as an amendment to the commission for its approval.

This bill, on and after July 1, 2017, would also require the commission to make an allocation of capital outlay support resources by project phase for each project in the program, and would require the department to submit a supplemental project allocation request to the commission for each project that experiences cost increases above the amounts in its allocation. The bill would require the commission to establish guidelines to provide exceptions to the requirement for a supplemental project allocation requirement that the commission determines are necessary to ensure that projects are not unnecessarily delayed.

(10) Existing law generally provides for transportation capital improvement projects to be nominated and programmed through the state highway operation and protection program, relative to state highway rehabilitation and similar projects, or through the state transportation improvement program, relative to capacity enhancements and other capital projects.

This bill would create the Solutions for Congested Corridors Program, with funding appropriated for the program from a portion of the new transportation improvement fee to be allocated by the California Transportation Commission to projects designed to achieve a balanced set of transportation, environmental, and community access improvements within highly congested travel corridors throughout the state and that are part of a comprehensive corridor plan. The bill would provide for regional transportation agencies and the Department of Transportation to nominate projects, with preference to be given to projects that demonstrate collaboration between the regional agencies and the department.

(11) The California Environmental Quality Act (CEQA) requires a lead agency, as defined, to prepare, or cause to be prepared, and certify the completion of, an environmental impact report on a project that it proposes to carry out or approve that may have a significant effect on the environment or to adopt a negative declaration if it finds that the project will not have that effect. CEQA also requires a lead agency to prepare a mitigated negative declaration for a project that may have a significant effect on the environment if revisions in the project would

avoid or mitigate that effect and there is no substantial evidence that the project, as revised, would have a significant effect on the environment.

This bill would establish the Advance Mitigation Program in the Department of Transportation to enhance communications between the department and stakeholders to, among other things, protect natural resources and accelerate project delivery. The bill would require the department to set aside not less than \$30,000,000 annually for 4 years for the program from capital outlay revenues.

(12) Existing law imposes various limitations on emissions of air contaminants for the control of air pollution from vehicular and nonvehicular sources. Existing law generally designates the State Air Resources Board as the state agency with the primary responsibility for the control of vehicular air pollution.

This bill would prohibit, except as specified, the requiring of the retirement, replacement, retrofit, or repower of a self-propelled commercial motor vehicle during a specified period. The bill would require the state board to, by January 1, 2025, evaluate the impact of these provisions on state and local clean air efforts to meet state and local clean air goals, as provided.

(13) Existing law prohibits a person from driving, moving, or leaving standing upon a highway any motor vehicle, as defined, that has been registered in violation of provisions regulating vehicle emissions.

This bill, effective January 1, 2020, would require the Department of Motor Vehicles to confirm, prior to the initial registration or the transfer of ownership and registration of a diesel-fueled vehicle with a gross vehicle weight rating of more than 14,000 pounds, that the vehicle is compliant with, or exempt from, applicable air pollution control technology requirements, pursuant to specified provisions. The bill would require the department to refuse registration, or renewal or transfer of registration, for certain diesel-fueled vehicles, based on weight and model year, that are subject to specified provisions relating to the reduction of emissions of diesel particulate matter, oxides of nitrogen, and other criteria pollutants from in-use diesel-fueled vehicles. The bill would authorize the department to allow registration, or renewal or transfer of registration, for any diesel-fueled vehicle that has been reported to the State Air Resources Board, and is using an approved exemption, or is compliant with applicable air pollution control technology requirements, pursuant to specified provisions.

Existing law authorizes the department, in its discretion, to issue a temporary permit to operate a vehicle when a payment of fees has been accepted in an amount to be determined by the department and paid to the department by the owner or other person in lawful possession of the vehicle.

This bill would additionally authorize the department to issue a temporary permit to operate a vehicle for which registration is otherwise required to be refused under the provisions of the bill, as prescribed.

(14) The bill would enact other related provisions.

(15) This bill would declare that it is to take effect immediately as an urgency statute.

Vote: 2/3 Appropriation: yes Fiscal Committee: yes Local Program: no

## THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

**SECTION 1.** The Legislature finds and declares all of the following:

(a) Over the next 10 years, the state faces a \$59 billion shortfall to adequately maintain the existing state highway system in order to keep it in a basic state of good repair.

(b) Similarly, cities and counties face a \$78 billion shortfall over the next decade to adequately maintain the existing network of local streets and roads.

(c) Statewide taxes and fees dedicated to the maintenance of the system have not been increased in more than 20 years, with those revenues losing more than 55 percent of their purchasing power, while costs to maintain the system have steadily increased and much of the underlying infrastructure has aged past its expected useful life.

(d) California motorists are spending \$17 billion annually in extra maintenance and car repair bills, which is more than \$700 per driver, due to the state's poorly maintained roads.

(e) Failing to act now to address this growing problem means that more drastic measures will be required to maintain our system in the future, essentially passing the burden on to future generations instead of doing our job today.

(f) A funding program will help address a portion of the maintenance backlog on the state's road system and will stop the growth of the problem.

(g) Modestly increasing various fees can spread the cost of road repairs broadly to all users and beneficiaries of the road network without overburdening any one group.

(h) Improving the condition of the state's road system will have a positive impact on the economy as it lowers the transportation costs of doing business, reduces congestion impacts for employees, and protects property values in the state.

(i) The federal government estimates that increased spending on infrastructure creates more than 13,000 jobs per \$1 billion spent.

(j) Well-maintained roads benefit all users, not just drivers, as roads are used for all modes of transport, whether motor vehicles, transit, bicycles, or pedestrians.

(k) Well-maintained roads additionally provide significant health benefits and prevent injuries and death due to crashes caused by poorly maintained infrastructure.

(l) A comprehensive, reasonable transportation funding package will do all of the following:

(1) Ensure these transportation needs are addressed.

(2) Fairly distribute the economic impact of increased funding.

(3) Restore the gas tax rate previously reduced by the State Board of Equalization pursuant to the gas tax swap.

(4) Direct increased revenue to the state's highest transportation needs.

(m) This act presents a balance of new revenues and reasonable reforms to ensure efficiency, accountability, and performance from each dollar invested to improve California's transportation system. The revenues designated in this act are intended to address both state and local transportation infrastructure needs as follows:

(1) The revenues estimated to be available for allocation under the act to local agencies are estimated over the next 10 years to be as follows:

(A) Fifteen billion dollars (\$15,000,000,000) to local street and road maintenance.

(B) Seven billion five hundred million dollars (\$7,500,000,000) for transit operations and capital.

(C) Two billion dollars (\$2,000,000,000) for the local partnership program.

(D) One billion dollars (\$1,000,000,000) for the Active Transportation Program.

(E) Eight hundred twenty-five million dollars (\$825,000,000) for the regional share of the State Transportation Improvement Program.

(F) Two hundred fifty million dollars (\$250,000,000) for local planning grants.

(2) The revenues estimated to be available for allocation under the act to the state are estimated over the next 10 years to be as follows:

(A) Fifteen billion dollars (\$15,000,000,000) for state highway maintenance and rehabilitation.

(B) Four billion dollars (\$4,000,000,000) for highway bridge and culvert maintenance and rehabilitation.

(C) Three billion dollars (\$3,000,000,000) for high priority freight corridors.

(D) Two billion five hundred million dollars (\$2,500,000,000) for congested corridor relief.

(E) Eight hundred million dollars (\$800,000,000) for parks programs, off-highway vehicle programs, boating programs, and agricultural programs.

(F) Two hundred seventy-five million dollars (\$275,000,000) for the interregional share of the State Transportation Improvement Program.

(G) Two hundred fifty million dollars (\$250,000,000) for freeway service patrols.

(H) Seventy million dollars (\$70,000,000) for transportation research at the University of California and the California State University.

(n) It is the intent of the Legislature that the Department of Transportation meet the following preliminary performance outcomes for additional state highway investments by the end of 2027, in accordance with applicable state and federal standards:

(1) Not less than 98 percent of pavement on the state highway system in good or fair condition.

(2) Not less than 90 percent level of service achieved for maintenance of potholes, spalls, and cracks.

(3) Not less than 90 percent of culverts in good or fair condition.

(4) Not less than 90 percent of the transportation management system units in good condition.

(5) Fix not less than an additional 500 bridges.

(o) Further, it is the intent of the Legislature that the Department of Transportation leverage funding provided by this act for trade corridors and other highly congested travel corridors in order to obtain matching funds from federal and other sources to maximize improvements in the state's high-priority freight corridors and in the most congested commute corridors.

(p) Constitutionally protecting the funds raised by this act ensures that these funds are to be used only for transportation purposes necessary to repair roads and bridges, expand the economy, and protect natural resources.

(q) This act advances greenhouse gas reduction objectives and other environmental goals by focusing on "fix-it-first" projects, investments in transit and active transportation, and supporting Senate Bill 375 (Chapter 728, Statutes of 2008) and transportation plans.

**SEC. 2.** This act shall be known, and may be cited as, the Road Repair and Accountability Act of 2017.

**SEC. 3.** Section 14033 is added to the Government Code, to read:

**14033.** On or before January 1, 2018, the department shall update the Highway Design Manual to incorporate the "complete streets" design concept.

**SEC. 4.** Section 14110 is added to the Government Code, to read:

**14110.** Consistent with federal and state laws and regulations, including, but not limited to, the department's goal setting methodology as approved by the Federal Highway Administration, the department shall develop a plan by January 1, 2020, to increase by up to 100 percent the dollar value of contracts and procurements awarded to small businesses, disadvantaged business enterprises, and disabled veteran business enterprises. The plan shall include the use of targeted media, including minority and women business enterprises, to outreach to these businesses and shall be provided to the Legislature pursuant to Section 9795.

**SEC. 5.** Chapter 5 (commencing with Section 14460) is added to Part 5 of Division 3 of Title 2 of the Government Code, to read:

#### **CHAPTER 5. Department of Transportation independent Office of Audits and Investigations**

**14460.** (a) There is hereby created in the department the Independent Office of Audits and Investigations to ensure all of the following:

(1) The department, and external entities that receive state and federal transportation funds from the department, are spending those funds efficiently, effectively, economically, and in compliance with applicable state and federal requirements. Those external entities include, but are not limited to, private for profit and nonprofit organizations, local transportation agencies, and other local agencies that receive transportation funds either through a contract with the department or through an agreement or grant administered by the department.

(2) The department's programs are functioning consistent with applicable accounting standards and practices and are administered effectively, efficiently, and economically.

(3) The department's management is accomplishing departmental priorities, developing an annual audit plan, administering an effective enterprise risk management program, and is making efficient, effective, and financially responsible transportation decisions.

(4) The Secretary of Transportation, the Legislature, the California Transportation Commission, and the director and chief deputy director of the department are fully informed concerning fraud, improper activities, or other serious abuses or deficiencies relating to the expenditure of transportation funds or administration of department programs and operations.

(b) The Governor shall appoint the director of the Audits and Investigations Office, who shall serve a six-year term, have the title of Inspector General, and be subject to Senate confirmation. The Inspector General may not be removed from office during that term, except for good cause. The reasons for removal of the Inspector General shall be stated in writing and shall include the basis for removal. The writing shall be sent to the Secretary of the Senate and the Chief Clerk of the Assembly at the time of the removal and shall be deemed to be a public document.

(c) The Inspector General is vested with the full authority to exercise all responsibility for maintaining a full scope, independent, and objective audit and investigation program as prescribed by Sections 1237, 13885, 13886.5, 13887.5, and 13888, including, but not limited to, those activities described in Section 14461.

(d) Notwithstanding Section 13887, in order to achieve independence and objectivity pursuant to this section, the Independent Office of Audits and Investigation shall meet all of the following requirements:

(1) The Inspector General shall report all audit and confidential investigation findings and recommendations made under his or her jurisdiction to the Secretary of Transportation and the director and chief deputy director of the department on an ongoing and current basis.

(2) The Inspector General shall report at least annually, or upon request, to the Governor, the Legislature, and the California Transportation Commission with a summary of his or her investigation and audit findings and recommendations. The summary shall be posted on the office's Internet Web site and shall otherwise be made available to the public upon its release to the Governor, commission, and Legislature. The summary shall include, but need not be limited to, significant problems discovered by the Inspector General and whether the Inspector General's recommendations relative to audits and investigations have been implemented by the affected units and programs of the department or affected external entities. The report shall be submitted to the Legislature in compliance with Section 9795.

**14461.** The Inspector General shall review policies, practices, and procedures and conduct audits and investigations of activities involving state transportation funds administered by the department in consultation with all affected units and programs of the department and external entities.

**SEC. 6.** Section 14526.5 of the Government Code is amended to read:

**14526.5.** (a) Based on the asset management plan prepared and approved pursuant to Section 14526.4, the department shall prepare a state highway operation and protection program for the expenditure of transportation funds for major capital improvements that are necessary to preserve and protect the state highway system. Projects included in the program shall be limited to improvements relative to the maintenance, safety, operation, and rehabilitation of state highways and bridges that do not add a new traffic lane to the system.

(b) The program shall include projects that are expected to be advertised prior to July 1 of the year following submission of the program, but which have not yet been funded. The program shall include those projects for which construction is to begin within four fiscal years, starting July 1 of the year following the year the program is submitted.

(c) (1) The department, at a minimum, shall specify, for each project in the state highway operation and protection program, the capital and support budget, as applicable, for each of the following project phases:

(A) Project approval and environmental documents, support only.

(B) Plans, specifications, and estimates, support only.

(C) Rights-of-way.

(D) Construction.

(2) The department shall specify, for each project in the state highway operation and protection program, a projected delivery date for each of the following components:

(A) Project approval and environmental document completion.

(B) Plans, specifications, and estimates completion.

(C) Right-of-way certification.

(D) Start of construction.

(d) The department shall submit its proposed program to the commission not later than January 31 of each even-numbered year. Prior to submitting its proposed program, the department shall make a draft of its proposed program available to transportation planning agencies for review and comment and shall include the comments in its submittal to the commission. The department shall provide the commission with detailed information for all programmed projects on cost, scope, schedule, and performance metrics as determined by the commission.

(e) The commission shall review the proposed program relative to its overall adequacy, consistency with the asset management plan prepared and approved pursuant to Section 14526.4 and funding priorities established in Section 167 of the Streets and Highways Code, the level of annual funding needed to implement the program, and the impact of those expenditures on the state transportation improvement program. The commission shall adopt the program and submit it to the Legislature and the Governor not later than April 1 of each even-numbered year. The commission may decline to adopt the program if the commission determines that the program is not sufficiently consistent with the asset management plan prepared and approved pursuant to Section 14526.4.

(f) As part of the commission's review of the program required pursuant to subdivision (a), the commission shall hold at least one hearing in northern California and one hearing in southern California regarding the proposed program.

(g) On or after July 1, 2017, to provide sufficient and transparent oversight of the department's capital outlay support resources composed of both state staff and contractors, the commission shall be required to allocate the department's capital outlay support resources by project phase, including preconstruction. Through this action, the commission will provide public transparency for the department's budget estimates, increasing assurance that the annual budget forecast is reasonable. The commission shall develop guidelines, in consultation with the department, to implement this subdivision. Guidelines adopted by the commission to implement this subdivision shall be exempt from the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1).

(h) Beginning July 1, 2017, for a project that experiences increases in capital or support costs above the amounts in the commission's allocation pursuant to subdivision (g), the commission shall establish a threshold for requiring a supplemental project allocation. The commission's guidelines adopted pursuant to subdivision (g) shall also establish the threshold that the commission determines is necessary to ensure efficiency and may provide exceptions as necessary so that projects are not unnecessarily delayed.

(i) The department, for each project requiring a supplemental project allocation pursuant to subdivision (h), shall submit a request to the commission for its approval.

(j) Expenditures for these projects shall not be subject to Sections 188 and 188.8 of the Streets and Highways Code.

**SEC. 7.** Section 14526.7 is added to the Government Code, to read:

**14526.7.** (a) The department shall incorporate the performance targets in subdivision (n) of Section 1 of the act adding this section into the asset management plan adopted by the commission and targets adopted by the commission pursuant to Sections 14526.4 and 14526.5. The asset management plan shall also include targets adopted by the commission in consultation with the department for each asset class included in subdivision (n) of Section 1 of the act adding this section to measure the degree to which progress was made towards achieving the overall 2027 targets. Targets may be modified by the commission as needed to conform to federal regulation on performance measures and the completion of the department's asset management plan. Nothing in this section precludes the commission from adopting additional targets and performance measures pursuant to paragraph (1) of subdivision (c) of Section 14526.4.

(b) As specified by guidelines adopted by the commission, the department shall report to the commission on its progress toward meeting the targets and performance measures established for state highways pursuant to subdivision (n) of Section 1 of the act adding this section and paragraph (1) of subdivision (c) of Section 14526.4.

**SEC. 8.** Section 14556.41 is added to the Government Code, to read:

**14556.41.** As of June 30, 2017, projects in Section 14556.40 for the Traffic Congestion Relief Program shall be deemed complete and final, and funding levels shall be based on actual amounts requested by the designated lead applicant pursuant to Section 14556.12. Projects without approved applications in accordance with Section 14556.12 shall no longer be eligible for program funding. Traffic Congestion Relief Program savings shall be transferred to other transportation accounts for the purposes specified in Section 16321.

**SEC. 9.** Section 16321 is added to the Government Code, to read:

**16321.** The amount of outstanding loans made pursuant to Section 14556.8 is seven hundred six million dollars (\$706,000,000). This amount shall be repaid from the General Fund pursuant to subdivision (c) of Section 20 of Article XVI of the California Constitution no later than June 30, 2020, and upon repayment of this amount all loans authorized pursuant to Section 14556.8 and any associated interest shall be deemed repaid. The loans shall be repaid proportionately and in equal installments over three years. The Department of Finance shall prepare a loan repayment schedule, pursuant to which the outstanding loans shall be repaid by June 30, 2020, as follows:

(a) Two hundred fifty-six million dollars (\$256,000,000) for transfer to the Public Transportation Account, to be allocated as follows:

(1) Up to twenty million dollars (\$20,000,000) to local and regional agencies for climate change adaptation planning.

(2) The remainder to the Transit and Intercity Rail Capital Program as authorized in Part 2 (commencing with Section 75220) of Division 44 of the Public Resources Code.

(b) Two hundred twenty-five million dollars (\$225,000,000) for transfer to the State Highway Account, for the State Highway Operation and Protection Program.

(c) Two hundred twenty-five million dollars (\$225,000,000) is hereby continuously appropriated without regard to fiscal year to the Controller for apportionment to cities and counties for local streets and roads pursuant to the formula in paragraph (3) of subdivision (a) of Section 2103 of the Streets and Highways Code.

**SEC. 10.** Section 63048.65 of the Government Code is repealed.

**SEC. 11.** Section 63048.65 is added to the Government Code, to read:

**63048.65.** (a) Prior to July 1, 2015, three hundred twenty-one million dollars (\$321,000,000) of the one billion two hundred million dollars (\$1,200,000,000) of loans from the Traffic Congestion Relief Fund to the General Fund was repaid using tribal gaming compact revenues. In 2016, an additional one hundred seventy-three million dollars (\$173,000,000) was repaid from the General Fund.

(b) The remaining seven hundred six million dollars (\$706,000,000) of loans from the Traffic Congestion Relief Fund to the General Fund shall be repaid pursuant to Section 14556.8.

**SEC. 12.** Section 63048.66 of the Government Code is repealed.

**SEC. 13.** Section 63048.67 of the Government Code is repealed.

**SEC. 14.** Section 63048.7 of the Government Code is repealed.

**SEC. 15.** Section 63048.75 of the Government Code is repealed.

**SEC. 16.** Section 63048.8 of the Government Code is repealed.

**SEC. 17.** Section 63048.85 of the Government Code is repealed.

**SEC. 18.** Section 43021 is added to the Health and Safety Code, to read:

**43021.** (a) Except as provided in subdivision (b), the retirement, replacement, retrofit, or repower of a self-propelled commercial motor vehicle, as defined in Section 34601 of the Vehicle Code, shall not be required until the later of the following:

(1) Thirteen years from the model year the engine and emission control system are first certified for use in self-propelled commercial motor vehicles by the state board or other applicable state and federal agencies.

(2) When the vehicle reaches the earlier of either 800,000 vehicle miles traveled or 18 years from the model year the engine and emission control system are first certified for use in self-propelled commercial motor vehicles by the state board or other applicable state and federal agencies.

(b) This section does not apply to any of the following:

(1) Safety programs, including, but not limited to, those adopted pursuant to Section 34501 of the Vehicle Code.

(2) Voluntary incentive and grant programs, including, but not limited to, those that give preferential access to a facility to a particular vehicle or class of vehicles.

(3) Programs designed to address inspection of, tampering with, and maintenance of, emission control systems.

(4) Programs designed to address imminent health risks where evidence, unavailable at the time equipment is certified for use by the state board or other applicable state and federal agencies, is sufficient to show that immediate corrective action is necessary to prevent injury, illness, or death.

(c) This section only applies to laws or regulations adopted or amended after January 1, 2017.

(d) It is the intent of the Legislature for this section to provide owners of self-propelled commercial motor vehicles, as defined in subdivision (a), certainty about the useful life of engines certified by the state board and other applicable agencies to meet required environmental standards for sale in the state. This section is not meant to otherwise restrict the authority of the state board or districts.

(e) (1) The state board shall, by January 1, 2025, evaluate the impact of the provisions of this section on state and local clean air efforts to meet state and local clean air goals. The evaluation shall include a review of the following:

(A) Compliance with the truck and bus rule (Section 2025 of Title 13 of the California Code of Regulations).

(B) The benefits and impacts of measures enacted to improve local air quality impacts from stationary sources.

(C) State implementation plan compliance.

(2) As part of the study, the state board shall make recommendations to the Legislature on additional or different mechanisms for achieving those goals while recognizing the financial investments made by the effected entities. In developing the study, the state board shall take into account the report required in Section 38531 of the Health and Safety Code.

(3) The state board shall hold at least one public workshop prior to the completion of the study.

**SEC. 19.** Section 99312.1 of the Public Utilities Code is amended to read:

**99312.1.** (a) Revenues transferred to the Public Transportation Account pursuant to Sections 6051.8 and 6201.8 of the Revenue and Taxation Code for the State Transit Assistance Program are hereby continuously appropriated to the Controller for allocation as follows:

(1) Fifty percent for allocation to transportation planning agencies, county transportation commissions, and the San Diego Metropolitan Transit Development Board pursuant to Section 99314.

(2) Fifty percent for allocation to transportation agencies, county transportation commissions, and the San Diego Metropolitan Transit Development Board for purposes of Section 99313.

(b) For purposes of this chapter, the revenues allocated pursuant to this section shall be subject to the same requirements as revenues allocated pursuant to subdivisions (b) and (c), as applicable, of Section 99312.

(c) The revenues transferred to the Public Transportation Account for the State Transit Assistance Program that are attributable to subdivision (a) of Section 11053 of the Revenue and Taxation Code are hereby continuously appropriated to the Controller, and, upon allocation pursuant to Sections 99313 and 99314, shall only be expended on the following:

(1) Transit capital projects or services to maintain or repair a transit operator's existing transit vehicle fleet or existing transit facilities, including rehabilitation or modernization of existing vehicles or facilities.

(2) The design, acquisition, and construction of new vehicles or facilities that improve existing transit services.

(3) Transit services that complement local efforts for repair and improvement of local transportation infrastructure.

(d) (1) Prior to receiving an apportionment of funds pursuant to subdivision (c) from the Controller in a fiscal year, a recipient transit agency shall submit to the Department of Transportation a list of projects proposed to be funded with these funds. The list of projects proposed to be funded with these funds shall include a description and location of each proposed project, a proposed schedule for the project's completion, and the estimated useful life of the improvement. The project list shall not limit the flexibility of a recipient transit agency to fund projects in accordance with local needs and priorities so long as the projects are consistent with subdivision (c).

(2) The department shall report to the Controller the recipient transit agencies that have submitted a list of projects as described in this subdivision and that are therefore eligible to receive an apportionment of funds for the applicable fiscal year. The Controller, upon receipt of the report, shall apportion funds pursuant to Sections 99313 and 99314.

(e) For each fiscal year, each recipient transit agency receiving an apportionment of funds pursuant to subdivision (c) shall, upon expending those funds, submit documentation to the department that includes a description and location of each completed project, the amount of funds expended on the project, the completion date, and the estimated useful life of the improvement.

(f) The audit of transit operator finances required pursuant to Section 99245 shall verify that the revenues identified in subdivision (c) have been expended in conformance with these specific requirements and all other generally applicable requirements.

**SEC. 20.** Section 99312.3 is added to the Public Utilities Code, to read:

**99312.3.** Revenues transferred to the Public Transportation Account pursuant to paragraph (2) of subdivision (c) of Section 6051.8 and paragraph (2) of subdivision (c) of Section 6201.8 of the Revenue and Taxation Code are hereby continuously appropriated to the Transportation Agency for distribution in the following manner:

(a) (1) Fifty percent of available annual revenues under this section shall be allocated by the Transportation Agency to the public agencies, including joint powers agencies, responsible for state-supported intercity rail services. A minimum of 25 percent of the funds available under this subdivision shall be allocated to each of the state's three intercity rail corridors that provide regularly scheduled intercity rail service.

(2) The Transportation Agency shall adopt guidelines governing the administration of the funds available under this subdivision, including provisions providing authority for loans of these funds by mutual agreement between intercity rail service corridors.

(b) (1) Fifty percent of available annual revenues under this section shall be allocated by the Transportation Agency to the public agencies, including joint powers agencies, responsible for commuter rail services. For the 2018–19 and 2019–20 fiscal years, 20 percent of the funds available under this subdivision shall be allocated to each of the state's five commuter rail service providers that provide regularly scheduled commuter rail service. Commencing July 1, 2020, the funds available under this subdivision shall be allocated based on guidelines and a distribution formula adopted by the Transportation Agency.

(2) On or before July 1, 2019, the Transportation Agency shall prepare a draft of the proposed guidelines and distribution formula and make them available for public comment. In preparing the proposed guidelines and distribution formula, the agency shall consult with the state's five commuter rail service providers. The final guidelines and distribution formula shall be adopted on or before January 1, 2020. The guidelines shall include, but need not be limited to, provisions providing authority for loans of these funds by mutual agreement between commuter rail service providers and providing for baseline allocations to each provider.

(c) The funds made available by this section may be used for operations and capital improvements.

**SEC. 21.** Section 99312.4 is added to the Public Utilities Code, to read:

**99312.4.** Revenues transferred to the Public Transportation Account pursuant to subdivision (a) of Section 11053 of the Revenue and Taxation Code for the Transit and Intercity Rail Capital Program (Part 2 (commencing with Section 75220) of Division 44 of the Public Resources Code) shall be available for appropriation to that program pursuant to the annual Budget Act.

**SEC. 22.** Section 99314.9 is added to the Public Utilities Code, to read:

**99314.9.** The Controller shall compute quarterly proposed allocations for State Transit Assistance Program funds available for allocation pursuant to Sections 99313 and 99314. The Controller shall publish the allocations for each eligible recipient agency, including one list applicable to revenues allocated pursuant to subdivision (c) of Section 99312.1 and another list for revenues allocated from all other revenues in the Public Transportation Account that are designated for the State Transit Assistance Program.

**SEC. 23.** Section 6051.8 of the Revenue and Taxation Code is amended to read:

**6051.8.** (a) Except as provided by Section 6357.3, in addition to the taxes imposed by this part, for the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 1.75 percent of the gross receipts of any retailer from the sale of all diesel fuel, as defined in Section 60022.

(b) Except as provided by Section 6357.3, in addition to the taxes imposed by this part and by subdivision (a), commencing November 1, 2017, for the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 4 percent of the gross receipts of any retailer from the sale of all diesel fuel, as defined in Section 60022, sold at retail in this state.

(c) (1) Notwithstanding subdivision (b) of Section 7102, except as otherwise provided in paragraph (2), all of the revenues, less refunds, collected pursuant to this section shall be estimated by the State Board of Equalization, with the concurrence of the Department of Finance, and transferred quarterly to the Public Transportation Account in the State Transportation Fund for allocation under the State Transit Assistance Program pursuant to Section 99312.1 of the Public Utilities Code.

(2) The revenues, less refunds, attributable to a rate of 0.5 percent of the 4-percent increase in the rate pursuant to subdivision (b), amounting to one-eighth of revenues from the increase in the rate under that subdivision, shall be estimated by the State Board of Equalization, with the concurrence of the Department of Finance, and transferred quarterly to the Public Transportation Account in the State Transportation Fund for allocation by the Transportation Agency to intercity rail and commuter rail purposes pursuant to Section 99312.3 of the Public Utilities Code.

**SEC. 24.** Section 6201.8 of the Revenue and Taxation Code is amended to read:

**6201.8.** (a) Except as provided by Section 6357.3, in addition to the taxes imposed by this part, an excise tax is hereby imposed on the storage, use, or other consumption in this state of diesel fuel, as defined in Section 60022, at the rate of 1.75 percent of the sales price of the diesel fuel.

(b) Except as provided by Section 6357.3, in addition to the taxes imposed by this part and by subdivision (a), commencing November 1, 2017, an excise tax is hereby imposed on the storage, use, or other consumption in this state of diesel fuel, as defined in Section 60022, at the rate of 4 percent of the sales price of the diesel fuel.

(c) (1) Notwithstanding subdivision (b) of Section 7102, except as otherwise provided in paragraph (2), all of the revenues, less refunds, collected pursuant to this section shall be estimated by the State Board of Equalization, with the concurrence of the Department of Finance, and transferred quarterly to the Public Transportation Account in the State Transportation Fund for allocation pursuant to Section 99312.1 of the Public Utilities Code.

(2) The revenues, less refunds, attributable to a rate of 0.5 percent of the 4-percent increase in the rate pursuant to subdivision (b), amounting to one-eighth of revenues from the increase in the rate under that subdivision, shall be estimated by the State Board of Equalization, with the concurrence of the Department of Finance, and transferred quarterly to the Public Transportation Account in the State Transportation Fund for allocation by the Transportation Agency to intercity rail and commuter rail purposes pursuant to Section 99312.3 of the Public Utilities Code.

**SEC. 25.** Section 7360 of the Revenue and Taxation Code is amended to read:

**7360.** (a) (1) A tax of eighteen cents (\$0.18) is hereby imposed upon each gallon of fuel subject to the tax in Sections 7362, 7363, and 7364.

(2) If the federal fuel tax is reduced below the rate of nine cents (\$0.09) per gallon and federal financial allocations to this state for highway and exclusive public mass transit guideway purposes are reduced or eliminated correspondingly, the tax rate imposed by paragraph (1), on and after the date of the reduction, shall be recalculated by an amount so that the combined state rate under paragraph (1) and the federal tax rate per gallon equal twenty-seven cents (\$0.27).

(3) If any person or entity is exempt or partially exempt from the federal fuel tax at the time of a reduction, the person or entity shall continue to be so exempt under this section.

(b) (1) On and after July 1, 2010, in addition to the tax imposed by subdivision (a), a tax is hereby imposed upon each gallon of motor vehicle fuel, other than aviation gasoline, subject to the tax in Sections 7362, 7363, and 7364 in an amount equal to seventeen and three-tenths cents (\$0.173) per gallon.

(2) For the 2011–12 fiscal year and each fiscal year thereafter, the board shall, on or before March 1 of the fiscal year immediately preceding the applicable fiscal year, adjust the rate in paragraph (1) in that manner as to generate an amount of revenue that will equal the amount of revenue loss attributable to the exemption provided by Section 6357.7, based on estimates made by the board, and that rate shall be effective during the state's next fiscal year.

(3) In order to maintain revenue neutrality for each year, beginning with the rate adjustment on or before March 1, 2012, the adjustment under paragraph (2) shall also take into account the extent to which the actual amount of revenues derived pursuant to this subdivision and, as applicable, Section 7361.1, the revenue loss attributable to the exemption provided by Section 6357.7 resulted in a net revenue gain or loss for the fiscal year ending prior to the rate adjustment date on or before March 1.

(4) The intent of paragraphs (2) and (3) is to ensure that the act adding this subdivision and Section 6357.7 does not produce a net revenue gain in state taxes.

(5) Commencing July 1, 2019, the adjustments in paragraphs (2) and (3) shall cease, and the rate imposed by this subdivision shall be the rate in paragraph (1).

(c) On and after November 1, 2017, in addition to the taxes imposed by subdivisions (a) and (b), a tax is hereby imposed upon each gallon of motor vehicle fuel, other than aviation gasoline, subject to the tax in Sections 7362, 7363, and 7364, in an amount equal to twelve cents (\$0.12) per gallon.

(d) On July 1, 2020, and every July 1 thereafter, the board shall adjust the taxes imposed by subdivisions (a), (b), and (c), with the adjustment to apply to both to the base tax rates specified in those provisions and to any previous adjustment in rates made pursuant to this subdivision, by increasing the taxes by a percentage amount equal to the increase in the California Consumer Price Index, as calculated by the Department of Finance with the resulting taxes rounded to the nearest one-tenth of one cent (\$0.01). The first adjustment pursuant to this subdivision shall be a percentage amount equal to the increase in the California Consumer Price Index from November 1, 2017, to November 1, 2019. Subsequent annual adjustments shall cover subsequent 12 month periods. The incremental change shall be added to the associated rate for that year.

(e) Any increases to the taxes imposed under subdivisions (a), (b), and (c) that are enacted by legislation subsequent to July 1, 2017, shall be deemed to be changes to the base tax rates for purposes of the California Consumer Price Index calculation and adjustment performed pursuant to subdivision (d).

**SEC. 26.** Section 7361.2 is added to the Revenue and Taxation Code, to read:

**7361.2.** (a) For the privilege of storing, for the purpose of sale, each supplier, wholesaler, and retailer owning 1,000 or more gallons of tax-paid motor vehicle fuel on November 1, 2017, shall pay a storage tax, the rate of which shall be determined by the board pursuant to the difference in the rate of the tax on motor vehicle fuel in effect on October 31, 2017, and the rate in effect on November 1, 2017, on tax-paid motor vehicle fuel in storage according to the volumetric measure thereof.

(b) For purposes of this section:

(1) "Owning" means having title to the motor vehicle fuel.

(2) "Retailer" means any person who sells motor vehicle fuel in this state to a person who subsequently uses the motor vehicle fuel.

(3) "Storing" includes the ownership or possession of tax-paid motor vehicle fuel outside of the bulk transfer/terminal system, including the holding of tax-paid motor vehicle fuel for sale at wholesale or retail locations stored in a container of any kind, including railroad tank cars and trucks or trailer cargo tanks. "Storing" also includes tax-paid motor vehicle fuel purchased from and invoiced by the seller, and tax-paid motor vehicle fuel removed from a terminal or entered into by a supplier, prior to the date specified in subdivision (a) and in transit on that date.

(4) "Wholesaler" means any person who sells diesel fuel in this state for resale to a retailer or to a person who is not a retailer and subsequently uses the motor vehicle fuel.

**SEC. 27.** Section 7653.2 is added to the Revenue and Taxation Code, to read:

**7653.2.** On or before January 1, 2018, each person subject to the storage tax imposed under Section 7361.2 shall prepare and file with the board, in a form prescribed by the board, a return showing the total number of gallons of tax-paid motor vehicle fuel owned by the person on November 1, 2017, the amount of the storage tax, and any other information that the board deems necessary for the proper administration of this part. The return shall be accompanied by a remittance payable to the board in the amount of tax due.

**SEC. 28.** Section 8352.4 of the Revenue and Taxation Code is amended to read:

**8352.4.** (a) Subject to Sections 8352 and 8352.1, and except as otherwise provided in subdivision (b), there shall be transferred from the money deposited to the credit of the Motor Vehicle Fuel Account to the Harbors and Watercraft Revolving Fund, for expenditure in accordance with Division 1 (commencing with Section 30) of the Harbors and Navigation Code, the sum of six million six hundred thousand dollars (\$6,600,000) per annum, representing the amount of money in the Motor Vehicle Fuel Account attributable to taxes imposed on distributions of motor vehicle fuel used or usable in propelling vessels. The actual amount shall be calculated using the annual reports of registered boats prepared by the Department of Motor Vehicles for the United States Coast Guard and the formula and method of the December 1972 report prepared for this purpose and submitted to the Legislature on December 26, 1972, by the Director of Transportation. If the amount transferred during each fiscal year is in excess of the calculated amount, the excess shall be retransferred from the Harbors and Watercraft Revolving Fund to the Motor Vehicle Fuel Account. If the amount transferred is less than the amount calculated, the difference shall be transferred from the Motor Vehicle Fuel Account to the Harbors and Watercraft Revolving Fund. No adjustment shall be made if the computed difference is less than fifty thousand dollars (\$50,000), and the amount shall be adjusted to reflect any temporary or permanent increase or decrease that may be made in the rate under the Motor Vehicle Fuel Tax Law. Payments pursuant to this section shall be made prior to payments pursuant to Section 8352.2.

(b) (1) Commencing July 1, 2012, the revenues attributable to the taxes imposed pursuant to subdivision (b) of Section 7360 and otherwise to be deposited in the Harbors and Watercraft Revolving Fund pursuant to subdivision (a) shall instead be transferred to the General Fund.

(2) Commencing November 1, 2017, the revenues attributable to the taxes imposed pursuant to subdivision (c) of Section 7360, any adjustment pursuant to subdivision (d) of Section 7360, and Section 7361.2, and otherwise to be deposited in the Harbors and Watercraft Revolving Fund pursuant to subdivision (a), shall instead be transferred to the State Parks and Recreation Fund to be used for state parks, off-highway vehicle programs, or boating programs.

**SEC. 29.** Section 8352.5 of the Revenue and Taxation Code is amended to read:

**8352.5.** (a) (1) Subject to Sections 8352 and 8352.1, and except as otherwise provided in paragraph (1) of subdivision (b), there shall be transferred from the money deposited to the credit of the Motor Vehicle Fuel Account to the Department of Food and Agriculture Fund, during the second quarter of each fiscal year, an amount equal to the estimate contained in the most recent report prepared pursuant to this section.

(2) The amounts are not subject to Section 6357 with respect to the collection of sales and use taxes thereon, and represent the portion of receipts in the Motor Vehicle Fuel Account during a calendar year that were attributable to agricultural off-highway use of motor vehicle fuel which is subject to refund pursuant to Section 8101, less gross refunds allowed by the Controller during the fiscal year ending June 30 following the calendar year to persons entitled to refunds for agricultural off-highway use pursuant to Section 8101. Payments pursuant to this section shall be made prior to payments pursuant to Section 8352.2.

(b) (1) Commencing July 1, 2012, the revenues attributable to the taxes imposed pursuant to subdivision (b) of Section 7360 and otherwise to be deposited in the Department of Food and Agriculture Fund pursuant to subdivision (a) shall instead be transferred to the General Fund.

(2) Commencing November 1, 2017, the revenues attributable to the taxes imposed pursuant to subdivision (c) of Section 7360, as adjusted pursuant to subdivision (d) of Section 7360, and Section 7361.2 shall be deposited in the Department of Food and Agriculture Fund.

(c) On or before September 30, 2012, and on or before September 30 of each even-numbered year thereafter, the Director of Transportation and the Director of Food and Agriculture shall jointly prepare, or cause to be prepared, a report setting forth the current estimate of the amount of money in the Motor Vehicle Fuel Account attributable to agricultural off-highway use of motor vehicle fuel, which is subject to refund pursuant to Section 8101 less gross refunds allowed by the Controller to persons entitled to refunds for agricultural off-highway use pursuant to Section 8101; and they shall submit a copy of the report to the Legislature.

**SEC. 30.** Section 8352.6 of the Revenue and Taxation Code is amended to read:

**8352.6.** (a) (1) Subject to Section 8352.1, and except as otherwise provided in paragraphs (2) and (3), on the first day of every month, there shall be transferred from moneys deposited to the credit of the Motor Vehicle Fuel Account to the Off-Highway Vehicle Trust Fund created by Section 38225 of the Vehicle Code an amount attributable to taxes imposed upon distributions of motor vehicle fuel used in the operation of motor vehicles off highway and for which a refund has not been claimed. Transfers made pursuant to this section shall be made prior to transfers pursuant to Section 8352.2.

(2) (A) Commencing July 1, 2012, the revenues attributable to the taxes imposed pursuant to subdivision (b) of Section 7360 and otherwise to be deposited in the Off-Highway Vehicle Trust Fund pursuant to paragraph (1) shall instead be transferred to the General Fund.

(B) Commencing November 1, 2017, the revenues attributable to the taxes imposed pursuant to subdivision (c) of Section 7360, any adjustment pursuant to subdivision (d) of Section 7360, and Section 7361.2, and otherwise to be deposited in the Off-Highway Vehicle Trust Fund pursuant to subdivision (a), shall instead be transferred to the State Parks and Recreation Fund to be used for state parks, off-highway vehicle programs, or boating programs.

(3) The Controller shall withhold eight hundred thirty-three thousand dollars (\$833,000) from the monthly transfer to the Off-Highway Vehicle Trust Fund pursuant to paragraph (1), and transfer that amount to the General Fund.

(b) The amount transferred to the Off-Highway Vehicle Trust Fund pursuant to paragraph (1) of subdivision (a), as a percentage of the Motor Vehicle Fuel Account, shall be equal to the percentage transferred in the 2006–07 fiscal year. Every five years, starting in the 2013–14 fiscal year, the percentage transferred may be adjusted by the Department of Transportation in cooperation with the Department of Parks and Recreation and the Department of Motor Vehicles. Adjustments shall be based on, but not limited to, the changes in the following factors since the 2006–07 fiscal year or the last adjustment, whichever is more recent:

(1) The number of vehicles registered as off-highway motor vehicles as required by Division 16.5 (commencing with Section 38000) of the Vehicle Code.

(2) The number of registered street-legal vehicles that are anticipated to be used off highway, including four-wheel drive vehicles, all-wheel drive vehicles, and dual-sport motorcycles.

(3) Attendance at the state vehicular recreation areas.

(4) Off-highway recreation use on federal lands as indicated by the United States Forest Service's National Visitor Use Monitoring and the United States Bureau of Land Management's Recreation Management Information

System.

(c) It is the intent of the Legislature that transfers from the Motor Vehicle Fuel Account to the Off-Highway Vehicle Trust Fund should reflect the full range of motorized vehicle use off highway for both motorized recreation and motorized off-road access to other recreation opportunities. Therefore, the Legislature finds that the fuel tax baseline established in subdivision (b), attributable to off-highway estimates of use as of the 2006–07 fiscal year, accounts for the three categories of vehicles that have been found over the years to be users of fuel for off-highway motorized recreation or motorized access to nonmotorized recreational pursuits. These three categories are registered off-highway motorized vehicles, registered street-legal motorized vehicles used off highway, and unregistered off-highway motorized vehicles.

(d) It is the intent of the Legislature that the off-highway motor vehicle recreational use to be determined by the Department of Transportation pursuant to paragraph (2) of subdivision (b) be that usage by vehicles subject to registration under Division 3 (commencing with Section 4000) of the Vehicle Code, for recreation or the pursuit of recreation on surfaces where the use of vehicles registered under Division 16.5 (commencing with Section 38000) of the Vehicle Code may occur.

(e) In the 2014–15 fiscal year, the Department of Transportation, in consultation with the Department of Parks and Recreation and the Department of Motor Vehicles, shall undertake a study to determine the appropriate adjustment to the amount transferred pursuant to subdivision (b) and to update the estimate of the amount attributable to taxes imposed upon distributions of motor vehicle fuel used in the operation of motor vehicles off highway and for which a refund has not been claimed. The department shall provide a copy of this study to the Legislature no later than January 1, 2016.

**SEC. 31.** Chapter 6 (commencing with Section 11050) is added to Part 5 of Division 2 of the Revenue and Taxation Code, to read:

**CHAPTER 6. Transportation Improvement Fee**

**11050.** For purposes of this chapter, the following terms have the following meanings:

(a) "Transportation purposes" means both of the following:

(1) The research, planning, construction, improvement, maintenance, and operation of public streets and highways (and their related public facilities for nonmotorized traffic), including the mitigation of their environmental effects, the payment for property taken or damaged for the foregoing purposes, and the administrative costs necessarily incurred in the foregoing purposes.

(2) The research, planning, construction, improvement, maintenance, and operation of public transportation systems (and their related equipment and fixed facilities), including the mitigation of their environmental effects, the payment for property taken or damaged for the foregoing purposes, and the administrative costs necessarily incurred in the foregoing purposes.

(b) "Transportation improvement fee" means a supplemental charge added to the fee imposed pursuant to Chapter 2 (commencing with Section 10751).

(c) "Vehicle" means every vehicle that is subject to the fee in Chapter 2 (commencing with Section 10751), except the following:

(1) A commercial vehicle with an unladen weight of more than 10,000 pounds.

(2) A vehicle exempted pursuant to the Vehicle Code from the payment of registration fees.

(3) A vehicle for which a certificate of nonoperation has been filed with the Department of Motor Vehicles pursuant to Section 4604 of the Vehicle Code, during the period of time covered by the certificate.

(4) A vehicle described in Section 5004 of the Vehicle Code.

**11051.** (a) In addition to any other fee imposed on a vehicle by this code or the Vehicle Code, a transportation improvement fee is hereby imposed on each vehicle as defined in subdivision (b) of Section 11050 effective on January 1, 2018, or as soon after that date as the department is able to commence collection of the fee. The transportation improvement fee shall be in the amounts specified in Section 11052.

(b) The department shall collect the fee at the same time and in the same manner as the department collects the vehicle registration fee pursuant to Section 9250 of the Vehicle Code.

(c) The fee imposed pursuant to this chapter is imposed for the privilege of a resident of California to operate upon the public highways a vehicle or trailer coach, the registrant of which is subject to the fee under Chapter 2 (commencing with Section 10751).

(d) The revenues from the transportation improvement fee imposed by this chapter shall be available for expenditure only on transportation purposes as provided in Section 11053.

**11052.** (a) The annual amount of the transportation improvement fee shall be based on the market value of the vehicle, as determined by the department pursuant to Sections 10753, 10753.2, and 10753.5, using the following schedule:

(1) Vehicles with a vehicle market value range between zero dollars (\$0) and four thousand nine hundred ninety-nine dollars (\$4,999), a fee of twenty-five dollars (\$25).

(2) Vehicles with a vehicle market value range between five thousand dollars (\$5,000) and twenty-four thousand nine hundred ninety-nine dollars (\$24,999), a fee of fifty dollars (\$50).

(3) Vehicles with a vehicle market value range between twenty-five thousand dollars (\$25,000) and thirty-four thousand nine hundred ninety-nine dollars (\$34,999), a fee of one hundred dollars (\$100).

(4) Vehicles with a vehicle market value range between thirty-five thousand dollars (\$35,000) and fifty-nine thousand nine hundred ninety-nine dollars (\$59,999), a fee of one hundred fifty dollars (\$150).

(5) Vehicles with a vehicle market value range of sixty thousand dollars (\$60,000) and higher, a fee of one hundred seventy-five dollars (\$175).

(b) On January 1, 2020, and every January 1 thereafter, the department shall adjust the transportation improvement fee imposed under subdivision (a) by increasing the fee for each vehicle market range in an amount equal to the increase in the California Consumer Price Index for the prior year, except the first adjustment shall cover the prior two years, as calculated by the Department of Finance, with amounts equal to or greater than fifty cents (\$0.50) rounded to the highest whole dollar. The incremental change shall be added to the associated fee rate for that year.

(c) Any changes to the transportation improvement fee imposed in subdivision (a) that are enacted by the Legislature subsequent to January 1, 2018, shall be deemed to be changes to the base fee for purposes of the California Consumer Price Index calculation and adjustment performed pursuant to subdivision (b).

**11053.** Revenues from the transportation improvement fee, after deduction of the department's administrative costs related to this chapter, shall be transferred by the department to the Controller for deposit as follows:

(a) Commencing with the 2017-18 fiscal year, three hundred fifty million dollars (\$350,000,000), plus an annual increase for inflation as determined in subdivision (b) of Section 11052 for this proportional share, shall annually be deposited into the Public Transportation Account. The Controller shall, each month, set aside one-twelfth of this amount, to accumulate a total of three hundred fifty million dollars (\$350,000,000) in each fiscal year or the appropriate adjusted amount. For each fiscal year commencing with the 2017-18 fiscal year, the annual Budget Act shall include an appropriation for 70 percent of these revenues to be allocated to the Transit and Intercity Rail Capital Program (Part 2 (commencing with Section 75220) of Division 44 of the Public Resources Code), pursuant to Section 99312.4 of the Public Utilities Code. The remaining 30 percent of these revenues shall be continuously appropriated to the Controller for allocation under the State Transit Assistance program, pursuant to subdivision (c) of Section 99312.1 of the Public Utilities Code.

(b) Commencing with the 2017-18 fiscal year, two hundred fifty million dollars (\$250,000,000) shall annually be deposited into the State Highway Account for appropriation by the annual Budget Act to the Congested Corridor Program created pursuant to Section 2391 of the Streets and Highways Code. The Controller shall, each month, set aside one-twelfth of this amount, to accumulate a total of two hundred fifty million dollars (\$250,000,000) in each fiscal year.

(c) The remaining revenues after the transfers made in subdivisions (a) and (b) shall be deposited into the Road Maintenance and Rehabilitation Account created pursuant to Section 2031 of the Streets and Highway Code.

**SEC. 32.** Section 60050 of the Revenue and Taxation Code is amended to read:

**60050.** (a) (1) A tax of sixteen cents (\$0.16) is hereby imposed upon each gallon of diesel fuel subject to the tax in Sections 60051, 60052, and 60058.

(2) If the federal fuel tax is reduced below the rate of fifteen cents (\$0.15) per gallon and federal financial allocations to this state for highway and exclusive public mass transit guideway purposes are reduced or eliminated correspondingly, the tax rate imposed by paragraph (1) shall be increased by an amount so that the combined state rate under paragraph (1) and the federal tax rate per gallon equal what it would have been in the absence of the federal reduction.

(3) If any person or entity is exempt or partially exempt from the federal fuel tax at the time of a reduction, the person or entity shall continue to be exempt under this section.

(b) On and after November 1, 2017, in addition to the tax imposed pursuant to subdivision (a), an additional tax of twenty cents (\$0.20) is hereby imposed upon each gallon of diesel fuel subject to the tax in Sections 60051, 60052, and 60058.

(c) On July 1, 2020, and every July 1 thereafter, the State Board of Equalization shall adjust the taxes imposed by subdivisions (a), and (b), with the adjustment to apply to both to the base tax rates specified in those provisions and to any previous adjustment in rates made pursuant to this subdivision, by increasing the taxes by a percentage amount equal to the increase in the California Consumer Price Index, as calculated by the Department of Finance with the resulting taxes rounded to the nearest one-tenth of one cent (\$0.01). The first adjustment pursuant to this subdivision shall be a percentage amount equal to the increase in the California Consumer Price Index from November 1, 2017, to November 1, 2019. Subsequent annual adjustments shall cover subsequent 12 month periods. The incremental change shall be added to the associated rate for that year.

(d) Any changes to the taxes imposed under this section that are enacted by legislation subsequent to July 1, 2017, shall be deemed to be changes to the base tax rates for purposes of the California Consumer Price Index calculation and adjustment performed pursuant to paragraph (1).

**SEC. 33.** Section 60050.2 is added to the Revenue and Taxation Code, to read:

**60050.2.** (a) For the privilege of storing, for the purpose of sale, each supplier, wholesaler, and retailer owning 1,000 or more gallons of tax-paid diesel fuel on November 1, 2017, shall pay a storage tax of twenty cents (\$0.20) per gallon of tax-paid diesel fuel in storage according to the volumetric measure thereof.

(b) For purposes of this section:

(1) "Owning" means having title to the diesel fuel.

(2) "Retailer" means any person who sells diesel fuel in this state to a person who subsequently uses the diesel fuel.

(3) "Storing" includes the ownership or possession of tax-paid diesel fuel outside of the bulk transfer/terminal system, including the holding of tax-paid diesel fuel for sale at wholesale or retail locations stored in a container of any kind, including railroad tank cars and trucks or trailer cargo tanks. "Storing" also includes tax-paid diesel fuel purchased from and invoiced by the seller, and tax-paid diesel fuel removed from a terminal or entered into by a supplier, prior to the date specified in subdivision (a) and in transit on that date.

(4) "Wholesaler" means any person who sells diesel fuel in this state for resale to a retailer or to a person who is not a retailer and subsequently uses the diesel fuel.

**SEC. 34.** Section 60201.4 is added to the Revenue and Taxation Code, to read:

**60201.4.** On or before January 1, 2018, each person subject to the storage tax imposed under Section 60050.2 shall prepare and file with the board, in a form prescribed by the board, a return showing the total number of gallons of tax-paid diesel fuel owned by the person on November 1, 2017, the amount of the storage tax, and any other information that the board deems necessary for the proper administration of this part. The return shall be accompanied by a remittance payable to the board in the amount of tax due.

**SEC. 35.** Article 2.5 (commencing with Section 800) is added to Chapter 4 of Division 1 of the Streets and Highways Code, to read:

**Article 2.5. Advance Mitigation Program**

**800.** (a) The Advance Mitigation Program is hereby created to enhance communications between the department and stakeholders to protect natural resources through project mitigation, to meet or exceed applicable environmental requirements, to accelerate project delivery, and to fully mitigate environmental impacts from transportation infrastructure projects. The department shall consult on all activities pursuant to this article with the Department of Fish and Wildlife, including activities pursuant to Chapter 9 (commencing with Section 1850) of Division 2 of the Fish and Game Code.

(b) Commencing with the 2017–18 fiscal year, and for a period of four years, the department shall set aside no less than thirty million dollars (\$30,000,000) annually for the Advance Mitigation Program from the annual appropriations for the State Transportation Improvement Program and the State Highway Operation and Protection Program for the planning and implementation of projects in the Advanced Mitigation Program.

(c) The annual Budget Act and subsequent legislation may establish additional provisions and requirements for the program.

**SEC. 36.** Chapter 2 (commencing with Section 2030) is added to Division 3 of the Streets and Highways Code, to read:

**CHAPTER 2. Road Maintenance and Rehabilitation Program**

**2030.** (a) The Road Maintenance and Rehabilitation Program is hereby created to address deferred maintenance on the state highway system and the local street and road system. Funds made available by the program shall be prioritized for expenditure on basic road maintenance and road rehabilitation projects, and on critical safety projects.

(b) (1) Funds made available by the program shall be used for projects that include, but are not limited to, the following:

(A) Road maintenance and rehabilitation.

(B) Safety projects.

(C) Railroad grade separations.

(D) Complete street components, including active transportation purposes, pedestrian and bicycle safety projects, transit facilities, and drainage and stormwater capture projects in conjunction with any other allowable project.

(E) Traffic control devices.

(2) Funds made available by the program may also be used to satisfy a match requirement in order to obtain state or federal funds for projects authorized by this subdivision.

(c) To the extent possible and cost effective, and where feasible, the department and cities and counties receiving funds under the program shall use advanced technologies and material recycling techniques that reduce the cost of maintaining and rehabilitating the streets and highways, and that exhibit reduced levels of greenhouse gas emissions through material choice and construction method.

(d) To the extent possible and cost effective, and where feasible, the department and cities and counties receiving funds under the program shall use advanced technologies and communications systems in transportation infrastructure that recognize and accommodate advanced automotive technologies that may include, but are not necessarily limited to, charging or fueling opportunities for zero-emission vehicles, and provision of infrastructure-to-vehicle communications for transitional or full autonomous vehicle systems.

(e) To the extent deemed cost effective, and where feasible, in the context of both the project scope and the risk level for the asset due to global climate change, the department and cities and counties receiving funds under the program shall include features in the projects funded by the program to better adapt the asset to withstand the negative effects of climate change and make the asset more resilient to impacts such as fires, floods, and sea level rise.

(f) To the extent beneficial, cost effective, and practicable in the context of facility type, right-of-way, project scope, and quality of nearby alternative facilities, and where feasible, the department and cities and counties receiving funds under the program shall incorporate complete street elements into projects funded by the program, including, but not limited to, elements that improve the quality of bicycle and pedestrian facilities and that improve safety for all users of transportation facilities.

(g) For purposes of funds directed to the State Highway Operation and Protection Program, the guidelines and reporting provisions shall be consistent with Section 14526.5 of the Government Code.

(h) Guidelines adopted by the commission to facilitate the allocation of funds in the account shall be exempt from the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).

**2031.** The following revenues shall be deposited in the Road Maintenance and Rehabilitation Account, which is hereby created in the State Transportation Fund:

(a) Notwithstanding subdivision (b) of Section 2103 and pursuant to subdivision (a) of Section 2103.1, the portion of the revenues in the Highway Users Tax Account attributable to the increases in the motor vehicle fuel excise tax pursuant to subdivision (c) of Section 7360 of the Revenue and Taxation Code, as adjusted pursuant to subdivision (d) of that section.

(b) The revenues from the portion of the transportation improvement fee pursuant to subdivision (c) of Section 11053 of the Revenue and Taxation Code.

(c) The revenues from the increase in the vehicle registration fee pursuant to Section 9250.6 of the Vehicle Code, as adjusted pursuant to subdivision (b) of that section.

(d) Notwithstanding subdivision (b) of Section 2103 and pursuant to paragraph (2) of subdivision (b) of Section 2103.1, one-half of the revenues attributable to the increase in the diesel fuel excise tax pursuant to subdivisions (b) and (c) of Section 60050 of the Revenue and Taxation Code.

(e) Any other revenues designated for the program.

**2031.5.** For each fiscal year, the annual Budget Act shall contain an appropriation from the Road Maintenance and Rehabilitation Account for the costs of administering this chapter.

**2032.** (a) (1) After deducting the amounts appropriated in the annual Budget Act, as provided in Section 2031.5, two hundred million dollars (\$200,000,000) of the remaining revenues deposited in the Road Maintenance and Rehabilitation Account shall be set aside annually for counties that have sought and received voter approval of taxes or that have imposed fees, including uniform developer fees as defined by subdivision (b) of Section 8879.67 of the Government Code, which taxes or fees are dedicated solely to transportation improvements. The Controller shall each month set aside one-twelfth of this amount, to accumulate a total of two hundred million dollars (\$200,000,000) in each fiscal year.

(2) Eligible projects under this subdivision shall include, but not are limited to, sound walls for a freeway that was built prior to 1987 without sound walls and with or without high occupancy vehicle lanes if the completion of the sound walls has been deferred due to lack of available funding for at least 20 years and a noise barrier scope summary report has been completed within the last 20 years.

(3) Notwithstanding Section 13340 of the Government Code, the funds available under this subdivision in each fiscal year are hereby continuously appropriated for allocation to each eligible county and each city in the county for road maintenance and rehabilitation purposes pursuant to Section 2033.

(b) After deducting the amounts appropriated in the annual Budget Act pursuant to Section 2031.5 and the amount allocated in subdivision (a), beginning in the 2017–18 fiscal year, one hundred million dollars (\$100,000,000) of the remaining revenues shall be available annually for expenditure, upon appropriation by the Legislature, on the Active Transportation Program created pursuant to Chapter 8 (commencing with Section 2380) of Division 3 to be allocated by the California Transportation Commission pursuant to Section 2381. The Controller shall each month set aside one-twelfth of this amount, to accumulate a total of one hundred million dollars (\$100,000,000) in each fiscal year.

(c) After deducting the amounts appropriated in the annual Budget Act pursuant to Section 2031.5 and the amounts allocated in subdivisions (a) and (b), beginning in the 2017–18 fiscal year, four hundred million dollars (\$400,000,000) of the remaining revenues shall be available annually for expenditure, upon appropriation by the Legislature, by the department for bridge and culvert maintenance and rehabilitation. The Controller shall each month set aside one-twelfth of this amount, to accumulate a total of four hundred million dollars (\$400,000,000) in each fiscal year.

(d) After deducting the amounts appropriated in the annual Budget Act pursuant to Section 2031.5 and the amounts allocated in subdivisions (a), (b), and (c), beginning in the 2017–18 fiscal year, twenty-five million dollars (\$25,000,000) of the remaining revenues shall be transferred annually to the State Highway Account for expenditure, upon appropriation by the Legislature, to supplement the freeway service patrol program. The Controller shall each month set aside one-twelfth of this amount, to accumulate a total of twenty-five million dollars (\$25,000,000) in each fiscal year.

(e) After deducting the amounts appropriated in the annual Budget Act pursuant to Section 2031.5 and the amounts allocated in subdivisions (a), (b), (c), and (d), in the 2017–18, 2018–19, 2019–20, 2020–21, and 2021–22 fiscal years, from revenues in the Road Maintenance and Rehabilitation Account that are not subject to Article XIX of the California Constitution, five million dollars (\$5,000,000) shall be appropriated in each fiscal year to the California Workforce Development Board to assist local agencies to implement policies to promote preapprenticeship training programs to carry out the projects that are funded by the account pursuant to Section 2038. Funds appropriated pursuant to this subdivision in the Budget Act but remaining unexpended at the end of each applicable fiscal year shall be reappropriated for the same purposes in the following year's Budget Act, but all funds appropriated or reappropriated pursuant to this subdivision in the Budget Act shall be liquidated no later than June 30, 2027.

(f) After deducting the amounts appropriated in the annual Budget Act pursuant to Section 2031.5 and the amounts allocated in subdivisions (a), (b), (c), (d), and (e), beginning in the 2017–18 fiscal year, twenty-five million dollars (\$25,000,000) of the remaining revenues shall be available annually for expenditure, upon appropriation by the Legislature, by the department for local planning grants, as described in Section 2033.5. The Controller shall each month set aside one-twelfth of this amount, to accumulate a total of twenty-five million dollars (\$25,000,000) in each fiscal year.

(g) After deducting the amounts appropriated in the annual Budget Act pursuant to Section 2031.5 and the amounts allocated in subdivisions (a), (b), (c), (d), (e), and (f), beginning in the 2017–18 fiscal year and each fiscal year thereafter, from the remaining revenues, five million dollars (\$5,000,000) shall be available, upon appropriation, to the University of California for the purpose of conducting transportation research and two million dollars (\$2,000,000) shall be available, upon appropriation, to the California State University for the purpose of conducting transportation research and transportation-related workforce education, training, and development. Prior to the start of each fiscal year, the Secretary of Transportation and the chairs of the Assembly Committee on Transportation and the Senate Committee on Transportation and Housing may set out a recommended priority list of research components to be addressed in the upcoming fiscal year.

(h) Notwithstanding Section 13340 of the Government Code, the balance of the revenues deposited in the Road Maintenance and Rehabilitation Account are hereby continuously appropriated as follows:

(1) Fifty percent for allocation to the department for maintenance of the state highway system or for purposes of the state highway operation and protection program.

(2) Fifty percent for apportionment to cities and counties by the Controller pursuant to the formula in clauses (i) and (ii) of subparagraph (C) of paragraph (3) of subdivision (a) of Section 2103 for the purposes authorized by this chapter.

**2032.5.** (a) It is the intent of the Legislature that the Department of Transportation and local governments are held accountable for the efficient investment of public funds to maintain the public highways, streets, and roads, and are accountable to the people through performance goals that are tracked and reported.

(b) The department shall annually report to the commission relative to the expenditures made with funds received pursuant to subdivision (c) of, and paragraph (1) of subdivision (g) of, Section 2032, and the progress made and achievement of the performance goals outlined in subdivision (n) of Section 1 of the act adding this section.

(c) For each fiscal year in which the department receives an allocation of funds described in subdivision (b), the department shall submit documentation to the commission that includes a description and the location of each completed project, the amount of funds expended on the project, the completion date, and the project's estimated useful life. Annually, the commission shall evaluate the effectiveness of the department in reducing deferred maintenance and improving road conditions on the state highway system, as demonstrated by the

progress made by the goals set forth in subdivision (n) of Section 1 of the act enacting this section. The commission may make recommendations for improvement and may withhold future project allocations if it determines program funds are not being appropriately spent. The commission shall annually include any findings in its annual report to the Legislature pursuant to Section 14535 of the Government Code.

(d) The department shall implement efficiency measures with the goal to generate at least one hundred million dollars (\$100,000,000) per year in savings to invest in maintenance and rehabilitation of the state highway system. These savings shall be reported to the commission.

**2033.** (a) On or before January 1, 2018, the commission, in cooperation with the department, transportation planning agencies, county transportation commissions, and other local agencies, shall develop guidelines for the allocation of funds pursuant to subdivision (a) of Section 2032.

(b) The guidelines shall be the complete and full statement of the policy, standards, and criteria that the commission intends to use to determine how these funds will be allocated.

(c) The commission may amend the adopted guidelines after conducting at least one public hearing.

**2033.5.** The department, from funds made available pursuant to subdivision (f) of Section 2032, shall allocate local planning grants to encourage local and regional planning that furthers state goals, including, but not limited to, the goals and best practices cited in the regional transportation guidelines adopted by the commission pursuant to Sections 14522 to 14522.3, inclusive, of the Government Code. The department shall develop a grant guide and shall consult with the State Air Resources Board, the Governor's Office of Planning and Research, and the Department of Housing and Community Development in the development of the grant guide, and shall provide status reports as it administers these funds. The grant guide shall be exempt from the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).

**2034.** (a) (1) Prior to receiving an apportionment of funds under the program pursuant to paragraph (2) of subdivision (h) of Section 2032 from the Controller in a fiscal year, an eligible city or county shall submit to the commission a list of projects proposed to be funded with these funds pursuant to an adopted city or county budget. All projects proposed to receive funding shall be included in a city or county budget that is adopted by the applicable city council or county board of supervisors at a regular public meeting. The list of projects proposed to be funded with these funds shall include a description and the location of each proposed project, a proposed schedule for the project's completion, and the estimated useful life of the improvement. The project list shall not limit the flexibility of an eligible city or county to fund projects in accordance with local needs and priorities so long as the projects are consistent with subdivision (b) of Section 2030.

(2) The commission shall report to the Controller the cities and counties that have submitted a list of projects as described in this subdivision and that are therefore eligible to receive an apportionment of funds under the program for the applicable fiscal year. The Controller, upon receipt of the report, shall apportion funds to eligible cities and counties.

(b) For each fiscal year, each city or county receiving an apportionment of funds shall, upon expending program funds, submit documentation to the commission that includes a description and location of each completed project, the amount of funds expended on the project, the completion date, and the estimated useful life of the improvement.

**2036.** (a) Cities and counties shall maintain their existing commitment of local funds for street, road, and highway purposes in order to remain eligible for an allocation or apportionment of funds pursuant to Section 2032.

(b) In order to receive an allocation or apportionment pursuant to Section 2032, the city or county shall annually expend from its general fund for street, road, and highway purposes an amount not less than the annual average of its expenditures from its general fund during the 2009-10, 2010-11, and 2011-12 fiscal years, as reported to the Controller pursuant to Section 2151. For purposes of this subdivision, in calculating a city's or county's annual general fund expenditures and its average general fund expenditures for the 2009-10, 2010-11, and 2011-12 fiscal years, any unrestricted funds that the city or county may expend at its discretion, including vehicle in-lieu tax revenues and revenues from fines and forfeitures, expended for street, road, and highway purposes shall be considered expenditures from the general fund. One-time allocations that have been expended for street and highway purposes, but which may not be available on an ongoing basis, including revenue provided under the Teeter Plan Bond Law of 1994 (Chapter 6.6 (commencing with Section 54773) of Part 1 of Division 2 of Title 5 of the Government Code), may not be considered when calculating a city's or county's annual general fund expenditures.

(c) For any city incorporated after July 1, 2009, the Controller shall calculate an annual average expenditure for the period between July 1, 2009, and December 31, 2015, inclusive, that the city was incorporated.

(d) For purposes of subdivision (b), the Controller may request fiscal data from cities and counties in addition to data provided pursuant to Section 2151, for the 2009-10, 2010-11, and 2011-12 fiscal years. Each city and county shall furnish the data to the Controller not later than 120 days after receiving the request. The Controller may withhold payment to cities and counties that do not comply with the request for information or that provide incomplete data.

(e) The Controller may perform audits to ensure compliance with subdivision (b) when deemed necessary. Any city or county that has not complied with subdivision (b) shall reimburse the state for the funds it received during that fiscal year. Any funds withheld or returned as a result of a failure to comply with subdivision (b) shall be reapportioned to the other counties and cities whose expenditures are in compliance.

(f) If a city or county fails to comply with the requirements of subdivision (b) in a particular fiscal year, the city or county may expend during that fiscal year and the following fiscal year a total amount that is not less than the total amount required to be expended for those fiscal years for purposes of complying with subdivision (b).

**2037.** A city or county may spend its apportionment of funds under the program on transportation priorities other than those allowable pursuant to this chapter if the city's or county's average Pavement Condition Index meets or exceeds 80.

**2038.** The California Workforce Development Board shall develop guidelines for public agencies receiving Road Maintenance and Rehabilitation Account funds to participate in, invest in, or partner with, new or existing preapprenticeship training programs established pursuant to subdivision (e) of Section 14230 of the Unemployment Insurance Code. The department and local agencies that receive Road Maintenance and Rehabilitation Account funds pursuant to this chapter shall, not later than July 1, 2023, follow the guidelines set forth by the board. The board shall also establish a preapprenticeship development and training grant program, beginning January 1, 2019, pursuant to subdivision (e) of Section 14230 of the Unemployment Insurance Code. Local public agencies that receive Road Maintenance and Rehabilitation Account funds pursuant to this chapter are eligible to compete for such grants and may apply in partnership with other agencies and entities, including those with existing preapprenticeship programs. Successful grant applicants shall, to the extent feasible:

(a) Follow the multicraft core curriculum implemented by the State Department of Education for its pilot project with the California Partnership Academies and by the California Workforce Development Board and local boards.

(b) Include a plan for outreach to and retention of women participants in the preapprenticeship program to help increase the representation of women in the building and construction trades.

(c) Include a plan for outreach to and retention of minority participants and underrepresented subgroups in the preapprenticeship program to help increase their representation in the building and construction trades.

(d) Include a plan for outreach to and retention of disadvantaged youth participants in the preapprenticeship program to help increase their employment opportunities in the building and construction trades.

(e) Include a plan for outreach to individuals in the local labor market area and to formerly incarcerated individuals to provide pathways to employment and training.

(f) Coordinate with local state-approved apprenticeship programs, local building trade councils, and to the extent possible the California Conservation Corps and certified community conservation corps, so individuals who have completed these programs have a pathway to continued employment.

**SEC. 37.** Section 2103.1 is added to the Streets and Highways Code, to read:

**2103.1.** (a) Notwithstanding subdivision (b) of Section 2103, the portion of revenues in the Highway Users Tax Account attributable to the increases in the motor vehicle fuel excise tax pursuant to subdivision (c) of Section 7360 of the Revenue and Taxation Code, as adjusted pursuant to subdivision (d) of that section, shall be transferred to the Road Maintenance and Rehabilitation Account pursuant to Section 2031.

(b) Notwithstanding subdivision (b) of Section 2103, the portion of revenues in the Highway Users Tax Account attributable to the increase in the diesel fuel excise tax pursuant to subdivision (b) of Section 60050 of the Revenue and Taxation Code, as adjusted pursuant to subdivision (c) of that section, shall be transferred as follows:

(1) Fifty percent to the Trade Corridors Enhancement Account pursuant to Section 2192.4.

(2) Fifty percent to the Road Maintenance and Rehabilitation Account pursuant to Section 2031.

(c) Notwithstanding subdivision (b) of Section 2103, the portion of the revenues in the Highway Users Tax Account attributable to the storage taxes imposed pursuant to Sections 7361.2 and 60050.2 of the Revenue and Taxation Code shall be deposited in the Road Maintenance and Rehabilitation Account created pursuant to Section 2031.

**SEC. 38.** Section 2104 of the Streets and Highways Code is amended to read:

**2104.** Notwithstanding Section 13340 of the Government Code, a sum equal to the net revenue derived from 11.3 percent of the per gallon tax under the Motor Vehicle Fuel License Tax Law (Part 2 (commencing with Section 7301) of Division 2), 1.80 cents (\$0.0180) under the Use Fuel Tax Law (Part 3 (commencing with Section 8601) of Division 2), and 11.5 percent of the per gallon tax under the Diesel Fuel Tax Law (Part 31 (commencing with Section 60001) of Division 2) of the Revenue and Taxation Code, shall be apportioned among the counties, as follows:

(a) Each county shall be paid one thousand six hundred sixty-seven dollars (\$1,667) during each calendar month, which amount shall be expended exclusively for engineering costs and administrative expenses with

respect to county roads.

(b) A sum equal to the total of all reimbursable snow removal or snow grooming, or both, costs filed pursuant to subdivision (d) of Section 2152, or seven million dollars (\$7,000,000), whichever is less, shall be apportioned in 12 approximately equal monthly apportionments for snow removal or snow grooming, or both, on county roads, as provided in Section 2110.

(c) A sum equal to five hundred thousand dollars (\$500,000) shall be apportioned in 12 approximately equal monthly apportionments, as provided in Section 2110.5.

(d) (1) Seventy-five percent of the funds payable under this section shall be apportioned among the counties monthly in the respective proportions that the number of fee-paid and exempt vehicles which are registered in each county bears to the total number of fee-paid and exempt vehicles registered in the state.

(2) For purposes of apportionment under this subdivision, the Department of Motor Vehicles shall, as soon as possible after the last day of each calendar month, furnish to the Controller a verified statement showing the number of fee-paid and exempt vehicles which are registered in each county and in the state as of the last day of each calendar month as reflected by the records of the Department of Motor Vehicles.

(e) Of the remaining money payable, there shall be paid to each eligible county an amount that is computed monthly as follows: The number of miles of maintained county roads in each county shall be multiplied by sixty dollars (\$60); from the resultant amount, there shall be deducted the amount received by each county under subdivision (d) and the remainder, if any, shall be paid to each county.

(f) The remaining money payable, after the foregoing apportionments, shall be apportioned among the counties in the same proportion as the money referred to in subdivision (d).

(g) (1) Transfers of revenues from the Highway Users Tax Account to counties pursuant to this section collected during the months of March, April, May, June, and July of 2008, shall be made with the transfer of August 2008 revenues in September of 2008. This suspension shall not apply to a county with a population of less than 40,000.

(2) For the purpose of meeting the cash obligations associated with ongoing budgeted costs, a county may make use of any cash balance in its county road fund, including that resulting from the receipt of funds pursuant to the Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006 (Chapter 12.49 (commencing with Section 8879.20) of Division 1 of Title 2 of the Government Code (hereafter bond act)) for local streets and roads maintenance, during the period of this suspension, without the use of this cash being reflected as an expenditure of bond act funds, provided the cash is replaced once this suspension is repaid in September of 2008. Counties may accrue the revenue received in September 2008 as repayment of these suspensions for the months of April, May, and June of 2008 back to the 2007-08 fiscal year. Nothing in this paragraph shall change the fact that expenditures must be accrued and reflected from the appropriate funding sources for which the moneys were received and meet all the requirements of those funding sources.

(h) (1) The transfer of revenues from the Highway Users Tax Account to counties pursuant to this section that are collected during the months of January, February, and March 2009, shall be made with the transfer of April 2009 revenues in May 2009.

(2) For the purpose of meeting the cash obligations associated with ongoing budgeted costs, a county may make use of any cash balance in its county road fund, including that resulting from the receipt of funds pursuant to the Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006 (Chapter 12.49 (commencing with Section 8879.20) of Division 1 of Title 2 of the Government Code (bond act)) for local streets and roads maintenance during the period of this suspension, provided the cash is replaced once this suspension is repaid in May of 2009.

(3) This subdivision shall not affect any requirement that an expenditure is required to be accrued and reflected from the appropriate funding source for which the money was received and to meet all the requirements of its funding source.

**SEC. 39.** Section 2105 of the Streets and Highways Code is amended to read:

**2105.** Notwithstanding Section 13340 of the Government Code, in addition to the apportionments prescribed by Sections 2104, 2106, and 2107, from the revenues derived from a per gallon tax imposed pursuant to Section 7360 of the Revenue and Taxation Code, and a per gallon tax imposed pursuant to Sections 8651, 8651.5, and 8651.6 of the Revenue and Taxation Code, and a per gallon tax imposed pursuant to Sections 60050 and 60115 of the Revenue and Taxation Code, the following apportionments shall be made:

(a) A sum equal to 5.8 percent of the per gallon tax under Section 7360 of the Revenue and Taxation Code, 11.5 percent of any per gallon tax in excess of nine cents (\$0.09) per gallon under Sections 8651, 8651.5, and 8651.6 of the Revenue and Taxation Code, and 6.5 percent of the per gallon tax under Sections 60050 and 60115 of the Revenue and Taxation Code, shall be apportioned among the counties, including a city and county.

The amount of apportionment to each county, including a city and county, during a fiscal year shall be calculated as follows:

(1) One million dollars (\$1,000,000) for apportionment to all counties, including a city and county, in proportion to each county's receipts during the prior fiscal year under Sections 2104 and 2106.

(2) One million dollars (\$1,000,000) for apportionment to all counties, including a city and county, as follows:

(A) Seventy-five percent in the proportion that the number of fee-paid and exempt vehicles which are registered in the county bears to the number of fee-paid and exempt vehicles registered in the state.

(B) Twenty-five percent in the proportion that the number of miles of maintained county roads in the county bears to the miles of maintained county roads in the state.

(3) For each county, determine its factor which is the higher amount calculated pursuant to paragraph (1) or (2) divided by the sum of the higher amounts for all of the counties.

(4) The amount to be apportioned to each county is equal to its factor multiplied by the amount available for apportionment.

(b) A sum equal to 5.8 percent of the per gallon tax under Section 7360 of the Revenue and Taxation Code, 11.5 percent of any per gallon tax in excess of nine cents (\$0.09) per gallon under Sections 8651, 8651.5, and 8651.6 of the Revenue and Taxation Code, and 6.5 percent of the per gallon tax under Sections 60050 and 60115 of the Revenue and Taxation Code, shall be apportioned to cities, including a city and county, in the proportion that the total population of the city bears to the total population of all the cities in the state.

(c) (1) Transfers of revenues from the Highway Users Tax Account to counties or cities pursuant to this section collected during the months of March, April, May, June, and July of 2008, shall be made with the transfer of August 2008 revenues in September of 2008. This suspension shall not apply to a county with a population of less than 40,000.

(2) For the purpose of meeting the cash obligations associated with ongoing budgeted costs, a city or county may make use of any cash balance in the city account that is designated for the receipt of state funds allocated for local streets and roads or the county road fund, including that resulting from the receipt of funds pursuant to the Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006 (Chapter 12.49 (commencing with Section 8879.20) of Division 1 of Title 2 of the Government Code (hereafter bond act)) for local streets and roads maintenance, during the period of this suspension, without the use of this cash being reflected as an expenditure of bond act funds, provided the cash is replaced once this suspension is repaid in September of 2008. Counties and cities may accrue the revenue received in September 2008 as repayment of these suspensions for the months of April, May, and June of 2008 back to the 2007–08 fiscal year. Nothing in this paragraph shall change the fact that expenditures must be accrued and reflected from the appropriate funding sources for which the moneys were received and meet all the requirements of those funding sources.

(d) (1) The transfer of revenues from the Highway Users Tax Account to counties or cities pursuant to this section collected during the months of January, February, and March 2009 shall be made with the transfer of April 2009 revenues in May 2009.

(2) For the purpose of meeting the cash obligations associated with ongoing budgeted costs, a city or county may make use of any cash balance in the city account that is designated for the receipt of state funds allocated for local streets and roads or the county road fund, including that resulting from the receipt of funds pursuant to the Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006 (Chapter 12.49 (commencing with Section 8879.20) of Division 1 of Title 2 of the Government Code (bond act)) for local streets and roads maintenance, during the period of this suspension, and the use of this cash shall not be considered as an expenditure of bond act funds, if the cash is replaced when the payments that are suspended pursuant to this subdivision are repaid in May 2009.

(3) This subdivision shall not affect any requirement that an expenditure is required to be accrued and reflected from the appropriate funding source for which the money was received and to meet all the requirements of its funding source.

**SEC. 40.** Section 2106 of the Streets and Highways Code is amended to read:

**2106.** Notwithstanding Section 13340 of the Government Code, a sum equal to the net revenue derived from 5.3 percent of the per gallon tax under the Motor Vehicle Fuel License Tax Law (Part 2 (commencing with Section 7301) of Division 2 of the Revenue and Taxation Code) shall be apportioned monthly from the Highway Users Tax Account in the Transportation Tax Fund among the counties and cities as follows:

(a) Four hundred dollars (\$400) per month shall be apportioned to each city and city and county and eight hundred dollars (\$800) per month shall be apportioned to each county and city and county.

(b) On the last day of each month, the sum of six hundred thousand dollars (\$600,000) shall be transferred to the State Highway Account in the State Transportation Fund for the Active Transportation Program pursuant to Chapter 8 (commencing with Section 2380). For each month in the 2013–14 fiscal year that has passed prior to the enactment of the bill adding this sentence, six hundred thousand dollars (\$600,000) shall be immediately transferred from the Bicycle Transportation Account to the State Highway Account in the State Transportation Fund for the Active Transportation Program, less any amount already expended for that program from the Bicycle Transportation Account during the 2013–14 fiscal year.

(c) The balance shall be apportioned, as follows:

(1) A base sum shall be computed for each county by using the same proportions of fee-paid and exempt vehicles as are established for purposes of apportionment of funds under subdivision (d) of Section 2104.

(2) For each county, the percentage of the total assessed valuation of tangible property subject to local tax levies within the county which is represented by the assessed valuation of tangible property outside the incorporated cities of the county shall be applied to its base sum, and the resulting amount shall be apportioned to the county. The assessed valuation of taxable tangible property, for purposes of this computation, shall be that most recently used for countywide tax levies as reported to the Controller by the State Board of Equalization. If an incorporation or annexation is legally completed following the base sum computation, the new city's assessed valuation shall be deducted from the county's assessed valuation, the estimate of which may be provided by the State Board of Equalization.

(3) The difference between the base sum for each county and the amount apportioned to the county shall be apportioned to the cities of that county in the proportion that the population of each city bears to the total population of all the cities in the county. Populations used for determining apportionment of money under Section 2107 are to be used for purposes of this section.

(d) (1) Transfers of revenues from the Highway Users Tax Account to counties or cities pursuant to this section collected during the months of March, April, May, June, and July of 2008, shall be made with the transfer of August 2008 revenues in September of 2008. This suspension shall not apply to a county with a population of less than 40,000.

(2) For the purpose of meeting the cash obligations associated with ongoing budgeted costs, a city or county may make use of any cash balance in the city account that is designated for the receipt of state funds allocated for local streets and roads or the county road fund, including that resulting from the receipt of funds pursuant to the Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006 (Chapter 12.49 (commencing with Section 8879.20) of Division 1 of Title 2 of the Government Code (hereafter bond act)) for local streets and roads maintenance, during the period of this suspension, without the use of this cash being reflected as an expenditure of bond act funds, provided the cash is replaced once this suspension is repaid in September of 2008. Counties and cities may accrue the revenue received in September 2008 as repayment of these suspensions for the months of April, May, and June of 2008 back to the 2007-08 fiscal year. Nothing in this paragraph shall change the fact that expenditures must be accrued and reflected from the appropriate funding sources for which the moneys were received and meet all the requirements of those funding sources.

(e) (1) The transfer of revenues from the Highway Users Tax Account to counties or cities pursuant to this section collected during the months of January, February, and March 2009, shall be made with the transfer of April 2009 revenues in May 2009.

(2) For the purpose of meeting the cash obligations associated with ongoing budgeted costs, a city or county may make use of any cash balance in the city account that is designated for the receipt of state funds allocated for local streets and roads or the county road fund, including that resulting from the receipt of funds pursuant to the Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006 (Chapter 12.49 (commencing with Section 8879.20) of Division 1 of Title 2 of the Government Code (bond act)) for local streets and roads maintenance, during the period of this suspension, and the use of this cash shall not be considered as an expenditure of bond act funds, if the cash is replaced when the payments that are suspended pursuant to this subdivision are repaid in May 2009.

(3) This subdivision shall not affect any requirement that an expenditure is required to be accrued and reflected from the appropriate funding source for which the money was received and to meet all the requirements of its funding source.

**SEC. 41.** Section 2107 of the Streets and Highways Code is amended to read:

**2107.** (a) Notwithstanding Section 13340 of the Government Code, a sum equal to the net revenues derived from 7.3 percent of the per gallon tax under the Motor Vehicle Fuel License Tax Law (Part 2 (commencing with Section 7301) of Division 2), 2.59 cents (\$0.0259) under the Use Fuel Tax Law (Part 3 (commencing with Section 8601) of Division 2), and 11.5 percent under the Diesel Fuel Tax Law (Part 31 (commencing with Section 60001) of Division 2) of the Revenue and Taxation Code, shall be apportioned monthly to the cities and counties of this state from the Highway Users Tax Account in the Transportation Tax Fund as provided in this section.

(b) From the sum determined pursuant to subdivision (a), the Controller shall allocate annually to each city that has filed a report containing the information prescribed by subdivision (c) of Section 2152, and that had expenditures in excess of five thousand dollars (\$5,000) during the preceding fiscal year for snow removal, an amount equal to one-half of the amount of its expenditures for snow removal in excess of five thousand dollars (\$5,000) during that fiscal year.

(c) The balance of the sum determined pursuant to subdivision (a) from the Highway Users Tax Account shall be allocated to each city, including city and county, in the proportion that the total population of the city bears to the total population of all the cities in this state.

(d) (1) For the purpose of this section, except as otherwise provided in paragraph (2), the population in each city is the population determined for that city in the manner specified in Section 11005.3 of the Revenue and Taxation Code.

(2) Commencing with the ninth fiscal year of a city described in subdivision (a) of Section 11005.3 of the Revenue and Taxation Code, the sixth fiscal year of a city described in subdivision (b) of Section 11005.3 of the Revenue and Taxation Code, and the 61st month of the city described in subdivision (c) of Section 11005.3 of

the Revenue and Taxation Code, the population in each city is the actual population of that city, as defined in subdivision (e) of Section 11005.3 of the Revenue and Taxation Code.

(e) (1) Transfers of revenues from the Highway Users Tax Account to cities pursuant to this section collected during the months of March, April, May, June, and July of 2008, shall be made with the transfer of August 2008 revenues in September of 2008.

(2) For the purpose of meeting the cash obligations associated with ongoing budgeted costs, a city may make use of any cash balance in the city account that is designated for the receipt of state funds allocated for local streets and roads, including that resulting from the receipt of funds pursuant to the Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006 (Chapter 12.49 (commencing with Section 8879.20) of Division 1 of Title 2 of the Government Code (hereafter bond act)) for local streets and roads maintenance, during the period of this suspension, without the use of this cash being reflected as an expenditure of bond act funds, provided the cash is replaced once this suspension is repaid in September of 2008. Cities may accrue the revenue received in September 2008 as repayment of these suspensions for the months of April, May, and June of 2008 back to the 2007–08 fiscal year. Nothing in this paragraph shall change the fact that expenditures must be accrued and reflected from the appropriate funding sources for which the moneys were received and meet all the requirements of those funding sources.

(f) (1) A transfer of revenues from the Highway Users Tax Account to cities pursuant to this section collected during the months of January, February, and March 2009, shall be made with the transfer of April 2009 revenues in May 2009.

(2) For the purpose of meeting the cash obligations associated with ongoing budgeted costs, a city may make use of any cash balance in the city account that is designated for the receipt of state funds allocated for local streets and roads, including that resulting from the receipt of funds pursuant to the Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006 (Chapter 12.49 (commencing with Section 8879.20) of Division 1 of Title 2 of the Government Code (bond act)) for local streets and roads maintenance, during the period of this suspension, and the use of this cash shall not be reflected as an expenditure of bond act funds, if the cash is replaced once this suspension is repaid in May 2009.

(3) This subdivision shall not affect any requirement that an expenditure is required to be accrued and reflected from the appropriate funding sources for which the moneys were received and to meet all the requirements of those funding sources.

**SEC. 42.** Section 2192.4 is added to the Streets and Highways Code, to read:

**2192.4.** The Trade Corridor Enhancement Account is hereby created in the State Transportation Fund to receive funds from subdivision (b) of Section 60050 of the Revenue and Taxation Code, as adjusted. Funds in the account shall be available for expenditure upon appropriation by the Legislature for corridor-based freight projects nominated by local agencies and the state.

**SEC. 43.** The Legislature finds and declares all of the following:

(a) Californians know congestion. For decades, California has been home to five or six of the nation's most congested travel corridors, which are located in Los Angeles, the San Francisco-Oakland-San Jose Bay Area, the Inland Empire, San Diego, and increasingly, in the central valley. While congestion is a vexing challenge in a state that is home to nearly 40 million people and that adds nearly a half-million people each year, regions and localities are finding new ways to address congestion in highly traveled corridors by undertaking long-term, comprehensive, and multimodal approaches that seek to reduce congestion by expanding travel choices, improving the quality of life, and preserving the local community character within the corridor.

(b) Examples of this more comprehensive approach to improving congestion in highly traveled corridors include, but are not limited to, programs in the following regions:

(1) The North Coast Corridor improvements along Route 5 and the parallel rail corridor in the County of San Diego.

(2) The Route 91 and Metrolink rail corridor improvements in the County of Riverside.

(3) Emerging solutions for the Route 101 and Caltrain corridor connecting Silicon Valley with San Francisco.

(4) Multimodal approaches for the Route 101 and SMART rail corridor between the Counties of Marin and Sonoma.

(5) Comprehensive solutions for the Route 405 Corridor in the County of Los Angeles.

(c) The state recognizes the benefits to mobility, quality of life, and the environment through comprehensive, multimodal proposals that address mobility, community, and environmental challenges along highly traveled corridors. Therefore, the Solutions for Congested Corridors Program is being created to support collaborative and comprehensive proposals to address these challenges.

**SEC. 44.** Chapter 8.5 (commencing with Section 2390) is added to Division 3 of the Streets and Highways Code, to read:

**CHAPTER 8.5. Congested Corridors**

**2390.** The Solutions for Congested Corridors Program is hereby created.

**2391.** Pursuant to subdivision (b) of Section 11053 of the Revenue and Taxation Code, two hundred fifty million dollars (\$250,000,000) in the State Highway Account shall be available for appropriation to the Department of Transportation in each annual Budget Act for the Solutions for Congested Corridors Program. Funds made available for the program shall be allocated by the California Transportation Commission to projects designed to achieve a balanced set of transportation, environmental, and community access improvements within highly congested travel corridors throughout the state. Funding shall be available for projects that make specific performance improvements and are part of a comprehensive corridor plan designed to reduce congestion in highly traveled corridors by providing more transportation choices for residents, commuters, and visitors to the area of the corridor while preserving the character of the local community and creating opportunities for neighborhood enhancement projects. In order to mitigate increases in vehicle miles traveled, greenhouse gases, and air pollution, highway lane capacity-increasing projects funded by this program shall be limited to high-occupancy vehicle lanes, managed lanes as defined in Section 14106 of the Government Code, and other non-general purpose lane improvements primarily designed to improve safety for all modes of travel, such as auxiliary lanes, truck climbing lanes, or dedicated bicycle lanes. Project elements within the corridor plans may include improvements to state highways, local streets and roads, public transit facilities, bicycle and pedestrian facilities, and restoration or preservation work that protects critical local habitat or open space.

**2392.** A regional transportation planning agency or county transportation commission or authority responsible for preparing a regional transportation improvement plan under Section 14527 of the Government Code or the department may nominate projects for funding through the program that are consistent with the policy objectives of the program as set forth in this chapter. The commission shall allocate no more than one-half of the funds available each year to projects nominated exclusively by the department. Preference shall be given to corridor plans that demonstrate that the plans and the specific project improvements to be undertaken are the result of collaboration between the department and local or regional partners that reflect a comprehensive approach to addressing congestion and quality-of-life issues within the affected corridor through investment in transportation and related environmental solutions. Collaboration between the partners may be demonstrated by a project being jointly nominated by both the regional agency and the department.

**2393.** A project nomination shall include documentation regarding the quantitative and qualitative measures validating the project's consistency with the policy objectives of the program as set forth in this chapter. In addition to being included in a corridor plan, a nominated project shall also be included in the region's regional transportation plan. Projects within the boundaries of a metropolitan planning organization must be included in an adopted regional transportation plan that includes a sustainable communities strategy determined by the State Air Resources Board to achieve the region's greenhouse gas emissions reduction targets.

**2394.** The commission shall allocate program funds to projects after reviewing the corridor plans submitted by the regional agencies or the department and making a determination that a proposed project is consistent with the objectives of the corridor plan. In addition to making a consistency determination with respect to project nominations, the commission shall score the proposed projects on the following criteria:

(a) Safety.

(b) Congestion.

(c) Accessibility.

(d) Economic development and job creation and retention.

(e) Furtherance of state and federal ambient air standards and greenhouse gas emissions reduction standards pursuant to the California Global Warming Solutions Act of 2006 (Division 25.5 (commencing with Section 38550) of the Health and Safety Code) and Senate Bill 375 (Chapter 728 of the Statutes of 2008).

(f) Efficient land use.

(g) Matching funds.

(h) Project deliverability.

**2395.** The commission shall adopt an initial program of projects to be funded through the initial appropriation for the program. The initial program may cover a multiyear programming period. Subsequent programs of projects shall be adopted on a biennial basis consistent with available funds for the program, and may include updates to programs of projects previously adopted.

**2396.** The commission, in consultation with the State Air Resources Board, shall develop and adopt guidelines for the program consistent with the requirements of this chapter. Guidelines adopted by the commission shall be exempt from the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code). Prior to adopting the guidelines, the commission shall conduct at least one public hearing in northern California and one public hearing in southern California to review and provide an opportunity for public comment. The commission shall adopt the final guidelines no sooner than 30 days after the commission provides the proposed guidelines to the Joint Legislative Budget Committee and the transportation policy committees in the Senate and the Assembly.

**2397.** On or before March 1, 2019, and annually thereafter, the commission shall provide project update reports on the development and implementation of the program described in this chapter in its annual report to the Legislature prepared pursuant to Section 14535 of the Government Code. A copy of the report shall be provided to the Joint Legislative Budget Committee and the transportation policy committees of both houses of the Legislature. The report, at a minimum, shall include information on each project that received funding under the program, including, but not limited to, all of the following:

- (a) A summary describing the overall progress of the project since the initial award.
- (b) Expenditures to date for all project phase costs.
- (c) A summary of milestones achieved during the prior year and milestones expected to be reached in the coming year.
- (d) An assessment of how the project is meeting the quantitative and qualitative measurements identified in the project nomination, as outlined in Section 2393.

**SEC. 45.** Section 4000.15 is added to the Vehicle Code, to read:

**4000.15.** (a) Effective January 1, 2020, the department shall confirm, prior to the initial registration or the transfer of ownership and registration of a diesel-fueled vehicle with a gross vehicle weight rating of more than 14,000 pounds, that the vehicle is compliant with, or exempt from, applicable air pollution control technology requirements pursuant to Division 26 (commencing with Section 39000) of the Health and Safety Code and regulations of the State Air Resources Board adopted pursuant to that division.

(b) Except as otherwise provided in subdivision (c), for diesel-fueled vehicles subject to Section 43018 of the Health and Safety Code, as applied to the reduction of emissions of diesel particulate matter, oxides of nitrogen, and other criteria pollutants from in-use diesel-fueled vehicles, and Section 2025 of Title 13 of the California Code of Regulations as it read January 1, 2017, or as subsequently amended:

(1) The department shall refuse registration, or renewal or transfer of registration, for a diesel-fueled vehicle with a gross vehicle weight rating of 14,001 pounds to 26,000 pounds for the following vehicle model years:

- (A) Effective January 1, 2020, vehicle model years 2004 and older.
- (B) Effective January 1, 2021, vehicle model years 2007 and older.
- (C) Effective January 1, 2023, vehicle model years 2010 and older.

(2) The department shall refuse registration, or renewal or transfer of registration, for a diesel-fueled vehicle with a gross vehicle weight rating of more than 26,000 pounds for the following vehicle model years:

- (A) Effective January 1, 2020, vehicle model years 2000 and older.
- (B) Effective January 1, 2021, vehicle model years 2005 and older.
- (C) Effective January 1, 2022, vehicle model years 2007 and older.
- (D) Effective January 1, 2023, vehicle model years 2010 and older.

(c) (1) As determined by the State Air Resources Board, notwithstanding effective dates and vehicle model years identified in subdivision (b), the department may allow registration, or renewal or transfer of registration, for a diesel-fueled vehicle that has been reported to the State Air Resources Board, and is using an approved exemption, or is compliant with applicable air pollution control technology requirements pursuant to Division 26 (commencing with Section 39000) of the Health and Safety Code and regulations of the State Air Resources Board adopted pursuant to that division, including vehicles equipped with the required model year emissions equivalent engine or otherwise using an approved compliance option.

(2) The State Air Resources Board shall notify the department of the vehicles allowed to be registered pursuant to this subdivision.

**SEC. 46.** Section 4156 of the Vehicle Code is amended to read:

**4156.** (a) Notwithstanding any other provision of this code, and except as provided in subdivision (b), the department in its discretion may issue a temporary permit to operate a vehicle when a payment of fees has been accepted in an amount to be determined by, and paid to the department, by the owner or other person in lawful possession of the vehicle. The permit shall be subject to the terms and conditions, and shall be valid for the period of time, that the department shall deem appropriate under the circumstances.

(b) (1) The department shall not issue a temporary permit pursuant to subdivision (a) to operate a vehicle for which a certificate of compliance is required pursuant to Section 4000.3, and for which that certificate of compliance has not been issued, unless the department is presented with sufficient evidence, as determined by the department, that the vehicle has failed its most recent smog check inspection.

(2) Only one temporary permit may be issued pursuant to this subdivision to a vehicle owner in a two-year period.

(3) A temporary permit issued pursuant to paragraph (1) is valid for either 60 days after the expiration of the registration of the vehicle or 60 days after the date that vehicle is removed from nonoperation, whichever is applicable at the time that the temporary permit is issued.

(4) A temporary permit issued pursuant to paragraph (1) is subject to Section 9257.5.

(c) (1) The department may issue a temporary permit pursuant to subdivision (a) to operate a vehicle for which registration may be refused pursuant to Section 4000.15.

(2) Only one temporary permit may be issued pursuant to this subdivision for any vehicle, unless otherwise approved by the State Air Resources Board.

(3) A temporary permit issued pursuant to paragraph (1) is valid for either 90 days after the expiration of the registration of the vehicle or 90 days after the date that vehicle is removed from nonoperation, whichever is applicable at the time the temporary permit is issued.

(4) A temporary permit issued pursuant to paragraph (1) is subject to Section 9257.5.

**SEC. 47.** Section 9250.6 is added to the Vehicle Code, to read:

**9250.6.** (a) In addition to any other fees specified in this code, or the Revenue and Taxation Code, commencing July 1, 2020, a road improvement fee of one hundred dollars (\$100) shall be paid to the department for registration or renewal of registration of every zero-emission motor vehicle model year 2020 and later subject to registration under this code, except those motor vehicles that are expressly exempted under this code from payment of registration fees.

(b) On January 1, 2021, and every January 1 thereafter, the Department of Motor Vehicles shall adjust the road improvement fee imposed under subdivision (a) by increasing the fee in an amount equal to the increase in the California Consumer Price Index for the prior year, except the first adjustment shall cover the prior six months, as calculated by the Department of Finance, with amounts equal to or greater than fifty cents (\$0.50) rounded to the highest whole dollar. The incremental change shall be added to the associated fee rate for that year.

(c) Any changes to the road improvement fee imposed by subdivision (a) that are enacted by legislation subsequent to July 1, 2017, shall be deemed to be changes to the base fee rate for purposes of the California Consumer Price Index calculation and adjustment performed pursuant to subdivision (b).

(d) Revenues from the road improvement fee, after deduction of the department's administrative costs related to this section, shall be deposited in the Road Maintenance and Rehabilitation Account created pursuant to Section 2031 of the Streets and Highways Code.

(e) This section does not apply to a commercial motor vehicle subject to Section 9400.1.

(f) The road improvement fee required pursuant to this section does not apply to the initial registration after the purchase of a new zero-emission motor vehicle.

(g) For purposes of this section, "zero-emission motor vehicle" means a motor vehicle as described in subdivision (d) of Section 44258 of the Health and Safety Code, or any other motor vehicle that is able to operate on any fuel other than gasoline or diesel fuel.

**SEC. 48.** (a) On or before January 1, 2019, the Institute for Transportation Studies at the University of California, Davis is requested to prepare and submit to the Governor and the Legislature a report that makes recommendations on potential methodologies to raise revenue from zero-emission and low-emission vehicle owners to achieve the state's transportation electrification, clean air, and climate targets established under law while also ensuring those vehicle owners pay their fair share of any costs borne by motorists to fund improvements to the transportation system.

(b) The report shall examine all fees, taxes, and incentives for zero- and low-emission vehicles, and other vehicles, and shall make recommendations for options that ensure the purchase and ownership of zero- and low-emission vehicles are properly incentivized to assist in meeting state clean air and climate targets, while also ensuring appropriate levels of funding for roads and transportation.

(c) The study shall assess annual fees on zero-emission vehicles or other vehicles not otherwise subject to state fuel excise or use taxes and compare that to the average annual state fuel excise tax assessed on gasoline or diesel vehicles with equivalent fuel economy.

(d) The Institute shall consult with the State Air Resources Board, the Department of Transportation, the Department of Motor Vehicles, and the State Board of Equalization in preparing the report.

(e) This report shall be submitted in compliance with Section 9795 of the Government Code.

**SEC. 49.** Guidelines adopted to implement transportation programs in this act by the California Transportation Commission, the Department of Transportation, the Transportation Agency, or any other state agency shall be exempt from the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).

**SEC. 50.** This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts

constituting the necessity are:

In order to provide additional funding for road maintenance and rehabilitation purposes as quickly as possible, it is necessary for this act to take effect immediately.



# OPPORTUNITIES FOR SMALL AND DIVERSE BUSINESSES AT CALTRANS



Under SB 1, Caltrans will be increasing its outreach and training efforts aimed at helping small businesses make connections and learn how to navigate contracting with the State. These efforts include:

## ■ Prime Contractor and Subcontractor Training

Includes information regarding how to search for Caltrans' advertised contracts, bidding processes, Caltrans' construction contract standards, Caltrans' Small Business Programs, documenting work commitments to subcontractors, managing the performance of work, labor compliance, prompt payment requirements, substitution processes, reporting requirements, opportunities for networking with potential primes and subcontractors, and information about Caltrans resources for prime contractors and subcontractors.

## ■ Disadvantaged Business Enterprise (DBE) Certification Workshops

Includes information regarding federal eligibility requirements, the application process, document submittal requirements, on-site visit, and an overview of DBE program benefits.

## ■ "Meet the Primes" Events

Events bring together prime contractors/consultants and subcontractors/subconsultants for information sharing, questions and answers (Q&A), and networking. A panel of prime contractors/consultants provide testimonials to an audience of subcontractors/subconsultants about the type of work they typically pursue, and the manner in which they source subcontractors/subconsultants—what they look for, dos and don'ts, etc.

## ■ Procurement Fairs

Events provide a forum for small businesses to meet face-to-face with Caltrans buyers and/or contract managers from various functional areas. Attendees learn about the types of goods and services Caltrans procures, upcoming procurement opportunities, upcoming statewide contract opportunities, and requirements and procedures for doing business with Caltrans.

## ■ Pre-Bid/Pre-Proposal Meeting

Pre-bid (construction) and pre-proposal (professional services) meetings afford Caltrans an opportunity to communicate project information to prospective bidders and/or proposers prior to the bid/proposal due date. Meetings are contract-specific and open to all interested parties. Meetings include an overview of the project scope, schedule, and budget; presentations from subject matter experts relative to the solicitation method and submittal requirements; and information regarding contract goals and resources for sourcing certified Small Business (SB), Disabled Veteran Business Enterprise (DVBE), and DBE firms, if applicable. Networking is encouraged at the conclusion of the presentations.

## ■ "How To Do Business With Caltrans" Events

Includes information about how to search for Caltrans contracting and procurement opportunities, solicitation methods and processes, Caltrans' Small Business Programs, overview of Caltrans' web site, role of the District Small Business Liaison, and information about resources.

## ■ Calmentor

This program pairs established prime consultants, or mentors, with emerging subconsultants, or protégés, in a structured pairing relationship that lasts from 12-18 months. A steering committee, comprised of Caltrans staff and current and/or former Calmentor participants, reviews and approves applications for prospective mentors and protégés, as well as pairings. Pairings are documented in a formal memorandum of understanding, which includes details regarding performance metrics and program expectations.

For information on these events or other questions related to working with Caltrans, please contact the Office of Business and Economic Opportunity at (916) 324-0449 or send an email to [SmallBusinessAdvocate@dot.ca.gov](mailto:SmallBusinessAdvocate@dot.ca.gov).



**SB-103 Transportation.** (2017-2018)

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Date Published: 07/21/2017 09:00 PM

**Senate Bill No. 103**

**CHAPTER 95**

An act to amend Section 1861 of the Fish and Game Code, to add Sections 14105.6, 14110.1, 14110.2, 14110.3, and 14110.4 to the Government Code, to amend Section 3073.5 of the Labor Code, to amend Section 10140 of the Public Contract Code, and to amend Sections 800, 2038, 2192, and 2192.2 of, and to add Sections 800.5, 800.6, 800.7, 800.8, and 800.9 to, the Streets and Highways Code, relating to transportation, and making an appropriation therefor, to take effect immediately, bill related to the budget.

[ Approved by Governor July 21, 2017. Filed with Secretary of State July 21, 2017. ]

**LEGISLATIVE COUNSEL'S DIGEST**

SB 103, Committee on Budget and Fiscal Review. Transportation.

(1) Existing law creates the Department of Transportation within the Transportation Agency. The Road Repair and Accountability Act of 2017 creates the Independent Office of Audits and Investigations within the department, with specified powers and duties, and provides that the director of the office, known as the inspector general, is appointed by the Governor. The act requires the department to develop a plan by January 1, 2020, to increase by up to 100% the dollar value of contracts awarded to small businesses, disadvantaged business enterprises, and disabled veteran business enterprises.

Existing federal law implements the Disadvantaged Business Enterprise Program to foster equal opportunity for firms owned by disadvantaged individuals on United States Department of Transportation assisted contracts.

This bill would require the department to develop and submit to the Legislature and specified legislative caucuses, by January 1, 2019, a detailed outreach plan intended to increase procurement opportunities for new and limited contracting small business enterprises, as defined, including, but not limited to, those owned by women, minority, disabled veterans, LGBT, and other disadvantaged groups, in all the department's transportation programs, to undertake specified outreach activities required to be included in the plan, and to update that plan and submit it to specified entities. The bill would require the inspector general to review, audit, and report on the department's outreach efforts, and to audit contract-seeking businesses as appropriate to ensure that they do not subvert the purposes of these provisions.

This bill would require the department to achieve, at a minimum, 25% certified small business participation in state-funded contracts and procurements. The bill would require the department, beginning with the 2018-19 fiscal year, to take all lawful and reasonable steps to raise the disparity indices for contracts awarded under the federal Disadvantaged Business Enterprise Program to 100 for contracts and procurements subject to federal participation requirements, with particular emphasis on those minorities that exhibit substantial disparities with the indices, and to implement the recommendations from every disparity study undertaken by the department as part of that federal program, consistent with federal laws and regulations and a specified provision of the California Constitution. The bill would require the department to prepare a detailed plan that includes steps the department will take to ensure that it is in conformance with its policies to prevent discrimination or preferences in its employing practices or its practices in bidding and awarding public contracts to provide equal access to opportunities for all qualified applicants, and would require the department to report the plan to the Legislature and to report updates to the plan, as necessary. The bill would require the department to collect voluntarily reported data on groups of interest awarded public contracts by the department, including, but not limited to, women, minority, LGBT, and disabled veteran business enterprises, and to annually report that information and the percentages of entities receiving public contracts from the department, disaggregated by classifications, including, but not limited to, new and limited contracting small business enterprises, and women, minority, disabled veteran, and LGBT business enterprises, to the Legislature.

(2) Existing law requires the Chief of the Division of Apprenticeship Standards and the California Apprenticeship Council to report annually through the Director of Industrial Relations on the activities of the division and the council, and further requires that the report include specified information with respect to apprenticeship programs in this state.

This bill would require the report to include annual demographic data detailing the racial, ethnic, and gender makeup of participants in construction trade apprenticeship programs.

(3) Existing law requires the Department of Transportation to give public notice of a project by publication, as specified, but allows the department to comply with this requirement by publishing the notice on its Internet Web site.

This bill would require the department, if the department publishes the notice on its Internet Web site, to also publish information regarding notices listed on the department's Internet Web site in trade papers, newspapers, or magazines, as appropriate, including those whose primary audience consists of underrepresented groups, including, but not limited to, women, minorities, LGBT, and disabled veterans, as specified.

(4) The Road Repair and Accountability Act of 2017 requires \$5,000,000 of the funds made available by the act that are not restricted by Article XIX of the California Constitution to be appropriated each fiscal year to the California Workforce Development Board to assist local agencies to implement policies to promote preapprenticeship training programs to carry out specified projects funded by the Road Maintenance and Rehabilitation Account. The act requires the board to also establish a preapprenticeship development and training grant program, beginning January 1, 2019, and requires a grant recipient to, among other things, include plans relating to specified outreach activities.

This bill, as a condition of receiving a grant, would require grantees to collect demographic data from participants and to report this data to the board. The bill would require the board to provide technical assistance to grantees on the manner in which to collect this data, and to annually report demographic data to the Legislature, detailing the racial, ethnic, and gender makeup of participants in the grant programs and including demographic data on participation, completion, and placement.

(5) Existing law creates the Advance Mitigation Program to enhance communications between the Department of Transportation and stakeholders to, among other things, protect natural resources and accelerate project delivery. Existing law requires the department to set aside not less than \$30,000,000 annually for 4 years for the program from capital outlay revenues for purposes of the program.

This bill would create the Advance Mitigation Account in the State Transportation Fund as a revolving fund. The bill would require expenditures from the account to later be reimbursed from project funding available at the time a planned transportation project is constructed. The bill would continuously appropriate the moneys in the fund for the purposes of the Advance Mitigation Program and state that the Advance Mitigation Program is intended to become self-sustaining.

The bill would authorize the department to engage in various activities to implement the Advance Mitigation Program, including, among other things, purchasing, or funding the purchase of, credits from mitigation banks, conservation banks, or in-lieu fee programs approved by one or more regulatory agencies. The bill would also authorize the department to establish, or fund the establishment of, those types of activities if the department determines that those activities would provide appropriate mitigation of the anticipated potential impacts of planned transportation improvements, as defined. The bill would authorize the department to pay or fund the payment of mitigation fees for the department's or transportation agency's covered activities under natural community conservation plans approved by the Department of Fish and Wildlife under the Natural Community Conservation Planning Act.

The bill would authorize the department to use, or allow other transportation agencies to use, mitigation credits or values generated or obtained under the program to fulfill the mitigation requirements of planned transportation improvements if the applicable transportation agency reimburses the program for all costs of purchasing or creating the mitigation credits or values, as determined by the department. The bill would exclude high-speed rail projects or projects associated with or interacting with the high-speed rail program from the definition of "planned transportation improvement," thereby excluding those projects from participating in the Advance Mitigation Program. The bill would require the department to track all implemented advance mitigation projects to use as credits for environmental mitigation, and would require the department, and the Department of Fish and Wildlife to report to the Legislature on the Advance Mitigation Program.

(6) Existing law authorizes the Department of Fish and Wildlife to approve a regional conservation investment strategy, as defined, upon request of one or more state agencies, under specified circumstances. Existing law provides that the department shall not approve more than 8 regional conservation investment strategies under these provisions before January 1, 2020, and prohibits the department from approving a regional conservation investment strategy, or from entering into a mitigation credit agreement under these provisions, after that date.

This bill would repeal these restrictions on approving regional conservation investment strategies other than restricting the number of strategies approved to a maximum of 8.

(7) Existing law continues in existence the Trade Corridors Improvement Fund to fund trade corridor improvements consistent with various requirements. Existing law also creates the Trade Corridor Enhancement Account to receive funding from the Road Repair and Accountability Act of 2017 for corridor-based freight projects nominated by local agencies and the state.

This bill would delete these references to the Trade Corridors Improvement Fund, and instead revise and recast the requirements currently applicable to that fund and make them applicable to the Trade Corridor Enhancement Account. The bill would provide that certain federal funds apportioned to the state shall be expended consistent with these revised requirements. The bill would require the California Transportation Commission to allocate 60% of available funds to projects nominated by regional transportation agencies and other local agencies, with the remaining 40% of available funds to be allocated to projects nominated by the Department of Transportation. The bill would prohibit funding of projects that include the purchase of fully automated cargo handling equipment, as specified. The bill would require the California Transportation Commission to adopt guidelines for the purpose of administering these funds.

(8) This bill would declare that it is to take effect immediately as a bill providing for appropriations related to the Budget Bill.

Vote: majority Appropriation: yes Fiscal Committee: yes Local Program: no

## THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

**SECTION 1.** (a) The Legislature, in regard to Sections 3 to 9, inclusive, and Section 16 of this act, finds and declares all of the following:

(1) The maintenance and expansion of the transportation infrastructure of the state will benefit from developing and employing capable contractors who will be available in the coming years and decades to ensure the safety of California's infrastructure.

(2) The contracting laws and practices of the state, while intended to be easily satisfied by those with the skills to perform contract requirements, can discourage would-be contractors due to complexity and unfamiliarity, particularly diverse business enterprises.

(3) State agencies should increase outreach to, and technical assistance for, capable persons and businesses who may be interested in contracting opportunities related to California infrastructure, in order to include diverse business enterprises.

(4) Some of the barriers expressed by some contractors to accessing state contract bidding systems, including finding out which projects are available for bid and understanding the process for preparing a qualifying bid, discourage new contractors from entering into state contracts.

(5) In particular, the Legislature is concerned that these barriers may result in less than desirable levels of participation of women and minorities in the labor force in California.

(6) The difficulties presented by these initial barriers to new contractors could create a contractor base that does not represent the diversity of the state at large, does not include as many qualified contractors as would be optimal to reduce state costs and improve the quality of our roads, bridges, and other transportation infrastructure, and therefore could cost the state money, safety, and employment equity.

(b) It is therefore the intent of the Legislature, in regards to Sections 3 to 9, inclusive, and Section 16 of this act, to emphasize all of the following objectives:

(1) That women- and minority-owned businesses continue to have an equal opportunity to participate in contracts awarded by transportation agencies.

(2) That all persons, regardless of race, gender, or ethnicity, have an equal opportunity to learn of and participate in preapprenticeship programs leading to the skills necessary for work under contracts awarded by the department, and that preapprentices are encouraged to successfully complete those programs.

(3) That all persons, regardless of race, gender, or ethnicity, have an equal opportunity to learn of and participate in professional service contracts.

**SEC. 2.** Section 1861 of the Fish and Game Code is amended to read:

**1861.** The department shall approve no more than eight regional conservation investment strategies.

**SEC. 3.** Section 14105.6 is added to the Government Code, to read:

**14105.6.** (a) The department shall prepare a detailed plan that shall include steps the department will take to ensure that it is in conformance with its policies to prevent discrimination or preferences in its employing practices or its practices in bidding and awarding public contracts to provide equal access to opportunities for all qualified applicants, and shall report the plan to the Legislature and shall report updates to the plan, as necessary.

(b) All reports to the Legislature required by this section shall be submitted in conformance with Section 9795.

**SEC. 4.** Section 14110.1 is added to the Government Code, to read:

**14110.1.** (a) (1) The department shall develop and submit to the Legislature, by January 1, 2019, a detailed outreach plan intended to increase procurement opportunities for new and limited contracting small business enterprises, including, but not limited to, those owned by women, minority, disabled veterans, LGBT, and other

disadvantaged groups, in all the department's transportation programs, including, but not limited to, state road repairs, bridge repair and maintenance, trade corridors, congestion commute corridors, and local partnerships.

(2) The department shall update the outreach plan based on the outcome of any disparity study undertaken every three years as part of the federal Disadvantaged Business Enterprise Program (Part 26 of Title 49 of the Code of Federal Regulations).

(b) The department shall undertake all of the following outreach activities, which shall be included in the plan:

(1) Sponsor, fund, or partner with apprenticeship programs, including those engaged in specific efforts to increase participation in the transportation construction industry of all groups, including, but not limited to, women, minorities, LGBT, disabled veterans, disadvantaged youth, and formerly incarcerated individuals.

(2) Host, fund, or partner with organizations that host workshops, training classes, and other activities around the state focused on opportunities to contract with the department. Contracting opportunities discussed may include, but shall not be limited to, construction, communication, and consulting services in the areas of engineering, environmental, and surveying services.

(3) Sponsor meetings to introduce prime contractors to new and limited contracting small business enterprises, including, but not limited to, those owned by women, minority, disabled veterans, LGBT, and other disadvantaged groups.

(4) Sponsor opportunities, including, but not limited to, prebid meetings and the department's Calmentor program, to increase contacts between prime contractors and new and limited contracting small business enterprises, including, but not limited to, those owned by women, minority, disabled veterans, LGBT, and other disadvantaged groups.

(5) Partner with organizations representing persons and business enterprises from underrepresented groups, including, but not limited to, women, minority, disabled veterans, LGBT, and other disadvantaged groups, in a manner that will inform members of these organizations on opportunities to participate in transportation contracts.

(c) By January 1, 2019, the department shall submit the outreach plan prepared pursuant to paragraph (1) of subdivision (a), and each update thereafter, to the California Legislative Black Caucus, California Latino Legislative Caucus, California Asian Pacific Islander Legislative Caucus, California Legislative Lesbian, Gay, Bisexual, and Transgender Caucus, and California Legislative Women's Caucus.

(d) The department shall annually report to the Legislature, pursuant to Section 14110.2, the percentages of entities receiving public contracts from the department, disaggregated by classifications, including, but not limited to, new and limited contracting enterprises, and women, minority, disabled veteran, and LGBT business enterprises, and further disaggregated within each of these classifications by contract size categories, as determined by the department.

(e) All reports to the Legislature required by this section shall be submitted in conformance with Section 9795.

(f) The Inspector General of the Independent Office of Audits and Investigations shall review, audit, and report on the department's outreach efforts required by this section. In addition, the Inspector General shall audit businesses as appropriate to ensure that persons associated with entities that do not meet the definition of a new or limited contracting small business enterprise do not create a new associated entity that would meet the definition of a new or limited contracting small business enterprise and thereby subvert the purposes of this section.

(g) For purposes of this section, the following terms have the following meanings:

(1) "Limited contracting small business enterprise" means a certified small business, as defined in Section 14837, that has received fewer than five public contracts from the department in the previous two years or has received public contracts from the department totaling less than two hundred fifty thousand dollars (\$250,000) in the previous two years.

(2) "New small business enterprise" means a certified small business, as defined in Section 14837, that has not received a public contract from the department in the previous two years.

**SEC. 5.** Section 14110.2 is added to the Government Code, to read:

**14110.2.** (a) The department shall collect voluntarily reported data on groups of interest awarded public contracts by the department, including, but not limited to, women, minority, LGBT, and disabled veteran business enterprises.

(b) The department shall report the information collected pursuant to subdivision (a) annually to the Legislature in conformance with Section 9795.

**SEC. 6.** Section 14110.3 is added to the Government Code, to read:

**14110.3.** The department shall achieve, at a minimum, an overall rate of 25 percent certified small business participation in state-funded contracts and procurements. For purposes of this section, "small business" has the same meaning as set forth in Section 14837.

**SEC. 7.** Section 14110.4 is added to the Government Code, to read:

**14110.4.** (a) Beginning with the 2018–19 fiscal year, the department shall take all lawful and reasonable steps to raise the disparity indices for contracts awarded under the federal Disadvantaged Business Enterprise Program (Part 26 of Title 49 of the Code of Federal Regulations) to 100 for contracts and procurements subject to federal participation requirements, with particular emphasis on those minorities that exhibit substantial disparities with the indices, consistent with federal laws and regulations and subdivision (e) of Section 31 of Article I of the California Constitution.

(b) The department shall implement the recommendations from every disparity study undertaken as part of the federal Disadvantaged Business Enterprise Program (Part 26 of Title 49 of the Code of Federal Regulations), consistent with federal laws and regulations and subdivision (e) of Section 31 of Article I of the California Constitution.

**SEC. 8.** Section 3073.5 of the Labor Code is amended to read:

**3073.5.** The Chief of the Division of Apprenticeship Standards and the California Apprenticeship Council shall annually report through the Director of Industrial Relations to the Legislature and the public on the activities of the division and the council. The report shall contain information including, but not limited to, analyses of the following:

(a) (1) The number of individuals, including numbers of women and minorities, registered in apprenticeship programs in this state for the current year and in each of the previous five years.

(2) For construction trade apprenticeship programs, the report shall include demographic data detailing the racial, ethnic, and gender makeup of those participants for the annual reporting period.

(b) The number and percentage of apprentices, including numbers and percentages of minorities and women, registered in each apprenticeship program having five or more apprentices, and the percentage of those apprentices who have completed their programs successfully in the current year and in each of the previous five years.

(c) Remedial actions taken by the division to assist those apprenticeship programs having difficulty in achieving affirmative action goals or having very low completion rates.

(d) The number of disputed issues with respect to individual apprenticeship agreements submitted to the Administrator of Apprenticeship for determination and the number of those issues resolved by the council on appeal.

(e) The number of apprenticeship program applications received by the division, the number approved, the number denied and the reason for those denials, the number being reviewed, and deficiencies, if any, with respect to those program applications being reviewed.

(f) The number of apprenticeship programs, approved by the Division of Apprenticeship Standards, that are disapproved by the California Apprenticeship Council, and the reasons for those disapprovals.

**SEC. 9.** Section 10140 of the Public Contract Code is amended to read:

**10140.** (a) Public notice of a project shall be given by publication once a week for at least two consecutive weeks or once a week for more than two consecutive weeks if the longer period of advertising is deemed necessary by the department, as follows:

(1) In a newspaper of general circulation published in the county in which the project is located, or if located in more than one county, in such a newspaper in a county in which a major portion of the work is to be done.

(2) In a trade paper of general circulation published in San Francisco for projects located in County Group No. 1, as defined in Section 187 of the Streets and Highways Code, or in Los Angeles for projects located in County Group No. 2, as defined in Section 187 of the Streets and Highways Code, devoted primarily to the dissemination of contract and building news among contracting and building materials supply firms.

(b) The department may publish the notice to bidders for a project in additional trade papers or newspapers of general circulation that it deems advisable.

(c) (1) In the case of the Department of Transportation, instead of the public notice described in subdivision (a), the public notice requirement of this section may instead be met by publishing the public notice electronically on that department's Internet Web site.

(2) If the department exercises its authority under paragraph (1), the department shall also publish information regarding notices listed on the department's Internet Web site in trade papers, newspapers, or magazines, as appropriate in order to ensure all communities have access to the public notice, including those publications whose primary audience consists of underrepresented groups, including, but not limited to, women, minorities, LGBT, and disabled veterans, pursuant to the frequency requirements specified in subdivision (a).

**SEC. 10.** Section 800 of the Streets and Highways Code is amended to read:

**800.** (a) The Advance Mitigation Program is hereby created in the department to enhance communications between the department and stakeholders to protect natural resources through project mitigation, to meet or exceed applicable environmental requirements, to accelerate project delivery, and to mitigate, to the maximum extent required by law, environmental impacts from transportation infrastructure projects. The department shall consult on all activities pursuant to this article with the Department of Fish and Wildlife, including activities pursuant to Chapter 9 (commencing with Section 1850) of Division 2 of the Fish and Game Code.

(b) Commencing with the 2017–18 fiscal year, and for a period of four years, the department shall set aside no less than thirty million dollars (\$30,000,000) annually for the Advance Mitigation Program from the annual appropriations for the State Highway Operation and Protection Program and the State Transportation Improvement Program for the planning and implementation of projects in the Advance Mitigation Program. Mitigation credits or values generated or obtained with these funds may be used only for transportation improvements in the State Transportation Improvement Program or the State Highway Operation and Protection Program, and may be transferred to another agency, but only upon full reimbursement of the department pursuant to subdivision (b) of Section 800.6.

(c) Upon the order of the Director of Finance, the Controller shall transfer the amount identified for the Advance Mitigation Program in subdivision (b), as determined by the department and the Department of Finance, to the Advance Mitigation Account in the State Transportation Fund.

(d) The annual Budget Act and subsequent legislation may establish additional provisions and requirements for the program.

**SEC. 11.** Section 800.5 is added to the Streets and Highways Code, to read:

**800.5.** For purposes of this article, the following terms have the following meanings:

(a) "Acquire" and "acquisition" mean, with respect to land or a waterway, acquisition of fee title or purchase of a conservation easement that protects conservation and mitigation values on the land or waterway in perpetuity.

(b) "Administrative draft natural community conservation plan" means a substantially complete draft of a natural community conservation plan that is released after January 1, 2016, to the general public, plan participants, and the department.

(c) "Advance mitigation" means mitigation implemented before, and in anticipation of, environmental effects of planned transportation improvements.

(d) "Commission" means the California Transportation Commission.

(e) "Conservation easement" means a perpetual conservation easement that complies with Chapter 4 (commencing with Section 815) of Title 2 of Part 2 of Division 2 of the Civil Code.

(f) "Department" means the Department of Transportation.

(g) "Mitigation credit agreement" means a mitigation credit agreement pursuant to Chapter 9 (commencing with Section 1850) of Division 2 of the Fish and Game Code.

(h) "Natural Communities Conservation Plan" means a plan developed pursuant to Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game Code.

(i) "Planned transportation improvement" means a transportation project that a transportation agency has identified in a regional transportation plan, an interregional transportation plan, a capital improvement program, or other approved transportation planning document, excluding any project that is associated with or interacting with the high-speed rail program. A planned transportation improvement may include, but is not limited to, a transportation project that has been planned, programmed, proposed for approval, or that has been approved.

(j) "Program" means the Advance Mitigation Program implemented pursuant to this article.

(k) "Regional conservation investment strategy" means a regional conservation investment strategy approved by the Department of Fish and Wildlife pursuant to Chapter 9 (commencing with Section 1850) of Division 2 of the Fish and Game Code.

(l) "Regulatory agency" means a state or federal natural resource protection agency with regulatory authority over planned transportation improvements. A regulatory agency includes, but is not limited to, the Natural Resources Agency, the Department of Fish and Wildlife, California regional water quality control boards, the United States Fish and Wildlife Service, the National Marine Fisheries Service, the United States Environmental Protection Agency, and the United States Army Corps of Engineers.

(m) "Transportation agency" means the department, a metropolitan planning organization, a regional transportation planning agency, or another public agency that implements transportation improvements.

(n) "Transportation improvement" means a transportation capital improvement project.

**SEC. 12.** Section 800.6 is added to the Streets and Highways Code, to read:

**800.6.** (a) The funds in the Advance Mitigation Account created in Section 800.7 shall be used only to do the following:

(1) Purchase, or fund the purchase of, credits from mitigation banks, conservation banks, or in-lieu fee programs approved by one or more regulatory agencies. The department may also establish mitigation banks, conservation banks, or in-lieu fee programs, or fund the establishment of mitigation banks, conservation banks, or in-lieu fee programs, in accordance with applicable state and federal standards, if the department determines that those banks or in-lieu fee programs would provide appropriate mitigation of the anticipated potential impacts of planned transportation improvements identified pursuant to Section 800.8.

(2) Pay, or fund the payment of, mitigation fees or other costs or payments associated with coverage for the department's or other transportation agency's projects under natural community conservation plans approved pursuant to Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game Code, or habitat conservation plans approved in accordance with the federal Endangered Species Act. The department shall, upon commencement of a regional conservation investment strategy pursuant to paragraph (3), provide written notification thereof to the executive administrative officer of any administrative draft natural community conservation plan, approved natural community conservation plan, or approved regional federal habitat conservation plan that overlaps the proposed area of the regional conservation investment strategy.

(3) Prepare, or fund the preparation of, regional conservation assessments and regional conservation investment strategies. Where a regional conservation investment strategy has been approved by the Department of Fish and Wildlife, the department may do either of the following:

(A) Enter into, or fund the preparation of, mitigation credit agreements with the Department of Fish and Wildlife; purchase credits from an established mitigation credit agreement; or implement, or fund the implementation of, conservation actions and habitat enhancement actions as needed to generate mitigation credits pursuant to those mitigation credit agreements.

(B) Acquire, restore, manage, monitor, enhance, and preserve lands, waterways, aquatic resources, or fisheries, or fund the acquisition, restoration, management, monitoring, enhancement, and preservation of lands, waterways, aquatic resources, or fisheries that would measurably advance a conservation objective in the regional conservation investment strategy if the department concludes that the action or actions could conserve or create environmental values that are appropriate to mitigate the anticipated potential impacts of planned transportation improvements.

(4) Where the advance mitigation mechanisms in paragraphs (1) to (3), inclusive, are not practicable, the department may implement advance mitigation, or fund the implementation of advance mitigation, in accordance with a programmatic mitigation plan pursuant to Section 800.9. No more than 25 percent of the funds in the Advance Mitigation Account may be allocated for this purpose over a four-year period.

(b) The department may use, or allow other transportation agencies to use, mitigation credits or values generated or obtained under the program to fulfill the mitigation requirements of planned transportation improvements if the applicable transportation agency reimburses the program for all costs of purchasing or creating the mitigation credits or values, as determined by the department. Those costs shall be calculated using total cost accounting and shall include, as applicable, land acquisition or conservation easement costs, monitoring and enforcement costs, restoration costs, transaction costs, administrative costs, contingency costs, and land management, monitoring, and protection costs.

(c) The department shall track all implemented advance mitigation projects to use as credits for environmental mitigation.

(d) Projects or plans prepared pursuant to this section that overlap with any approved natural community conservation plan or approved regional federal habitat conservation plan, shall be consistent with that plan and shall include an explanation of whether and to what extent they are consistent with any overlapping state or federal recovery plan, or other state-approved or federal-approved conservation strategy.

(e) Mitigation credits created pursuant to this section may be used for covered activities under an approved natural community conservation plan only in accordance with the requirements of the plan. Individuals and entities eligible for coverage as a participating special entity under an approved natural community conservation plan may use mitigation credits created pursuant to this section only if the plan's implementing entity declines to extend coverage to the covered activity proposed by the eligible individual or entity.

(f) By July 1, 2019, and biennially thereafter, the department, pursuant to Section 9795 of the Government Code, and notwithstanding Section 10231.5 of the Government Code, shall submit to the Legislature a report that describes to what extent the Advance Mitigation Program has accelerated the delivery of transportation projects. At a minimum, the report shall include the following:

(1) An accounting of the Advance Mitigation Account funds.

(2) Identification of expected state and federal resource and regulatory agency mitigation requirements for transportation projects utilizing the Advance Mitigation Program.

(3) A discussion of the extent to which those requirements are satisfied using advance mitigation credits.

(4) The use of funds to prepare, or to fund the preparation of, regional conservation assessments and regional conservation investment strategies.

(5) Recommendations for maximizing the ability of the Advance Mitigation Program to satisfy state and federal mitigation requirements.

(g) By July 1, 2018, or one year after the initial Advance Mitigation Program investments have begun, whichever is earlier, and biennially thereafter, the Department of Fish and Wildlife shall, pursuant to Section 9795 of the Government Code, and notwithstanding Section 10231.5 of the Government Code, submit a report to the Legislature that describes the extent to which the Advance Mitigation Program has improved the quality and effectiveness of habitat mitigation provided by the department for transportation projects and makes related recommendations on how to maximize these attributes. The report shall also include recommendations on how to maximize the quality and effectiveness of habitat mitigation developed pursuant to the Advance Mitigation Program.

(h) Nothing in this article shall be construed to impose any restrictions or requirements on the department for activities that do not involve the utilization of Advance Mitigation Account funds. Nothing in this article shall be construed to require the department to use the Advance Mitigation Program.

(i) Prior to making any expenditure from the Advance Mitigation Account, the Director of Transportation shall make a determination and justification that the proposed expenditure is likely to accelerate project delivery of specific projects.

(j) Any state water or transportation infrastructure agency that requests approval of a regional conservation investment strategy pursuant to subdivision (a) of Section 1852 of the Fish and Game Code that may be used to facilitate mitigation for an infrastructure project shall not be subject to the limitation on the number of regional conservation investment strategies set in Section 1861 of the Fish and Game Code.

**SEC. 13.** Section 800.7 is added to the Streets and Highways Code, to read:

**800.7.** The Advance Mitigation Account is hereby created in the State Transportation Fund as a revolving fund. Notwithstanding Section 13340 of the Government Code, the account shall be continuously appropriated without regard to fiscal years for purposes of the Advance Mitigation Program. The activity of the account shall be reported to the commission. The program is intended to become self-sustaining. Expenditures from the account shall later be reimbursed from project funding available at the time a planned transportation project is constructed.

**SEC. 14.** Section 800.8 is added to the Streets and Highways Code, to read:

**800.8.** The program is intended to improve the efficiency and efficacy of mitigation only and is not intended to supplant the requirements of the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resource Code) or any other environmental law. The identification of planned transportation projects and of mitigation projects or measures for planned transportation projects under this article does not imply or require approval of those projects for purposes of the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resource Code) or any other environmental law.

**SEC. 15.** Section 800.9 is added to the Streets and Highways Code, to read:

**800.9.** The department, pursuant to this article and for the purpose of implementing the Advance Mitigation Program, may develop a programmatic mitigation plan pursuant to Section 169 of Title 23 of the United States Code to address the potential environmental impacts of future transportation projects for the purpose of required mitigation approved by federal, state, and local agencies. The programmatic mitigation plans shall include, to the maximum extent practicable, the information required for regional conservation investment strategies.

**SEC. 16.** Section 2038 of the Streets and Highways Code is amended to read:

**2038.** (a) The California Workforce Development Board shall develop guidelines for public agencies receiving Road Maintenance and Rehabilitation Account funds to participate in, invest in, or partner with, new or existing preapprenticeship training programs established pursuant to subdivision (e) of Section 14230 of the Unemployment Insurance Code. The department and local agencies that receive Road Maintenance and Rehabilitation Account funds pursuant to this chapter shall, not later than July 1, 2023, follow the guidelines set forth by the board. The board shall also establish a preapprenticeship development and training grant program, beginning January 1, 2019, pursuant to subdivision (e) of Section 14230 of the Unemployment Insurance Code. Local public agencies that receive Road Maintenance and Rehabilitation Account funds pursuant to this chapter are eligible to compete for such grants and may apply in partnership with other agencies and entities, including those with existing preapprenticeship programs. Successful grant applicants shall, to the extent feasible:

- (1) Follow the multicraft core curriculum implemented by the State Department of Education for its pilot project with the California Partnership Academies and by the California Workforce Development Board and local boards.
- (2) Include a plan for outreach to and retention of women participants in the preapprenticeship program to help increase the representation of women in the building and construction trades.
- (3) Include a plan for outreach to and retention of minority participants and underrepresented subgroups in the preapprenticeship program to help increase their representation in the building and construction trades.
- (4) Include a plan for outreach to and retention of disadvantaged youth participants in the preapprenticeship program to help increase their employment opportunities in the building and construction trades.

(5) Include a plan for outreach to individuals in the local labor market area and to formerly incarcerated individuals to provide pathways to employment and training.

(6) Coordinate with local state-approved apprenticeship programs, local building trade councils, and to the extent possible the California Conservation Corps and certified community conservation corps, so individuals who have completed these programs have a pathway to continued employment.

(b) As a condition of receiving a grant, grantees shall collect demographic data from participants and shall report this data to the California Workforce Development Board. The California Workforce Development Board shall provide technical assistance to grantees on the manner in which to collect this data. The California Workforce Development Board shall annually report this demographic data to the Legislature, detailing the racial, ethnic, and gender makeup of participants in the grant programs. This report shall include demographic data on participation, completion, and placement.

**SEC. 17.** Section 2192 of the Streets and Highways Code is amended to read:

**2192.** (a) The following revenues shall be allocated for infrastructure projects pursuant to this section:

(1) The revenues deposited in the Trade Corridors Enhancement Account pursuant to Section 2192.4, except for those revenues in the account that were appropriated by Senate Bill 132 of the 2017–18 Regular Session (Chapter 7 of the Statutes of 2017).

(2) An amount of federal funds equal to the amount of revenue apportioned to the state under Section 167 of Title 23 of the United States Code from the national highway freight programs, pursuant to the federal Fixing America's Surface Transportation Act ("FAST Act," Public Law 114-94).

(b) The funding described in subdivision (a) shall be available upon appropriation for allocation by the California Transportation Commission for infrastructure improvements in this state on federally designated Trade Corridors of National and Regional Significance, on the Primary Freight Network, and along other corridors that have a high volume of freight movement, as determined by the commission and as identified in the state freight plan developed pursuant to Section 13978.8 of the Government Code. Projects eligible for funding shall be included in an adopted regional transportation plan. Projects within the boundaries of a metropolitan planning organization shall be included in an adopted regional transportation plan that includes a sustainable communities strategy determined by the State Air Resources Board to achieve the region's greenhouse gas emissions reduction targets. In developing guidelines for implementing this section, the commission shall (1) apply the guiding principles, to the maximum extent practicable, in the California Sustainable Freight Action Plan released in July 2016 pursuant to Executive Order B-32-15, and (2) consult the state freight plan and the applicable port master plan.

(c) Eligible projects for these funds include, but are not limited to, all of the following:

(1) Highway improvements to more efficiently accommodate the movement of freight, particularly for ingress and egress to and from the state's land ports of entry, rail terminals, and seaports, including navigable inland waterways used to transport freight between seaports, land ports of entry, and airports, and to relieve traffic congestion along major trade or goods movement corridors.

(2) Freight rail system improvements to enhance the ability to move goods from seaports, land ports of entry, and airports to warehousing and distribution centers throughout California, including projects that separate rail lines from highway or local road traffic, improve freight rail mobility, and other projects that improve the safety, efficiency, and capacity of the rail freight system.

(3) Projects to enhance the capacity and efficiency of ports, except that funds available under this section shall not be allocated to a project that includes the purchase of fully automated cargo handling equipment. For the purposes of this paragraph, "fully automated" means equipment that is remotely operated or remotely monitored, with or without the exercise of human intervention or control. Nothing in this paragraph shall prohibit the use of funds available pursuant to this section for a project that includes the purchase of human-operated zero-emission equipment, human-operated near-zero-emission equipment, and infrastructure supporting that human-operated equipment. Furthermore, nothing in this section shall prohibit the purchase of devices that support that human-operated equipment, including equipment to evaluate the utilization and environmental benefits of that human-operated equipment.

(4) Truck corridor improvements, including dedicated truck facilities or truck toll facilities, including the mitigation of the emissions from trucks or these facilities.

(5) Border access improvements that enhance goods movement between California and Mexico and that maximize the state's ability to access funds made available to the state by federal law.

(6) Surface transportation, local road, and connector road improvements to effectively facilitate the movement of goods, particularly for ingress and egress to and from the state's land ports of entry, airports, and seaports, to relieve traffic congestion along major trade or goods movement corridors.

(d) Projects funded with revenues identified in paragraph (1) of subdivision (a) shall be consistent with Article XIX of the California Constitution.

(e) (1) In adopting the program of projects to be funded with funds described in subdivision (a), the commission shall evaluate the total potential economic and noneconomic benefits of the program of projects to California's

economy, environment, and public health. The evaluation shall specifically assess localized impacts in disadvantaged communities. The commission shall consult with the agencies identified in Executive Order B-32-15 and metropolitan planning organizations in order to utilize the appropriate models, techniques, and methods to develop the parameters for evaluating the program of projects. The commission shall allocate the funding from subdivision (a) for trade infrastructure improvements as follows:

(A) Sixty percent of the funds shall be available for projects nominated by regional transportation agencies and other public agencies, including counties, cities, and port authorities, in consultation with the department. The commission shall provide reasonable geographic targets for funding allocations without constraining what an agency may propose or what the commission may approve.

(B) Forty percent of the funds shall be available for projects nominated by the department, in consultation with regional transportation agencies.

(2) In adopting a program of projects pursuant to paragraph (1), the commission shall prioritize projects jointly nominated and jointly funded by the state and local agencies. In considering geographic balance for the overall program, the commission may adjust the corridor-based targets in subparagraph (A) of paragraph (1) to account for projects programmed pursuant to subparagraph (B) of paragraph (1).

(f) The commission shall adopt guidelines, including a transparent process to evaluate projects and to allocate the funding described in subdivision (a) for trade infrastructure improvements in a manner that (1) addresses the state's most urgent needs, (2) balances the demands of various land ports of entry, seaports, and airports, (3) places emphasis on projects that improve trade corridor mobility and safety while reducing emissions of diesel particulates, greenhouse gases, and other pollutants and reducing other negative community impacts, especially in disadvantaged communities, (4) makes a significant contribution to the state's economy, (5) recognizes the key role of the state in project identification, (6) supports integrating statewide goods movement priorities in a corridor approach, and (7) includes disadvantaged communities measures, as established by the California Environmental Protection Agency pursuant to Section 39711 of the Health and Safety Code, and other tools the commission determines, for evaluating benefits or costs for disadvantaged communities and low-income communities. Project nominations shall include either a quantitative or qualitative assessment of the benefits the project is expected to achieve relative to the evaluation criteria.

(g) In addition, the commission shall also consider the following factors when allocating these funds:

(1) "Velocity," which means the speed by which large cargo would travel from the land port of entry or seaport through the distribution system.

(2) "Throughput," which means the volume of cargo that would move from the land port of entry or seaport through the distribution system.

(3) "Reliability," which means a reasonably consistent and predictable amount of time for cargo to travel from one point to another on any given day or at any given time in California.

(4) "Congestion reduction," which means the reduction in recurrent daily hours of delay to be achieved.

(h) For purposes of this section, the following terms have the following meanings:

(1) "Disadvantaged communities" are those communities identified by the California Environmental Protection Agency pursuant to Section 39711 of the Health and Safety Code.

(2) "Low-income communities" are census tracts with median household incomes at or below 80 percent of the statewide median income or with median household incomes at or below the threshold designated as low income by the Department of Housing and Community Development's list of state income limits adopted pursuant to Section 50093 of the Health and Safety Code.

(i) It is the intent of the Legislature for the commission to adopt an initial program of projects utilizing the state and federal funds described in subdivision (a) for eligible projects as soon as practicable and no later than May 17, 2018.

**SEC. 18.** Section 2192.2 of the Streets and Highways Code is amended to read:

**2192.2.** The commission shall allocate funds made available by this chapter to projects that have identified and committed supplemental funding from appropriate local, federal, or private sources. The commission shall determine the appropriate amount of supplemental funding each project should have to be eligible for moneys from the fund based on a project-by-project review and an assessment of the project's benefit to the state and the program. The commission may give priority for funding to projects with higher levels of committed supplemental funding.

**SEC. 19.** The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

**SEC. 20.** This act is a bill providing for appropriations related to the Budget Bill within the meaning of subdivision (e) of Section 12 of Article IV of the California Constitution, has been identified as related to the budget in the Budget Bill, and shall take effect immediately.

# Small Business Outreach Plan & Implementation Report

Report to the Legislature  
2019



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For individuals with disabilities, this document is available in Braille, large print, audiocassette, or computer disc. It is also available in an alternative language. To obtain a copy in one of these formats, please email us at [smallbusinessadvocate@dot.ca.gov](mailto:smallbusinessadvocate@dot.ca.gov) or call (916) 324-0449, TTY: 711.

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## Executive Summary

Governor Brown signed Senate Bill (SB) 1 (Beall, Chapter 5, Statutes of 2017), the *Road Repair and Accountability Act of 2017*, into law on April 28, 2017, which invests \$54 billion over the next decade to improve and maintain California's transportation infrastructure and significantly expands the scope of opportunities available for small businesses to participate on Caltrans' contracts. On July 21, 2017, Governor Brown signed a budget trailer bill, SB 103 (Committee on Budget and Fiscal Review, Chapter 95, Statutes of 2017), which established additional provisions for various transportation programs.

SB 103 requires Caltrans to develop an outreach plan by January 1, 2019, to increase procurement opportunities for new and limited contracting small business enterprises owned by certain disadvantaged groups. Caltrans has prepared this Small Business Outreach Plan and Implementation Report in accordance with SB 103. Caltrans' Small Business Outreach Plan is organized into three parts:

- Part I: Small Business Outreach Plan
- Part II: Implementation of Related SB 103 Small Business Requirements
- Part III: Appendices

## Overview of Outreach Efforts

Caltrans' Small Business Outreach Plan (Part I) proposes a balance of new outreach strategies and approaches, as well as enhancements to existing efforts, that seek to build upon Caltrans' success at increasing the dollar value of contracts and procurements awarded to certified Small Business, Disabled Veteran Business Enterprise, and Disadvantaged Business Enterprise firms.

Caltrans has consistently exceeded the 25 percent Small Business participation goal and 3 percent Disabled Veteran Business Enterprise participation goal in state-funded contracts and procurements. Meanwhile, Caltrans has steadily increased Disadvantaged Business Enterprise participation in its Federal Highway Administration-assisted contracts relative to its overall annual goal of 17.6 percent for federal fiscal years 2019-2021. As a certifying agency for Disadvantaged Business Enterprises, Caltrans is committed to increasing the number of newly certified highway construction and related professional services Disadvantaged Business Enterprises by 100 percent in the 2019 calendar year.

Caltrans' Office of Business and Economic Opportunity will increase outreach efforts to connect with potential participants, use results from data driven targeted marketing campaigns, and convene a workgroup of key internal stakeholders to monitor progress, track outcomes, and meet participation goals. Caltrans will work diligently to implement the Small Business Outreach Plan in compliance with applicable laws, rules, and regulations through the following statutorily required activities:

- Improve partnerships with the Department of Industrial Relations, Division of Apprenticeship Standards, and the Federal Highway Administration by exploring opportunities for underrepresented individuals to participate in apprenticeship programs to increase participation in the transportation construction industry, as required by SB 103 Sec. 4, Government Code section 14110.1(b)(1).
- Improve partnerships with business assistance organizations, including, but not limited to, Caltrans' Disadvantaged Business Enterprise Supportive Services consultants, that host workshops, training classes, and other activities around the state focused on opportunities to contract with Caltrans, as required by SB 103 Sec. 4, Government Code section 14110.1(b)(2).
- Introduce new and limited contracting small business enterprises to prime contractors by organizing business matchmaking events and activities; contract-specific outreach events; and meetings with industry organizations, as required by SB 103 Sec. 4, Government Code section 14110.1(b)(3).
- Establish baseline metrics, collect and track contracting and procurement data, maintain district-specific contact lists, and inform new and limited contracting small business enterprises of upcoming opportunities to increasing contacts between these enterprises and prime contractors, as required by SB 103 Sec. 4, Government Code section 14110.1(b)(4).
- Expand opportunities for underrepresented groups to participate in Caltrans' statewide Small Business Council, Disadvantaged Business Enterprise Participation Committee, and other partnering activities to inform members of opportunities to participate in transportation contracts, as required by SB 103 Sec. 4, Government Code section 14110.1(b)(5).

The Implementation Report (Part II) describes the following activities required by SB 103 to monitor and increase procurement opportunities for new and limited contracting small business enterprises:

- Collecting and reporting voluntarily reported data on recipients of Caltrans' contract awards, as required by SB 103 Sec. 5, Government Code section 14110.2.
- Achieving a minimum of 25 percent certified Small Business participation in Caltrans' state-funded contracts and procurements, as required by SB 103 Sec. 6, Government Code section 14110.3.
- Taking steps to raise the disparity indices for Caltrans' contracts awarded under the federal Disadvantaged Business Enterprise program, as required by SB 103 Sec. 7, Government Code section 14110.4(a).
- Implementing recommendations from Caltrans' Disadvantaged Business Enterprise disparity studies, under SB 103 Sec. 7, Government Code section 14110.4(b).
- Publishing notices of Caltrans' contracting opportunities in publications whose primary audience consists of underrepresented groups, as required by SB 103 Sec. 9, Public Contract Code section 10140(c)(2).

Pursuant to SB 103 Sec. 4, Government Code section 14110.1(c), Caltrans will submit its Small Business Outreach Plan and Implementation Report, including any future updates, to the California Legislative Black Caucus; California Latino Legislative Caucus; California Asian Pacific Islander Legislative Caucus; California Legislative Lesbian, Gay, Bisexual, and Transgender Caucus; and the California Legislative Women's Caucus.

## Background

Governor Brown signed into law Senate Bill (SB) 1 (Beall, Chapter 5, Statutes of 2017), the *Road Repair and Accountability Act of 2017*, on April 28, 2017. SB 1 invests \$54 billion over the next decade to improve and maintain California's transportation infrastructure, which significantly expands the scope of opportunities available for small businesses to participate on Caltrans' contracts. SB 1 requires Caltrans to prepare a plan by January 1, 2020, to increase by up to 100 percent the dollar value of contracts and procurements awarded to certified Small Business, Disabled Veteran Business Enterprise, and Disadvantaged Business Enterprise firms.

SB 103 (Committee on Budget and Fiscal Review, Chapter 95, Statutes of 2017), a budget trailer bill for SB 1, signed on July 21, 2017, established additional provisions for various transportation programs, including a requirement for Caltrans to develop an outreach plan to increase procurement opportunities for new and limited contracting small business enterprises, including, but not limited to, those owned by women, minorities, disabled veterans, lesbian, gay, bisexual, and transgender (LGBT), and other disadvantaged groups, by January 1, 2019.

### Part I: Small Business Outreach Plan

Caltrans has prepared its Small Business Outreach Plan (Part I) in accordance with SB 103 Sec. 4, Government Code section 14110.1(a), which states, in part:

“The department shall develop and submit to the Legislature, by January 1, 2019, a detailed outreach plan intended to increase procurement opportunities for new and limited contracting small business enterprises, including, but not limited to, those owned by women, minority, disabled veterans, LGBT, and other disadvantaged groups, in all the department's transportation programs, including, but not limited to, state road repairs, bridge repair and maintenance, trade corridors, congestion commute corridors, and local partnerships.”

SB 103 Sec. 4, Government Code section 14110.1(b) specifies the types of outreach activities Caltrans shall undertake and include in its Small Business Outreach Plan. They are as follows:

- SB 103 Sec. 4, Government Code section 14110.1(b)(1): Use of apprenticeship programs to increase participation in the transportation construction industry.
- SB 103 Sec. 4, Government Code section 14110.1(b)(2): Partnering with organizations that host workshops, training classes, and other activities around the state focused on opportunities to contract with Caltrans.
- SB 103 Sec. 4, Government Code section 14110.1(b)(3): Introducing prime contractors to new and limited contracting small business enterprises.
- SB 103 Sec. 4, Government Code section 14110.1(b)(4): Increasing contacts between prime contractors and new and limited contracting small business enterprises.

- SB 103 Sec. 4, Government Code section 14110.1(b)(5): Partnering with organizations representing persons and business enterprises from underrepresented groups to inform members of opportunities to participate in transportation contracts.

## Part II: Implementation of Related SB 103 Small Business Requirements

Caltrans' Small Business Outreach Plan focuses on the activities specified in SB 103 Sec. 4, Government Code section 14110.1(b), as required. Additionally, Caltrans has incorporated into its plan supplemental information and references to related provisions and corresponding activities that may contribute to increasing procurement opportunities for new and limited contracting small business enterprises, including those owned by underrepresented individuals. These provisions are as follows:

- SB 103 Sec. 5, Government Code section 14110.2: Collecting and reporting voluntarily reported data on recipients of Caltrans contract awards.
- SB 103 Sec. 6, Government Code section 14110.3: Achieving a minimum of 25 percent certified Small Business participation in Caltrans' state-funded contracts and procurements.
- SB 103 Sec. 7, Government Code section 14110.4(a): Taking steps to raise the disparity indices for Caltrans' contracts awarded under the federal Disadvantaged Business Enterprise program.
- SB 103 Sec. 7, Government Code section 14110.4(b): Implementing recommendations from Caltrans' Disadvantaged Business Enterprise disparity studies.
- SB 103 Sec. 9, Public Contract Code section 10140(c)(2): Publishing notices of Caltrans' contracting opportunities in publications whose primary audience consists of underrepresented groups.

## Part I: Small Business Outreach Plan

### Outreach Plan Overview

Caltrans' Office of Business and Economic Opportunity, the organizational home of Caltrans' overarching Small Business Program, served as the primary author of Caltrans' Small Business Outreach Plan. The Office of Business and Economic Opportunity's mission, "Promote equal opportunity in Caltrans' programs, services, and activities," aligns closely with many SB 103 provisions, including efforts to create a more level-playing field for small businesses and underrepresented groups to participate in Caltrans' contracts and procurements.

The Office of Business and Economic Opportunity's proposed activities include a balance of new outreach strategies and approaches, as well as enhancements to existing efforts that seek to build upon Caltrans' success at increasing the dollar value of contracts and procurements awarded to certified Small Business, Disabled Veteran Business Enterprise, and Disadvantaged Business Enterprise firms over the past several years.

The Office of Business and Economic Opportunity will use data from state fiscal year 2017-2018 and/or federal fiscal year 2017, as shown in Table 1 below, as baselines for evaluating efforts to increase procurement opportunities.

*Table 1*

<b>Program</b>	<b>Overall Goal</b>	<b>Authority</b>	<b>Scope</b>	<b>Caltrans' Fiscal Year 2017-2018 Participation</b>
Small Business	25 percent	Government Code section 14110.3	Applies to state-funded contracts and procurements	28.5 percent
Disabled Veteran Business Enterprise	3 percent	Military and Veterans Code section 999.1	Applies to state-funded contracts and procurements	4.9 percent
Disadvantaged Business Enterprise	17.6 percent*	Title 49, Code of Federal Regulations, Part 26.45	Applies to contracts and procurements funded all, or in part, with United States Department of Transportation funds	12.1 percent**

*\*Effective October 1, 2018*

*\*\*Federal fiscal year 2017 Disadvantaged Business Enterprise participation*

The Office of Business and Economic Opportunity's proposed activities require the participation of key internal stakeholders, such as Caltrans' 12 district offices and other divisions engaged in project delivery-related functions, to effectively develop and implement plan components, monitor and report out on progress, and effect change based on outcomes. The Office of Business and Economic Opportunity will organize, implement, and chair a workgroup of key internal stakeholders to facilitate tracking and monitoring of plan components and outcomes. An overview of the proposed workgroup can be found in Appendix B.

Caltrans' Small Business Outreach Plan is organized into three parts:

- Part I: Small Business Outreach Plan
- Part II: Implementation of Related SB 103 Small Business Requirements
- Part III: Appendices

Part I includes the specific types of outreach activities required to be included in Caltrans' Small Business Outreach Plan pursuant to Government Code section 14110.1(a)-(b). Part II summarizes implementation activities required by SB 103 that may contribute to increasing procurement opportunities for new and limited contracting small business enterprises. Part III compiles supplemental information.

The Office of Business and Economic Opportunity will pursue the development of departmental policies relative to the use of small businesses, including new and limited contracting small business enterprises, to provide goods and services. One policy issue involves establishing a standard for training all Caltrans contracting and purchasing staff on how they can use small businesses to assist in meeting overall annual business participation goals. Another policy will establish a process to include the use of new and limited contracting small business enterprises on Caltrans' contracts and procurements to the maximum extent possible.

As Caltrans explores efforts to engage and assist new and limited contracting small business enterprises, including those owned by underrepresented individuals, Caltrans must be cognizant of existing law that prohibits State government agencies from considering race, sex, color, ethnicity, or national origin in public contracting. Proposition 209 potentially restricts the type and scope of activities that Caltrans could implement in certain situations to increase procurement opportunities for underrepresented businesses. As Caltrans implements its Small Business Outreach Plan, it will work diligently to craft programs, services, and activities that comply with applicable laws, rules, and regulations, including Proposition 209.

## [Overview of the Small Business, Disabled Veteran Business Enterprise, and Disadvantaged Business Enterprise Programs](#)

Caltrans has two main sources of funding: State funding and federal funding. Each funding source comes with its own provisions and restrictions regarding use of small businesses and minority-owned businesses. On the State side, Proposition 209 establishes limitations on

providing any preference based on race or gender; thus, existing State programs focus on small businesses and disabled veteran-owned businesses. On the federal side, however, Caltrans may institute a narrowly-tailored goal where disparities are known to exist for businesses that have historically faced disadvantages, including those owned by women and minorities. If a Caltrans contract or procurement is funded all, or in part, with United States Department of Transportation funds, the contract or procurement is considered “federalized” and, therefore, federal business participation requirements apply.

The State of California’s Small Business Program was established by Government Code section 14835-14847 with the intent to preserve a free market economy where a fair proportion of total contracts and purchases are awarded to certified small businesses. Government Code section 14835-14847 provides authority for state departments to offer a bid preference for certified Small Business bidders (and a corresponding bid preference for non-certified bidders who commit at least 25 percent of a contract to certified small businesses), as well as an option for state departments to contract directly with a certified Small Business or Disabled Veteran Business Enterprise for goods, services, and information technology valued between \$5,000.01 and \$249,999.99 (up to \$314,000 for public works contracts), also known as the Small Business/Disabled Veteran Business Enterprise Option. Two executive orders, D-37-01 and S-02-06, direct state departments to meet a 25 percent Small Business participation goal in state contracting. SB 103 includes a 25 percent Small Business participation requirement for state contracting that applies specifically to Caltrans.

<b>Small Business Participation Achieved by Caltrans</b>			
<b>Fiscal Year</b>	<b>Total Contract \$</b>	<b>Small Business \$</b>	<b>Small Business %</b>
17/18	\$1,785,183,219	\$509,017,424	28.51%
16/17	\$1,416,819,919	\$408,919,922	28.86%
15/16	\$1,129,015,763	\$519,879,000	46.05%
14/15	\$1,230,371,824	\$349,378,944	28.40%
13/14	\$1,074,833,768	\$303,566,873	28.24%

The State of California’s Disabled Veteran Business Enterprise program was established by Military and Veterans Code section 999-999.13 to recognize the sacrifices of Californians disabled during military service and address the needs of disabled veterans that are interested in starting their own businesses. Military and Veterans Code section 999-999.13 establishes a requirement for all state departments to meet a 3 percent Disabled Veteran Business Enterprise participation goal in state contracting; the 3 percent participation goal is also referenced in Public Contract Code section 10115 and Executive Order D-43-01. Military and Veterans Code section 999-999.13 provides authority for state departments to set Disabled Veteran Business Enterprise

contract goals on individual contracts as well as apply a Disabled Veteran Business Enterprise incentive to solicitations as a means of encouraging additional participation.

<b>Disabled Veteran Business Enterprise Participation Achieved by Caltrans</b>			
<b>Fiscal Year</b>	<b>Total Contract \$</b>	<b>Disabled Veteran Business Enterprise \$</b>	<b>Disabled Veteran Business Enterprise %</b>
17/18	\$1,785,183,219	\$87,857,147	4.92%
16/17	\$1,416,819,919	\$46,800,099	3.30%
15/16	\$1,129,015,763	\$57,190,818	5.07%
14/15	\$1,230,371,824	\$47,149,004	3.83%
13/14	\$1,074,833,768	\$40,695,746	3.79%

The Disadvantaged Business Enterprise program is a United States Department of Transportation program established under the authority of Title VI of the Civil Rights Act of 1964. Its objectives are to ensure nondiscrimination in the award and administration of United States Department of Transportation-assisted contracts, create a level playing field for Disadvantaged Business Enterprise firms to compete fairly for work, remove barriers to Disadvantaged Business Enterprise participation, and assist Disadvantaged Business Enterprise firms to compete successfully in the marketplace outside of the Disadvantaged Business Enterprise program. As a direct recipient of United States Department of Transportation funds, Caltrans is required to implement a Disadvantaged Business Enterprise program pursuant to Title 49 of the Code of Federal Regulations, Part 26. These regulations require Caltrans to calculate an overall annual Disadvantaged Business Enterprise participation goal for its Federal Highway Administration- and Federal Transit Administration-assisted contracts every three years, which must be based on demonstrable evidence of the relative availability of Disadvantaged Business Enterprises to perform Caltrans work. The process Caltrans follows to obtain this evidence is referred to as a disparity study. Caltrans obtains Disadvantaged Business Enterprise participation by employing a combination of race- and gender-conscious measures (i.e., setting individual Disadvantaged Business Enterprise goals on contracts with subcontracting opportunities) and race-neutral measures (i.e., measures that benefit all small businesses, including Disadvantaged Business Enterprises) in accordance with Title 49 of the Code of Federal Regulations, Part 26.

### Disadvantaged Business Enterprise Participation Achieved by Caltrans

Fiscal Year	Total Contract \$	Disadvantaged Business Enterprise \$	Disadvantaged Business Enterprise %
2017	\$2,067,672,953	\$249,731,945	12.08%
2016	\$2,487,833,457	\$327,195,499	13.15%
2015	\$2,155,775,962	\$268,285,823	12.44%
2014	\$1,561,153,730	\$185,567,694	11.89%
2013	\$1,854,546,001	\$197,584,914	10.65%

#### Caltrans' Office of Business and Economic Opportunity, Training and Outreach Branch

Within Caltrans' Office of Business and Economic Opportunity, the Training and Outreach Branch is primarily responsible for assisting small businesses, including businesses owned by underrepresented individuals, to help Caltrans meet its overall annual participation goals for the Small Business (25 percent), Disabled Veteran Business Enterprise (5 percent), and Disadvantaged Business Enterprise (17.6 percent) programs. This includes, but is not limited to, providing training and technical assistance to small businesses, organizing and/or participating in outreach events and activities, working collaboratively with Caltrans' contracting and purchasing staff to mitigate participation barriers and apply or enforce programmatic requirements, and tracking and reporting outcomes. These functions are inclusive of the mission-critical advocacy services Caltrans is required to implement pursuant to Government Code section 14846 (i.e., Small Business Advocate) and Military and Veterans Code section 999.12 (i.e., Disabled Veteran Business Enterprise Advocate). In addition, these functions contribute to "good faith" administration of Caltrans' federal Disadvantaged Business Enterprise program, as required by Title 49 of the Code of Federal Regulations, Part 26.

Over the past four federal fiscal years, the Training and Outreach Branch has more than tripled the number of training and outreach events in which it has participated. Refer to Table 2 below:

*Table 2*

Training and Outreach Branch Events	
Federal Fiscal Year	Event Count*
2018	72
2017	39
2016	31
2015	19

*\*Source: Disadvantaged Business Enterprise Annual Element Reports*

Sample events include:

- “Doing Business with Caltrans: Getting Started”: Is an introductory-style training that provides information and resources to businesses that are interested in learning about Caltrans’ contracting and procurement opportunities.
- Certification Workshops: Provides information to participants regarding eligibility requirements for Small Business, Disabled Veteran Business Enterprise, or Disadvantaged Business Enterprise certification, application processes, and benefits.
- Subcontractor Training: Covers relevant requirements and information to help prepare highway construction subcontractors to compete for work on Caltrans’ construction contracts.
- Pre-Proposal Conferences for Architectural and Engineering Contracts: Provides information and resources to prospective proposers and subconsultants to navigate contract-specific requirements, including how to source certified businesses to meet business participation goals, expectations for payments/utilization of listed subconsultants, and substitution procedures.
- Business Matchmaking Events: Participation typically consists of overseeing an informational resource table and interacting directly with attendees, participating in structured business matchmaking activities, or presenting information during breakout seminars/panels to educate audiences about Caltrans contracting opportunities.

The Training and Outreach Branch typically publicizes and markets events and activities in advance using a combination of methods, such as populating an online events calendar on the Office of Business and Economic Opportunity’s web site, developing and disseminating promotional flyers, posting on social media, sending direct mailings to prospective attendees, and leveraging partnerships with business assistance organizations to share information with members. In 2018, the Office of Business and Economic Opportunity purchased a subscription to Constant Contact, an e-mail marketing product that will provide enhanced tracking and analytics relative to communication efforts moving forward.

The Training and Outreach Branch’s efforts to identify target audiences for events and activities are informed by the purpose, scope, and location of the event or activity. For example, when organizing a certification workshop, staff canvasses lists of “potential” applicants for whom there exists relevant data about business size, scope, and/or ownership, and includes these businesses in mailings. For contract-specific outreach events, staff accesses directories of certified businesses—like Cal eProcure (for certified Small Business and Disabled Veteran Business Enterprise firms) and the California Unified Certification Program database (for certified Disadvantaged Business Enterprise firms)—and uses relevant coding, such as United Nations Standard Products and Services Codes, North American Industry Classification System codes, work category codes, and other identifiers, to include businesses whose primary activities suggest they may benefit from participating. Bidding histories and/or records may also inform

outreach, by providing information about businesses that expressed interest in a project and submitted a bid but were ultimately not selected.

Most of the events and activities in which the Training and Outreach Branch participates require participants to be physically present to receive information and resources. However, in 2018, the Office of Business and Economic Opportunity introduced a video teleconference option to facilitate participation in sparsely-populated regions and completed voice-over recordings of several training presentations for on-demand viewing on the Office of Business and Economic Opportunity's web site. The Office of Business and Economic Opportunity purchased equipment in 2018 that will streamline the process for supplementing traditional classroom activities with virtual learning opportunities (i.e., webinars) and, as a result, help Caltrans connect with a broader audience.

The Training and Outreach Branch employs a participant evaluation survey for its training presentations that is designed to assess the level of satisfaction relative to the scope of information provided. The Training and Outreach Branch has administered this survey in one of two ways: 1) electronically, in the days following the session, or 2) in hard-copy form during the session, prior to adjourning. There are pros and cons to both options. For example, electronic surveys afford respondents greater privacy and anonymity when answering questions, but the overall response rate is generally low; hard-copy surveys (distributed during sessions) result in a higher overall response rate, but there is less specificity in terms of feedback. Refer to Appendix A for a summary of survey results from the Training and Outreach Branch's fiscal year 2017-2018 training presentations.

The Training and Outreach Branch has also developed course-specific pre- and post-assessment instruments and hands-on exercises to measure the degree to which presentations and materials were successful in meeting their intended learning objectives. For example, an audience may be asked to complete a written assessment at the beginning of a session to evaluate knowledge in certain areas, and at the end of a session, complete the same or equivalent assessment to evaluate knowledge in the same areas. This approach provides a simple methodology for assessing growth, or regression, and attributing results to specific components of a specific session. Results can be used to inform the scope, structure, and delivery of future sessions.

The Training and Outreach Branch attempts to correlate participation in events with a positive outcome—such as submitting a new application for Small Business, Disabled Veteran Business Enterprise, or Disadvantaged Business Enterprise certification; submitting a bid for a contract; or receiving a contract—to assist in evaluating the effectiveness of services provided. This type of data mining necessitates cross-referencing paper and electronic records across multiple data sources and platforms, as well as ongoing follow-up with event participants long after an event has passed. However, this type of data mining has not been a standard practice for all events, and the bulk of the potential source data has not been mined. Moving forward, the Training and Outreach Branch will attempt to identify a viable and sustainable process for tracking participants' post-event actions as a measure of the relative success of a specific event.

The Training and Outreach Branch plans to augment existing curriculum for small businesses, which broadly encompassing requirements for doing business with Caltrans, with more concise, needs-based learning opportunities that target specific business concerns, such as how to search for and identify potential Caltrans contracting and procurement opportunities. Concepts under review include:

- “Talk to the Trainer” (working title): Consists of one-on-one appointments with Caltrans’ subject-matter experts to assist businesses in identifying opportunities based on their primary business activities.
- “Paving the Way to Contracting” (working title): A series of courses focused on various requirements and expectations for doing business with Caltrans. This concept expounds on many of the topics presented in the Office of Business and Economic Opportunity’s “Doing Business with Caltrans: Getting Started” presentation. Training needs will be assessed individually and include recommendations for specific courses.
- Walk-In Business Resource Center: Will be available in person at the Office of Business and Economic Opportunity’s office, 1823 14<sup>th</sup> Street, Sacramento, CA 95811, Monday through Friday, from 8:00 a.m. to 5:00 p.m. The resource center may include information about Caltrans’ upcoming contracting opportunities, informational handouts, access to a computer terminal with educational videos and tutorials, and provide opportunities to meet face-to-face with Caltrans subject-matter experts.

### Caltrans’ District Office Functions

Caltrans’ 12 district offices are an integral part of efforts to increase the participation of businesses owned by women, minorities, disabled veterans, LGBT, and other underrepresented groups on Caltrans’ contracts and procurements. Because each district office is responsible for a defined part of the state, district staff is inherently vested in local communities and actively cultivates relationships and partnerships with businesses, organizations, and agencies headquartered in the area and/or region.

Each district office designates at least one individual to serve as a District Small Business Liaison, who serves as the district’s primary point of contact for small business-related concerns. District Small Business Liaisons provide technical assistance, outreach, and advocacy services for businesses that are interested in working within their respective district. District Small Business Liaison activities include, but are not limited to:

- Educating internal and external stakeholders regarding Caltrans’ Small Business, Disabled Veteran Business Enterprise, and Disadvantaged Business Enterprise programs.

- Marketing Caltrans’ contracting and procurement opportunities to the small business community, including certified Small Business, Disabled Veteran Business Enterprise, and Disadvantaged Business Enterprise firms.
- Organizing and/or participating in events and activities for small businesses.
- Cultivating partnerships with business assistance organizations, industry groups, and other state and local government agencies.
- Tracking and reporting outreach activities and performance metrics.

District Small Business Liaisons develop and maintain various mailing lists for outreach purposes and work closely with district public information officers to coordinate marketing campaigns via social media. District Small Business Liaisons create flyers and other promotional materials for distribution to target audiences, as well as update district web sites with details of upcoming events and resources for small businesses.

District Small Business Liaisons independently plan and organize events and activities for small businesses or work in partnership with other district offices, Caltrans’ Office of Business and Economic Opportunity, or other public and private entities. District Small Business Liaisons assist with event tracking and follow-up to quantify outreach efforts and provide after-action reports to Caltrans’ Office of Business and Economic Opportunity, where applicable.

The following table (Table 3) breaks down the types of events in which Caltrans’ district staff participated during state fiscal year 2017-2018:

*Table 3*

<b>District Outreach Events and Activities: 2017-2018</b>	
<b>Description</b>	<b>Count</b>
Trainings/Workshops	30
Small Business/Disabled Veteran Business Enterprise/Disadvantaged Business Enterprise Certification Events	16
Business Assistance Organization Events	15
Pre-Bid/Pre-Proposal Meetings	14
Woman/Minority/Veteran Business Assistance Organization Events	12
Business Expos	12
Local Public Agency Events	8
Meet the Buyer/Meet the Prime	7
Procurement Fairs	7
U.S. Small Business Administration Events	7
Bonding/Financial Events	4
Calmentor Events	4
Construction Industry Events	3
Workforce Development Events	1
<b>Total</b>	<b>140</b>

The role of the District Small Business Liaisons is highly visible within a district; therefore, District Small Business Liaisons routinely field inquiries from small businesses and assist with dispute resolutions. District Small Business Liaisons also work collaboratively with district contract managers and buyers to identify opportunities for maximizing small business participation, such as using the Small Business/Disabled Veteran Business Enterprise Option to contract directly with a certified Small Business or Disabled Veteran Business Enterprise, unbundling larger contracts into smaller contracts, and actively searching directories of certified businesses to identify newly-certified and/or prospective businesses that may be able to provide goods or services.

District offices and their District Small Business Liaisons actively seek out partnerships with local and/or regional public agencies, business assistance organizations, institutions of higher education, technical assistance providers, and financial institutions to help small businesses learn about and compete for Caltrans' contracting opportunities.

Partnerships are typically initiated by introductions to other stakeholders at events and activities, referrals from other organizations and/or individuals, and/or by conducting online market research to identify potential resources. Most partnerships materialize for a specific purpose: organizing an event, exchanging bidders' lists, or sharing contracting opportunities with members or constituents; they evolve through pursuit of shared goals and objectives. Formal memoranda of understanding or partnership agreements are not typically employed.

Sample district partners include:

- California Capital Procurement Technical Assistance Center
- Northern California Procurement and Technical Assistance Center
- Butte College Small Business Development Center
- Sacramento Service Corps of Retired Executives
- Sacramento Public Agency Consortium
- Sacramento Employment Training Agency
- Valley Contractors Exchange
- Sacramento Metro Chamber of Commerce
- Sacramento Asian-Pacific Chamber of Commerce
- Sacramento Hispanic Chamber of Commerce
- Yuba-Sutter Chamber of Commerce
- Sacramento Municipal Utility District
- Associated General Contractors
- Disabled Veteran Business Alliance
- Society of American Military Engineers
- Construction Management Association of America
- City of Los Angeles
- United States Small Business Administration

- Ventura Service Corps of Retired Executives
- City National Bank
- East Los Angeles Small Business Development Center
- Department of General Services
- City of Compton Business Roundtable
- Los Angeles Area Chamber of Commerce
- Greater Conejo Valley Chamber of Commerce
- Los Angeles County Metropolitan Transportation Authority
- Small Business Development Centers
- Southwest Veterans' Business Resource Center
- San Bernardino County Transportation Authority
- Employment Development Department
- Orange County Hispanic Chamber of Commerce
- Orange County Black Chamber of Commerce

Caltrans' Office of Business and Economic Opportunity provides general guidance and direction to District Small Business Liaisons to facilitate consistency in the application and administration of program-specific requirements, strategic objectives, and goals. The Office of Business and Economic Opportunity's guidance for District Small Business Liaisons includes, but is not limited to:

- Hosting bimonthly teleconferences to share information and provide training on emerging issues.
- Maintaining a District Small Business Liaison resource center on the Office of Business and Economic Opportunity's intranet web site that includes relevant informational handouts, presentations, templates, reports, and links.
- Hosting an annual two-day District Small Business Liaison Training Symposium that includes curriculum aimed at increasing Small Business, Disabled Veteran Business Enterprise, and Disadvantaged Business Enterprise participation; guest speakers from various functional areas; and individual and group learning exercises.
- Services of two statewide liaisons who are available to answer questions and provide technical assistance.

### Efforts to Certify New Disadvantaged Business Enterprises

The Office of Business and Economic Opportunity's Certification Branch is committed to increasing the number of newly certified highway construction and related professional services Disadvantaged Business Enterprises by 100 percent in the 2019 calendar year. The Office of Business and Economic Opportunity's Certification Branch will use, as its baseline, 158, the number of Disadvantaged Business Enterprises certified in 2018. Progress toward meeting this target will be tracked monthly.

The Certification Branch's outreach efforts to connect with potential Disadvantaged Business Enterprises will include:

- Conducting outreach to certified State Minority Business Enterprise and State Women Business Enterprise firms that may qualify as Disadvantaged Business Enterprises.
- Contacting woman- and minority-owned firms identified in Caltrans' 2016 Federal Highway Administration Disparity Study to communicate the benefits of being certified as a Disadvantaged Business Enterprise.
- Noticing potential Disadvantaged Business Enterprises about appropriate websites that list opportunities to work on Caltrans contracts.
- Providing assistance to apply for Disadvantaged Business Enterprise certification.
- Following-up with Disadvantaged Business Enterprise certification workshop attendees to determine their interest in becoming certified and offer technical assistance.

Assistance with the Disadvantaged Business Enterprise application process includes availability of a walk-in resource center at the Office of Business and Economic Opportunity's office, at 1823 14<sup>th</sup> Street, Sacramento, CA 95811, where an applicant can meet face-to-face with a Disadvantaged Business Enterprise certification analyst Monday through Friday, 8:00 a.m. to 5:00 p.m. Certification information and resources are also available on Caltrans' internet web site, including links to a webinar regarding the Disadvantaged Business Enterprise application process. In addition, the Certification Branch will begin contacting Disadvantaged Business Enterprise certification workshop attendees within 30 days of a session to inquire about next steps and answer questions about the application process.

Disadvantaged Business Enterprise regulations require the Certification Branch to conduct on-site visits to the applicant firms. The Certification Branch will take this opportunity to discuss contracting opportunities on Caltrans' projects with applicants. In addition, the Certification Branch will identify and contact certified Disadvantaged Business Enterprises that have not been active on any Caltrans projects to determine the reasons. This information could drive system improvements and will be monitored to identify trends.

Targeted marketing campaigns will be data driven and results will be shared with outreach staff, including District Small Business Liaisons. Within five days of receipt of a new Disadvantaged Business Enterprise certification application, the Certification Branch will contact an applicant to determine how they learned about Disadvantaged Business Enterprise certification and the Disadvantaged Business Enterprise program. In addition, the Certification Branch will conduct outreach to other State agencies, including the Contractors State License Board, to raise awareness about Disadvantaged Business Enterprise certification and its benefits for newly licensed businesses. The Certification Branch will make available to District Small Business Liaisons a flyer promoting Disadvantaged Business Enterprise certification for distribution within their respective districts and/or regions.

The Office of Business and Economic Opportunity continuously promotes Disadvantaged Business Enterprise certification and associated benefits to Caltrans' statewide Small Business Council and at partnering meetings with business assistance organizations and industry groups. The Certification Branch will continue to partner with other California Unified Certification Program member agencies that also certify Disadvantaged Business Enterprises by promoting their outreach events on the California Unified Certification Program's website and Caltrans' online event calendar.

## New and Limited Contracting Small Businesses Enterprises

### Objectives

1. Establish baselines for new and limited contracting small business enterprises.
2. Collect and track contracting and procurement data, including the participation of new and limited contracting small business enterprises, to determine if outreach plan components are contributing to increased contracting and procurement opportunities for new and limited contracting small business enterprises.
3. Conduct outreach to new and limited contracting small business enterprises to inform them of upcoming contracting and procurement opportunities.

### Implementation

As part of establishing baselines for new and limited contracting small business enterprises, Caltrans has defined the terms "contract" and "procurement" using applicable California law, regulations, manuals, and guidance. Caltrans defines "contract" and "procurement" as follows:

Contract: A contract is a binding agreement with specific terms, enforceable by law, between two or more parties or entities in which there is a promise to do something in return for a valuable benefit known as consideration. A contract is a promise or set of promises that are legally enforceable and, if violated, allow the injured party access to legal remedies.

Procurement: A procurement provides for an item/commodity. Procurement is the act of obtaining or buying goods, services, or work from an external source that is vital to an organization, often via a tendering or competitive bidding process. This process is used to ensure the buyer receives goods, services, or work at the best possible price, when aspects such as quality, quantity, time, and location are compared.

SB 103 Sec. 4, Government Code section 14110.1(g)(1)(2) defines the following terms:

Limited contracting small business enterprise: A certified small business, as defined in Section 14837, that has received fewer than five public contracts from the department in the previous two years or has received public contracts from the department totaling less than two hundred fifty thousand dollars (\$250,000) in the previous two years.

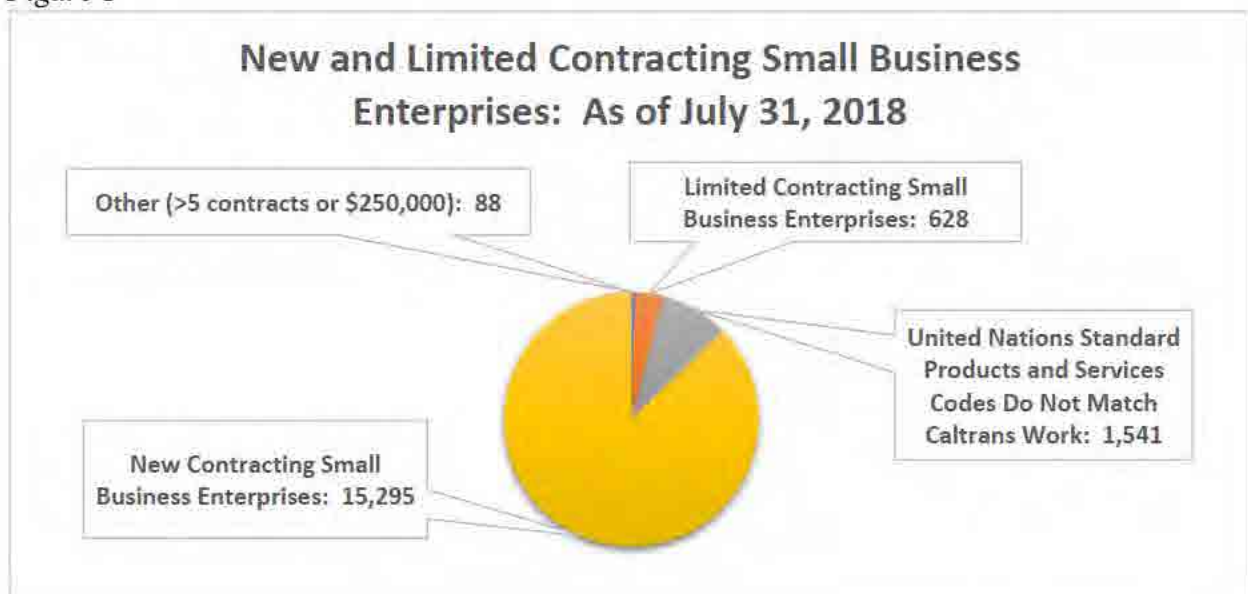
New small business enterprise: A certified small business, as defined in Section 14837, that has not received a public contract from the department in the previous two years.

By extensively researching all certified Small Business firms in the Department of General Services' Cal eProcure database, the Office of Business and Economic Opportunity has determined that there are 17,552 certified Small Business firms as of July 31, 2018. The breakdown of certified Small Business firms, according to SB 103's definitions for new and limited contracting small business enterprises, is as follows:

- 15,295 new contracting small businesses enterprises
- 628 limited contracting small businesses enterprises
- 88 certified Small Businesses with more than 5 contracts or \$250,000 worth of contracts (other)
- 1,541 certified Small Businesses who are not certified to do Caltrans' work based on assigned United Nations Standard Products and Services Codes

Figure 1 presents baselines for new and limited contracting small business enterprises in chart form.

*Figure 1*



Baselines for new and limited contracting small business enterprises were established using the following process:

1. The Office of Business and Economic Opportunity downloaded all certified Small Business firms in the Department of General Services' Cal eProcure database and cross-referenced listings with firms that received dollars from Caltrans in the previous two fiscal years using data from Caltrans' Division of Procurement and Contracts.
2. All certified Small Business firms are assigned one or more United Nations Standard Products and Services Codes as part of their certification profile. The United Nations Standard Products and Services Codes system is a classification of products and services that allowed the Office of Business and Economic Opportunity to identify businesses whose core activities are the most likely to seek contracts with Caltrans.
3. The Office of Business and Economic Opportunity cross-referenced both data sets to determine which firms qualified as new and limited contracting small business enterprises or others (i.e., a certified Small Business that received more than five contracts or greater than \$250,000 in contracts in the previous two years).
4. Some United Nations Standard Products and Services Codes were identified as classifications for which Caltrans does not have a business need. For example, United Nations Standard Products and Services Codes that classify businesses in industries such as agriculture, pets, and baking. Certified Small Business firms with those United Nations Standard Products and Services Codes were not included in establishing a baseline for new and limited contracting small business enterprises.
5. Data went through three levels of quality control to confirm accuracy.

The Office of Business and Economic Opportunity will collect and report on new and limited contracting small business enterprises data annually to the Legislature.

In addition to the Office of Business and Economic Opportunity's statewide new and limited contracting small business enterprises list, each Caltrans district will have a district-specific new and limited contracting small business enterprises list for tracking purposes and to conduct targeted outreach. District Small Business Liaisons will reach out to certified Small Business firms on their new and limited contracting small business enterprises list to inform them of contracting and procurement opportunities within their respective districts. District Small Business Liaisons will also provide training to district contract managers and buyers regarding use of the new and limited contracting small business enterprises list when contracting opportunities arise. District offices, as well as the Office of Business and Economic Opportunity, will track outreach efforts to certified Small Business firms on the new and limited contracting small business enterprises list and attempt to correlate outreach efforts with bid submittals and potential awards.

## Outreach Activities Required by Statute

The following sections of Part I of the report describe Caltrans' objectives and implementation strategies for the Small Business Outreach Plan elements, as required by Government Code sections 11410.1(b)(1) through 11410.1(b)(5).

### A. Apprenticeship Programs (*Government Code Section 11410.1(b)(1)*)

#### Requirement

SB 103 Sec. 4, Government Code section 14110.1(b)(1): Sponsor, fund, or partner with apprenticeship programs, including those engaged in specific efforts to increase participation in the transportation construction industry of all groups, including, but not limited to, women, minorities, LGBT, disabled veterans, disadvantaged youth, and formerly incarcerated individuals.

#### Objectives

1. Partner with the Department of Industrial Relations, Division of Apprenticeship Standards, to identify apprenticeship programs throughout the State with approved curricula.
2. Partner with the Federal Highway Administration to identify highway construction crafts in which there exists a shortage of qualified workers, based on annual reports of workforce data.
3. Pursue contractual agreements with apprenticeship programs approved by the Department of Industrial Relations, Division of Apprenticeship Standards, to provide opportunities for all groups, including underrepresented populations, to receive job-related training that leads to meaningful employment.

#### Implementation

The Federal Highway Administration allocates funds annually to Caltrans to implement an On-the-Job Training Supportive Services program. The On-the-Job Training Supportive Services program seeks to increase the employability of historically underrepresented individuals in the highway construction trades.

The Office of Business and Economic Opportunity researches trades in which federal-aid highway construction contractors report shortages of apprentices and/or trainees by analyzing annual workforce data reports. Using job forecasting data from the United States Department of Labor, Bureau of Labor Statistics, the Office of Business and Economic Opportunity identifies anticipated future employment opportunities for women, minorities, and other underrepresented or disadvantaged groups to determine which crafts to target for apprenticeship training programs.

The Office of Business and Economic Opportunity also analyzes the types of barriers that may preclude individuals from participating in the selected crafts and develops mitigation measures.

The Office of Business and Economic Opportunity confirms availability of apprenticeship programs for selected trades that are accredited by the Department of Industrial Relations, Division of Apprenticeship Standards, as required by the Federal Highway Administration. Once availability is confirmed, the Office of Business and Economic Opportunity completes vetting of potential apprenticeship programs and provides recommendations to the Federal Highway Administration for approval. Upon approval by the Federal Highway Administration, the Office of Business and Economic Opportunity pursues contractual agreements with apprenticeship programs. Once executed, the Office of Business and Economic Opportunity monitors participant progress and tracks the number of hours logged toward journeyman status.

Caltrans has contracted with the Field Ironworker Apprenticeship & Training Program to provide ironworker apprenticeship training for women, minorities, and other disadvantaged individuals. During the contract's 12-month term, the Field Ironworker Apprenticeship & Training Program will enroll 80 participants into a pre-apprenticeship training program to prepare them for ironworker apprenticeship program requirements and expectations. Upon graduation from the pre-apprenticeship training program, each graduate will proceed to the Field Ironworker Apprenticeship & Training Program's ironworker apprenticeship program and work in the construction trade, sponsored by either a local union or participating contractor. The Field Ironworker Apprenticeship & Training Program's first pre-apprenticeship class had 10 students, and upon graduation, all 10 graduates—now apprentices—worked on Caltrans contracts. Additional classes will be scheduled throughout the contract term to reach the target enrollment figure.

In the future, Caltrans plans to work with other highway construction crafts to provide apprenticeship opportunities for women, minorities, and other disadvantaged individuals. Success will be measured by the number of underrepresented individuals who sign up for apprenticeship programs, by the number of hours logged during the contract term, and by the number of contracts/projects on which participating apprentices worked during the contract term. The Office of Business and Economic Opportunity will monitor the outcome of the current program and make any necessary adjustments to ensure its future success.

## **B. Partnerships with Organizations (*Government Code Section 11410.1(b)(2)*)**

### Requirement

SB 103 Sec. 4, Government Code section 14110.1(b)(2): Host, fund, or partner with organizations that host workshops, training classes, and other activities around the state focused on opportunities to contract with the department. Contracting opportunities discussed may

include, but shall not be limited to, construction, communication, and consulting services in the areas of engineering, environmental, and surveying services.

### Objectives

1. Establish a business development program for certified Disadvantaged Business Enterprises pursuant to Appendix C of Title 49 of the Code of Federal Regulations, Part 26.
2. Increase the number of bids/proposals submitted by certified Disadvantaged Business Enterprises for work on Caltrans contracts.
3. Increase the number of Disadvantaged Business Enterprises listed on Caltrans contracts.

### Implementation

The Federal Highway Administration allocates funding annually to Caltrans for the provision of Disadvantaged Business Enterprise Supportive Services to certified and potential Disadvantaged Business Enterprises at no-cost to participants. Services are made available on a contract basis and include: training, technical assistance, and assistance in preparing and/or updating business plans. Disadvantaged Business Enterprise Supportive Services funds support the delivery of services and activities that are consistent with SB 103, relative to increasing Disadvantaged Business Enterprise participation only. The use of Disadvantaged Business Enterprise Supportive Services funding to assist certified Small Business and Disabled Veteran Business Enterprise firms, as well as other underrepresented businesses that are not also certified as Disadvantaged Business Enterprises or considered potential Disadvantaged Business Enterprises, is not permissible under federal regulation. A “potential Disadvantaged Business Enterprise” is defined as a minority- or woman-owned business that meets revenue requirements described in Title 49 of the Code of Federal Regulations, Part 26.65.

Caltrans offers Disadvantaged Business Enterprise Supportive Services to certified and potential Disadvantaged Business Enterprises on a contract basis. The following contracts are currently in place to provide Disadvantaged Business Enterprise Supportive Services statewide:

- Caltrans has contracted with Humboldt State University, Sponsored Programs Foundation, to provide services in the Northern Region (Districts 1, 2, 3, and 4).
- Caltrans has contracted with California State University, Fresno Foundation, to provide services in the Central Region (Districts 5, 6, 9, and 10).
- Caltrans has contracted with the MiraCosta Community College District to provide services in the Southern Region (Districts 7, 8, 11, and 12).

Each agreement has contract-specific performance metrics for the number of Disadvantaged Business Enterprises to be enrolled, for the number of business plans to be created and/or updated, for the number of participating Disadvantaged Business Enterprises that submit bids for

Caltrans contracts, and for the number of workshops to be held to educate potential Disadvantaged Business Enterprises about certification eligibility requirements. All three contracts expire in June 2019, but they can be extended if funding is approved. In 2018, Caltrans adopted a “pay-for-performance” model for its Disadvantaged Business Enterprise Supportive Services contracts, which is expected to result in quantifiable increases in the number of certified Disadvantaged Business Enterprises competing for and working on Caltrans contracts. Caltrans’ “pay for performance” model stipulates that Disadvantaged Business Enterprise Supportive Services providers will only receive payment for training and technical assistance services rendered by meeting specific performance metrics included in contract terms. The more effective the services, the more the Disadvantaged Business Enterprise Supportive Services provider is paid, up to the stated value for each performance metric that is included in each contract. Caltrans meets weekly with each Disadvantaged Business Enterprise Supportive Services provider and receives monthly progress reports to monitor progress and verify reimbursement claims.

### C. Increase Contacts Between Prime Contractors and New and Limited Contracting Small Business Enterprises (*Government Code Sections 11410.1(b)(3) & 11410.1(b)(4)*)

#### Requirements

SB 103 Sec. 4, Government Code section 14110.1(b)(3): Sponsor meetings to introduce prime contractors to new and limited contracting small business enterprises, including, but not limited to, those owned by women, minority, disabled veterans, LGBT, and other disadvantaged groups.

SB 103 Sec. 4, Government Code section 14110.1(b)(4): Sponsor opportunities, including, but not limited to, prebid meetings and the department’s Calmentor program, to increase contacts between prime contractors and new and limited contracting small business enterprises, including, but not limited to, those owned by women, minority, disabled veterans, LGBT, and other disadvantaged groups.

#### Objectives

1. Host “Meet the Primes” events to facilitate opportunities for new and limited contracting small business enterprises to meet with prime contractors.
2. Arrange for prime contractor representatives to participate as guest speakers during training presentations for small businesses.
3. Partner with industry organizations to organize business matchmaking events.
4. Establish and/or update criteria for hosting pre-bid meetings for Caltrans contracts and provide training to contracting and purchasing staff.
5. Develop and implement a marketing campaign to recruit additional mentors to participate in the Calmentor program.

## Implementation

Caltrans' Office of Business and Economic Opportunity hosted a pair of "Meet the Primes" events in 2016 and 2017 to facilitate exchanges between prime contractors and small businesses. Each event featured a panel of several established prime contractors that educated participating small businesses about the components of a successful bid, the type of work they typically subcontract out, and the resources they make available to assist small businesses to compete for work. The events also included a round table question and answer session, facilitated by Office of Business and Economic Opportunity staff, and allowed time for participants to meet one-on-one to exchange line cards and statements of qualification. Each event was well-attended, but the Office of Business and Economic Opportunity could not quantify the degree to which the events increased contracting opportunities for participating small businesses. In addition, one prime contractor lamented that the attendees were not representative of the type of work they typically make available for subcontracting. Caltrans will continue hosting these events in 2019, placing greater emphasis on targeted marketing to ensure participation of relevant businesses, and capture data from participants to determine whether they went on to submit bids for and/or work on Caltrans contracts as a means of validating success.

Caltrans maintains a robust training and outreach schedule that includes events and activities throughout the State. The traditional model is for Caltrans staff to present information and answer audience questions, but Caltrans will explore opportunities to invite prime contractors to participate as guest speakers to provide important context for industry-specific applications of key concepts. This value-added feature increases contacts between prime contractors and small businesses and serves as a form of mentoring. Caltrans will develop prompts and instructions for participating prime contractors, as well as solicit questions from advance registrants, to inform the scope of information included in presentations and tailor the material for the intended audience. In addition, Caltrans will set aside time during each training session for business matchmaking appointments for participating small businesses.

Caltrans recognizes the importance of relationship-building in making business decisions, especially those involving contractual arrangements with new and limited contracting small business enterprises. Caltrans intends to foster new relationships by creating opportunities for small businesses to meet face-to-face with prime contractors to review qualifications, exchange information, and discuss potential contracting opportunities, requirements, and expectations. These activities streamline the introduction process, expedite vetting, and can help mitigate potential concerns about working with new contractors. In addition, Caltrans will continue to communicate with prime contractors—during partnering meetings with industry groups, during prime contractor training sessions, and during outreach events—to emphasize the critical role they play in helping Caltrans to create a more diverse contractor base and increase the participation of new and limited contracting small business enterprises.

One of the barriers to growing the Calmentor program involves recruiting mentors. Caltrans has not been successful in recruiting enough mentors to participate in the Calmentor program, and, as

a result, there are protégés who may be placed on a waiting list to be paired with a suitable mentor. A more creative approach to marketing Calmentor that highlights potential benefits for prospective mentors—personal, programmatic, industry-specific—may attract new participants, and therefore, expand opportunities for small businesses to participate. Accordingly, Caltrans will develop a campaign for ongoing recruitment of mentors to participate in its Calmentor program. The campaign will include, but not be limited to, promotional flyers and other marketing materials, a video that incorporates testimonials from participating mentors and protégés who have graduated from the program, and orientation-style events for mentors to be held throughout the state.

Caltrans' existing guidance for hosting pre-bid meetings—a pre-bid manual—provides general criteria for staff to consider when evaluating opportunities for hosting pre-bid meetings, but there is no established performance target (i.e., number of pre-bid meetings per year by division and/or district) for monitoring purposes. Therefore, some districts do not currently host pre-bid meetings as a matter of practice; those that do may not follow a standard format. Caltrans plans to revise its guidance to include greater specificity, where applicable, and adopt a more performance-based approach for pre-bid meetings to maximize opportunities and benefits for small businesses. Caltrans will provide training to its contract managers and buyers regarding procedures for hosting pre-bid meetings, including how to effectively conduct outreach to new and limited contracting small business enterprises to increase their participation in these activities.

#### D. Sponsor Events to Increase Contracting Opportunities (*Government Code Section 11410.1(b)(5)*)

##### Requirement

SB 103 Sec. 4, Government Code section 14110.1(b)(5): Partner with organizations representing persons and business enterprises from underrepresented groups, including, but not limited to, women, minority, disabled veterans, LGBT, and other disadvantaged groups, in a manner that will inform members of these organizations on opportunities to participate in transportation contracts.

##### Objectives

1. Meet with organizations representing businesses from underrepresented groups by continuing to host statewide and regional small business council meetings.
2. Meet with local, regional, state, and/or national business assistance organizations representing businesses from underrepresented groups.
3. Meet with construction and professional services industry organizations to effectively engage member businesses.
4. Participate in workgroups whose primary objective is to increase small business participation.

## Implementation

Caltrans' statewide Small Business Council is an external advisory committee comprised of a diverse group of individuals and business owners representing multicultural, multi-ethnic trade associations; chambers of commerce; and other business assistance organizations. As of September 2018, the following organizations are represented on Caltrans' statewide Small Business Council:

- American Council of Engineering Companies - California
- American Indian Chamber of Commerce of California
- American Public Works Association
- Asian American Architects and Engineers, Southern California
- Asian American Architects and Engineers Association
- Asian Business Community Development, Inc.
- California Asian Pacific Chamber of Commerce
- California Black Chamber of Commerce
- California Chinese American Construction Professionals, Inc.
- California Community Connection Corporation
- United States Veterans Business Alliance
- Elite Service-Disabled Veteran-Owned Business Network
- Fresno Chamber of Commerce
- Fresno Metro Black Chamber of Commerce
- La Raza Roundtable de California
- Latin Business Association
- Mexican American Business and Professional Association
- National Association of Minority Contractors, Northern California Chapter
- San Francisco African American Chamber of Commerce
- San Francisco Bay Area Small Business Council
- San Joaquin County Hispanic Chamber of Commerce
- Society of Hispanic Professional Engineers, Los Angeles Chapter
- Southern California Black Chamber of Commerce
- Women Construction Coalition
- Women Construction Owners and Executives, California Chapter
- Women Construction Owners and Executives, United States of America

The purpose of Caltrans' statewide Small Business Council is to encourage small business participation on Caltrans' contracts and provide a forum to obtain feedback about Caltrans' policies and procedures that impact small business utilization. The statewide Small Business Council strives to identify and remove systemic barriers through advocating for policy-level initiatives and directives, thereby assisting Caltrans in maximizing opportunities for small business participation.

Each year, from September to November, the statewide Small Business Council reviews its member roster to verify that all participating organizations are complying with requirements and expectations defined in a set of operating guidelines established and maintained by Caltrans' Office of Business and Economic Opportunity. This review includes: removing organizations that have not met minimum participation requirements, researching new members/organizations, and following-up with prospective members/organizations to educate them about the work for which the statewide Small Business Council is responsible. The statewide Small Business Council also conducts an annual planning session during which it develops strategic objectives and performance measures. The planning session provides an opportunity to incorporate best practices gleaned from the previous year's meetings, as well as engage new public and private partners regarding efforts to reach a broader audience.

The statewide Small Business Council has contributed to Caltrans' efforts to revise its Standard Specifications for construction contracts, divide larger contracts into multiple smaller contracts to facilitate small businesses bidding as prime contractors, and disseminate information about bidding and working on Caltrans' contracts.

The statewide Small Business Council is chaired by the Assistant Director of the Office of Business and Economic Opportunity. Participants include: Caltrans' Director, Chief Deputy Director, District Directors, Division of Procurement and Contracts, Division of Local Assistance, Division of Construction, Office of Business and Economic Opportunity, SB 1 and SB 103 coordinators and liaisons, and representatives from the Federal Highway Administration and Department of General Services.

The statewide Small Business Council includes the following standing committees:

1. Commodities Committee: Discusses policy and procedures related to Caltrans' procurement of goods and supplies for projects and other contracts.
2. Construction Committee: Discusses policy and procedures related to Caltrans' construction projects.
3. Local Assistance/Professional Services Committee: Discusses policy and procedures related to Caltrans contracts with local agencies and professional services (i.e., architectural and engineering contracts).

In addition, there are two ad hoc committees:

1. Working Group to Enhance Participation of African American Firms in Caltrans' Contracting: Addresses increasing the pool of African American firms available to participate in Caltrans' contracting.
2. SB 1 Workgroup: Addresses increasing Small Business, Disabled Veteran Business Enterprise, and Disadvantaged Business Enterprise participation on SB 1-funded projects; maximizing Small Business, Disabled Veteran Business Enterprise, and Disadvantaged Business Enterprise opportunities and awareness;

enhancing the willingness of Small Business, Disabled Veteran Business Enterprise, and Disadvantaged Business Enterprise firms to do business with Caltrans; and removing barriers hindering Small Business, Disabled Veteran Business Enterprise, and Disadvantaged Business Enterprise participation in Caltrans' projects.

Several regional small business councils complement Caltrans' statewide Small Business Council. Regional councils exist in District 4 (greater San Francisco Bay Area); Districts 7, 8, and 12 (greater Los Angeles area, Orange County, and Inland Empire); and District 11 (San Diego and Imperial counties).

Caltrans also convenes a Disadvantaged Business Enterprise Participation Committee to develop and implement strategies and initiatives to increase participation opportunities for underrepresented businesses that are Disadvantaged Business Enterprise-certified to perform construction-related work. The Disadvantaged Business Enterprise Participation Committee roster includes businesses owned by underrepresented individuals, prime contractors, representatives from construction industry organizations, Caltrans project delivery stakeholders (including the Office of Business and Economic Opportunity), and representatives from the Federal Highway Administration.

Moving forward, Caltrans' Disadvantaged Business Enterprise Participation Committee is considering expanding its scope to include Disadvantaged Business Enterprises engaged in professional services, such as architectural and engineering work, as well as prime consultants. The addition of architectural and engineering-related prime consultants and subconsultants will allow for a more comprehensive discussion on ways to increase Caltrans' overall Disadvantaged Business Enterprise participation.

Caltrans' Disadvantaged Business Enterprise Participation Committee includes the following task groups:

1. Task Group B: Focused on post-award/utilization issues, including stop notices; prime contractor withholds; prompt payment; educating current and future Disadvantaged Business Enterprise firms on pre/post award activities related to Disadvantaged Business Enterprise utilization; dispute resolution for primes, subs, and suppliers; and joint checks.
2. Task Group C: Focused on pre-award issues, including effective outreach strategies to educate contractors about the Disadvantaged Business Enterprise certification process; strengthening the connection and effectiveness of Caltrans' District Small Business Liaisons; reorganizing the Office of Business and Economic Opportunity's website to increase effectiveness; and improving access to online tools for prospective Disadvantaged Business Enterprise firms and prime contractors searching for Disadvantaged Business Enterprises to meet contract goals.

3. Task Group D: Focused on the use of North American Industry Classification System codes and work category codes to identify ready, willing, and able Disadvantaged Business Enterprises by primary business activity, including relevancy to the Disadvantaged Business Enterprise program; determining the pros and cons of coding systems; and addressing the challenges Disadvantaged Business Enterprise-certified firms face when attempting to add codes to their database profile.

Caltrans' Disadvantaged Business Enterprise Participation Committee has two new focus areas: 1) trucking (i.e, transport of materials and equipment), and 2) good faith efforts to meet Disadvantaged Business Enterprise contract goals. Each focus area will be assigned a task group to discuss challenges and develop mitigation measures.

Caltrans' Office of Business and Economic Opportunity will continue to meet with business assistance organizations who represent businesses owned by underrepresented individuals to increase awareness of Caltrans' contracting opportunities among community members. As of September 2018, Caltrans' Office of Business and Economic Opportunity has met with the following organizations:

- American Indian Chamber of Commerce
- California Asian-Pacific Chamber of Commerce
- California Black Chamber of Commerce
- California Hispanic Chamber of Commerce
- Golden Gate Business Association (San Francisco LGBT Chamber of Commerce)
- National Gay and Lesbian Chamber of Commerce
- United States Veterans Business Alliance
- Veterans in Business Network
- Elite Service-Disabled Veteran-Owned Business Network

Caltrans' Office of Business and Economic Opportunity will continue to meet quarterly with construction and professional industry organizations, including, but not limited to, the Associated General Contractors, United Contractors, Southern California Contractors Association, and American Council of Engineering Companies, to discuss efforts to maximize Small Business, Disabled Veteran Business Enterprise, and Disadvantaged Business Enterprise participation on Caltrans contracts.

Caltrans' 12 district offices also serve as catalysts for cultivating partnerships at the district and/or regional level. District partners include, but are not limited to:

- Small Business Development Centers
- Procurement Technical Assistance Centers
- Builders' exchanges
- Service Corps of Retired Executives chapters
- Chambers of commerce
- Woman/minority/disabled veteran/LGBT organizations
- Community colleges
- Financial institutions
- Local, state, and federal agencies

## **Part II: Implementation of Related SB 103 Small Business Requirements**

### **A. Voluntarily Reported Data (*Government Code Section 14110.2*)**

#### Requirements

SB 103 Sec. 5, Government Code section 14110.2(a): The department shall collect voluntarily reported data on groups of interest awarded public contracts by the department, including, but not limited to, women, minority, LGBT, and disabled veteran business enterprises.

SB 103 Sec. 5, Government Code section 14110.2(b): The department shall report the information collected pursuant to subdivision (a) annually to the Legislature in conformance with Section 9795.

#### Implementation

As required in SB 103, and in compliance with California Proposition 209, Caltrans will collect voluntarily reported data from recipients of its public contract awards, including, but not limited to, businesses owned by women, minorities, LGBT, and disabled veterans. Proposition 209 prohibits Caltrans and other State departments from discriminating against or giving preferential treatment to any individual or group in public employment, public education, or public contracting based on race, sex, color, ethnicity, or national origin.

Caltrans collects voluntarily reported data, pursuant to Public Contract Code section 10111, by employing a “Voluntary Statistical Data Sheet” form (ADM-3023; see Appendix C). Data from voluntary statistical data sheets is aggregated annually and reported to the Department of General Services by way of the Ethnicity, Race, Gender, Sexual Orientation Report, which is part of the annual Contracting Activity Report (Form 810) requirement.

Caltrans’ Division of Procurement and Contracts sends voluntarily statistical data sheets to all prime contractors on state-funded contracts. Submittal of information to Caltrans is strictly voluntary. Information collected on voluntary statistical data sheets is anonymous and cannot be correlated to a specific certified Small Business; therefore, data cannot be disaggregated by group. Since completion of voluntary statistical data sheets is voluntary, Caltrans does not receive data for every state-funded contract.

The Office of Business and Economic Opportunity and the Division of Procurement and Contracts are developing processes to increase the collection of voluntary statistical data sheets. By June 2019, the Division of Procurement and Contracts will begin sending all contract documents electronically to contractors, including voluntary statistical data sheet forms. Contractors must then sign and send back documents electronically to the Division of Procurement and Contracts, including, potentially, the voluntary statistical data sheet, if contractors elect to provide the data. By streamlining the document submittal process, Caltrans

estimates that an additional 20-30 percent of voluntary statistical data sheet forms could be collected.

To comply with SB 103, Caltrans will report annually to the Legislature its progress on the collection of voluntary statistical data sheet forms. Caltrans will base all reporting on voluntarily collected data; the accuracy of voluntary data reports is based on the data submitted by contractors.

Figure A-1 compares voluntary statistical data sheet forms received from contractors in state fiscal year 2016-2017 and 2017-2018.

*Figure A-1*

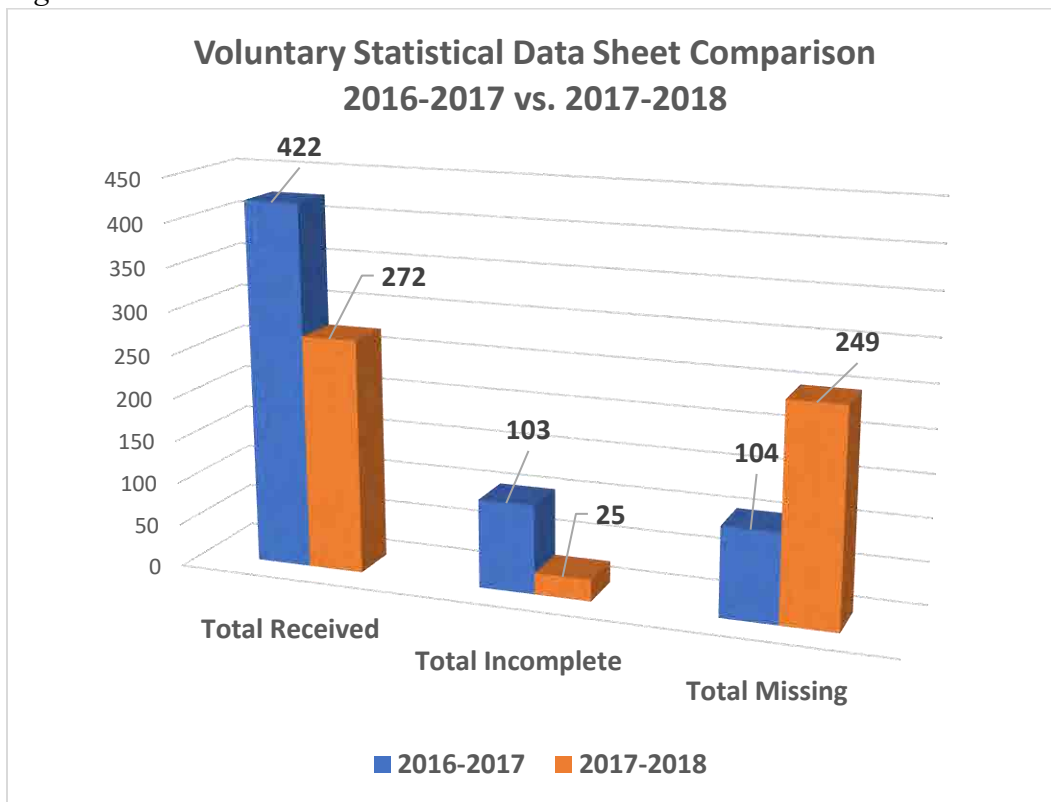


Figure A-2 details voluntary statistical data sheet forms sent and received in state fiscal year 2016-2017.

Figure A-2

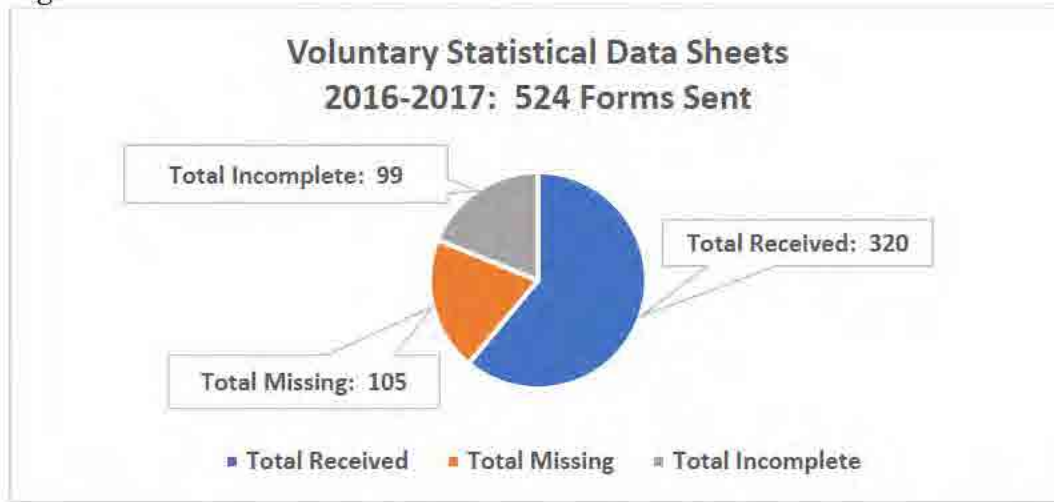


Figure A-3 summarizes the results from voluntary statistical data sheet forms collected in state fiscal year 2016-2017.

Figure A-3

Ethnicity, Race, Gender, Sexual Orientation (ERGSO) Report					
Agency: Transportation Agency		Department: Transportation			
Fiscal Year: 2016/2017		All Contracts			
		Goods Column A	Services Column B	Construction Column C	Totals Column D
<b>Ethnicity Classifications</b>					
	Asian-Indian		\$ 9,422,656	\$ 260,000	\$ 9,682,656
	Black	\$ 556	\$ 5,229,279	\$ 761,739	\$ 5,991,573
	Hispanic	\$ 1,266	\$ 14,228,113	\$ 1,508,871	\$ 15,798,270
	Native American	\$ -	\$ 6,230,000	\$ 6,540,000	\$ 12,770,000
	Pacific-Asian		\$ 17,947,200	\$ 200,000	\$ 18,147,200
	Other		\$ 39,438,194	\$ 7,457,205	\$ 46,895,399
	<b>TOTALS</b>	\$ 1,842	\$ 92,495,442	\$ 16,727,815	\$ 109,225,099
<b>Race Classifications</b>					
	American Indian or Alaska Native	\$ -	\$ 5,530,000	\$ 40,000	\$ 5,570,000
	Asian		\$ 21,769,180	\$ 200,000	\$ 21,969,180
	Black or African American	\$ 556	\$ 5,229,279	\$ 761,739	\$ 5,991,573
	Native Hawaiian or Other Pacific Islander	\$ -	\$ 105,000	\$ -	\$ 105,000
	White	\$ 2,238,809	\$ 104,521,137	\$ 4,886,105	\$ 111,756,051
	Other	\$ -	\$ 11,268,490	\$ 6,024,507	\$ 17,292,997
	<b>TOTALS</b>	\$ 2,239,365	\$ 148,443,092	\$ 12,022,351	\$ 162,704,807
<b>Gender</b>					
	Female	\$ 455,004	\$ 26,563,755	\$ 4,842,000	\$ 31,860,759
	Male	\$ 1,784,831	\$ 138,166,475	\$ 31,100,244	\$ 173,051,649
	Transgender	\$ -	\$ -	\$ -	\$ -
	<b>TOTALS</b>	\$ 2,239,835	\$ 164,730,230	\$ 35,942,244	\$ 202,912,409
<b>Sexual Orientation</b>					
	Lesbian	\$ -	\$ -	\$ -	\$ -
	Gay	\$ -	\$ -	\$ -	\$ -
	Bisexual	\$ -	\$ -	\$ 1,367,300	\$ 1,367,300
	<b>TOTALS</b>	\$ -	\$ -	\$ 1,367,300	\$ 1,367,300

Figure A-4 details voluntary statistical data sheet forms sent and received in fiscal year 2017-2018.

Figure A-4

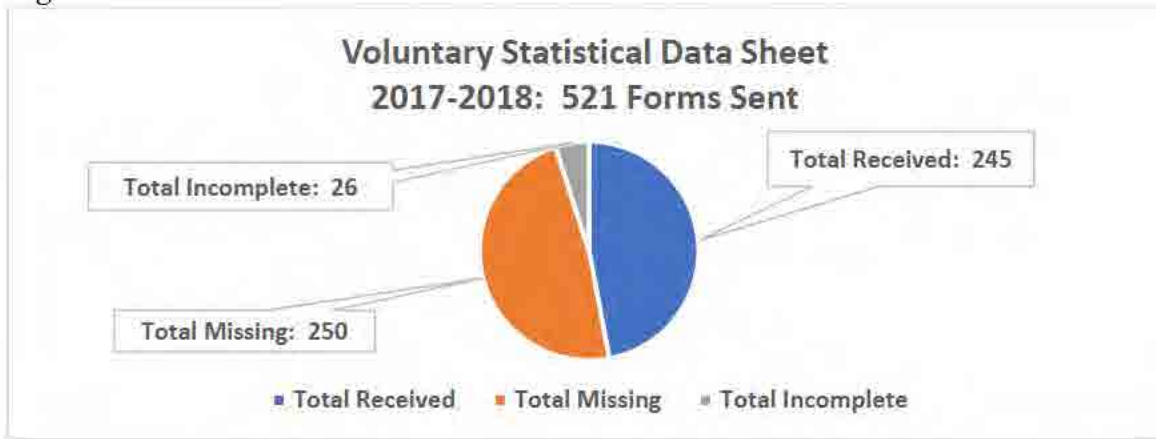


Figure A-5 summarizes the results from voluntary statistical data sheet forms collected in state fiscal year 2017-2018.

Figure A-5

Ethnicity, Race, Gender, Sexual Orientation (ERGSO) Report						
Agency:		Transportation Agency		Department:		Transportation
Fiscal Year:		2017/2018		All Contracts		
		Goods Column A	Services Column B	Construction Column C	Totals Column D	
<b>Ethnicity Classifications</b>						
P R I N T	Asian-Indian	\$ -	\$ 11,504,170	\$ -	\$ 11,504,170	
	Black	\$ 392	\$ 3,814,900	\$ -	\$ 3,815,292	
	Hispanic	\$ 65,270	\$ 21,785,302	\$ 9,434,005	\$ 31,284,579	
	Native American	\$ -	\$ 2,604,039	\$ 30,000	\$ 2,634,039	
	Pacific-Asian	\$ -	\$ 2,604,039	\$ 2,800,000	\$ 5,404,039	
	Other	\$ 20,940	\$ 31,025,469	\$ 8,177,555	\$ 39,223,964	
	<b>TOTALS</b>	<b>\$ 86,602</b>	<b>\$ 73,337,919</b>	<b>\$ 20,441,581</b>	<b>\$ 93,686,082</b>	
<b>Race Classifications</b>						
P R I N T	American Indian or Alaska Native	\$ -	\$ 1,985,131	\$ -	\$ 1,985,131	
	Asian	\$ -	\$ 12,900,550	\$ 2,850,000	\$ 15,460,550	
	Black or African American	\$ 392	\$ 2,243,003	\$ -	\$ 2,243,395	
	Native Hawaiian or Other Pacific Islander	\$ -	\$ 2,883,054	\$ -	\$ 2,883,054	
	White	\$ 86,210	\$ 86,639,240	\$ 83,884,125	\$ 170,606,574	
	Other	\$ -	\$ 3,426,292	\$ 2,709,285	\$ 6,135,577	
	<b>TOTALS</b>	<b>\$ 86,602</b>	<b>\$ 109,778,270</b>	<b>\$ 89,453,410</b>	<b>\$ 199,316,282</b>	
<b>Gender</b>						
P R I N T	Female	\$ 86,602	\$ 90,428,859	\$ 28,950,021	\$ 49,484,203	
	Male	\$ -	\$ 82,095,122	\$ 84,803,210	\$ 146,898,332	
	Transgender	\$ -	\$ -	\$ -	\$ -	
	<b>TOTALS</b>	<b>\$ 86,602</b>	<b>\$ 102,521,802</b>	<b>\$ 93,754,131</b>	<b>\$ 196,362,534</b>	
<b>Sexual Orientation</b>						
P R I N T	Lesbian	\$ -	\$ -	\$ -	\$ -	
	Gay	\$ -	\$ -	\$ -	\$ -	
	Bisexual	\$ 392	\$ 58,389	\$ 400,000	\$ 458,781	
	<b>TOTALS</b>	<b>\$ 392</b>	<b>\$ 58,389</b>	<b>\$ 400,000</b>	<b>\$ 458,781</b>	

## B. Disadvantaged Business Enterprise Participation on Federally-Funded Contracts

Caltrans can supplement voluntarily reported data from its state-funded contracts with certain demographic data it collects for certified Disadvantaged Business Enterprises that participate on its United States Department of Transportation-assisted contracts. Certification as a Disadvantaged Business Enterprise is based, in part, on whether a business is majority-owned by individuals presumed to be socially and economically disadvantaged, as defined in Title 49 of the Code of Federal Regulations, Part 26, including women and minorities. Therefore, Caltrans can quantify the participation of certified Disadvantaged Business Enterprises, including members of certain underrepresented groups, on its United States Department of Transportation-assisted contracts by race/ethnicity and gender.

Caltrans is required to report semi-annually to the United States Department of Transportation the total dollar value of contracts awarded to Disadvantaged Business Enterprises during the federal fiscal year, including a breakdown by race/ethnicity/gender, pursuant to Title 49 of the Code of Federal Regulations, Part 26.11. Figures B-1 and B-2 reflect Caltrans' 2016-2017 and 2017-2018 Disadvantaged Business Enterprise participation, disaggregated by disadvantaged groups defined in Title 49 of the Code of Federal Regulations, Part 26, on major construction, minor A construction, and maintenance contracts awarded by the Division of Engineering Services-Office Engineer, and minor B construction and architectural and engineering contracts awarded by the Division of Procurement and Contracts.

Figure B-1

**Division of Engineering Services-Office Engineer  
and Division of Procurement and Contracts  
Combined Disadvantaged Business Enterprise  
Commitment 2016-2017: \$199,759,592.51**

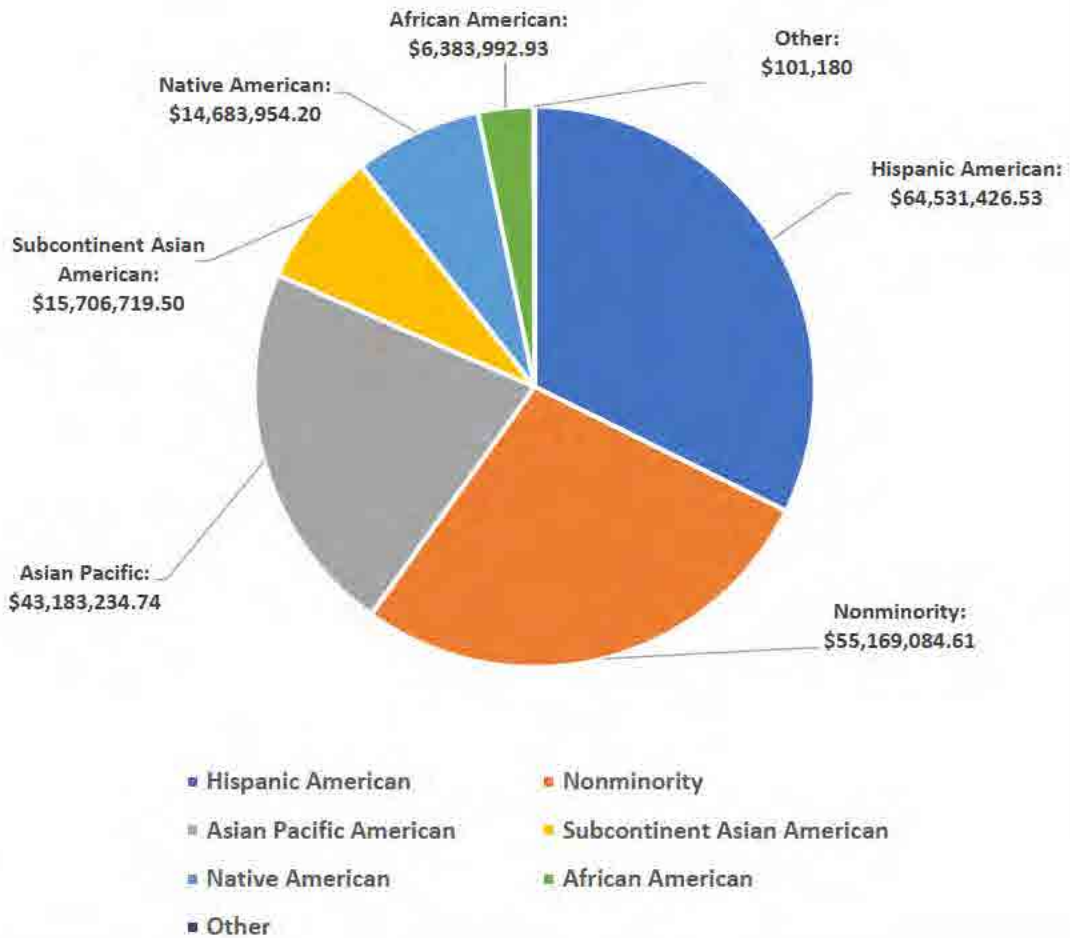
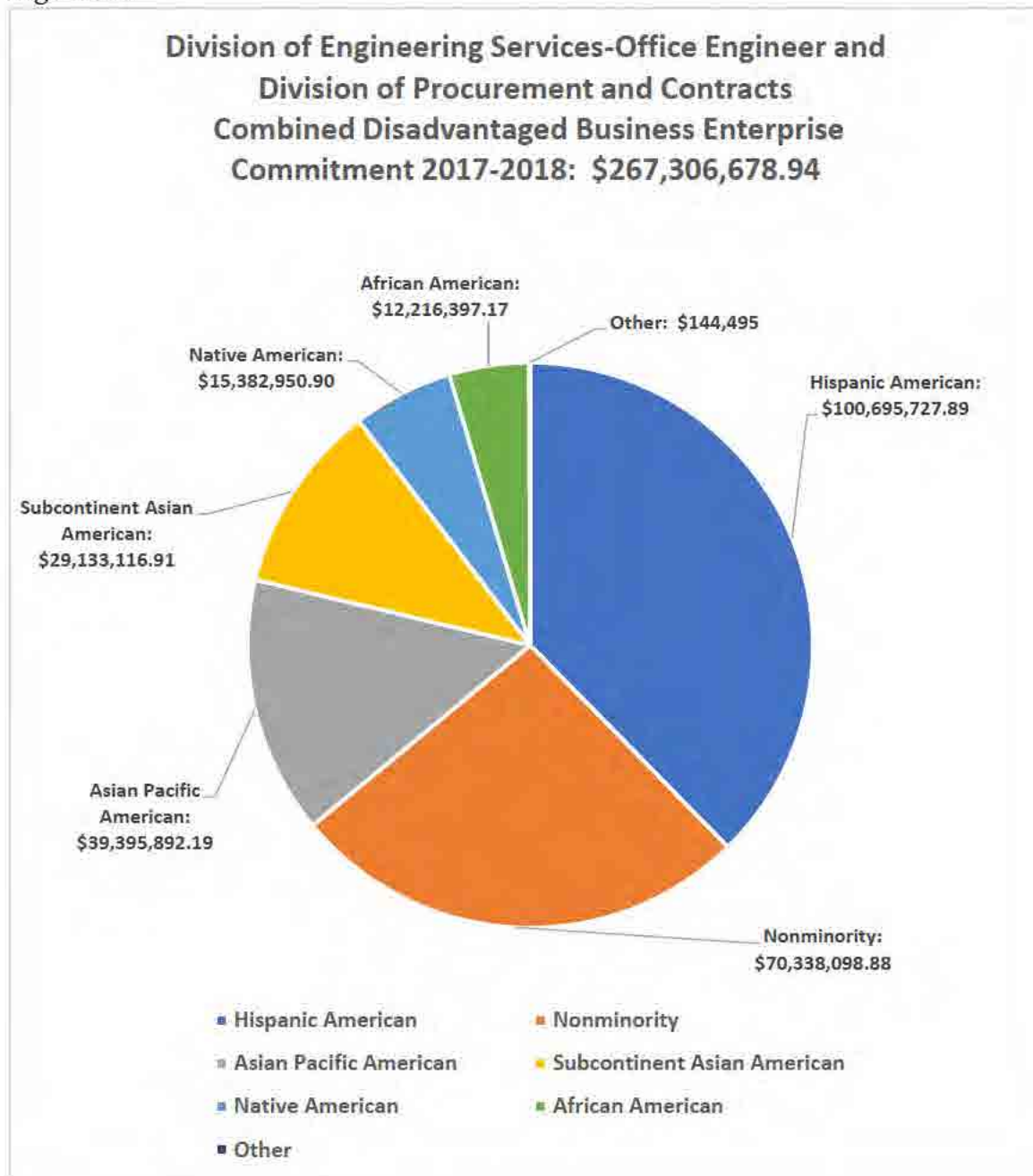


Figure B-2



C. Achieve 25 Percent Small Business Participation (*Government Code Section 14110.3*)

Requirement

SB 103 Sec. 6, Government Code section 14110.3: The department shall achieve, at a minimum, an overall rate of 25 percent certified small business participation in state-funded contracts and procurements.

Objectives

1. Maximize Small Business participation through use of available procurement options and mechanisms.
2. Track and monitor Small Business participation on state-funded contracts and procurements on an ongoing basis.
3. Schedule partnering meetings with Caltrans contracting and purchasing staff to identify opportunities for maximizing Small Business participation and provide training, where applicable.

Implementation

Pursuant to Public Contract Code section 10111, Caltrans is required to report annually on the dollar value of its state-funded contracts and procurements awarded to certified Small Business firms. This report is known as the Contracting Activity Report and is due to the Department of General Services annually by August 1.

Caltrans has exceeded the 25 percent Small Business participation target in each of the previous 5 state fiscal years, as reported on the Contracting Activity Report. Refer to the table below:

<b>Caltrans' Small Business Participation on State-Funded Contracts and Procurements</b>			
<b>Fiscal Year</b>	<b>Total State Dollars</b>	<b>Total Small Business \$</b>	<b>Small Business %</b>
17/18	\$1,785,183,219	\$510,017,424	28.51 percent
16/17	\$1,416,819,919	\$408,919,922	28.86 percent
15/16	\$1,129,015,763	\$519,879,000	46.05 percent
14/15	\$1,230,371,824	\$349,378,944	28.40 percent
13/14	\$1,074,833,768	\$303,566,873	28.24 percent

Caltrans obtains Small Business participation by contracting directly with and/or purchasing directly from certified Small Business firms using the Small Business/Disabled Veteran Business Enterprise Option. In addition, Caltrans offers a bid preference for certified Small Business bidders and a bid preference for noncertified bidders who commit at least 25 percent of the value of a contract to certified Small Business subcontractors. The preceding measures are consistent with the Small Business Procurement and Contract Act (Government Code sections 14835-14847). Although Caltrans does not currently set individual contract goals for Small Business

participation, SB 103 and amended Government Code language provide Caltrans with a statutory basis for considering this practice as a method for increasing Small Business participation.

Caltrans will continue to track and monitor Small Business participation on its state-funded contracts and procurements on an ongoing basis using quarterly reports issued by the Division of Procurement and Contracts, which is responsible for preparing the Contracting Activity Report on behalf of Caltrans, and supplemental data provided by the Division of Engineering Services—Office Engineer and the Office of Business and Economic Opportunity. All three divisions—Division of Procurement and Contracts, Division of Engineering Services, and the Office of Business and Economic Opportunity—will meet at regular intervals to monitor progress toward achieving an overall rate of 25 percent Small Business participation on state-funded contracts and procurements.

In State fiscal year 2015-2016, Caltrans reported Small Business participation of 46.05 percent. This percentage is a statistical outlier, and, thus, required further research. In October 2016, the Department of General Services audited Caltrans' reported Small Business participation for state fiscal year 2015-2016. The Department of General Services concurred with Caltrans' reported Small Business participation of 46.05 percent and there were no findings.

#### **D. Increase Disparity Study Indices (*Government Code Sections 14110.4*)**

##### Requirements

SB 103 Sec. 7, Government Code section 14110.4(a): Beginning with the 2018-2019 fiscal year, the department shall take all lawful and reasonable steps to raise the disparity indices for contracts awarded under the federal Disadvantaged Business Enterprise Program (Part 26 of Title 49 of the Code of Federal Regulations) to 100 for contracts and procurements subject to federal participation requirements, with particular emphasis on those minorities that exhibited substantial disparities with the indices, consistent with federal laws and regulations and subdivision (e) of Section 31 of Article I of the California Constitution.

SB 103 Sec. 7, Government Code section 14110.4(b): The department shall implement the recommendations from every disparity study undertaken as part of the federal Disadvantaged Business Enterprise Program (Part 26 of Title 49 of the Code of Federal Regulations), consistent with federal laws and regulations and subdivision (e) of Section 31 of Article I of the California Constitution.

##### Objectives

1. Calculate and analyze disparity indices.
2. Identify minority groups with substantial disparities.
3. Outline recommendations from previous disparity studies.

## Implementation

Caltrans conducts disparity studies every three years to obtain evidence on which to base its overall annual Disadvantaged Business Enterprise participation goals for Federal Highway Administration- and Federal Transit Administration-assisted contracts pursuant to Title 49 of the Code of Federal Regulations, Part 26.45. A disparity study examines whether discrimination exists in the transportation industry and quantifies the degree to which it exists, if applicable.

A disparity study compares the participation of minority- and woman-owned businesses across racial/ethnic and gender groups by calculating disparity indices. Disparity indices provide a way of assessing how closely the actual participation of minority- and woman-owned businesses matches the percentage of contract dollars that those businesses might be expected to receive based on their availability for specific sets of contracts.

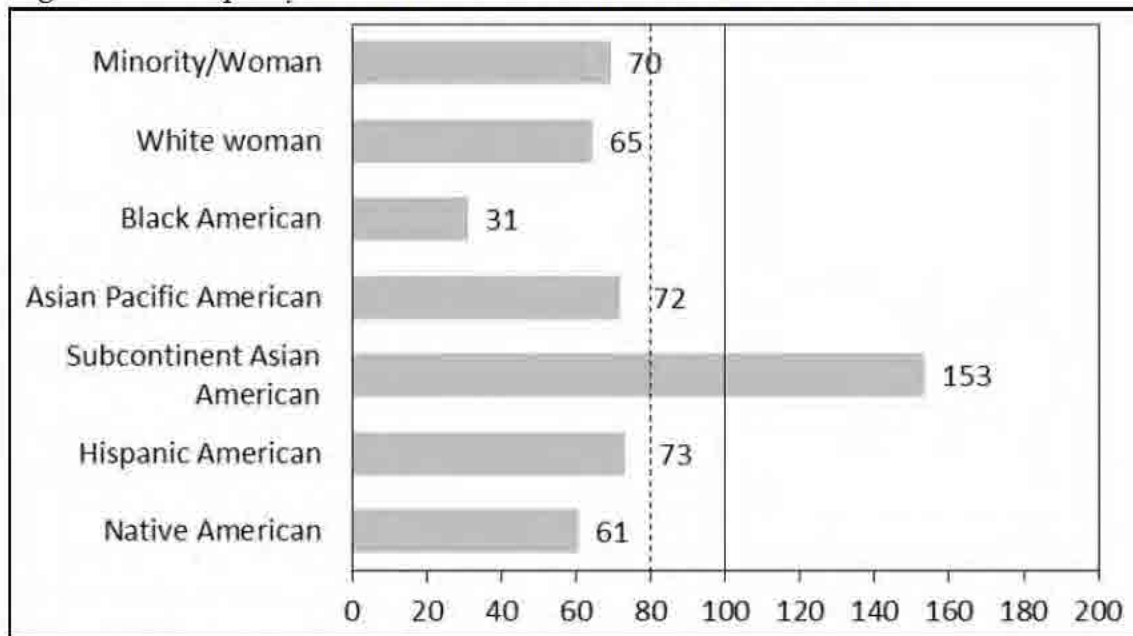
Disparity indices are calculated using the following formula:

$$\frac{\% \text{ Actual Participation}}{\% \text{ Availability}} \times 100 = \text{Disparity Index}$$

A disparity index of 100, also referred to as parity, indicates a match between actual participation and availability for a particular group for a specific set of contracts. A disparity index of less than 100 may indicate a disparity between participation and availability. A disparity index of less than 80 is often interpreted as an indicator of substantial disparity.

Disparity indices for Caltrans' state-funded contracts—that is, contracts without race- or gender-conscious measures—were calculated as part of Caltrans' 2016 Federal Highway Administration Disparity Study. Assessing disparities on contracts in a race- and gender-neutral environment, without Disadvantaged Business Enterprise contract goals, allows Caltrans to better understand the effects of Disadvantaged Business Enterprise contract goals on the participation of minority- and woman-owned businesses. The results identified five of six Disadvantaged Business Enterprise groups with substantial disparities (i.e., a disparity index of less than 80). One Disadvantaged Business Enterprise group, Subcontinent Asian Americans, was found to be above parity (i.e., a disparity index above 100). Refer to figure D-1, next page.

Figure D-1: Disparity Indices on Caltrans' State-Funded Contracts\*



\*Source: Caltrans' 2016 Federal Highway Administration Disparity Study

Caltrans' practice of setting individual Disadvantaged Business Enterprise contract goals on Federal Highway Administration- and Federal Transit Administration-assisted contracts with subcontracting opportunities is considered a race-conscious measure, because it applies specifically to woman- and minority-owned businesses who meet Disadvantaged Business Enterprise certification eligibility requirements. In addition, Caltrans has a broad range of race- and gender-neutral measures to encourage the participation of all small businesses, including Disadvantaged Business Enterprises, in its construction and professional services contracts.

Caltrans' race- and gender-neutral efforts can be classified into the following categories:

- Business outreach and communication
- Technical assistance and training
- Improved contracting processes
- Finance and bonding programs
- Prompt payment
- Data collection, monitoring, and reporting

Caltrans has completed four disparity studies for its Disadvantaged Business Enterprise program: February 2007 (Federal Highway Administration), August 2012 (Federal Highway Administration), December 2014 (Federal Transit Administration), and June 2016 (Federal Highway Administration). All four studies have yielded a combined 118 recommendations. Recommendations have been sorted into four categories:

1. Included in the Small Business Outreach Plan
2. Previously implemented
3. In development
4. Under review

Most items identified as being “under review” require a legal opinion. One of the objectives of the Disadvantaged Business Enterprise program is to create a level-playing field for groups presumed to be socially and economically disadvantaged to compete for United States Department of Transportation-assisted contracts. However, California’s Proposition 209, passed in November 1996, amended the State Constitution to prohibit public institutions from considering race, sex, color, ethnicity, or national origin in several areas, including public contracting. As Caltrans consults with and receives legal counsel, recommendations will be phased into future updates to the Small Business Outreach Plan.

Items identified as “in development” generally fall into two categories:

1. Software
2. Outreach

The Office of Business and Economic Opportunity, in collaboration with Caltrans’ Division of Local Assistance, Division of Transportation Planning, and Division of Rail and Mass Transportation, is researching available software that can accommodate the growing need for business participation data on demand, as well as generate mandated contracting activity reports. The goal is to choose the software that best suits a myriad of departmental needs and purchase and deploy in 12 to 18 months.

Recommendations for enhanced outreach will be phased into future updates to the Small Business Outreach Plan.

#### E. Advertising Contracting and Procurement Information (*Public Contract Code Section 10140(c)(2)*)

##### Requirement

SB 103 Sec. 9, Public Contract Code 10140(c)(2): If the department exercises its authority under paragraph (1), the department shall also publish information regarding notices listed on the

department's Internet Web site in trade papers, newspapers, or magazines, as appropriate in order to ensure all communities have access to the public notice, including those publications whose primary audience consists of underrepresented groups, including, but not limited to, women, minorities, LGBT, and disabled veterans, pursuant to the frequency requirements specified in subdivision (a).

### Objectives

1. Develop a list of publications whose primary audience consists of underrepresented groups.
2. Develop content for notices, tailoring information to the maximum extent possible, including translating notices into other languages, as appropriate.
3. Supplement print notices with notices in relevant online publications and resources, where applicable, as well as use of social media and direct mailings.

### Implementation

Public Contract Code section 10140(a)(1) allows State departments to meet requirements for issuing public notice of a project by using "a newspaper of general circulation published in the county in which the project is located, or if located in more than one county, in such a newspaper in a county in which a major portion of the work is to be done." If Caltrans exercises this option, it must comply with the provisions of Public Contract Code section 10140(c)(2) and also place notices in publications whose primary audience consists of underrepresented groups.

In December 2017, Caltrans' Office of Business and Economic Opportunity developed a list of publications whose readership includes a significant number of underrepresented individuals; this list will continue to evolve as research continues. Ongoing meetings with women, minority, LGBT, and veteran organizations will also identify avenues for engaging business owners in their respective communities.

Between January 2018 and April 2018, the Office of Business and Economic Opportunity placed print notices in 27 publications throughout the state whose readership includes a significant number of underrepresented individuals. Between June 2018 and August 2018, the Office of Business and Economic Opportunity placed an additional 26 notices. The first notice announced upcoming Caltrans contracting opportunities resulting from SB 1, while the second notice included links to Caltrans' construction and architectural and engineering contract "Look Ahead Reports" and an online calendar of upcoming trainings and resources. Notices were translated into seven other languages (Hindi, Japanese, Korean, Mandarin, Punjabi, Spanish, and Vietnamese), as appropriate.

Caltrans will continue to develop notices for placement in print publications throughout the state whose readership includes a significant number of underrepresented individuals. Content will vary, as appropriate, and will include, but not be limited to, information regarding currently

advertised contracts, upcoming contracting opportunities, training opportunities and resources, and outreach events and activities. Caltrans will supplement print notices by using social media (i.e., Facebook, Twitter) and direct mailings, where applicable.

Caltrans' Office of Business and Economic Opportunity will continue to work with departmental project delivery stakeholders to identify opportunities for placing notices, develop suitable content, and identify additional industry-centric publications for consideration.

### **Part III: Appendices**

- A: Evaluation Survey Results: Office of Business and Economic Opportunity's Fiscal Year 2017-2018 Training Presentations
- B: Overview of Caltrans' Small Business Outreach Workgroup
- C: Voluntary Statistical Data Sheet (ADM-3023)
- D: Small Business Outreach Roles and Responsibilities
- E: Caltrans District Map
- F: Statutory Reporting Reference

Appendix A: Evaluation Survey Results: Office of Business and Economic Opportunity's Fiscal Year 2017-2018 Training Presentations

Presentation Title	Attendees	Number of Survey Responses Received	Percentage of Respondents Who Were Satisfied	Survey Format	Recommended Improvements
Doing Business with Caltrans: Getting Started	137	22	86%	Electronic and hard copy	<ul style="list-style-type: none"> <li>• Survey attendees at the beginning of the workshop for specific concerns.</li> <li>• Discuss requirements for Safe Harbor Rate (specifically related to architectural and engineering contracts).</li> <li>• Details for service contracts.</li> <li>• More consulting information (specifically environmental consulting).</li> <li>• Opportunities to meet actual prime contractors.</li> </ul>
Disadvantaged Business Enterprise Certification Workshop	86	4	75%	Electronic	<ul style="list-style-type: none"> <li>• Expand information regarding North American Industry Classification System coding.</li> <li>• More time for questions.</li> </ul>
Subcontractor Training	86	17	100%	Electronic and hard copy	<ul style="list-style-type: none"> <li>• More frequent workshops.</li> <li>• Website navigation assistance.</li> <li>• Opportunities to meet prime contractors.</li> </ul>
Prime Contractor Training	43	7	85%	Electronic and hard copy	<ul style="list-style-type: none"> <li>• More information about becoming a prime contractor.</li> <li>• Use local radio stations to reach out to minority businesses.</li> <li>• Get participation and/or feedback from suppliers.</li> </ul>

## Appendix B: Overview of Caltrans' Small Business Outreach Workgroup

### Purpose

Caltrans' Small Business Outreach Workgroup brings together a cross-functional team of Caltrans subject-matter experts to monitor the implementation of Small Business Outreach Plan components. This activity provides a mechanism for communication, tracking, evaluation, reporting, and resources management.

### Reporting Structure

The Office of Business and Economic Opportunity will serve as the chair of Caltrans' Small Business Outreach Workgroup. The Office of Business and Economic Opportunity will appoint a workgroup facilitator, who will be charged with managing the workgroup's roster, scheduling meetings, developing agendas, tracking action items, preparing reports, and communicating updates to executive management.

### Objectives

1. Invest in activities that create opportunities for prime contractors and subcontractors, including new and limited contract small business enterprises, to meet face-to-face.
2. Collaborate with internal and external partners to organize and deliver events and activities focusing on Caltrans contracting opportunities.
3. Communicate more effectively with new and limited contracting small business enterprises regarding Caltrans contracting opportunities.
4. Expand options for accessing and receiving training and technical assistance.
5. Employ assessments, surveys, and other metrics to evaluate the effectiveness of programs, services, and activities, and inform future outreach efforts.

### Participating Divisions

- Office of Business and Economic Opportunity: Responsible for conducting outreach to promote awareness of Caltrans' contracting opportunities, providing resources for new and limited contracting small business enterprises (i.e., training and technical assistance), and tracking and reporting business participation data.

- Division of Engineering Services-Office Engineer: Responsible for developing, advertising, and awarding minor A construction, major construction, and maintenance contracts.
- Division of Procurement and Contracts: Responsible for procurement of information technology and non-information technology commodities, as well as developing, advertising, awarding, and managing minor B construction, service, and architectural and engineering contracts.
- Division of Local Assistance: Responsible for authorizing and overseeing local public agency construction and architectural and engineering contracts for over 600 cities, counties, and local municipalities.
- Division of Construction: Responsible for oversight of the performance of work on Caltrans construction contracts, including utilization of listed Small Business, Disabled Veteran Business Enterprise, Disadvantaged Business Enterprise, and noncertified subcontractors.

# Appendix C: Voluntary Statistical Data Sheet: ADM-3023

STATE OF CALIFORNIA • DEPARTMENT OF TRANSPORTATION  
**VOLUNTARY STATISTICAL DATA SHEET**  
ADM-3023 (REV 06/2017)

### Information to be used for reporting purposes only

Public Contract Code (PCC) 10111(f), requires State agencies to capture information on ethnicity, race, and gender (ERG) of business owners on all awarded contracts and procurements to the extent that the information has been voluntarily reported to the department. The awarding department is prohibited from using this data to discriminate or provide a preference in the solicitation or acceptance of bids, quotes, or estimates for goods, services, construction and/or information technology. This information shall not be collected until after the contract award is made. The completion of this form is **strictly voluntary**.

The data you provide on this form should best describe the *ownership of your business*. Ownership of a business should be determined as follows:

- For a business that is a sole proprietorship, partnership, corporation, or joint venture at least 51 percent is owned by one or more individuals in a classification designated below or, in case of any business whose stock is publicly held, at least 51 percent of the stock is owned by one or more individuals in a designated classification, or
- For other business entities, the owner is the person controlling management and daily operations and who "owns" the business

*For purposes of this report, respond only if the business has its home office in the United States and is not a branch or subsidiary of a foreign corporation firm or other business.*

#### Ethnicity/Minority Classification - *As defined in PCC Section 2051(c)*

- Asian-Indian - a person whose origins are from India, Pakistan, or Bangladesh
- Black - a person having origins in any of the black racial groups of Africa
- Hispanic - a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin regardless of race
- Native American - an American Indian, Eskimo, Aleut, or Native Hawaiian
- Pacific Asian - a person whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, or the United States Trust Territories of the Pacific, including the Northern Marianas
- Other - Any other group of natural persons identified as minorities in the respective project specifications of an awarding department or participating local agency

#### Race Classification - As defined by the Office of Management and Budget, Federal Register Notice, October 30, 1997 at <http://www.whitehouse.gov/information-for-agencies/federal-register>

- |                                                            |                                                                    |
|------------------------------------------------------------|--------------------------------------------------------------------|
| <input type="checkbox"/> American Indian or Alaskan Native | <input type="checkbox"/> Asian                                     |
| <input type="checkbox"/> Black or African American         | <input type="checkbox"/> Native Hawaiian or Other Pacific Islander |
| <input type="checkbox"/> White                             | <input type="checkbox"/> Other                                     |

#### Gender Classification

- |                                 |                               |
|---------------------------------|-------------------------------|
| <input type="checkbox"/> Female | <input type="checkbox"/> Male |
|---------------------------------|-------------------------------|

#### Sexual Orientation Classification: *As defined by Public Contract Code 10111(f)*

- |                                  |                                      |
|----------------------------------|--------------------------------------|
| <input type="checkbox"/> Lesbian | <input type="checkbox"/> Bisexual    |
| <input type="checkbox"/> Gay     | <input type="checkbox"/> Transgender |

The completed form can be returned via fax (916) 324-1869 or mailed to:  
Department of Transportation, Office of Business and Economic Opportunity (MS-79)  
Attention: DBE Program Manager, 1823 14th Street, Sacramento, CA 95811

**ACQUISITIONS ANALYST: COMPLETE THE SECTION BELOW BEFORE YOU SEND IT OUT WITH AWARD.**

#### ITEMS BELOW TO BE COMPLETED BY STATE AGENCY/DEPARTMENT ONLY

- |                                |                                   |                                       |
|--------------------------------|-----------------------------------|---------------------------------------|
| <input type="checkbox"/> Goods | <input type="checkbox"/> Services | <input type="checkbox"/> Construction |
|--------------------------------|-----------------------------------|---------------------------------------|

Total Acquisition Purchase: \$ \_\_\_\_\_ Acquisition Award Date: \_\_\_\_\_

## Appendix D: Small Business Outreach Roles and Responsibilities

### Office of Business and Economic Opportunity

- Develop Caltrans' Small Business Outreach Plan to increase procurement opportunities for new and limited contracting small business enterprises, including underrepresented groups.
- Update Caltrans' Small Business Outreach Plan, as required.
- Determine baselines for new and limited contracting small business enterprises.
- Track and monitor awards to new and limited contracting small business enterprises.
- Submit annual reports to the Legislature for new and limited contracting small business enterprises and other underrepresented groups receiving Caltrans contracts.
- Sponsor apprenticeship programs.
- Sponsor meetings to introduce prime contractors to new and limited contracting small business enterprises.
- Partner with organizations to increase contracting opportunities for all underrepresented groups.
- Develop new outreach methods to engage new and limited contracting small business enterprises.
- Place notices regarding upcoming Caltrans contracting opportunities in publications whose primary audience includes underrepresented individuals.
- Chair Caltrans' Small Business Outreach Workgroup.

### Division of Procurement and Contracts

- Send quarterly Small Business and Disabled Veteran Business Enterprise participation data on state-funded contracts and purchases to the Office of Business and Economic Opportunity.
- Assist with increasing receipt of voluntary statistical data sheet forms for Caltrans' awarded contracts.
- Assist with outreach to new and limited contracting small business enterprises to increase procurement opportunities.
- Participate in Caltrans' Small Business Outreach Workgroup.

### Caltrans' Divisions and District Offices

- Sponsor apprenticeship programs.
- Partner with organizations to increase contracting opportunities for all underrepresented groups.
- Sponsor meetings to introduce prime contractors to new and limited contracting small business enterprises.
- Host training workshops.

- Sponsor pre-bid meetings.
- Sponsor Calmentor activities.
- Fund placement of notices regarding upcoming Caltrans contracting opportunities in publications whose primary audience includes underrepresented individuals.
- Participate in Caltrans' Small Business Outreach Workgroup.

# Appendix E: Caltrans District Map



## Appendix F: Statutory Reporting Reference

### SB 103 Sec. 4, Government Code section 14110.1

14110.1. (a) (1) The department shall develop and submit to the Legislature, by January 1, 2019, a detailed outreach plan intended to increase procurement opportunities for new and limited contracting small business enterprises, including, but not limited to, those owned by women, minority, disabled veterans, LGBT, and other disadvantaged groups, in all the department's transportation programs, including, but not limited to, state road repairs, bridge repair and maintenance, trade corridors, congestion commute corridors, and local partnerships.

(2) The department shall update the outreach plan based on the outcome of any disparity study undertaken every three years as part of the federal Disadvantaged Business Enterprise Program (Part 26 of Title 49 of the Code of Federal Regulations).

(b) The department shall undertake all of the following outreach activities, which shall be included in the plan:

(1) Sponsor, fund, or partner with apprenticeship programs, including those engaged in specific efforts to increase participation in the transportation construction industry of all groups, including, but not limited to, women, minorities, LGBT, disabled veterans, disadvantaged youth, and formerly incarcerated individuals.

(2) Host, fund, or partner with organizations that host workshops, training classes, and other activities around the state focused on opportunities to contract with the department. Contracting opportunities discussed may include, but shall not be limited to, construction, communication, and consulting services in the areas of engineering, environmental, and surveying services.

(3) Sponsor meetings to introduce prime contractors to new and limited contracting small business enterprises, including, but not limited to, those owned by women, minority, disabled veterans, LGBT, and other disadvantaged groups.

(4) Sponsor opportunities, including, but not limited to, prebid meetings and the department's Calmentor program, to increase contacts between prime contractors and new and limited contracting small business enterprises, including, but not limited to, those owned by women, minority, disabled veterans, LGBT, and other disadvantaged groups.

(5) Partner with organizations representing persons and business enterprises from underrepresented groups, including, but not limited to, women, minority, disabled veterans, LGBT, and other disadvantaged groups, in a manner that will inform members of these organizations on opportunities to participate in transportation contracts.

(c) By January 1, 2019, the department shall submit the outreach plan prepared pursuant to paragraph (1) of subdivision (a), and each update thereafter, to the California Legislative Black Caucus, California Latino Legislative Caucus, California Asian Pacific Islander Legislative Caucus, California Legislative Lesbian, Gay, Bisexual, and Transgender Caucus, and California Legislative Women's Caucus.

(d) The department shall annually report to the Legislature, pursuant to Section 14110.2, the percentages of entities receiving public contracts from the department, disaggregated by classifications, including, but not limited to, new and limited contracting enterprises, and

women, minority, disabled veteran, and LGBT business enterprises, and further disaggregated within each of these classifications by contract size categories, as determined by the department.

(e) All reports to the Legislature required by this section shall be submitted in conformance with Section 9795.

(f) The Inspector General of the Independent Office of Audits and Investigations shall review, audit, and report on the department's outreach efforts required by this section. In addition, the Inspector General shall audit businesses as appropriate to ensure that persons associated with entities that do not meet the definition of a new or limited contracting small business enterprise do not create a new associated entity that would meet the definition of a new or limited contracting small business enterprise and thereby subvert the purposes of this section.

(g) For purposes of this section, the following terms have the following meanings:

(1) "Limited contracting small business enterprise" means a certified small business, as defined in Section 14837, that has received fewer than five public contracts from the department in the previous two years or has received public contracts from the department totaling less than two hundred fifty thousand dollars (\$250,000) in the previous two years.

(2) "New small business enterprise" means a certified small business, as defined in Section 14837, that has not received a public contract from the department in the previous two years.

#### SB 103 Sec. 5, Government Code section 14110.2

14110.2. (a) The department shall collect voluntarily reported data on groups of interest awarded public contracts by the department, including, but not limited to, women, minority, LGBT, and disabled veteran business enterprises.

(b) The department shall report the information collected pursuant to subdivision (a) annually to the Legislature in conformance with Section 9795.

#### SB 103 Sec. 6, Government Code section 14110.3

14110.3. The department shall achieve, at a minimum, an overall rate of 25 percent certified small business participation in state-funded contracts and procurements. For purposes of this section, "small business" has the same meaning as set forth in Section 14837.

#### SB 103 Sec. 7, Government Code section 14110.4

14110.4. (a) Beginning with the 2018–19 fiscal year, the department shall take all lawful and reasonable steps to raise the disparity indices for contracts awarded under the federal Disadvantaged Business Enterprise Program (Part 26 of Title 49 of the Code of Federal Regulations) to 100 for contracts and procurements subject to federal participation requirements, with particular emphasis on those minorities that exhibit substantial disparities with the indices, consistent with federal laws and regulations and subdivision (e) of Section 31 of Article I of the California Constitution.

(b) The department shall implement the recommendations from every disparity study undertaken as part of the federal Disadvantaged Business Enterprise Program (Part 26 of Title 49 of the

Code of Federal Regulations), consistent with federal laws and regulations and subdivision (e) of Section 31 of Article I of the California Constitution.

SB 103 Sec. 9, Public Contract Code section 10140

10140. (a) Public notice of a project shall be given by publication once a week for at least two consecutive weeks or once a week for more than two consecutive weeks if the longer period of advertising is deemed necessary by the department, as follows:

(1) In a newspaper of general circulation published in the county in which the project is located, or if located in more than one county, in such a newspaper in a county in which a major portion of the work is to be done.

(2) In a trade paper of general circulation published in San Francisco for projects located in County Group No. 1, as defined in Section 187 of the Streets and Highways Code, or in Los Angeles for projects located in County Group No. 2, as defined in Section 187 of the Streets and Highways Code, devoted primarily to the dissemination of contract and building news among contracting and building materials supply firms.

(b) The department may publish the notice to bidders for a project in additional trade papers or newspapers of general circulation that it deems advisable.

(c) (1) In the case of the Department of Transportation, instead of the public notice described in subdivision (a), the public notice requirement of this section may instead be met by publishing the public notice electronically on that department's Internet Web site.

(2) If the department exercises its authority under paragraph (1), the department shall also publish information regarding notices listed on the department's Internet Web site in trade papers, newspapers, or magazines, as appropriate in order to ensure all communities have access to the public notice, including those publications whose primary audience consists of underrepresented groups, including, but not limited to, women, minorities, LGBT, and disabled veterans, pursuant to the frequency requirements specified in subdivision (a).

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map Date	Date certain federal assistance no longer available in SFHAs
Taft, Town of, Muskogee County .....	400128	June 26, 1976, Emerg; August 25, 1987, Reg; February 4, 2011, Susp.	.....do* .....	Do.
Wainwright, Town of, Muskogee County	400129	March 9, 1976, Emerg; August 8, 1978, Reg; February 4, 2011, Susp.	.....do* .....	Do.
Warner, Town of, Muskogee County ....	400130	December 29, 1976, Emerg; May 25, 1978, Reg; February 4, 2011, Susp.	.....do* .....	Do.
Webbers Falls, Town of, Muskogee County.	400131	November 28, 1975, Emerg; May 1, 1980, Reg; February 4, 2011, Susp.	.....do* .....	Do.
<b>Texas:</b>				
Bandera County, Unincorporated Areas	480020	January 21, 1974, Emerg; November 1, 1978, Reg; February 4, 2011, Susp.	.....do* .....	Do.
Benavides, City of, Duval County .....	480792	July 24, 1975, Emerg; March 4, 1986, Reg; February 4, 2011, Susp.	.....do* .....	Do.
Colorado County, WCID Number 2 .....	481489	October 28, 1977, Emerg; June 1, 1988, Reg; February 4, 2011, Susp.	.....do* .....	Do.
Colorado County, Unincorporated Areas	480144	February 29, 1980, Emerg; September 19, 1990, Reg; February 4, 2011, Susp.	.....do* .....	Do.
Columbus, City of, Colorado County .....	480145	February 19, 1975, Emerg; June 19, 1985, Reg; February 4, 2011, Susp.	.....do* .....	Do.
Duval County, Unincorporated Areas ....	480202	July 24, 1975, Emerg; May 1, 1987, Reg; February 4, 2011, Susp.	.....do* .....	Do.
Eagle Lake, City of, Colorado County ...	480146	July 30, 1975, Emerg; April 1, 1987, Reg; February 4, 2011, Susp.	.....do* .....	Do.
Lamesa, City of, Dawson County .....	480191	February 25, 1972, Emerg; April 30, 1976, Reg; February 4, 2011, Susp.	.....do* .....	Do.
San Diego, City of, Duval and Jim Wells Counties.	481199	December 26, 1975, Emerg; March 1, 1987, Reg; February 4, 2011, Susp.	.....do* .....	Do.

\*-do- = Ditto.

Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: January 19, 2011.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation.

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**DEPARTMENT OF TRANSPORTATION**

**Office of the Secretary**

**49 CFR Part 26**

[Docket No. OST-2010-0118]

RIN 2105-AD75

**Disadvantaged Business Enterprise: Program Improvements**

**AGENCY:** Office of the Secretary (OST), DOT.

**ACTION:** Final rule.

**SUMMARY:** This rule improves the administration of the Disadvantaged Business Enterprise (DBE) program by increasing accountability for recipients with respect to meeting overall goals, modifying and updating certification requirements, adjusting the personal net worth (PNW) threshold for inflation, providing for expedited interstate certification, adding provisions to foster small business participation, improving

post-award oversight, and addressing other issues.

**DATES: Effective Dates:** This rule is effective February 28, 2011.

**FOR FURTHER INFORMATION CONTACT:** Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, Room W94-302, 202-366-9310, [bob.ashby@dot.gov](mailto:bob.ashby@dot.gov).

**SUPPLEMENTARY INFORMATION:** The Department of Transportation issued an advance notice of proposed rulemaking (ANPRM) concerning several DBE program issues on April 8, 2009 (74 FR 15904). The first issue raised in the ANPRM concerned counting of items obtained by a DBE subcontractor from its prime contractor. The second concerned ways of encouraging the “unbundling” of contracts to facilitate participation by small businesses, including DBEs. The third was a request for comments on potential improvements to the DBE application form and personal net worth (PNW) form. The fourth asked for suggestions related to program oversight. The fifth concerned potential regulatory action to facilitate certification for firms seeking to work as DBEs in more than one state.

The sixth concerned additional limitations on the discretion of prime contractors to terminate DBEs for convenience, once the prime contractor had committed to using the DBE as part of its showing of good faith efforts. The Department received approximately 30 comment letters regarding these issues.

On May 10, 2010, the Department issued a notice of proposed rulemaking (NPRM) seeking further comment on proposals based on the ANPRM and proposing new provisions (75 FR 25815). The NPRM proposed an inflationary adjustment of the PNW cap to \$1.31 million, the figure that would result from proposed Federal Aviation Administration (FAA) reauthorization legislation then pending in both Houses of Congress. The Department proposed additional measures to hold recipients accountable for their performance in achieving DBE overall goals.

The NPRM also proposed amendments to the certification-related provisions of the DBE regulation. Those proposals resulted from the Department’s experience dealing with certification issues and certification appeal cases during the years since the last major revision of the DBE rule in 1999. The proposed amendments were intended to clarify issues that have arisen and avoid problems with which

recipients (*i.e.*, state highway agencies, transit authorities, and airport sponsors who receive DOT grant financial assistance) and the Department have had to grapple over the last 11 years.

The Department received approximately 160 comments on the NPRM from a variety of interested parties, including DBE and non-DBE firms, associations representing them, and recipients of DOT financial assistance. A summary of comments on the major issues in the rulemaking, and the Department's responses to those comments, follows.

### Counting Purchases From Prime Contractors

Under current counting rules, a DBE subcontractor and its prime contractor may count for DBE credit the entire cost of a construction contract, including items that the DBE subcontractor purchases or leases from a third party (*e.g.*, in a so-called "furnish and install" contract). There is an exception to this general rule: A DBE and its prime contractor may not count toward goals items that the DBE purchases or leases from its own prime contractor. The reason for this provision is that doing so would allow the prime contractor to count for DBE credit items that it produced itself.

As noted in the ANPRM, one DBE subcontractor and a number of prime contractors objected to this approach, saying that it unfairly denies a DBE in this situation the opportunity to count credit for items it has obtained from its prime contractor rather than from other sources. Especially in situations in which a commodity might only be available from a single source—a prime contractor or its affiliate—the rule would create a hardship, according to proponents of this view. The ANPRM proposed four options (1) keeping the rule as is; (2) keeping the basic rule as is, but allowing recipients to make exceptions in some cases; (3) allowing DBEs to count items purchased from any third party source, including the DBE's prime contractor; and (4) not allowing any items obtained from any non-DBE third party to be counted for DBE credit. Comment was divided among the four alternatives, which each garnering some support. For purposes of the NPRM, the Department decided not to propose any change from the current rule.

Comment on the issue was again divided. Seven commenters favored allowing items obtained from any source to be counted for credit, including the firm that was the original proponent of the idea and another DBE, two prime contractors' associations, a

prime contractor, and two State Departments of Transportation (DOTs). These commenters generally made the same arguments as had proponents of this view at the ANPRM stage. Thirteen commenters, among which were several recipients, a DBE contractors' association, and DBE contractors, favored the NPRM's proposed approach of not making any change to the existing rule, and they endorsed the NPRM's rationale. Sixteen commenters, including a recipient association and a number of DBE companies, supported disallowing credit for any items purchased or leased from a non-DBE source. They believed that this approach supported the general principle of awarding DBE credit only for contributions that DBEs themselves make on a contract.

### DOT Response

The Department remains unconvinced that it is appropriate for a prime contractor to produce an item (*e.g.*, asphalt), provide it to its own DBE subcontractor, and then count the value of the item toward its good faith efforts to meet DBE goals. The item—*asphalt*, in this example—is a contribution to the project made by the prime contractor itself and simply passed through the DBE. That is, the prime contractor, on paper, sells the item to the DBE, who then charges the cost of the item it just bought from the prime contractor as part of its subcontract price, which the prime then reports as DBE participation. In the Department's view, this pass-through relationship is inconsistent with the most important principle of counting DBE participation, which is that credit should only be counted for value that is added to the transaction by the DBE itself.

As mentioned in the ANPRM and NPRM, the current rule treats counting of items purchased by DBEs from non-DBE sources differently, depending on whether the items are obtained from the DBE's prime contractor or from a third-party source. The Department's current approach is a reasonable compromise between the commonly accepted practice of obtaining items from non-DBE sources as part of the contracting process and maintaining the principle of counting only the DBE's own contributions for credit toward goals, which is most seriously violated when the prime contractor itself is the source of the items. This compromise respects the dual, somewhat divergent, goals of accommodating a common way of doing business and avoiding a too-close relationship between a prime contractor and a DBE subcontractor that distorts the counting of credit toward DBE goals.

This compromise has been part of the regulation since 1999 and, with the exception of the proponent of changing the regulation and its prime contractor partners, has never been raised by program participants as a widespread problem requiring regulatory change. For these reasons, the Department will leave the existing regulatory language intact.

### Terminations of DBE Firms

The NPRM proposed that a prime contractor who, in the course of meeting its good faith efforts requirements on a procurement involving a contract goal, had submitted the names of one or more DBEs to work on the project, could not terminate a DBE firm without the written consent of the recipient. The firm could be terminated only for good cause. The NPRM proposed a list of what constituted good cause for this purpose.

Over 40 comments addressed this subject, a significant majority of which supported the proposal. Two recipients said the proposal was unnecessary and a third expressed concern about workload implications. Several recipients said that they already followed this practice.

However, commenters made a variety of suggestions with respect to the details of the proposal. A DBE firm questioned a good cause element that would allow a firm to be terminated for not meeting reasonable bonding requirements, noting that lack of access to bonding is a serious problem for many DBEs. A DBE contractors' association said that a DBE's action to halt performance should not necessarily be a ground for termination, because in some cases such an action could be a justified response to an action beyond its control (*e.g.*, the prime failing to make timely payments). A DBE requested clarification of what being "not responsible" meant in this context. A number of commenters, including recipients and DBEs, suggested that a prime could terminate a DBE only if the DBE "unreasonably" failed to perform or follow instructions from the prime.

A prime contractors' association suggested additional grounds for good cause to terminate, including not performing to schedule or not performing a commercially useful function. Another such association said the rule should be consistent with normal business practices and not impede a prime contractor's ability to remove a poorly performing subcontractor for good cause. A recipient wanted a public safety exception to the time frame for a DBE's reply to a prime contractor's notice

proposing termination, and another recipient wanted to shorten that period from five to two days. A State unified certification program (UCP) suggested adopting its State's list of good cause reasons, and a consultant suggested that contracting officers, not just the DBE Liaison Officer (DBELO), should be involved in the decision about whether to concur in a prime contractor's desire to terminate a DBE. A recipient wanted to add language concerning the prime contractor's obligation to make good faith efforts to replace a terminated DBE with another DBE.

#### DOT Response

The Department, like the majority of commenters on this issue, believes that the proposed amendment will help to prevent situations in which a DBE subcontractor, to which a prime contractor has committed work, is arbitrarily dismissed from the project by the prime contractor. Comments to the docket and in the earlier stakeholder sessions have underlined that this has been a persistent problem. By specifying that a DBE can be terminated only for good cause—not simply for the convenience of the prime contractor—and with the written consent of the recipient, this amendment should help to end this abuse.

With respect to the kinds of situations in which “good cause” for termination can exist, the Department has modified the language of the rule to say that good cause includes a situation where the DBE subcontractor has failed or refused to perform the work of its subcontract in accordance with normal industry standards. We note that industry standards may vary among projects, and could be higher for some projects than others, a matter the recipient could take into account in determining whether to consent to a prime contractor's proposal to terminate a DBE firm. However, good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor (e.g., the failure of the prime contractor to make timely payments or the unnecessary placing of obstacles in the path of the DBE's work).

Good cause also does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that it can self-perform the work in question or substitute another DBE or non-DBE firm. This approach responds to commenters who were concerned about prime contractors imposing unreasonable demands on DBE subcontractors while offering recipients a more definite standard than simple

reasonableness in deciding whether to approve a prime contractor's proposal to terminate a DBE firm. We have also adopted a recipient's suggestion to permit the time frame for the process to be shortened in a case where public necessity (e.g., safety) requires a shorter period of time before the recipient's decision.

In addition to the enumerated grounds, a recipient may permit a prime contractor to terminate a DBE for “other documented good cause that the recipient determines compels the termination of the DBE subcontractor.” This means that the recipient must document the basis for any such determination, and the prime contractor's reasons for terminating the DBE subcontractor make the termination essential, not merely discretionary or advantageous. While the recipient need not obtain DOT operating administration concurrence for such a decision, FHWA, FTA, and FAA retain the right to oversee such determinations by recipients.

#### Personal Net Worth

The NPRM proposed to make an inflationary adjustment in the personal net worth (PNW) cap from its present \$750,000 to \$1.31 million, based on the consumer price index (CPI) and relating back to 1989, as proposed in FAA authorization bills pending in Congress. The NPRM noted that such an adjustment had long been sought by DBE groups and that it maintained the status quo in real dollar terms. The Department also asked for comment on the issue of whether assets counted toward the PNW calculation should continue to include retirement savings products. The rule currently does include them, but the pending FAA legislation would move in the direction of excluding them from the calculation.

Of the 95 commenters who addressed the basic issue of whether the Department should make the proposed inflationary adjustment, 71—representing all categories of commenters—favored doing so. Many said that such an adjustment was long overdue and that it would mitigate the problem of a “glass ceiling” limiting the growth and development of DBE firms. A few commenters said that such adjustments should be done regionally or locally rather than nationally, to reflect economic differences among areas of the country. A number of the commenters wanted to make sure the Department made similar adjustments annually in the future. A member of Congress suggested that the PNW should be increased to \$2.5 million, while a few recipients favored a smaller

increase (e.g., to \$1 million). A few commenters also suggested that the Department explore some method of adjusting PNW other than the CPI, but they generally did not spell out what the alternative approaches might be.

The opponents of making the adjustment, mostly recipients and DBEs, made several arguments. The first was that \$1.31 million was too high and would include businesses owners who were not truly disadvantaged. The second was that raising the PNW number would favor larger, established, richer DBEs at the expense of smaller, start-up firms. These larger companies could then stay in the program longer, to the detriment of the program's aims. Some commenters said that the experience in their states was that very few firms were becoming ineligible for PNW reasons, suggesting that a change in the current standard was unnecessary.

With respect to the issue of retirement assets, about 28 comments, primarily from DBE groups and recipients, favored excluding some retirement assets from the PNW calculation, often asserting that this was appropriate because such funds are illiquid and not readily available to contribute toward the owners' businesses. Following this logic, some of the comments said that Federally-regulated illiquid retirement plans (e.g., 401k, Roth IRA, Keough, and Deferred Compensation plans, as well as 529 college savings plans) be excluded while other assets that are more liquid (CDs, savings accounts) be counted, even if said to be for retirement purposes. A number of these commenters said that a monetary cap on the amount that could be excluded (e.g., \$500,000) would be acceptable.

The 17 comments opposing excluding retirement accounts from the PNW calculation generally supported the rationale of the existing regulation, which is that assets of this kind, even if illiquid, should be regarded as part of an individual's wealth for PNW purposes. A few commenters also said that, since it is most likely wealthier DBE owners who have such retirement accounts, excluding them would help these more established DBEs at the expense of smaller DBEs who are less likely to be able to afford significant retirement savings products. Again, commenters said that this provision, by effectively raising the PNW cap, would inappropriately allow larger firms to stay in the program longer. Some of the commenters would accept exclusion of retirement accounts if an appropriate cap were put in place, however.

Finally, several commenters asked for a revised and improved PNW form with

additional guidance and instructions on how to make PNW calculations (*e.g.*, with respect to determining the value of a house or business).

#### DOT Response

To understand the purpose and effect of the Department's proposal to change the PNW threshold from the long-standing \$750,000 figure, it is important to keep in mind what an inflationary adjustment does. (Because of the passage of time from the issuance of the NPRM to the present time, the amount of the inflationary adjustment has changed slightly, from \$1.31 million to \$1.32 million.) The final rule's adjustment is based on the Department of Labor's consumer price index (CPI) calculator. This calculator was used because, of various readily available means of indexing for inflation, CPI appears to be the one that is most nearly relevant to an individual's personal wealth. Such an adjustment simply keeps things as they were originally in real dollar terms.

That is, in 1989, \$750,000 bought a certain amount of goods and services. In 2010, given the effects of inflation over 21 years, it would take \$1.32 million in today's dollars to buy the same amount of goods and services. The buying power of assets totaling \$750,000 in 1989 is the same as the buying power of assets totaling \$1.32 million in 2010. Notwithstanding the fact that \$1.32 million, on its face, is a higher number than \$750,000, the wealth of someone with \$1.32 million in assets today is the same, in real dollar or buying power terms, as that of someone with \$750,000 in 1989.

Put another way, if the Department did not adjust the \$750,000 number for inflation, our inaction would have the effect of establishing a significantly lower PNW cap in real dollar terms. A PNW cap of \$750,000 in 2010 dollars is equivalent to a PNW cap of approximately \$425,700 in 1989 dollars. This means that a DBE applicant today would be allowed to have \$325,000 less in real dollar assets than his or her counterpart in 1989.

The Department believes, in light of this understanding of an inflationary adjustment, that making the proposed adjustment at this time is appropriate. This is a judgment that is shared by the majority of commenters and both Houses of Congress. We do not believe that any important policy interest is served by continuing to lower the real dollar PNW threshold, which we believe would have the effect of further limiting the pool of eligible DBE owners beyond what is intended by the Department in adopting the PNW standard.

The Department is using 1989 as the base year for its inflationary adjustment for two reasons. First, doing so is consistent with what both the House and Senate determined was appropriate in the context of FAA authorization bills that both chambers passed. Second, while the Department adopted a PNW standard in 1999, the standard itself, which was adopted by the Small Business Administration (SBA) before 1989, has never been adjusted for inflation at any time. By 1999, the real dollar value of the original \$750,000 standard had already been eroded by inflation, and the Department believes that it is reasonable to take into account the effect of inflation on the standard that occurred before as well as after the Department adopted it.

We appreciate the concerns of commenters who opposed the proposed inflationary adjustment. Some of these commenters, it appears, may not have fully understood that an inflationary adjustment simply maintains the status quo in real dollar terms. The concern that making the adjustment would favor larger, established DBEs over smaller, start-up companies has some basis, and reflects the longstanding tension in the program between its role as an incubator for new firms and its purpose of allowing DBE firms to grow and develop to the point where they may be in a better position to compete for work outside the DBE program. Allowing persons with larger facial amounts of assets may seem to permit participation of people who are less disadvantaged than formerly in the program, but disadvantage in the DBE program has always properly been understood as relative disadvantage (*i.e.*, relative to owners and businesses in the economy generally), not absolute deprivation. People who own successful businesses are more affluent, by and large, than many people who participate in the economy only as employees, but this does not negate the fact that socially disadvantaged persons who own businesses may well, because of the effects of discrimination, accumulate less wealth than their non-socially disadvantaged counterparts. Consequently, the concerns of opponents of this change are not sufficient to persuade us to avoid making the proposed inflationary adjustment.

We do not believe that it is practical, in terms of program administration, to have standards that vary with recipient or region. We acknowledge that one size may not fit all to perfection, but the complexity of administering a national program with a key eligibility standard that varies, perhaps significantly, among

jurisdictions would be, in our view, an even greater problem. Nor do we see a strong policy rationale for a change to some fixed figure (*e.g.*, \$1 million, \$2.5 million) that is not tied to inflation. We do agree, however, that an improved PNW form would be an asset to the program, and we will propose such a form for comment in the next stage NPRM on the DBE program, which we hope to issue in 2011. This NPRM may also continue to examine other PNW issues.

Whenever there is a change in a rule of this sort, the issue of how to handle the transition between the former rule and the new rule inevitably arises. We provide the following guidance for recipients and firms applying for DBE certification.

- For applications or decertification actions pending on the date this amendment is published, but before its effective date, recipients should make decisions based on the new standards, though these decisions should not take effect until the amendment's effective date.

- Beginning on the effective date of this amendment, all new certification decisions must be based on the revised PNW standard, even if the application was filed or a decertification action pertaining to PNW began before this date.

- If a denial of an application or decertification occurred before the publication date of this amendment, because the owner's PNW was above \$750,000 but not above \$1.32 million, and the matter is now being appealed within the recipient's or unified certification program's (UCP's) process, then the recipient or UCP should resolve the appeal using the new standard. Recipients and UCPs may request updated information where relevant. In the case of an appeal pending before the Departmental Office of Civil Rights (DOCR) under section 26.89, DOCR will take the same approach or remand the matter, as appropriate.

- If a firm was decertified or its application denied within a year before the effective date of this amendment, because the owner's PNW was above \$750,000 but not above \$1.32 million, the recipient or UCP should permit the firm to resubmit PNW information without any further waiting period, and the firm should be recertified if the owner's PNW is not over \$1.32 million and the firm is otherwise eligible.

- We view any individual who has misrepresented his or her PNW information, whether before or after the inflationary adjustment takes effect, as having failed to cooperate with the DBE

program, in violation of 49 CFR 26.109(c). In addition to other remedies that may apply to such conduct, recipients should not certify a firm that has misrepresented this information.

The Department is not ready, at this time, to make a decision on the issue of retirement assets. The comments suggested a number of detailed issues the Department should consider before proposing any specific provisions on this subject. We will further consider commenters' thoughts on this issue at a future time.

### Interstate Certification

In response to longstanding concerns of DBEs and their groups, the NPRM proposed a mechanism to make interstate certification easier. The proposed mechanism did not involve pure national reciprocity (*i.e.*, in which each state would give full faith and credit to other states' certification decisions, with the result that a certification by any state would be honored nationwide). Rather, it created a rebuttable presumption that a firm certified in its home state would be certified in other states. A firm certified in home state A could take its application materials to State B. Within 30 days, State B would decide either to accept State A's certification or object to it. If it did not object, the firm would be certified in State B. If State B did object, the firm would be entitled to a proceeding in which State B bore the burden of proof to demonstrate that the firm should not be certified in State B. The NPRM also proposed that the DOT Departmental Office of Civil Rights (DOCR) would create a database that would be populated with denials and decertifications, which the various State UCPs would check with respect to applicants and currently certified firms.

This issue was one of the most frequently commented-upon subjects in the rulemaking. Over 30 comments, from a variety of sources including DBEs, DBE organizations, and a prime contractors' association. Members of Congress and others supported the proposed approach. They emphasized that the necessity for repeated certification applications to various UCPs, and the very real possibility of inconsistent results on the same facts, were time-consuming, burdensome, and costly for DBEs. In a national program, they said, there should be national criteria, uniformity of forms and interpretations, and more consistent training of certification personnel. The proposed approach, they said, while not ideal, would be a useful step toward those goals.

An approximately equal number of commenters, predominantly recipients but also including some DBEs and associations, opposed the proposal, preferring to keep the existing rules (under which recipients can, but are not required to, accept certifications made by other recipients) in place. Many of these commenters said that their certification programs frequently had to reject out-of-state firms that had been certified by their home states because the home states had not done a good job of vetting the qualifications of the firms for certification. They asserted that there was too much variation among states concerning applicable laws and regulations (*e.g.*, with respect to business licensing or marital property laws), interpretations of the DBE rule, forms and procedures, and the training of certifying agency personnel for something like the NPRM proposal to work well. Before going to something like the NPRM proposal, some of these commenters said, DOT should do more to ensure uniform national training, interpretations, forms etc.

Commenters opposed to the NPRM proposal were concerned that the integrity of the program would be compromised, as questionable firms certified by one state would slip into the directories of other states without adequate vetting. Moreover, the number of certification actions each state had to consider, and the number of certified firms that each state would have to manage, could increase significantly, straining already scarce resources.

A smaller number of commenters addressed the idea of national reciprocity. Some of these commenters said that, at least for the future, national reciprocity was a valuable goal to work toward. Some of these commenters, including an association that performs certification reviews nationally for MBE and WBE suppliers (albeit without on-site reviews) and a Member of Congress, supported using such a model now. On the other hand, other commenters believed national reciprocity was an idea whose time had not come, for many of the same reasons stated by commenters opposed to the NPRM proposal. Some of the commenters on the NPRM proposal said that the proposal would result in *de facto* national reciprocity, which they believed was bad for the program.

Two features of the NPRM proposal attracted considerable adverse comment. Thirty-one of the 34 comments addressing the proposed 30-day window for "State B" to decide whether to object to a home state certification of a firm said that the proposed time was too short. These

commenters, mostly recipients, suggested time frames ranging from 45–90 days. They said that the 30-day time frame would be very difficult to meet, given their resources, and would cause States to accept questionable certifications from other States simply because there was insufficient time to review the documentation they had been given. Moreover, the 30-day window would mean that out-of-state firms would jump to the front of the line for consideration over in-state firms, concerning which the rule allows 90 days for certification. This would be unfair to in-state firms, they said.

In addition, 22 of 28 commenters on the issue of the burden of proof for interstate certification—again, predominantly recipients—said that it was the out-of-state applicant firm, rather than State B, that should have the burden of proof once State B objected to a home state certification of the firm. These commenters also said that it is more sensible to put the out-of-state firm in the same position as any other applicant for certification by having to demonstrate to the certifying agency that it was eligible, rather than placing the certification agency in the position of the proponent in a decertification action for a firm that it had previously certified. Again, commenters said, the NPRM proposal would favor out-of-state over in-state applicants.

A few comments suggested trying reciprocal certification on a regional basis (*e.g.*, in the 10 Federal regions) before moving to a more national approach. Others suggested that only recent information (*e.g.*, applications and on-site reports less than three years old) be acceptable for interstate certification purposes. Some states pointed to state laws requiring local licenses or registration before a firm could do business in the State: Some commenters favored limiting out-of-state applications to those firms that had obtained the necessary permits, while one commenter suggested prohibiting States from imposing such requirements prior to DBE certification. Some comments suggested limiting the grounds on which State B could object to the home state certification of a firm (*i.e.*, "good cause" rather than "interpretive differences," differences in state law, evidence of fraud in obtaining home state certification).

There was a variety of other comments relevant to the issue of interstate certification. Most commenters who addressed the idea of the DOCR database supported it, though some said that denial/decertification data should be available only to certification agencies, not the general

public. Some also said that having to input and repeatedly check the data base would be burdensome. One commenter suggested including a firm's Federal Taxpayer ID number in the database entry. One commenter suggested a larger role for the database: Applicants should electronically input their application materials to the database, which would then be available to all certifying agencies, making individual submissions of application information to the States unnecessary. Some commenters wanted DOT to create or lead a national training and/or accreditation effort for certifier personnel.

### DOT Response

Commenters on interstate were almost evenly divided on the best course of action for the Department to take. Most DBEs favored making interstate certification less difficult for firms that wanted to work outside their home states; most recipients took the opposite point of view. This disagreement reflects, we believe, a tension between two fundamental objectives of the program. On one hand, it is important to facilitate the entry of DBE firms into this national program, so that they can compete for DOT-assisted contracting wherever those opportunities exist, while reducing administrative burdens and costs on the small businesses that seek to participate. On the other hand, it is important to maintain the integrity of the program, so that only eligible firms participate and ineligible firms do not take unfair advantage of the program.

The main concern of proponents of the NPRM proposal was that failing to make changes to facilitate interstate certification would leave in place unnecessary and unreasonable barriers to the participation of firms outside of their home states. The main concern of opponents of the NPRM proposal was that making the proposed changes would negatively affect program integrity. Their comments suggest that there is considerable mistrust among certification agencies and programs. Many commenters appear to believe that, while their own certification programs do a good job, other states' certification programs do not. Much of the opposition to facilitating interstate certification appears to have arisen from this mistrust, as certification agencies seek to prevent questionable firms certified by what they perceive as weak certification programs in other states from infiltrating their domains.

The Department does not believe that it is constructive to take the position that certification programs nationwide

are so hopelessly inadequate that the best response is to leave interstate barriers in place to contain the perceived contagion of poorly qualified, albeit certified, firms within the boundaries of their own states. To the contrary, we believe that, under a system like that proposed in the NPRM, if firms certified by State A are regularly rebuffed by States B, C, D, etc., State A firms will have an incentive to bring pressure on their certification agency to improve its performance.

The Department also believes that suggestions made by commenters, such as improving training and standardizing forms and interpretations, can improve the performance of certification agencies generally. In the follow-on NPRM the Department hopes to issue in 2011, one of the subjects we will address is improvements in the certification application and PNW forms, which certification agencies then would be required to use without alteration. DOT already provides many training opportunities to certification personnel, such as the National Transportation Institute courses provided by the Federal Transit Administration, presentations by knowledgeable DOT DBE staff at meetings of transportation organizations, and webinars and other training opportunities provided by Departmental Office of Civil Rights personnel. The Department will consider further ways of fostering training and education for certifiers (e.g., a DOT-provided web-based training course for certifiers). The Department also produces guidance on certification-related issues to assist certifiers in making decisions that are consistent with this regulation, and we will continue that practice.

While we will continue to work with our state and local partners to improve the certification process, we do not believe that steps to facilitate interstate certification should be taken only after all recipients achieve an optimal level of performance. The DBE program is a national program; administrative barriers to participation impair the important program objective of encouraging DBE firms to compete for business opportunities; provisions to facilitate interstate certification can be drafted in a way that permits "State B" to screen out firms that are not eligible in accordance with this regulation. Consequently, the Department has decided to proceed with a modified form of the NPRM proposal. However, the final rule will not make compliance with the new section 26.85 mandatory until January 1, 2012, in order to provide additional time for recipients and UCPs to take advantage of training

opportunities and to establish any needed administrative mechanisms to carry out the new provision. This will also provide time for DOCR to make its database for denials and decertifications operational.

As under the NPRM, a firm certified in its home state would present its certification application package to State B. In response to commenters' concerns about the time available, State B would have 60 days, rather than 30 as in the NPRM, to determine whether it had specific objections to the firm's eligibility and to communicate those objections to the firm. If State B believed that the firm was ineligible, State B would state, with particularity, the specific reasons or objections to the firm's eligibility. The firm would then have the opportunity to respond and to present information and arguments to State B concerning the specific objections that State B had made. This could be done in writing, at an in-person meeting with State B's decision maker, or both. Again in response to commenters' concerns, the firm, rather than State B, would have the burden of proof with respect, and only with respect, to the specific issues raised by State B's objections. We believe that these changes will enhance the ability of certification agencies to protect the integrity of the program while also enhancing firms' ability to pursue business opportunities outside their home states.

We emphasize that State B's objections must be specific, so that the firm can respond with information and arguments focused clearly on the particular issues State B has identified, rather than having to make an unnecessarily broad presentation. It is not enough for State B to say "the firm is not controlled by its disadvantaged owner" or "the owner exceeds the PNW cap." These are conclusions, not specific, fact-based objections. Rather, State B might say "the disadvantaged owner has a full-time job with another organization and has not shown that he has sufficient time to exercise control over the day-to-day operations of the firm" or "the owner's property interests in assets X, Y, and Z were improperly valued and cause his PNW to exceed \$1.32 million." This degree of specificity is mandatory regardless of the regulatory ground (e.g., new information, factual errors in State A's certification: See section 26.85(d)(2)) on which State B makes an objection. For example, if State B objected to the firm's State A certification on the basis that State B's law required a different result, State B would say something like "State B Revised Statutes Section xx.yyyy

provides only that a registered engineer has the power to control an engineering firm in State B, and the disadvantaged owner of the firm is not a registered engineer, who is therefore by law precluded from controlling the firm in State B.”

On receiving this specific objection, the owner of the firm would have the burden of proof that he or she does meet the applicable requirements of Part 26. In the first example above, the owner would have to show that either he or she does not now have a full-time job elsewhere or that, despite the demands of the other job, he or she can and does control the day-to-day operations of the firm seeking certification. This burden would be to make the required demonstration by a preponderance of the evidence, the same standard used for initial certification actions generally. This owner would not bear any burden of proof with respect to size, disadvantage, ownership, or other aspects of control, none of which would be at issue in the proceeding. The proceeding, and the firm’s burden of proof, would concern only matters about which State B had made a particularized, specific objection. This narrowing of the issues should save time and resources for firms and certification agencies alike.

The firm’s response to State B’s particularized objections could be in writing and/or in the form of an in-person meeting with State B’s decision maker to discuss State B’s objections to the firm’s eligibility. The decision maker would have to be someone who is knowledgeable about the eligibility provisions of the DBE rule.

We recognize that, in unusual circumstances, the information the firm provided to State B in response to State B’s specific objections could contain new information, not part of the original record, that could form the basis for an additional objection to the firm’s certification. In such a case, State B would immediately notify the firm of the new objection and offer the firm a prompt opportunity to respond.

Section 26.85(d)(2) of the final rule lists the grounds a State B can rely upon to object to a State A certification of a firm. These are largely the same as in the NPRM. In response to a comment, the Department cautions that by saying that a ground for objection is that State A’s certification is inconsistent with this regulation, we do not intend for mere interpretive disagreements about the meaning of a regulatory provision to form a ground for objection. Rather, State B would have to cite something in State A’s certification that contradicted

a provision in the regulatory text of Part 26.

The final rule also gives, as a ground for objecting to a State A certification, that a State B law “requires” a result different from the law of State (*see* the engineering example above). To form the basis for an objection on this ground, a difference between state laws must be outcome-determinative with respect to a certification. For example, State A may treat marital property as jointly held property, while State B is a community property state. The laws are different, but both, in a given case, may well result in each spouse having a 50 percent share of marital assets. This would not form the basis for a State B objection.

With respect to state requirements for business licenses, the Department believes that states should not erect a “Catch 22” to prevent DBE firms from other states from becoming certified. That is, if a firm from State A wants to do business in State B as a DBE, it is unlikely to want to pay a fee to State B for a business license before it knows whether it will be certified. Making the firm get the business license and pay the fee before the certification process takes place would be an unnecessary barrier to the firm’s participation that would be contrary to this regulation.

The Department believes that regional certification consortia, or reciprocity agreements among states in a region, are a very good idea, and we anticipate working with UCPs in the future to help create such arrangements. Among other things, the experience of actually working together could help to mitigate the current mistrust among certification agencies. However, we do not believe it would be appropriate to mandate such arrangements at this time.

The Department believes that the DOCR database of decertification and denial actions would be of great use in the certification process. However, the system is not yet up and running. Consequently, the final rule includes a one-year delay in the implementation date of requirements for use of the database.

#### Other Certification-Related Issues

The NPRM asked for comment on whether there should be a requirement for periodic certification reviews and/or updates of on-site reviews concerning certified firms. The interval most frequently mentioned by commenters on this subject was five years, though there was also some support for three-, six-, and seven-year intervals. A number of commenters suggested that such reviews should include an on-site update only when the firm’s circumstances had

changed materially, in order to avoid burdening the limited resources of certifying agencies. Having a standardized on-site review form would reduce burdens, some commenters suggested. Other commenters suggested that the timing of reviews should be left to certifying agencies’ discretion, or that on-site updates should be done on a random basis of a smaller number of firms.

The NPRM also asked about the handling of situations where an applicant withdraws its application before the certifying agency makes a decision. Should certifying agencies be able to apply the waiting period (*e.g.*, six or 12 months) used for reapplications after denials in this situation? Comments on this issue, mostly from recipients but also from some DBEs and their associations, were divided. Some commenters said that there were often good reasons for a firm to withdraw and correct an application (*e.g.*, a new firm unaccustomed to the certification process) and that their experience did not suggest that a lot of firms tried to game the system through repeated withdrawals. On the other hand, some commenters said that having to repeatedly process withdrawn and resubmitted applications was a burden on their resources that they would want to mitigate through applying a reapplication waiting period. One recipient said that, even in the absence of a waiting period, the resubmitted application should go to the back of the line for processing. Still others wanted to be able to apply case-by-case discretion concerning whether to impose a waiting period on a particular firm. A few commenters suggested middle-ground positions, such as imposing a shorter waiting period (*e.g.*, 90 days) than that imposed on firms who are denied or applying a waiting period only for a second or subsequent withdrawal and reapplication by the same firm.

Generally, commenters were supportive of the various detail-level certification provision changes proposed in the NPRM (*e.g.*, basing certification decisions on current circumstances of a firm). Commenters did speak to a wide variety of certification issues, however. One commenter said that in its state, the UCP arbitrarily limited the number of NAICS codes in which a firm could be certified, a practice the commenter said the regulation should forbid. In addition, this commenter said, the UCP inappropriately limited certification of professional services firms owned by someone who was not a licensed professional in a field, even in the

absence of a state law requiring such licensure. A number of commenters said that recipients should not have to automatically certify SBA-certified 8(a) firms, while another commenter recommended reviving the now-lapsed DOT-SBA memorandum of understanding (MOU) on certification issues. A DBE association said that certifying agencies should not count against firms seeking certification (e.g., with respect to independence determinations) investments from or relationships with larger firms that are permitted under other Federal programs (e.g., HubZone or other SBA programs). One commenter favored, and another opposed, allowing States to use their own business specialty classifications in addition to or in lieu of NAICS codes.

One recipient recommended a provision to prevent owners from transferring personal assets to their companies to avoid counting them in the PNW calculation. Another said the certification for the PNW statement should specifically say that the information is "complete" as well as true. Yet another suggested that a prime contractor who owns a high percentage (e.g., 49 percent) of a DBE should not be able to use that DBE for credit. There were a number of suggestions that more of the certification process be done electronically, rather than on paper. A few comments said that getting back to an applicant within 20 days, as proposed in the NPRM, concerning whether the application was complete was too difficult for some recipients who have small staffs.

#### DOT Response

The Department believes that regularly updated on-site reviews are an extremely important tool in helping avoid fraudulent firms or firms that no longer meet eligibility requirements from participating in the DBE program. Ensuring that only eligible firms participate is a key part of maintaining the integrity of the program. We also realize that on-site reviews can be time- and resource-intensive. Consequently, while we believe that it is advisable for recipients and UCPs to conduct updated on-site reviews of certified companies on regular and reasonably frequent basis, and we strongly encourage such undated reviews, we have decided not to mandate a particular schedule, though we urge recipients to regard on-site reviews as a critical part of their compliance activities. When recipients or UCPs become aware of a change in circumstances or concerns that a firm may be ineligible or engaging in misconduct (e.g., from notifications of changes by the firm itself, complaints,

information in the media, etc.), the recipient or UCP should review the firm's eligibility, including doing an on-site review.

When recipients in other states (see discussion of interstate certification above) obtain the home state's certification information, they must rely on the on-site report that the home state has in its files plus the affidavits of no change, etc. that the firm has filed with the home state. It is not appropriate for State B to object to an out-of-state firm's certification because the home state's on-site review is older than State B thinks desirable, since that would unfairly punish a firm for State A's failure to update the firm's on-site review. However, if an on-site report is more than three years old, State B could require that the firm provide an affidavit to the effect that all the facts in the report remain true and correct.

While we recognize that reports that have not been updated, or which do not appear to contain sufficient analysis of a firm's eligibility, make certification tasks more difficult, our expectation is that the Department's enhanced interstate certification process will result in improved quality in on-site reviews so that recipients in various states have a clear picture of the structure and operation of firms and the qualifications of their owners. To this end, we encourage recipients and UCPs to establish and maintain communication in ways that enable information collected in one state to be shared readily with certification agencies in other states. This information sharing can be done electronically to reduce costs.

Firms may withdraw pending applications for certification for a variety of reasons, many of them legitimate. A withdrawal of an application is not the equivalent of a denial of that application. Consequently, we believe that it is inappropriate for recipients and UCPs to penalize firms that withdraw pending applications by applying the up-to-12 month waiting period of section 26.86(c) to such withdrawals, thereby preventing the firm from resubmitting the application before that time elapses. We believe that permitting recipients to place resubmitted applications at the end of the line for consideration sufficiently protects the recipients' workloads from being overwhelmed by repeated resubmissions. For example, suppose that Firm X withdraws its application in August. It resubmits the application in October. Meanwhile, 20 other firms have submitted applications. The recipient must accept Firm X's resubmission in October, but is not

required to consider it before the 20 applications that arrived in the meantime. Recipients should also closely examine changes made to the firm since the time of its first application.

We agree with commenters that it is not appropriate for recipients to limit NAICS codes in which a firm is certified to a certain number. Firms may be certified in NAICS codes for however many types of business they demonstrate that they perform and concerning which their disadvantaged owners can demonstrate that they control. We have added language to the regulation making this point. We also agree that it is not appropriate for a recipient or UCP to insist on professional certification as a *per se* condition for controlling a firm where state law does not impose such a requirement. We have no objection to a recipient or UCP voluntarily using its own business classification system in addition to using NAICS codes, but it is necessary to use NAICS codes.

SBA has now gone to a self-certification approach for small disadvantaged business, the SBA 8(a) program differs from the DBE program in important respects, and the SBA-DOT memorandum of understanding (MOU) on certification matters lapsed over five years ago. Under these circumstances, we have decided to delete former sections 26.84 and 26.85, relating to provisions of that MOU.

DBE firms in the DBE program must be fully independent, as provided in Part 26. If a firm has become dependent on a non-DBE firm through participation in another program, then it may be found ineligible for DBE program purposes. To say otherwise would create inconsistent standards that would enable firms already participating in other programs to meet a lower standard than other firms for DBE participation.

We believe that adding a regulatory provision prohibiting owners from transferring personal assets to their companies to avoid counting them in the PNW calculation would be difficult to implement, since owners of businesses often invest assets in the companies for legitimate reasons. However, as an interpretive matter, recipients are authorized to examine such transfers and, if they conclude that the transfer is a ruse to avoid counting personal assets toward the PNW calculation rather than a legitimate investment in the company and its growth, recipients or UCPs may continue to count the assets toward PNW.

We agree that the certification for the PNW statement should specifically say

that the information is “complete” as well as true and that a somewhat longer time period would be appropriate for recipients and UCPs to get back to applicants with information on whether their applications were complete. We have added a regulatory text statement on the former point and extended the time period on the latter point to 30 days.

If a prime contractor who owns a high percentage of a DBE that it wishes to use on a contract, issues concerning independence, affiliation, and commercially useful function can easily arise. For this reason, recipients should closely scrutinize such relationships. This scrutiny may well result, in some cases, in denying DBE credit or initiating decertification action.

We encourage the use of electronic methods in the application and certification process. As in other areas, electronic methods can reduce administrative burdens and speed up the process.

#### Accountability and Goal Submissions

The NPRM proposed that if a recipient failed to meet its overall goal, it would, within 60 days, have to analyze the shortfall, explain the reasons for it, and come up with corrective actions for the future. All State DOTs and the largest transit authorities and airports would have to send their analyses and corrective action plans to DOT operating administrations; smaller transit authorities and airports would retain them on file. While there would not be any requirement to meet a goal—to “hit the number”—failure to comply with these requirements could be regarded as a failure to implement a recipient’s program in good faith, which could lead to a finding of noncompliance with the regulation.

In a related provision, the Department asked questions in the NPRM concerning the recent final provision concerning submitting overall goals on a three-year, rather than an annual, basis. In particular, the NPRM asked whether it should be acceptable for a recipient to submit year-to-year projections of goals within the structure of a three-year goal and how implementation of the accountability proposal would work in the context of a three-year goal, whether or not year-to-year projections were made.

About two-thirds of the 64 comments addressing the accountability provision supported it. These commenters included DBEs, recipients, and some associations and other commenters. Some of these commenters, in fact, thought the proposal should be made

stronger. For example, a commenter suggested that a violation “will” rather than “could” be found for failure to provide the requested information. Another suggested that, beyond looking at goal attainment numbers, the accountability provisions should be broadened to include the recipient’s success with respect to a number of program elements (e.g., good faith efforts on contracts, outreach, DBE liaison officer’s role, training and education of staff).

Commenters also presented various ideas for modifying the proposal. These included suggestions that the Department should add a public input component, provide more guidance on the shortfall analysis and how to do it, delay its effective date to allow recipients to find resources to comply, ensure ongoing measurement of achievements rather than just measuring at the end of a year or three-year period, ensure that there is enough flexibility in explaining the reasons for a shortfall, or lengthen the time recipients have to submit the materials (e.g., 90 days, or 60 days after the recipient’s report of commitments and achievements is due). One commenter suggested that an explanation should be required only when there is a pattern of goal shortfalls, not in individual instances. There could be a provision for excusing recipients who fell short of their goal by very small amount, or even if the recipient made 80 percent of its goal.

Opponents of the proposal—mostly recipients plus a few associations—said that the proposal would be too administratively burdensome. In addition, they feared that making recipients explain a shortfall and propose corrective measures would turn the program into a prohibited set-aside or quota program, a concern that was particularly troublesome in states affected by the *Western States* decision. Moreover, a number of commenters said, the inability of recipients to meet overall goals was often the result of factors beyond their control. In addition, recipients might unrealistically reduce goals in order to avoid having to explain missing a more ambitious target.

With respect to the reporting intervals for goals, 28 of the 39 commenters who addressed the issue favored some form of at least optional yearly reporting of goals, either in the form of annual goal submissions or, more frequently, of year-to-year projections of goals within the framework of a three-year overall goal. The main reason given for this preference was a concern that projects and the availability of Federal funding for them were sufficiently volatile that making a projection that was valid for

a three-year period was problematic. This point of view was advanced especially by airports. Some other commenters favored giving recipients discretion whether to report annually or triennially. Commenters who took the point of view that the three-year interval was preferable agreed with original rationale of reducing repeated paperwork burdens on recipients. One commenter asked that the rule specify that, especially in a three-year interval schedule of goal submission, a recipient “must” submit revisions if circumstances change.

There was discussion in the NPRM of the relationship between the goal submission interval and the accountability provision. For example, if a recipient submitted overall goals on a three-year basis, would the accountability provision be triggered annually, based on the recipient’s annual report (as the NPRM suggested) or only on the basis of the recipient’s performance over the three-year period? If there were year-to-year projections within a three-year goal, would the accountability provision relate to accountability for the annual projection or the cumulative three-year goal? Commenters who favored year-to-year projections appeared to believe that accountability would best relate to each year’s projection, though the discussion of this issue in the comments was often not explicit. Some comments, including one from a Member of Congress, did favor holding recipients accountable for each year’s separate performance.

There was a variety of other comments on goal-related issues. Some commenters asked that the three DOT operating administrations coordinate submitting goals so that a State DOT submitting goals every three years would be able to submit its FHWA, FAA, and FTA goals in the same year. A DBE group wanted the Department to strengthen requirements pertaining to the race-neutral portion of a recipient’s overall goal. A commenter who works with transit vehicle manufacturers requested better monitoring of transit vehicle manufacturers by FTA. A group representing DBEs wanted recipients to focus on potential, and not just certified, DBEs for purposes of goal setting. The same group also urged consideration of separate goals for minority- and women-owned firms.

#### DOT Response

Under Part 26, the Department has always made unmistakably clear that the DBE program does not impose quotas. No one ever has been, or ever will be, sanctioned for failing to “hit the number.” However, goals must be

implemented in a meaningful way. A recipient's overall goal represents its estimate of the DBE participation it would achieve in the absence of discrimination and its effects. Failing to meet an overall goal means that the recipient has not completely remedied discrimination and its effects in its DOT-assisted contracting. In the Department's view, good faith implementation of a DBE program by a recipient necessarily includes understanding why the recipient has not completely remedied discrimination and its effects, as measured by falling short of its "level playing field" estimate of DBE participation embodied in its overall goal. Good faith implementation further means that, having considered the reasons for such a shortfall, the recipient will devise program actions to help minimize the potential for a shortfall in the future.

Under the Department's procedures for reviewing overall goals and the methodology supporting them, the Department has the responsibility of ensuring that a recipient's goals are well-grounded in relevant data and are derived using a sound methodology. The Department would not approve a recipient's goal submission if it appeared to understate the "level playing field" amount of DBE participation the recipient could rationally expect, whether to avoid being accountable under the new provisions of the rule or for other reasons.

For these reasons, the Department is adopting the NPRM's proposed accountability mechanism. We do not believe that the concerns of some commenters that this mechanism would create a quota system are justified: No one will be penalized for failing to meet an overall goal. Moreover, promoting transparency and accountability is not synonymous with imposing a penalty and should not be viewed as such. Understanding the reasons for not meeting a goal and coming up with ways of avoiding a shortfall in the future, while not creating a quota system, do help to ensure that recipients take seriously the responsibility to address discrimination and its effects.

Moreover, the administrative burden of compliance falls only on those recipients who fail to meet a goal, not on all recipients. Understanding what is happening in one's program, why it is happening, and how to fix problems is, or ought to be, a normal, everyday part of implementing a program, so the analytical tasks involved in meeting this requirement should not be new to recipients. We do not envision that recipients' responses to this requirement

would be book-length; a reasonable succinct summary of the recipient's analysis and proposed actions should be sufficient though, like all documents submitted in connection with the DBE program, it should show the work and reasoning leading to the recipient's conclusions.

For example, a recipient might determine that its process for ascertaining whether prime bidders who failed to meet contract goals had made adequate good faith efforts was too weak, and that prime bidders consequently received contracts despite making insufficient efforts to find DBEs for contracts. In such a case, the recipient could take corrective action such as more stringent review of bidder submissions or meeting with prime bidders to provide guidance and assistance on how to do a better job of making good faith efforts.

We agree that there may be circumstances in which a recipient's inability to meet a goal is for reasons beyond its control. If that is the case, the recipient's response to this requirement can be to identify such factors, as well as suggesting how these problems may be taken into account and surmounted in the future. We also agree with those commenters who said that good-faith implementation of a DBE program involves more than meeting an overall goal. Factors like those cited by commenters are important as part of an overall evaluation of a recipient's success. This accountability provision, however, is intended to focus on the process recipients are using to achieve their overall goals, rather than to act as a total program evaluation tool. The operating administrations will continue to conduct program reviews that address the breadth of recipients' program implementation.

The Department believes that a clear, bright-line trigger for the application of the accountability provision makes the most sense administratively and in terms of achieving the purpose of the provision. Consequently, we are not adopting suggestions that the provision be triggered only by a pattern of missing goals, or an average of missing goals over the period of a three-year overall goal, or a shortfall of a particular percentage. Any shortfall means that a recipient has dealt only incompletely with the effects of discrimination, and we believe that it is appropriate in any such case that the recipient understand why that is the case and what steps to take to improve program implementation in the future.

The three-year goal review interval was intended to reduce administrative burdens on recipients. Nevertheless, we

understand that some recipients, especially airports, may be more comfortable with annual projections and updates of overall goals. We have no objection to recipients making annual projections, for informational purposes, within the three-year overall goal. It is still the formally submitted and reviewed three-year goal, however, and not the informal annual projections, that count from the point of view of the accountability mechanism. For example, suppose an airport has a three-year annual overall goal of 12 percent. For informational purposes, the airport chooses to make informal annual projections of 6, 12, and 18 percent for years 1–3, respectively (which, by the way, are not required to be submitted to the Department). The accountability mechanism requirements would be triggered in each of the three years covered by the overall goal if DBE achievements in each year were less than 12 percent.

The Department agrees that recipients should be accountable for effectively carrying out the race-neutral portion of their programs. If a recipient fell short of its overall goal because it did not achieve the projected race-neutral portion of its goal, then this is something the recipient would have to explain and establish measures to correct (*e.g.*, by stepping up race-neutral efforts and/or concluding that it needed to increase race-conscious means of achieving its goal). We also agree that it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (*e.g.*, firms apparently owned and controlled by minorities or women that have not been certified under the DBE program) as well as certified DBEs. This is consistent with good practice in the field as well as with DOT guidance. Separate goals for various groups of disadvantaged individuals are possible with a program waiver of the DBE regulation, if a sufficient case is made for the need for group-specific goals.

In the section of the rule concerning goal-setting (49 CFR 26.45), the Department is also taking this opportunity to make a technical correction. In the final rule establishing the three year DBE goal review cycle, the Department inadvertently omitted from § 26.45(f)'s regulatory text paragraphs (3), (4), and (5), which govern the content of goal submissions, operating administration review of the submission, and review of interim goal setting mechanisms. It was never the intent of the Department to remove or otherwise change those provisions of section 26.45(f) of the rule. This final rule corrects that error by restructuring

paragraphs (1) and (2) of section 26.45(f) and restoring the language of paragraphs (3), (4), and (5) of that section of the rule. We apologize for any confusion that this error may have caused.

The Department supports strong outreach efforts by recipients to encourage minority- and women-owned firms to become certified as DBEs, so that recipients can set and meet realistic goals. However, we caution recipients against stating or implying that minority- and women-owned firms can participate in recipients' contracts only if they become certified as DBEs. It would be contrary to nondiscrimination requirements of this part and of Title VI for a recipient to limit the opportunity of minority- or women-owned firms to compete for any contract because the firm was not a certified DBE.

### Program Oversight

The NPRM proposed to require recipients to certify that they have monitored the paperwork and on-site performance of DBE contracts to make sure that DBEs actually perform them. Comment was divided on this proposal, with 21 comments favoring either the proposal or stronger oversight mechanisms and 18 opposed.

Commenters who favored the proposal, including DBEs and some associations and recipients, generally believed that the provision would make it less likely that post-award abuse of DBEs by prime contractors would occur. One recipient noted that it already followed this approach with respect to ARRA grants. Some commenters wanted the Department to require additional steps, such as requiring recipients to make periodic visits to the job site and keeping records of each visit, to ensure that the DBELO did in fact have direct access to the organization's CEO concerning DBE matters, and to maintain sufficient trained staff to do needed monitoring. DBE associations wanted mandatory monitoring of good faith efforts (e.g., by keeping records of all contacts made by prime contractors) and terminations of DBEs by prime contractors, as well as to have certifications signed by persons higher up in the organization than the DBELO (e.g., the CEO). Another commenter sought further checking concerning counting issues. A consultant and a recipient suggested that recipient certifications should be more frequent than a one-time affair, (e.g., monthly or quarterly).

Commenters who opposed the NPRM proposal, most of whom were recipients, said that the workload the certification requirement would create would be too administratively

burdensome, particularly for recipients with small staffs. The certification requirement could duplicate existing commercially useful function reviews. They also doubted the payoff in terms of improved DBE program implementation would be worth the effort. Some recipients said that they did monitor post-award performance and that the proposed additional paperwork requirement step would add little to the substance of their processes. One recipient noted that it would be very difficult to perform an on-site review of contract performance in the case of professional services consultants whose work was performed out of state.

One recipient suggested that a middle ground might be to have the recipient certify monitoring of a sample of contracts, since it lacked the staff for field monitoring of all contracts. A consultant suggested selecting contracts for monitoring based on a "risk-based analysis" of contracts or by focusing on contracts where prime contractors' achievements did not measure up to their commitments. One recipient suggested limiting the certification requirement to one commercially useful function review per year on a contract. A few recipients asked for guidance on what constituted adequate staffing for the DBE program.

### DOT Response

The Department's DBE rule already includes a provision (49 CFR 26.37(b)) requiring recipients to have a monitoring and enforcement mechanism to ensure that work committed to DBEs is actually performed by DBEs. The trouble is that, based on the Department's experience, this provision is not being implemented by recipients as well as it should be. The FHWA review team that has been examining state implementation of the DBE program found that many states did not have an effective compliance monitoring program in place. DBE fraud cases investigated by the Department's Office of Inspector General and criminal prosecutions in the Federal courts have highlighted numerous cases in which recipients were unaware, often for many years, of situations in which non-DBE companies were claiming DBE credit for work that DBEs did not perform.

The Department believes that, for the DBE program to be meaningful, it is not enough that prime contractors commit to the use of DBEs at the time of contract award. It is also necessary that the DBEs actually perform the work involved. Recipients need to know whether DBEs are actually performing the work involved, lest program effectiveness suffer and the door be left open to fraud.

Recipients must actually monitor each contract, on paper and in the field, to ensure that that they have this knowledge. Monitoring DBE compliance on a contract is no less important, and should be no more brushed aside, than compliance of with project specifications. This is important for prime contracts performed by DBEs as well as for situations in which DBEs act as subcontractors, and the monitoring and certification requirements will apply to both situations.

Consequently, the Department believes that the proposed requirement that recipients memorialize the monitoring they are already required to perform has merit. Its intent is to make sure that the monitoring actually takes place and that the recipient stands by the statement that DBE participation claimed on a contract actually occurred. This monitoring, and the recipient's written certification that it took place, must occur with respect to every contract on which DBE participation is claimed, not just a sample or percentage of such contracts, to make sure that the program operates as it is intended. It applies to contracts entered into prior to the effective date of this rule, since the obligation to monitor work performed by DBEs has always been a key feature of the DBE program.

With respect to concerns about administrative burden, the Department believes that monitoring is something that recipients have been responsible for conducting since the inception of Part 26. Therefore, we are not asking recipients to do something with which they can claim they are unfamiliar. Moreover, as the final rule version of this provision makes clear, recipients can combine the on-site monitoring for DBE compliance with other monitoring they do. For example, the inspector who looks at a project to make sure that the contractor met contract specifications before final payment is authorized could also confirm that DBE requirements were honestly met.

While we believe that more intensive and more frequent monitoring of DBE performance on contracts is desirable, we encourage recipients to monitor contracts as closely as they can. However, we do not, for workload reasons, want to mandate more pervasive monitoring at this time. We agree with commenters that it would be difficult to do on-site monitoring of contracts performed outside the state (e.g., an out-of-state consulting contract), and we have added language specifying that the requirement to monitor work sites pertains to work sites in the recipient's state. In reference to what constitutes adequate staffing of

a DBE program, we believe that it is best to look at this question in terms of a performance standard. The Department's rule requires certain tasks (e.g., responding to applications for DBE eligibility, certification and monitoring of DBE performance on contracts) to be performed within certain time frames. If a recipient has sufficient staff to meet these requirements, then its staffing levels are adequate. If not (e.g., applications for DBE certification are backlogged for several months), then staffing is inadequate.

### Small Business Provisions

The NPRM proposed that recipients would add an element to their DBE programs to foster small business participation in contracts. The purpose of this proposal was to encourage programs that, by facilitating small business participation, augmented race-neutral efforts to meet DBE goals. The program element could include items such as race-neutral small business set-asides and unbundling provisions. The NPRM did not propose to mandate any specific elements, however.

The majority of commenters addressing this part of the NPRM—38 of 55—favored the NPRM's approach. Commenters approving the proposal were drawn from DBEs, associations, and recipients. Generally, they agreed that steps to create improved opportunities for small business would help achieve the objectives of the DBE program. Specific elements that various commenters supported included unbundling (which some commenters suggested should be made mandatory), prohibiting double-bonding, small business set-asides, expansions of existing small business development programs and mentor-protégé programs.

Commenters who did not support the NPRM proposal, most of whom were recipients, were concerned that having small business programs would draw focus from programs targeted more directly at DBEs. They were also concerned about having sufficient resources to carry out the programs they might include in a small business program element. One commenter thought that a small business program element would duplicate existing supportive services programs. Another thought unbundling would not work. A number of recipients thought it would be better for DOT to issue guidance on this subject rather than to create regulatory language. A recipient association characterized the proposal as burdensome and not productive.

Eight commenters addressed the issue of bonding and insurance requirements. A bonding company association

explained that both performance and payment bonds had an appropriate place in contracting and believed that subcontractor bonds were not duplicative of prime contractor bonds. A DBE wanted to prohibit prime contractors from setting bonding requirements for subcontractors. A recipient said the Department should treat prime contractors and subcontractors the same for bonding purposes. One DBE association said the combination of payment bonds, performance bonds, and retention was burdensome for subcontractors and Another DBE association said that it was inappropriate to require bonding of the subcontractor when the prime contractor was already bonded for the overall work of the contract. This association suggested that a prime contractor could not demonstrate good faith efforts to meet a goal if it insisted on such a double bond.

### DOT Response

DBEs are small businesses. Program provisions that help small businesses can help DBEs. By facilitating participation for small businesses, recipients can make possible more DBE participation, and participation by additional DBE firms. Consequently, we believe that a program element that pulls together the various ways that a recipient reaches out to small businesses and makes it easier for them to compete for DOT-assisted contracts will foster the objectives of the DBE program. Because small business programs of the kind suggested in the NPRM are race-neutral, use of these programs can assist recipients in meeting the race-neutral portions of their overall goals. This is consistent with the language that under Part 26, recipients are directed to meet as much as possible of their overall goals through race-neutral means.

It is important to keep in mind that race-neutral programs should not be passive. Simply waiting and hoping that occasional DBEs will participate without the use of contract goals does not an effective race-neutral program make. Rather, recipients are responsible for taking active, effective steps to increase race-neutral DBE participation, by implementing programs of the kind mentioned in this section of the NPRM and final rule. The Department will be monitoring recipients' race-neutral programs to make sure that they meet this standard.

In adopting the NPRM proposal requiring a small business program element, the Department believes that this element—which is properly viewed as an integral part of a recipient's DBE

program—need not distract recipients from other key parts of recipients' DBE programs, such as certification and the use of race-conscious measures. There are different ways of encouraging DBE participation and meeting DBE overall goals, and recipients' programs need to address a variety of these means. Many of the provisions that recipients can use to implement the requirements of the new section (e.g., unbundling, race-neutral small business set-asides) are already part of the regulation or DOT guidance, and carrying out these elements should not involve extensive additional burdens.

With respect to bonding, the Department believes that commenters made a good point with respect to the burden of duplicative bonding. By duplicative bonding, we mean insistence by a prime contractor that a DBE provide bonding for work that is already covered by bonding or insurance provided by the prime contractor or the recipient. Like duplicative bonding, excessive bonding—a requirement, which according to participants in the Department's stakeholder meetings, is sometimes imposed to provide a bond in excess of the value of the subcontractor's work—can act as an unnecessary barrier to DBE participation. While we believe that additional action to address these problems may have merit, there was not a great deal of comment on the implications of potential regulatory requirements in these areas. Consequently, we will defer action on these issues at this time and seek additional comment and information in the follow-on NPRM the Department is planning to issue.

### Miscellaneous Comments

Several commenters expressed general support for the DBE program and/or the NPRM, while two commenters opposed the DBE program in general. A large number of comments from an advocacy organization's members supported additional bonding assistance and more frequent data reporting. A commenter wanted to add DBE coverage for Federal Railroad Administration (FRA) grants. Commenters also suggested such steps as increasing technical assistance, using project labor agreements to increase DBE participation, an SBA 8(a) program-like term limit on participation in the DBE program, a better uniform reporting form, greater ease in complaining to DOT and recipients about noncompliance issues, and putting current joint check guidance into the rule's text.

## DOT Response

The Department already has programs in place concerning bonding and data reporting. There is not currently a direct, specific statutory mandate for a DBE program in FRA financial assistance programs, though the Department is considering ways of ensuring nondiscrimination in contracting in these programs. For example, like all recipients of Federal financial assistance, FRA recipients are subject to requirements under Title VI of the Civil Rights Act of 1964. Existing programs, such as the FHWA supportive services program and various initiatives by the Department's Office of Small and Disadvantaged Business Utilization, are in place to assist DBEs in being competitive. Given the language of the statutes authorizing the DOT DBE program, we do not believe that a term limit on the participation of DBE companies would be permissible. The Department is working on improvements on all its DBE forms, and we expect to seek comment on revised forms in the follow-on NPRM we anticipate publishing. At this point, we think that the joint check guidance is sufficient without codification, but we can look at this issue, among other certification issues, in the next round of rulemaking.

## The Continuing Compelling Need for the DBE Program

As numerous court decisions have noted,<sup>1</sup> the Department's DBE regulations, and the statutes authorizing them, are supported by a compelling need to address discrimination and its effects. This basis for the program has been established by Congress and applies on a nationwide basis. Both the House and Senate FAA reauthorization bills contained findings reaffirming the compelling need for the program. We would also call to readers' attention the additional information presented to the House of Representatives in a March 26, 2009, hearing before the Transportation and Infrastructure Committee and made a part of the record of that hearing and a Department of Justice document entitled "The Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: A Decade Later An Update to the May 23, 1996 Review of Barriers for Minority- and Women-

Owned Businesses" and the information and documents cited therein. This information confirms the continuing compelling need for race- and gender-conscious programs such as the DOT DBE program.

## Regulatory Analyses and Notices

### *Executive Order 12866 and DOT Regulatory Policies and Procedures*

This is a nonsignificant regulation for purposes of Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. Its provisions involve administrative modifications to several provisions of a long-existing and well-established program, designed to improve the program's implementation. The rule does not alter the direction of the program, make major policy changes, or impose significant new costs or burdens.

### *Regulatory Flexibility Act*

A number of provisions of the rule reduce small business burdens or increase opportunities for small business, notably the interstate certification process and the small business DBE program element provisions. Small recipients would not be required to file reports concerning the reasons for overall goal shortfalls and corrective action steps to be taken. Only State DOTs, the 50 largest transit authorities, and the 30–50 airports receiving the greatest amount of FAA financial assistance would have to file these reports. The task of sending copies of on-site review reports to other certification entities fall on UCPs, which are not small entities, and in any case can be handled electronically (e.g., by emailing PDF copies of the documents). While all recipients would have to input information about decertifications and denials into a DOT database, this would be a quick electronic process that would not be costly or burdensome. In any case, this requirement will be phased in as the Department prepares to put the database online. The rule does not make major policy changes that would cause recipients to expend significant resources on program modifications. For these reasons, the Department certifies that the rule does not have a significant economic effect on a substantial number of small entities.

### *Federalism*

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of

compliance on them. We have analyzed this rule under the Order and have determined that it does not have implications for federalism, since it merely makes administrative modifications to an existing program. It does not change the relationship between the Department and State or local governments, pre-empt State law, or impose substantial direct compliance costs on those governments.

### *Paperwork Reduction Act*

As required by the Paperwork Reduction Act of 1995, DOT has submitted the Information Collection Requests (ICRs) below to the Office of Management and Budget (OMB). Before OMB decides whether to approve these proposed collections of information and issue a control number, the public must be provided 30 days to comment. Organizations and individuals desiring to submit comments on the collections of information in this rule should direct them to the Office of Management and Budget, *Attention*: Desk Officer for the Office of the Secretary of Transportation, Office of Information and Regulatory Affairs, Washington, DC 20503. OMB is required to make a decision concerning the collection of information requirements contained in this rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

We will respond to any OMB or public comments on the information collection requirements contained in this rule. The Department will not impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. The Department intends to obtain current OMB control numbers for the new information collection requirements resulting from this rulemaking action. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

It is estimated that the total incremental annual burden hours for the information collection requirements in this rule are 47,450 hours in the first year, 83,370 in the second year, and 51,875 thereafter. The following are the information collection requirements in this rule:

Certification of Monitoring (49 CFR 26.37(b))

Each recipient would certify that it had conducted post-award monitoring of contracts which would be counted for

<sup>1</sup> See for instance *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *Northern Contracting Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007), *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003), *Western States Paving Co., Inc. v. Washington Department of Transportation*, 407 F.3d 983 (9th Cir. 2005).

DBE credit to ensure that DBEs had done the work for which credit was claimed. The certification is for the purpose of ensuring accountability for monitoring which the regulation already requires.

*Respondents:* 1,050.

*Frequency:* 13,400 (i.e., there are about 13,400 contracts per year that have DBE participation, based on 2009 data).

*Estimated Burden per Response:* 1/2 hour.

*Estimated Total Annual Burden:* 6,700 hours.

Small Business Program Element (49 CFR 26.39)

Each recipient would add a new DBE program element, consisting of strategies to encourage small business participation in their contracting activities. No specific element would be required, and many of the potential elements are already part of the existing DBE regulation or implementing guidance (e.g., unbundling; race-neutral small business set-asides). The small business program element is intended to pull a recipient's small business efforts into a single, unified place in this DBE Program. This requirement goes into effect a year from the effective date of the rule.

*Respondents:* 1,050.

*Frequency:* Once (for a one-time task).

*Estimated Burden per Response:* 30 hours.

*Estimated Total Annual Burden Hours:* 31,500 (one time).

Accountability Mechanism (49 CFR 26.47(c))

If a recipient failed to meet its overall goal in a given year, it would have to determine the reasons for its failure and establish corrective steps.

Approximately 150 large recipients would transmit this analysis to DOT; smaller recipients would perform the analysis but would not be required to submit it to DOT. We estimate that about half of recipients would be subject to this requirement in a given year.

*Respondents:* 525 (150 of which would have to submit reports to DOT).

*Frequency:* Once per year.

*Estimated Average Burden per Response:* 80 hours + 5 for recipients sending report to DOT.

*Estimated Total Annual Burden Hours:* 42,750.

Affidavit of Completeness (49 CFR 26.45(c)(4))

When a firm certified in its home state seeks certification in another state ("State B"), the firm must provide an affidavit that the information the firm

provides to State B is complete and is identical to that submitted to the home state. The calculation of the burden for this item assumes that there will be an average 2600 interstate applications each year to which this requirement would apply. This requirement takes effect a year from the effective date of this rule.

*Respondents:* 2,600.

*Frequency:* Once per year to a given recipient.

*Estimated Average Burden per Response:* 1 hour.

*Estimated Total Annual Burden Hours:* 2,600 hours.

Transmittal of On-Site Report (49 CFR 26.85(d)(1))

When a "State B" receives a request for certification from a firm certified in "State A," State A must promptly send a copy of that report to State B. This would involve simply emailing a PDF or other electronic copy of an existing report. This requirement takes effect one year from the effective date of this rule.

*Respondents:* 52.

*Frequency:* An average of 50 per year per recipient.

*Estimated Average Burden per Response:* 1/2 hour.

*Estimated Total Annual Burden Hours:* 1,300.

Transmittal of Decertification/Denial Information (49 CFR 26.85(f)(1))

When a unified certification program (UCP) in a state denies a firm's application for certification or decertifies the firm, it must electronically notify a DOT database of the fact. The information in the database is then available to other certification agencies for their reference. The calculation of the burden of this requirement assumes that there would be an average of 100 such actions per year by each UCP.

*Respondents:* 52.

*Frequency:* An average of 100 per year per recipient.

*Estimated Average Burden per Response:* 1/2 hour.

*Estimated Total Annual Burden Hours:* 2,600.

Transmittal of Denial/Decertification Documents (49 CFR 26.85(f)(3))

When a UCP notes, from the DOT database, that a firm that has applied or been granted certification was denied or decertified elsewhere, the UCP would request a copy of the decision by the other state, which would then have to send a copy. The Department anticipates that this would be done by an email exchange, the response attaching a PDF or other electronic copy

of an existing document. This requirement goes into effect a year from the effective date of the rule.

*Respondents:* 52.

*Frequency:* An average of 75 per year per recipient.

*Estimated Average Burden per*

*Response:* five minutes for the request; 1/2 hour for the response.

*Estimated Total Annual Burden Hours:* 2,625.

#### List of Subjects in 49 CFR Part 26

Administrative practice and procedure, Airports, Civil rights, Government contracts, Grant programs—transportation, Mass transportation, Minority businesses, Reporting and record keeping requirements.

Issued this 11th day of January, 2011, at Washington, DC.

**Ray LaHood,**

*Secretary of Transportation.*

For the reasons set forth in the preamble, the Department amends 49 CFR Part 26 as follows:

#### PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

■ 1. The authority citation for part 26 is amended to read as follows:

**Authority:** 23 U.S.C. 304 and 324; 42 U.S.C. 2000d, *et seq.*; 49 U.S.C. 47107, 47113, 47123; Sec. 1101(b), Pub. L. 105–178, 112 Stat. 107, 113.

■ 2. In section 26.5, add a definition of "Home state" in alphabetical order to read as follows:

#### § 26.5 What do the terms used in this part mean?

\* \* \* \* \*

"Home state" means the state in which a DBE firm or applicant for DBE certification maintains its principal place of business.

\* \* \* \* \*

■ 3. In § 26.11, add paragraph (a) to read as follows:

#### § 26.11 What records do recipients keep and report?

(a) You must transmit the Uniform Report of DBE Awards or Commitments and Payments, found in Appendix B to this part, at the intervals stated on the form.

\* \* \* \* \*

■ 4. Revise § 26.31 to read as follows:

#### § 26.31 What information must you include in your DBE directory?

(a) In the directory required under § 26.81(g) of this Part, you must list all

firms eligible to participate as DBEs in your program. In the listing for each firm, you must include its address, phone number, and the types of work the firm has been certified to perform as a DBE.

(b) You must list each type of work for which a firm is eligible to be certified by using the most specific NAICS code available to describe each type of work. You must make any changes to your current directory entries necessary to meet the requirement of this paragraph (a) by August 26, 2011.

■ 5. Revise § 26.37 (b) to read as follows:

**§ 26.37 What are a recipient's responsibilities for monitoring the performance of other program participants?**

\* \* \* \* \*

(b) Your DBE program must also include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently (e.g., as the result of modification to the contract) is actually performed by the DBEs to which the work was committed. This mechanism must include a written certification that you have reviewed contracting records and monitored work sites in your state for this purpose. The monitoring to which this paragraph refers may be conducted in conjunction with monitoring of contract performance for other purposes (e.g., close-out reviews for a contract).

\* \* \* \* \*

■ 6. Add § 26.39 to subpart B to read as follows:

**§ 26.39 Fostering small business participation.**

(a) Your DBE program must include an element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.

(b) This element must be submitted to the appropriate DOT operating administration for approval as a part of your DBE program by February 28, 2012. As part of this program element you may include, but are not limited to, the following strategies:

(1) Establishing a race-neutral small business set-aside for prime contracts under a stated amount (e.g., \$1 million).

(2) In multi-year design-build contracts or other large contracts (e.g., for "megaprojects") requiring bidders on the prime contract to specify elements of the contract or specific subcontracts

that are of a size that small businesses, including DBEs, can reasonably perform.

(3) On prime contracts not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved.

(4) Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts.

(5) To meet the portion of your overall goal you project to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform.

(c) You must actively implement your program elements to foster small business participation. Doing so is a requirement of good faith implementation of your DBE program.

■ 7. In § 26.45:

■ a. Revise paragraphs (e)(2), (e)(3), (f)(1), and (f)(2);

■ b. Redesignate paragraphs (f)(3) and (f)(4) as (f)(6) and (f)(7), respectively; and

■ c. Add new paragraphs (f)(3), (4), and (5).

The revisions and addition read as follows:

**§ 26.45 How do recipients set overall goals?**

\* \* \* \* \*

(e) \* \* \*

(2) If you are an FTA or FAA recipient, as a percentage of all FT or FAA funds (exclusive of FTA funds to be used for the purchase of transit vehicles) that you will expend in FTA or FAA-assisted contracts in the three forthcoming fiscal years.

(3) In appropriate cases, the FHWA, FTA or FAA Administrator may permit or require you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects. Like other overall goals, a project goal may be adjusted to reflect changed circumstances, with the concurrence of the appropriate operating administration.

(i) A project goal is an overall goal, and must meet all the substantive and procedural requirements of this section pertaining to overall goals.

(ii) A project goal covers the entire length of the project to which it applies.

(iii) The project goal should include a projection of the DBE participation anticipated to be obtained during each fiscal year covered by the project goal.

(iv) The funds for the project to which the project goal pertains are separated from the base from which your regular overall goal, applicable to contracts not part of the project covered by a project goal, is calculated.

(f)(1)(i) If you set your overall goal on a fiscal year basis, you must submit it to the applicable DOT operating administration by August 1 at three-year intervals, based on a schedule established by the FHWA, FTA, or FAA, as applicable, and posted on that agency's Web site.

(ii) You may adjust your three-year overall goal during the three-year period to which it applies, in order to reflect changed circumstances. You must submit such an adjustment to the concerned operating administration for review and approval.

(iii) The operating administration may direct you to undertake a review of your goal if necessary to ensure that the goal continues to fit your circumstances appropriately.

(iv) While you are required to submit an overall goal to FHWA, FTA, or FAA only every three years, the overall goal and the provisions of Sec. 26.47(c) apply to each year during that three-year period.

(v) You may make, for informational purposes, projections of your expected DBE achievements during each of the three years covered by your overall goal. However, it is the overall goal itself, and not these informational projections, to which the provisions of section 26.47(c) of this part apply.

(2) If you are a recipient and set your overall goal on a project or grant basis as provided in paragraph (e)(3) of this section, you must submit the goal for review at a time determined by the FHWA, FTA or FAA Administrator, as applicable.

(3) You must include with your overall goal submission a description of the methodology you used to establish the goal, including your base figure and the evidence with which it was calculated, and the adjustments you made to the base figure and the evidence you relied on for the adjustments. You should also include a summary listing of the relevant available evidence in your jurisdiction and, where applicable, an explanation of why you did not use that evidence to adjust your base figure. You must also include your projection of the portions of the overall goal you expect to meet through race-neutral and race-conscious measures, respectively (see 26.51(c)).

(4) You are not required to obtain prior operating administration concurrence with your overall goal. However, if the operating

administration's review suggests that your overall goal has not been correctly calculated, or that your method for calculating goals is inadequate, the operating administration may, after consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you.

(5) If you need additional time to collect data or take other steps to develop an approach to setting overall goals, you may request the approval of the concerned operating administration for an interim goal and/or goal-setting mechanism. Such a mechanism must:

(i) Reflect the relative availability of DBEs in your local market to the maximum extent feasible given the data available to you; and

(ii) Avoid imposing undue burdens on non-DBEs.

\* \* \* \* \*

■ 8. In § 26.47, add paragraphs (c) and (d) to read as follows:

**§ 26.47 Can recipients be penalized for failing to meet overall goals?**

\* \* \* \* \*

(c) If the awards and commitments shown on your Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, you must do the following in order to be regarded by the Department as implementing your DBE program in good faith:

(1) Analyze in detail the reasons for the difference between the overall goal and your awards and commitments in that fiscal year;

(2) Establish specific steps and milestones to correct the problems you have identified in your analysis and to enable you to meet fully your goal for the new fiscal year;

(3)(i) If you are a state highway agency; one of the 50 largest transit authorities as determined by the FTA; or an Operational Evolution Partnership Plan airport or other airport designated by the FAA, you must submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed under paragraphs (c)(1) and (2) of this section to the appropriate operating administration for approval. If the operating administration approves the report, you will be regarded as complying with the requirements of this section for the remainder of the fiscal year.

(ii) As a transit authority or airport not meeting the criteria of paragraph (c)(3)(i) of this section, you must retain analysis and corrective actions in your records for three years and make it available to FTA or FAA on request for their review.

(4) FHWA, FTA, or FAA may impose conditions on the recipient as part of its approval of the recipient's analysis and corrective actions including, but not limited to, modifications to your overall goal methodology, changes in your race-conscious/race-neutral split, or the introduction of additional race-neutral or race-conscious measures.

(5) You may be regarded as being in noncompliance with this Part, and therefore subject to the remedies in § 26.103 or § 26.105 of this part and other applicable regulations, for failing to implement your DBE program in good faith if any of the following things occur:

(i) You do not submit your analysis and corrective actions to FHWA, FTA, or FAA in a timely manner as required under paragraph (c)(3) of this section;

(ii) FHWA, FTA, or FAA disapproves your analysis or corrective actions; or

(iii) You do not fully implement the corrective actions to which you have committed or conditions that FHWA, FTA, or FAA has imposed following review of your analysis and corrective actions.

(d) If, as recipient, your Uniform Report of DBE Awards or Commitments and Payments or other information coming to the attention of FTA, FHWA, or FAA, demonstrates that current trends make it unlikely that you will achieve DBE awards and commitments that would be necessary to allow you to meet your overall goal at the end of the fiscal year, FHWA, FTA, or FAA, as applicable, may require you to make further good faith efforts, such as by modifying your race-conscious/race-neutral split or introducing additional race-neutral or race-conscious measures for the remainder of the fiscal year.

■ 9. In § 26.51, revise paragraphs (b)(1) and (f)(1) to read as follows:

**§ 26.51 What means do recipients use to meet overall goals?**

\* \* \* \* \*

(b) \* \* \*

(1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under § 26.39 of this part.

\* \* \* \* \*

(f) \* \* \*

(1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract

goals during that year, unless it becomes necessary in order meet your overall goal.

*Example to paragraph (f)(1):* Your overall goal for Year 1 is 12 percent. You estimate that you can obtain 12 percent or more DBE participation through the use of race-neutral measures, without any use of contract goals. In this case, you do not set any contract goals for the contracts that will be performed in Year 1. However, if part way through Year 1, your DBE awards or commitments are not at a level that would permit you to achieve your overall goal for Year 1, you could begin setting race-conscious DBE contract goals during the remainder of the year as part of your obligation to implement your program in good faith.

\* \* \* \* \*

■ 10. In § 26.53:

■ a. Redesignate paragraph (g) as paragraph (i);

■ b. Redesignate paragraphs (f)(2) and (3) as paragraphs (g) and (h), respectively;

■ c. Revise paragraph (f)(1); and

■ d. Add new paragraphs (f)(2) through (6) to read as follows:

**§ 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?**

\* \* \* \* \*

(f)(1) You must require that a prime contractor not terminate a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) without your prior written consent. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.

(2) You may provide such written consent only if you agree, for reasons stated in your concurrence document, that the prime contractor has good cause to terminate the DBE firm.

(3) For purposes of this paragraph, good cause includes the following circumstances:

(i) The listed DBE subcontractor fails or refuses to execute a written contract;

(ii) The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor;

(iii) The listed DBE subcontractor fails or refuses to meet the prime contractor's

reasonable, nondiscriminatory bond requirements.

(iv) The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;

(v) The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant 2 CFR Parts 180, 215 and 1,200 or applicable state law;

(vi) You have determined that the listed DBE subcontractor is not a responsible contractor;

(vii) The listed DBE subcontractor voluntarily withdraws from the project and provides to you written notice of its withdrawal;

(viii) The listed DBE is ineligible to receive DBE credit for the type of work required;

(ix) A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract;

(x) Other documented good cause that you determine compels the termination of the DBE subcontractor. Provided, that good cause does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award.

(4) Before transmitting to you its request to terminate and/or substitute a DBE subcontractor, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to you, of its intent to request to terminate and/or substitute, and the reason for the request.

(5) The prime contractor must give the DBE five days to respond to the prime contractor's notice and advise you and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why you should not approve the prime contractor's action. If required in a particular case as a matter of public necessity (e.g., safety), you may provide a response period shorter than five days.

(6) In addition to post-award terminations, the provisions of this section apply to preaward deletions of or substitutions for DBE firms put forward by offerors in negotiated procurements.

\* \* \* \* \*

■ 11. In § 26.67, revise paragraphs (a)(2)(i) and (iv), and in paragraphs (b), (c), and (d), remove "\$750,000" and add in its place "\$1.32 million".

The revisions read as follows:

**§ 26.67 What rules determine social and economic disadvantage?**

(a) \* \* \*

(2)(i) You must require each individual owner of a firm applying to participate as a DBE, whose ownership and control are relied upon for DBE certification to certify that he or she has a personal net worth that does not exceed \$1.32 million.

\* \* \* \* \*

(iv) Notwithstanding any provision of Federal or state law, you must not release an individual's personal net worth statement nor any documents pertaining to it to any third party without the written consent of the submitter. Provided, that you must transmit this information to DOT in any certification appeal proceeding under section 26.89 of this part or to any other state to which the individual's firm has applied for certification under § 26.85 of this part.

\* \* \* \* \*

■ 12. Revise § 26.71(n) to read as follows:

**§ 26.71 What rules govern determinations concerning control?**

\* \* \* \* \*

(n) You must grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm need demonstrate to you only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. You must not require that the firm be recertified or submit a new application for certification, but you must verify the disadvantaged owner's control of the firm in the additional type of work.

(1) The types of work a firm can perform (whether on initial certification or when a new type of work is added) must be described in terms of the most specific available NAICS code for that type of work. If you choose, you may also, in addition to applying the appropriate NAICS code, apply a descriptor from a classification scheme of equivalent detail and specificity. A correct NAICS code is one that describes, as specifically as possible, the principal goods or services which the firm would provide to DOT recipients. Multiple NAICS codes may be assigned where appropriate. Program participants must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a firm's certification. If your Directory does not list types of work for any firm

in a manner consistent with this paragraph (a)(1), you must update the Directory entry for that firm to meet the requirements of this paragraph (a)(1) by August 28, 2011.

(2) Firms and recipients must check carefully to make sure that the NAICS codes cited in a certification are kept up-to-date and accurately reflect work which the UCP has determined the firm's owners can control. The firm bears the burden of providing detailed company information the certifying agency needs to make an appropriate NAICS code designation.

(3) If a firm believes that there is not a NAICS code that fully or clearly describes the type(s) of work in which it is seeking to be certified as a DBE, the firm may request that the certifying agency, in its certification documentation, supplement the assigned NAICS code(s) with a clear, specific, and detailed narrative description of the type of work in which the firm is certified. A vague, general, or confusing description is not sufficient for this purpose, and recipients should not rely on such a description in determining whether a firm's participation can be counted toward DBE goals.

(4) A certifier is not precluded from changing a certification classification or description if there is a factual basis in the record. However, certifiers must not make after-the-fact statements about the scope of a certification, not supported by evidence in the record of the certification action.

\* \* \* \* \*

■ 13. Revise § 26.73(b) to read as follows:

**§ 26.73 What are other rules affecting certification?**

\* \* \* \* \*

(b)(1) You must evaluate the eligibility of a firm on the basis of present circumstances. You must not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part.

(2) You must not refuse to certify a firm solely on the basis that it is a newly formed firm, has not completed projects or contracts at the time of its application, has not yet realized profits from its activities, or has not demonstrated a potential for success. If the firm meets disadvantaged, size, ownership, and control requirements of

this Part, the firm is eligible for certification.

\* \* \* \* \*

#### § 26.81 [Amended]

■ 14. Amend § 26.81(g) by removing the word “section” and adding in its place the word “part” and by removing the period at the end of the last sentence and adding the words “and shall revise the print version of the Directory at least once a year.”

■ 15. In § 26.83, remove and reserve paragraph (e), revise paragraph (h), and add paragraphs (l) and (m) to read as follows:

#### § 26.83 What procedures do recipients follow in making certification decisions?

\* \* \* \* \*

(h) Once you have certified a DBE, it shall remain certified until and unless you have removed its certification, in whole or in part, through the procedures of section 26.87. You may not require DBEs to reapply for certification or require “recertification” of currently certified firms. However, you may conduct a certification review of a certified DBE firm, including a new on-site review, three years from the date of the firm’s most recent certification, or sooner if appropriate in light of changed circumstances (*e.g.*, of the kind requiring notice under paragraph (i) of this section), a complaint, or other information concerning the firm’s eligibility. If you have grounds to question the firm’s eligibility, you may conduct an on-site review on an unannounced basis, at the firm’s offices and jobsites.

\* \* \* \* \*

(l) As a recipient or UCP, you must advise each applicant within 30 days from your receipt of the application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.

(m) Except as otherwise provided in this paragraph, if an applicant for DBE certification withdraws its application before you have issued a decision on the application, the applicant can resubmit the application at any time. As a recipient or UCP, you may not apply the waiting period provided under § 26.86(c) of this part before allowing the applicant to resubmit its application. However, you may place the reapplication at the “end of the line,” behind other applications that have been made since the firm’s previous application was withdrawn. You may also apply the waiting period provided under § 26.86(c) of this part to a firm that has established a pattern of

frequently withdrawing applications before you make a decision.

#### § 26.84 [Removed]

■ 16. Remove section 26.84.

■ 17. Revise § 26.85 to read as follows

#### § 26.85 Interstate certification.

(a) This section applies with respect to any firm that is currently certified in its home state.

(b) When a firm currently certified in its home state (“State A”) applies to another State (“State B”) for DBE certification, State B may, at its discretion, accept State A’s certification and certify the firm, without further procedures.

(1) To obtain certification in this manner, the firm must provide to State B a copy of its certification notice from State A.

(2) Before certifying the firm, State B must confirm that the firm has a current valid certification from State A. State B can do so by reviewing State A’s electronic directory or obtaining written confirmation from State A.

(c) In any situation in which State B chooses not to accept State A’s certification of a firm as provided in paragraph (b) of this section, as the applicant firm you must provide the information in paragraphs (c)(1) through (4) of this section to State B.

(1) You must provide to State B a complete copy of the application form, all supporting documents, and any other information you have submitted to State A or any other state related to your firm’s certification. This includes affidavits of no change (*see* § 26.83(j)) and any notices of changes (*see* § 26.83(i)) that you have submitted to State A, as well as any correspondence you have had with State A’s UCP or any other recipient concerning your application or status as a DBE firm.

(2) You must also provide to State B any notices or correspondence from states other than State A relating to your status as an applicant or certified DBE in those states. For example, if you have been denied certification or decertified in State C, or subject to a decertification action there, you must inform State B of this fact and provide all documentation concerning this action to State B.

(3) If you have filed a certification appeal with DOT (*see* § 26.89), you must inform State B of the fact and provide your letter of appeal and DOT’s response to State B.

(4) You must submit an affidavit sworn to by the firm’s owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States.

(i) This affidavit must affirm that you have submitted all the information required by 49 CFR 26.85(c) and the information is complete and, in the case of the information required by § 26.85(c)(1), is an identical copy of the information submitted to State A.

(ii) If the on-site report from State A supporting your certification in State A is more than three years old, as of the date of your application to State B, State B may require that your affidavit also affirm that the facts in the on-site report remain true and correct.

(d) As State B, when you receive from an applicant firm all the information required by paragraph (c) of this section, you must take the following actions:

(1) Within seven days contact State A and request a copy of the site visit review report for the firm (*see* § 26.83(c)(1)), any updates to the site visit review, and any evaluation of the firm based on the site visit. As State A, you must transmit this information to State B within seven days of receiving the request. A pattern by State B of not making such requests in a timely manner or by “State A” or any other State of not complying with such requests in a timely manner is noncompliance with this Part.

(2) Determine whether there is good cause to believe that State A’s certification of the firm is erroneous or should not apply in your State. Reasons for making such a determination may include the following:

(i) Evidence that State A’s certification was obtained by fraud;

(ii) New information, not available to State A at the time of its certification, showing that the firm does not meet all eligibility criteria;

(iii) State A’s certification was factually erroneous or was inconsistent with the requirements of this part;

(iv) The State law of State B requires a result different from that of the State law of State A.

(v) The information provided by the applicant firm did not meet the requirements of paragraph (c) of this section.

(3) If, as State B, unless you have determined that there is good cause to believe that State A’s certification is erroneous or should not apply in your State, you must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice that it is certified and place the firm on your directory of certified firms.

(4) If, as State B, you have determined that there is good cause to believe that State A’s certification is erroneous or should not apply in your State, you

must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice stating the reasons for your determination.

(i) This notice must state with particularity the specific reasons why State B believes that the firm does not meet the requirements of this Part for DBE eligibility and must offer the firm an opportunity to respond to State B with respect to these reasons.

(ii) The firm may elect to respond in writing, to request an in-person meeting with State B's decision maker to discuss State B's objections to the firm's eligibility, or both. If the firm requests a meeting, as State B you must schedule the meeting to take place within 30 days of receiving the firm's request.

(iii) The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of this Part with respect to the particularized issues raised by State B's notice. The firm is not otherwise responsible for further demonstrating its eligibility to State B.

(iv) The decision maker for State B must be an individual who is thoroughly familiar with the provisions of this Part concerning certification.

(v) State B must issue a written decision within 30 days of the receipt of the written response from the firm or the meeting with the decision maker, whichever is later.

(vi) The firm's application for certification is stayed pending the outcome of this process.

(vii) A decision under this paragraph (d)(4) may be appealed to the

Departmental Office of Civil Rights under s§ 26.89 of this part.

(e) As State B, if you have not received from State A a copy of the site visit review report by a date 14 days after you have made a timely request for it, you may hold action required by paragraphs (d)(2) through (4) of this section in abeyance pending receipt of the site visit review report. In this event, you must, no later than 30 days from the date on which you received from an applicant firm all the information required by paragraph (c) of this section, notify the firm in writing of the delay in the process and the reason for it.

(f)(1) As a UCP, when you deny a firm's application, reject the application of a firm certified in State A or any other State in which the firm is certified, through the procedures of paragraph (d)(4) of this section, or decertify a firm, in whole or in part, you must make an entry in the Department of Transportation Office of Civil Rights' (DOCR's) Ineligibility Determination Online Database. You must enter the following information:

- (i) The name of the firm;
- (ii) The name(s) of the firm's owner(s);
- (iii) The type and date of the action;
- (iv) The reason for the action.

(2) As a UCP, you must check the DOCR Web site at least once every month to determine whether any firm that is applying to you for certification or that you have already certified is on the list.

(3) For any such firm that is on the list, you must promptly request a copy of the listed decision from the UCP that made it. As the UCP receiving such a request, you must provide a copy of the decision to the requesting UCP within 7 days of receiving the request. As the

UCP receiving the decision, you must then consider the information in the decision in determining what, if any, action to take with respect to the certified DBE firm or applicant.

(g) You must implement the requirements of this section beginning January 1, 2012.

**§ 26.87 [Amended]**

■ 18. In § 26.87, remove and reserve paragraph (h).

**§ 26.107 [Amended]**

■ 19. In § 26.107, in paragraphs (a) and (b), remove "49 CFR part 29" and add in its place, "2 CFR parts 180 and 1200".

■ 20. In § 26.109, revise paragraph (a)(2) to read as follows:

**§ 26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?**

(a) \* \* \*

(2) Notwithstanding any provision of Federal or state law, you must not release any information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting information. However, you must transmit this information to DOT in any certification appeal proceeding under § 26.89 of this part or to any other state to which the individual's firm has applied for certification under § 26.85 of this part.

\* \* \* \* \*

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Part II

Department of Transportation

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Office of the Secretary

49 CFR Part 26

Disadvantaged Business Enterprise: Program Implementation Modifications;  
Final Rule

**DEPARTMENT OF TRANSPORTATION****Office of the Secretary****49 CFR Part 26**

[Docket No. OST–2012–0147]

RIN 2105–AE08

**Disadvantaged Business Enterprise: Program Implementation Modifications**

**AGENCY:** Office of the Secretary (OST), U.S. Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** The U.S. Department of Transportation (DOT or Department) is amending its disadvantaged business enterprise (DBE) program regulations to improve program implementation in three major areas or categories. First, the rule revises the uniform certification application and reporting forms, creates a uniform personal net worth form, and collects data required by the Moving Ahead for Progress in the 21st Century Act (MAP–21), on the percentage of DBEs in each State. Second, the rule strengthens the certification-related program provisions, which includes adding a new provision authorizing summary suspensions under specified circumstances. Third, the rule modifies several other program provisions concerning such subjects as: Overall goal setting, good faith efforts, transit vehicle manufacturers, and counting for trucking companies. The revision also makes minor corrections to the rule.

**DATES:** This rule is effective November 3, 2014.

**FOR FURTHER INFORMATION CONTACT:** For questions related to this final rule or general information about the DBE rules/regulations, please contact Jo Anne Robinson, Senior Attorney, Office of General Law, Office of the General Counsel, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590, Room W94–205, 202–366–6984, [JoAnne.Robinson@dot.gov](mailto:JoAnne.Robinson@dot.gov). DBE program points of contact for information related to other aspects of the DBE program, including certification appeals, programs to assist small and disadvantaged businesses, and information on the DBE program in specific operating administrations, can be found at <https://www.civilrights.dot.gov/disadvantaged-business-enterprise/about-dbe-program/dbe-program-points-contact>.

**SUPPLEMENTARY INFORMATION:** On September 6, 2012, the Department published in the **Federal Register** (77 FR 54952) a notice of proposed

rulemaking (NPRM) to improve implementation of the DBE program. The DBE program is designed to enable small businesses owned and controlled by socially and economically disadvantaged individuals to compete for federally-funded contracts let by State and local transportation agencies the receive funds from DOT (i.e., recipients). The proposed rule called for a 60-day comment period, with comments to be received by November 5, 2012. Subsequently, the comment period was extended to December 24, 2012, through a notice published October 25, 2012 (77 FR 65164). The Department received approximately 300 comments from State departments of transportation, transit authorities, airports, DBEs, non-DBE firms, and representatives of various stakeholder organizations. Several commenters suggested that the Department hold a public meeting or listening session on the proposed changes before issuing a final rule. The Department responded by scheduling a public listening session for October 9, 2013, as announced in a September 18, 2013 notice (78 FR 57336), to receive additional public input on the costs and benefits of certain proposed changes, among other things. The public comment period also was reopened and extended from the date of publication until October 30, 2013. However, due to the lapse in government funding on October 1, 2013, the October 9, 2013 listening session was canceled and rescheduled to December 5, 2013 (78 FR 68016; November 13, 2013). The public comment period was reopened and extended to December 26, 2013.

The Department received an additional 50 written comments during the reopened comment periods and received in-person oral testimony from 23 individuals at the listening session, which was held in Washington, DC. Over 500 individuals registered to participate in the listening session via Web conferencing made available by the Department. A transcript of the comments received at the listening session and through the Web conferencing was placed in the NPRM docket before it closed on December 26, 2013.

Many of the written comments the Department received were extensive and covered numerous proposed changes, as well as commentary on existing regulations that are not the subject of a proposed amendment. Commenters also suggested changes beyond the scope of what was proposed by the Department in the NPRM. The Department has made changes in this final rule to some of its proposals in response to comments

received during the entire comment period and at the listening session. With the exception of comments that are beyond the scope of the proposed rulemaking, or that failed to set forth any rationale or make suggestions, the Department discusses and responds to the comments on the major issues in the NPRM below.

**Personal Net Worth (PNW) Form and Related Requirements***PNW Form*

The Department explained in the NPRM the reasons it believed creating a uniform personal net worth (PNW) form would clear the confusion that may exist when recipients or other entities that perform the certification function (i.e., certifying agencies) use the U.S. Small Business Administration's (SBA) Personal Financial Statement Form 413 as part of their evaluation of the economic disadvantage of an applicant for certification pursuant to the rule. For example, the SBA Form 413 requires each partner or stockholder with 20% ownership or more of voting stock to complete the form. This is not required by 49 CFR part 26 and has caused some confusion. We proposed a revision to 49 CFR 26.67 and offered a sample PNW form and accompanying instruction sheet (see the proposed Appendix G of the September 6, 2012, proposed rule). The Department proposed that a standard form be used by all applicants to the program. Recipients were encouraged to post the new form electronically in a screen-fillable format on their Web site to allow users to complete and print the form online.

The proposed PNW form differed in several respects from the SBA's form that the Department mentioned in its June 2003 revision to Part 26 as an appropriate form for use by our recipients in determining whether an applicant meets the economic disadvantage requirements. Most notably, the form's length increased when more columns and rows were added to give applicants space to fill in their answers. We also proposed that persons completing the form submit backup documentation such as current bank, brokerage, and retirement account statements, mortgage notes, and instruments of conveyance and encouraged recipients when reasonable questions or concerns arise to look behind the statement and the submissions. A related proposal involved requiring applicants to submit documentation for items excluded from the PNW calculation, such as net equity in the primary residence and the value

of the disadvantaged owner's interest in the applicant firm.

The Department invited comment on whether the spouse of an applicant owner should have to file a PNW statement even if the spouse is not involved in the business in question. We noted that the SBA requires the submission of a separate form from a non-applicant spouse if the applicant is not legally separated. However, the SBA requirement is linked to the agency's consideration of a spouse's financial situation in determining a person's access to credit and capital; the existing DOT rule does not take this into account except in cases involving individual determinations of social and economic disadvantage (e.g., Appendix E situations). Currently, certifiers are able to request relevant information on a case-by-case basis. The NPRM proposed adding language to 49 CFR 26.67 to recognize the authority of certifiers to request information concerning the assets of the disadvantaged owner's spouse where needed to clarify whether assets have been transferred to the spouse.

On a related subject, the Department asked for comment on whether the treatment of assets held by married couples should extend to couples who are part of domestic partnerships or civil unions where these relationships are formally recognized under State law.

Over 60 comments addressed issues related to the PNW form, a significant majority of which supported the idea of a DOT-developed PNW form, although some did advocate for the continued use of SBA Form 413. One commenter suggested that the Department mandate that the new form be used without modification and that regulatory provisions be added to address violations by Unified Certification Program (UCP) certifying agencies that revise the form. There were many comments regarding the propriety of including in the PNW form assets that are excluded from the calculation used to determine economic disadvantage under the terms of the existing regulations at 49 CFR 26.67(a). While the majority of the commenters supported creating a DOT form, many thought the proposed form was too burdensome, requested too much documentation, is complicated, and should not be used for those reasons. Similarly, other commenters objected to the form's length, with some likening it to a Federal income tax filing. Some commenters requested information on the methodology used to estimate the paperwork burden associated with completing the proposed DOT PNW form.

Commenters that addressed the question of requiring the spouse of an applicant who is not involved in operating the business to submit a PNW form included business owners, UCP recipients, and advocacy group representatives. Ten commenters favored such a requirement, citing the need to review the applicant's claim that his or her PNW statement accurately reflects community property interests and as a check on the transfer of assets as a means to circumvent the eligibility requirements. Twenty commenters opposed requiring a spousal PNW statement, citing paperwork burden concerns and pointing out that the existing regulation enables certifiers to obtain this information on a "case-by-case" basis. Many commenters believed the requirement would be intrusive and unwarranted and would complicate an already burdensome application. A commenter stated that a blanket requirement would be counter-productive and dissuade eligible DBE owners from participating in the program. However, the majority of commenters favored the collection of a PNW statement from a spouse if he or she has some role in the business (e.g., stockholder, corporate director, partner, officer, or key person), has funded or provided financial guarantees, or has transferred or sold the business to the applicant.

All of the commenters that responded to the Department's question of extending the treatment of assets of married couples to domestic partnerships or civil unions recognized under State law supported such an extension as a matter of fairness and equal treatment. Among the commenters was a coalition of nine organizations led by the National Gay & Lesbian Chamber of Commerce, a national not-for-profit advocacy organization dedicated to expanding the economic opportunities and advancements of lesbian, gay, bisexual and transgender-owned businesses across the country.

*DOT Response:* The Department has decided to finalize its own PNW form largely as proposed, but with certain changes in response to comments that argued that the proposed form was unnecessarily burdensome. We believe a more prudent approach than the proposal to require all persons to submit backup documentation in every instance (including items excluded under the regulations) is for recipients to request this information for any assets or liabilities noted on the PNW form on a case-by-case basis rather than mandatory submission by all applicants. A one-size fits all approach, in which

certifiers attempt to "substantiate" every line item regardless of magnitude or innocuousness is ill advised, administratively burdensome, and unduly restrictive. As argued by many commenters, that approach is unreasonable, onerous to applicants and sometimes excludes eligible firms. The final rule accomplishes two purposes: (1) Preserves recipient flexibility in seeking explanations for specific assets and liabilities and (2) shortens the form from 6 pages to a more manageable 3 pages, thereby streamlining the time it takes to complete it.

The DOT PNW form (attached as Appendix G) is the result of this balance of interests. As we proposed, this new form must be used without modification by certifiers and applicants whose economic disadvantaged status is relied upon for DBE certification. Section 26.67(a)(2)(i) and (ii) are amended to reflect this requirement. This is necessary to ensure that the requirements of this program are applied consistently by all certifying agencies. Language in the existing rule that requires requests for supporting documentation not be unduly lengthy, burdensome, or intrusive remains unchanged. We remind recipients that with regard to personal net worth, we intend for all information collection requests to serve a useful purpose that addresses a specific question regarding a value stated in the form and not in any way operate as authority to collect all possible documentation for each listed asset or a general requirement that business owners obtain appraisals of all assets. We urge recipients to exercise judgment and restraint when requesting reasonable supporting documentation. Personal net worth statements should not be requested for owners that are not claiming social and economic disadvantage. Nor should a personal net worth statement be requested from persons who are not listed as comprising 51% or more of the ownership percentage of the applicant firm.

The style and content of the form were carefully considered by the Department in this rulemaking. We are cognizant of concerns that too radical a departure from a form that certifiers are accustomed to using may cause some temporary confusion and corresponding administrative burdens. However, the Department believes that a standardized DOT PNW form accompanying the standard DBE Certification Application (also revised in this final rule) is a significant step in uniformity of practice. The DOT PNW form is modelled closely on SBA's Form 413, with differences tailored to DBE

program-specific needs, e.g., not to include the 49 CFR 26.67(a)(2)(iii) exclusions for ownership interest in the firm and equity in the primary residence on the front page.

The Department notes that the estimated burden hours contained in the proposed rule were based on the Department's experience in working with DBE and UCP agencies and our intent to produce a DBE-specific PNW form that includes the information typically needed to perform the certification function, but is not overly burdensome. Further, our proposed rule's estimate of 8 hours to complete the proposed PNW form is greater than the 1.5 hours SBA estimates for its form, which was designed to take into account the different purposes between the two programs and the fact that DBE applicants often need to supplement their form with supporting documentation. As discussed above, in response to comments, we have decided to lessen the requirements of the final form in today's final rule and believe that our original estimate, based on the form that will be now finalized, is reduced to 2 hours, slightly more than the SBA estimate for its form.

Another change we proposed and that we finalize today is that the instructions at the top of the form are customized for the DBE and ACDBE programs. Like SBA, we are requiring each owner to list on page 1 all assets (whether solely or jointly held) and specify liabilities. The categories of assets and liabilities we require mirror closely the SBA's categories but have minor differences. The Department's PNW form omits "sources of income and contingent liabilities," which is contained on SBA's form. On page 2, section 4 of the DOT PNW form, owners must report any equity line of credit balances on real estate holdings, how the asset was acquired (e.g. purchase, inherit, divorce, gift), and the source of market valuation. Owners must also detail in section 6, the nature of the personal property or assets, such as automobiles and other vehicles, their household goods, and any accounts receivable, placing a value on such items in the appropriate column. We added a column to this section asking whether any of these assets are insured. We envision recipients (again on a case-by-case basis) may wish to request copies of any insurance valuation on these assets listed as insured and copies of notes or liens. Sections 7 (value of other business investments) and 9 (transfer of assets) are unique to the Department's PNW form and require applicants to list these activities as described.

We have decided not to require submission of the PNW form by the spouse of a disadvantaged owner who is not involved in the operations of the business. We agree that such a requirement is unduly burdensome for the applicant and the certifier, needlessly intrudes into the affairs of individuals who are not participants in the program, and is not necessary since certifiers may request this information as needed on a case-by-case basis, but not as a routine matter.

We also agree with the commenters urging us to extend the treatment of assets held by married couples to include domestic partnerships and civil unions that are legally recognized under State law. To this end, we have added a definition of spouse that includes same-sex or opposite-sex couples that are part of a domestic partnership or civil union recognized under State law.

Concurrent with this final rule and as requested by many commenters, the Departmental Office of Civil Rights is making the final form available for distribution in a screen-fillable portable document (PDF) format, which recipients may post on their Web sites and distribute to applicants as part of the DBE certification application process.

#### *Economic Disadvantage 49 CFR 26.67*

Since 2007, the Department has, through guidance, recommended that recipients take account of evidence that indicates assets held by an individual suggest he or she is not economically disadvantaged even though the personal net worth falls below the \$1.32 million threshold that gives rise to a rebuttable presumption of economic disadvantage. The guidance reflects the Department's view that the purpose and intent of the economic disadvantage criteria is to more narrowly tailor the program to only reach those disadvantaged individuals adversely impacted by discrimination and the effects of discrimination and to accomplish the goal of remedying the effects of discrimination. The presumption is by regulation rebutted when the individual's personal net worth exceeds the \$1.32 million cap. We proposed in the NPRM to codify the existing guidance to recognize that the presumption also may be rebutted if the individual's personal net worth falls below the cap, but the individual is, in fact, too wealthy to be considered disadvantaged by any reasonable measure. To illustrate the point, the guidance notes that under some circumstances a person with a very expensive house, a yacht, and extensive real or personal property holdings may

be found not to be economically disadvantaged.

The Department also sought comment on whether a more bright-line approach would be preferable, such as whether someone with an adjusted gross income over one million dollars for two or three years on his or her Federal income tax return should not be presumed to be economically disadvantaged, regardless of their personal net worth (as defined by this program).

The Department received 42 comments on this issue. The difficulties potential applicants and recipients experience regarding economic disadvantage were expressed by many of the commenters and their views were not limited to whether the \$1.32 million personal net worth cap is reasonable. Commenters mentioned several difficulties with both the current rule, the proposed codification of the "accumulation of substantial wealth" guidance, and the alternative bright-line approach tied to the adjusted gross income of the disadvantaged owners. Most commenters comprised of recipients, DBEs, and general contractors opposed amending the regulations to include the ability to accumulate substantial wealth as a basis for rebutting the presumption of economic disadvantage. The opponents viewed the proposal as vague, subjective, and likely to result in arbitrary decisions.

Many of the opponents of this approach believed that, if the Department were to finalize criteria for personal net worth beyond the existing calculation, a measure similar to the bright-line approach with varying adjusted gross income numbers over varying numbers of years would be preferable because it provides a more objective measure of whether an applicant is economically disadvantaged. Several commenters thought that the existing bright line of \$1.32 million in personal net worth is sufficient. One commenter believes a bright-line approach helps certifiers because most are not accountants or tax experts. The Department also received comments specific to the application of the bright-line approach to S Corporations. Two commenters stated that using a bright-line approach was a false indicator for S Corporations in which the firm's income is passed through to DBE shareholders and thus is not a reflection of a shareholder's wealth. As defined by the U.S. Internal Revenue Service, S Corporations are corporations that elect to pass corporate income, losses, deductions, and credits through to their shareholders for federal tax purposes. One commenter did not

believe that a bright-line approach was appropriate for S Corporations and Limited Liability Corporations because owners of these entities recoup the profits on their personal returns in proportion to their ownership interests. The commenter went on to say that these entities distribute sufficient cash to their owners to enable them to pay income tax and this distribution does not increase the person's net worth.

*DOT Response:* As noted in the NPRM, the purpose of this proposed regulatory amendment is to give recipients a tool to exclude from the program someone who, in terms of overall assets is what a reasonable person would consider to be a wealthy individual, even if one with liabilities sufficient to bring his or her personal net worth under \$1.32 million. The Department continues to believe that this kind of tool must be available to ensure that the program truly benefits those for whom it is intended. We have seen in certification appeals upheld by the Federal courts the reasoned application of this standard based on specific facts and circumstances in the entire administrative record that support the decision. See *SRS Technologies v. United States*, 894 F. Supp 8 (D.D.C. 1995); *SRS Technologies v. United States*, 843 F. Supp. 740 (D.D.C. 1994).

We acknowledge the benefits of a bright-line approach (whether it is the adjusted gross income approach proposed in the NPRM or the current bright-line personal net worth cap that exist in the regulations) and the potential for manipulation to fall within the bright-line. The Department strongly believes that recipients must be able to look beyond the individual's personal net worth bottom line and consider his or her overall economic situation in cases where the specific facts suggest the individual is obviously wealthy with resources indicating to a reasonable person that he or she is not economically disadvantaged. Thus, the final rule incorporates the guidance but does not go beyond it as proposed. We have not included as factors "unlimited growth potential" or "has not experienced impediments to obtaining access to financing, markets, and resources." We believe that those additional criteria are unnecessary because the essence of what we intend is captured in the "ability to accumulate substantial wealth" standard as evidenced by the individual's income and the value of the various accumulated personal assets.

The Department, however, is sympathetic to the concerns raised by many commenters that the subjective

standard could lead to arbitrary decisions by recipients. To address this concern, we have included in the final rule specific factors recipients may consider in evaluating the economic disadvantaged status of an applicant or owner in this circumstance. Those factors include (1) whether the average adjusted gross income of the owner over the most recent three-year period exceeds \$350,000; (2) whether the income was unusual and not likely to occur in the future (e.g., inheritance); (3) whether the earnings were offset by losses (e.g., winnings and losses from gambling); (4) whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm; (5) other evidence that income is not indicative of lack of economic disadvantage, and (6) whether the fair market value of all assets exceed \$6 million. Similar factors are used by the Small Business Administration in its application of the economic disadvantage criteria to individuals seeking to participate in its Small Disadvantaged Business and 8(a) programs, which has long recognized the ability to accumulate substantial wealth as a basis for a finding of no economic disadvantage. The Federal courts have upheld consideration of income levels tied to the top 1–2% of high income wage earners in the United States to evaluate the economic disadvantaged status of a small business owner as reasonably based, not the subject of arbitrary decision making. *Id.* *SRS Technologies* cases cited above. As noted by the SBA, ". . . the average income for a small business owner is generally higher than the average income for the population at large and, therefore, what appears to be a high benchmark is merely reflective of the small business community." See preamble to the 2011 SBA Final Rule, 76 FR 8222–01.

We stress that we are not, with this change, requiring that a recipient consider these factors for every disadvantaged owner whose PNW would be below the current regulatory cap. Instead, today's final rule merely provides recipients who have a reasonable basis to believe that a particular owner should not be considered economically disadvantaged, despite their PNW, with the explicit authority to look at evidence beyond the PNW to determine whether that owner is truly economically disadvantaged. Further, the listed factors are simply intended to provide guidance to recipients about the kind of evidence they may look to in making this determination; it is not intended to be

a checklist. An adjusted gross income below \$350,000 may in appropriate circumstances indicate a lack of economic disadvantage. The determination should be based on the totality of the circumstances. Finally, as the final regulatory text clarifies, a recipient can only rebut the presumption of disadvantage under this standard through a proceeding that follows the same procedures as those used to remove a firm's eligibility under § 26.87. The Department believes that this procedural safeguard makes it unlikely that recipients will proceed in attempting to rebut the presumption of disadvantage in all but the most egregious cases.

#### *Transfer of Assets 49 CFR 26.67*

Under existing guidance contained in Appendix E, assets that individuals have transferred two years prior to filing their certification application may be counted when calculating their PNW. The Department proposed to codify the guidance by placing it in the rule text at § 26.67. The proposed rule essentially attributes to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to the submission of an application for certification or within two years of a participant's annual program review. This transfer rule would not apply to transfers to, or on behalf of, an immediate family member for that individual's education, medical expenses, or some other form of essential support or transfers to immediate family members that are consistent with the customary recognition of special occasions like birthdays, graduations, anniversaries, and retirements. We also proposed to expand the transfer rule to include transfers from the DBE owner to the applicant firm to ensure that such transfer are not used to enable the DBE owner to qualify for the program.

Most of the commenters, comprised largely of State departments of transportation and transit authorities, supported the proposed rule. Several commenters suggested there be no exception for transfers to a spouse and no exception where it can be demonstrated that the transfer was done to qualify for the program. Other commenters asked for clarification of certain terms (i.e., "transfer" or "essential support") or a narrowing of the exclusions. The few commenters that opposed the proposed rule provided little detail.

*DOT Response:* The Department is adopting the rule with a minor modification to the text. We see no reason to treat a spouse differently than other immediate family members regarding the exception. We agree with commenters that the exceptions would not apply if there is evidence indicating that a transfer to an immediate family member was in fact designed to enable the disadvantaged owner to evade the PNW threshold and thereby qualify for the program or remain in the program. The burden is on the applicant or the participant to demonstrate that the transfer is covered by the exception. In our experience with the Appendix E guidance, recipients have not had difficulty applying the transfer restrictions. However, we will through guidance provide clarification of terms used in the rule if needed based on specific facts and circumstances presented to the Department.

### Certification Application Form

The Department proposed a revised nationwide uniform DBE Certification Application Form to replace the one in use since 2003. In the 2003 proposed rule (68 FR 35542) at that time, we urged commenters to think about what must be contained in the application and what might be reserved for an on-site review. The resulting application reflected the Department's goal of retaining the basic structure originating in the 1999 rule that was manageable and easy to follow for applicants who must fill out the form, while simultaneously being accessible and practical for the many recipients required to accept the form. We acknowledged a concern about keeping the application within reasonable limit, regarding its length and content, to prevent it from becoming too unwieldy and burdensome. We allowed recipients to supplement the form with written consent of the operating administration with a one to two page attachment containing the additional information collection requirements. We also required applicants to submit additional supporting documents not already required by the uniform application. We strongly suggested that the form be streamlined and that additional information should be sought during the on-site review rather than during the application process. As explained in the 2012 NPRM, the 2003 application was designed to be more streamlined and user-friendly, yet comprehensive enough to supply recipients with the necessary information to form their initial line of questioning prior to and during an on-site visit. In addition, the application was designed to further

assist recipients in making determinations as to an applicant's eligibility for the DBE program.

In the Department's view, the above objectives still hold true, especially now that we provide for interstate certification. Pursuant to the January 28, 2011, final rule revision, provisions for interstate certification were added requiring applicants to provide to State B a complete copy of their application form, all supporting documentation, and other information submitted to State A or other States wherein the firm is certified. The application, therefore, must serve the needs of both sets of certifiers by providing a window into a firm's eligibility. As required by 49 CFR 26.73, eligibility determinations are to be based on present circumstances.

The Department's proposed application form as presented in the NPRM was longer in length than the existing form because of extra space added for applicants to write in their answer. We first noticed the need for more room for answers in the course of processing denial and decertification appeals where information was sometimes handwritten and overflowing the strict margins of the old form. However, despite our intention to make the form more amenable for applicants to have the option to fully explain their responses directly on the form, commenters raised concerns about the length of the form.

*DOT Response:* In response to comments about length and more specific technical comments about various aspects of the proposed form, we have shortened the entry spaces and removed several details that in our experience were not useful to include in the application but may have been more suitable questions to pose during an on-site review, as needed. For example, in the banking information space, we removed the need to insert the bank's phone number and address, but added a space identifying the names of individuals able to sign checks on the account. Similarly, in the bonding entry, we removed the need to specify the binder number, and the contact information of the bonding agent/broker. These items may be useful to a certifier, but we want to limit the amount of things an owner would have to "look up" to complete its application. The new form also removes obsolete material from the roadmap for applicants (page 1) and page 2 (e.g., relating to the long-expired Small Business Administration (SBA)—DOT Memorandum of Understanding). The final application form contains new items that were in the proposed form we believe are important. First, the dates of

any site visits conducted by other UCPs (besides the home State) are important facts that will enable certifiers to determine if any other certifier has assessed the firm's eligibility as a DBE. If an entry here is checked, we encourage certifiers to obtain the site visit report and denial/decertification decisions from their UCP members or fellow certifiers in other States. Second, the new application offers ample space for a firm to provide a concise description of its primary activities, the products and/or services it provides, and the North American Industry Classification System (NAICS) codes it believes apply to the firm. This description will help certifiers prepare for their on-site visit but also assign NAICS codes and list the firm properly in the UCP online directory if certified.

One section of the old form that deserves more explanation as to why it was revised is the area where applicants are asked to specify by name, title, ethnicity, and gender the firm's management personnel who control several key areas, such as financial decisions, estimating and bidding, contract negotiation, field supervision, etc. In crafting the NPRM, we believed then, as we do now, that some of these entries could be reworded or broken down into sub-questions and we have incorporated these changes in the new form. For instance, "sets policy for company direction/scope of operations," "hire and fire field staff or crew," and "attend bid opening and lettings," are new entries that examine more broadly the authority and responsibilities and authority roles of the majority owner vis-à-vis others in the firm. A more descriptive parenthetical is offered for "office management," which now adds billing, accounts receivable/payable, etc. within the entry.

We have also added a feature we modelled after a few certifying agencies who supplemented their form with a chart for applicants to specify the frequency by which owners and key management personnel perform the relevant tasks. Applicants will now circle, in the appropriate rows, how often a person is involved in the functions identified as: "always", "frequently", "seldom", or "never." These types of responses are very common across all certifiers who often ask this question during the on-site review. At least one commenter opposed this addition believing that assessing the amount of time owners and others devote implies that if they do not go into the field and supervise operations they are not in charge of the firm; and small business owners

frequently spend time arranging office-related matters (insurance, banking, accounting, etc.) to keep a business operational. We believe at a minimum, certifiers need to understand who does what, where, and for how long, when they assess owners' control of their firm. It is our intent that this simple breakdown of the frequency of the tasks identified will aid certifiers as they prepare for their on-site review of the owners, enabling them to ask targeted questions concerning the owners' control of their firm. The Department does not intend for certifiers to treat the new frequency chart as independently determinative of a firm's eligibility; rather, it is a tool to narrow the areas of further inquiry.

The application checklist, a vital component of the process to becoming a DBE, has also been simplified and divided into mandatory and optional items. Items from the original checklist have been left largely intact. However, to ease the paperwork burden, some are now no longer mandatory for all applicants (e.g., trust agreements held by any owner claiming disadvantaged status, year-end balance sheets and income statements for the past 3 years (or life of firm, if less than 3 years)). The Department intends for recipients to request and collect only the information necessary to determine eligibility. Smaller businesses with simple structures should not be subjected to unnecessarily burdensome data requests. We re-emphasize here that an owner's affidavit of certification attests to the fact that the information submitted is true and correct. Applicants should not be penalized for not having (or being unable to produce) items from the optional documentation list. Recipients should base eligibility decisions on the information they receive from the applicant.

To help simplify the data collection, we also clarified that the request for all applicants to submit tax returns should be limited to Federal not State returns. Two items identified in the NPRM were added to the checklist—the résumés of key personnel for the firm and any firm requests for current year federal tax return filing extensions. Résumés of key personnel are frequently requested of the applicant or provided voluntarily and should be readily available.

Various miscellaneous comments focused on the role of the Department in the certification process, with commenters suggesting that we host an on-line system for applications. Such a system would be difficult for the Department to manage and not in keeping with the delegation of the certification function to recipients and

others through their UCPs. We will conspicuously post the uniform certification application, instructions, certification affidavit, and checklist on the Departmental Office of Civil Rights Web site, <https://www.civilrights.dot.gov>. A handful of commenters (including a member of Congress) spoke to the idea that newly established firms should only be required to complete a shorter more simplified form. In response, we note that newer firms may not have the level of documentation a larger firm will and can easily enter "n/a" (not applicable) in the entries provided. In the interest of uniformity, it is more beneficial to require all applicants to submit the standardized form. We remind certifiers that a firm lacking certain documentation or a history of providing a particular good or service is, under 49 CFR 26.73(b), not necessarily ineligible for certification.

#### **Uniform Report of DBE Awards or Commitments and Payments, Appendix B**

The Department proposed several changes to the Uniform Report of DBE Awards or Commitments and Payments (Uniform Report) designed to address concerns regarding the absence of data on women-owned DBE participation by race, confusing instructions, the differing needs of the various types of businesses/organizations participating in the program, and the collection of payments to DBEs on a "real time" basis. In response, we proposed to: (1) Create separate forms for general DBE reports and projects reports; (2) clarify the instructions; (3) collect information on minority women-owned DBEs; and (4) collect information on actual payments to DBEs on ongoing contracts performed during the reporting period (i.e., real time). The proposed forms in the NPRM kept the standard format but provided clearer instructions for completing some fields. We also proposed a surrogate for comparing DBE payments to the corresponding DBE commitments to respond to concerns raised by the Government Accountability Office (GAO) in its 2011 report on the adequacy of using DBE commitment data to determine whether a recipient is meeting its overall DBE goal. As we explained in the NPRM, the GAO criticized the existing form because it did not permit DOT to match recipients' DBE commitments in a given year with actual payments made to DBEs on the contracts to which the commitments pertained. The existing form provides information on the funds that are committed to DBEs in contracts let each year. However, the

"achievements" block on the form refers to DBE payments that took place during the current year, including payments relating to contracts let in previous years, but could not include payments relating to contracts let in the current year that will not be made until future years.

Thirty-six (36) commenters addressed some aspect of the proposed changes to the existing Uniform Report. The majority of commenters agreed that the Uniform Report needs changes. Six commenters expressed general support for the proposed revisions and six expressed general opposition. Three commenters asked for simplified reporting requirements.

The collection of data on women-owned DBEs based on race/ethnicity drew comments from four general contractors associations, two of which suggested that the Department is creating additional requirements beyond what Congress intended in MAP-21. One commenter expressed the view that the breakout of DBE participation data by gender and race does nothing to improve the program and serves no purpose. Another commenter stated that prime contractors should not be responsible for gathering and reporting the racial classification of the women-owned DBE firms used on a project and that the data should not be used by the Department to set separate goals for women based on race.

The proposal to collect actual "real time" payment data on ongoing contracts drew a number of comments, many of which were favorable. Supporters viewed the information as a better snapshot of DBE participation and more closely connected to the overall DBE goal in some instances than is obtained through the existing collection of payment data on completed contracts. Proponents of this view include the Transit Vehicle Manufacturers (TVMs) who would like to submit data only on current payments, as well as some recipients that undertake mega projects (e.g., design/build) that may not show DBE activity at the outset. Some opponents thought the opposite, preferring to report payments on completed contracts to payments on ongoing contracts because, in their view, one can make the final comparison between the contract goal and actual payments to DBEs. One opponent was more concerned with the potential for the Department to incorrectly judge the recipients' overall performance, based on the payment data on ongoing contracts since the data would be affected by project schedules, project delays, change orders, and weather, all factors that impact the

schedule of DBE work and therefore payments to DBEs on a project. Another commenter expressed grave concerns about reporting on the current payment status of all active federally-assisted projects, citing the significant resources required and the challenge presented for those with electronic or paper processes. Two commenters suggested that the Department define “ongoing contracts” and one commenter asked for a definition of “completed contract.”

To address concerns raised by the GAO about the lack of a match between DBE commitments in a given year and the actual payments to DBEs on the contracts pertaining to the commitments, the NPRM sought to provide options for connecting work committed to DBEs with actual payments to the committed DBEs that are credited toward the overall goal for a particular year. One option was to collect data in 3–5 year groupings and calculate the average amount of commitments and the average amount of payments, providing a reasonable approximation for comparing the extent to which commitments result in actual payments over a specified period of time. Alternatively, a proposed modification to the existing form that would track payments credited to contracts let over a 5-year period was described in the preamble in an attempt to reach the result the GAO recommended. However, we acknowledged that it would take several years to determine the extent to which commitments resulted in payments that enabled a recipient to meet the relevant overall DBE goal and that the collection and reporting of this data would involve greater resources by recipients that may yield information of limited use for program administration and oversight purposes. We invited the public to offer other ideas that would meet the accountability and program administration objectives of the Department.

Comments on this issue supported the idea but did not think the proposed options would produce current usable information. One commenter indicated that making programmatic changes 3 years after the data is collected seems irrelevant. A State department of transportation objected to the administrative burden of accumulating and reporting data over several years, diverting resources from the “good work” of the DBE program for this purpose. In fact, of the six commenters who registered disapproval, four did so because of the level of effort needed to maintain this data. Two of the opponents did not think the proposals sufficiently addressed the GAO’s

concerns. One commenter suggested that the Department establish a workgroup with external stakeholders to address the GAO’s concern.

**DOT Response:** The Department has decided to make final the revisions to the Uniform Report and the accompanying instructions to be used by all recipients for general reporting, project reporting, and reporting by TVMs. The proposed “general reporting” and “project reporting” forms published in the NPRM were identical in format and content. The difference between the proposed forms lies in the instructions for completing one part of the form (Section A) when reporting on a project versus general reporting on DBE participation achieved during a specified period of time. Thus, the same form will be used by recipients for the different purposes as is done currently. Recipients will be expected to use the revised form to report on activity in Federal Fiscal Year 2015 (October 1, 2014–September 30, 2015). For example, the first report for FHWA and FTA recipients using the revised form will be due June 1, 2015 for the period beginning October 1, 2014 through March 31, 2015. The second report will be due December 1, 2015 for the period April 1, 2015 through September 30, 2015. Federal Aviation Administration (FAA) recipients will use the revised forms when they submit the annual report that is due December 1, 2015. Each operating administration will provide technical assistance and guidance to their recipients to ensure they understand what is required in each field for general reporting, project reporting, and reporting by TVMs. Collecting data on DBE participation by minority women will enable the Department to more fully respond to Congressional inquiries.

Actual payment data on ongoing contracts collected in Section C of the report applies to work on federally-assisted contracts performed during the reporting period. Payment data collected in Section D on completed contracts applies to contracts that the recipient has determined to be fully performed and thereby completed. No more work is required to be performed under the completed contract. In both instances, the data on payments to DBEs provides a “snap shot” of monies actually paid to DBEs, compared to dollars committed or awarded to DBEs but not yet paid, during the reporting period. The payment data on completed contracts allows recipients and the Department to determine success in meeting contract goals, while the payment data on ongoing contracts, over time, may provide some indication of

how well yearly overall goals are being met.

The Department is sensitive to the concerns raised by commenters about the practicality of the proposals offered in response to the GAO report. The additional payment data for work performed during the reporting period on ongoing contracts may enable us to better assess the adequacy of the existing comparisons used to determine how well annual overall goals are being met through dollars expended with DBEs. Because most DOT-assisted contracts are multi-year contracts, payments made pursuant to those contracts will cross more than one fiscal year. However, in those cases where the yearly overall DBE goal does not change radically from year to year, the on-going payment data may provide a closer match than currently exists. For now, reliance on contractual commitments made during the fiscal year to determine the extent to which overall DBE goals for that fiscal year are met provides a reasonable proxy. The Department will continue to explore ways of addressing the GAO’s concern that are likely to produce “real time,” useful information that does not strain existing recipient resources.

#### MAP–21 Data Reports

MAP–21 reauthorized the DBE program and included Congressional findings on the continued compelling need for the program. Section 1101(b)(4) of the statute included a long-standing but not yet implemented statutory requirement that States notify the Secretary in writing of the percentage of small business concerns that are controlled by: (1) Women, (2) socially and economically disadvantaged individuals (other than women), and (3) individuals who are women and are otherwise socially and economically disadvantaged individuals. The statute also directs the States to include the location of the aforementioned small businesses. The Department proposed to implement this requirement through the State Unified Certification Programs (UCP) that maintain statewide directories of all small businesses certified as DBEs. The information required by MAP–21 would be submitted to the Departmental Office of Civil Rights, the lead agency in the Office of the Secretary responsible for overseeing DOT implementation of the DBE program. For those firms that fall into more than one of the three categories, we proposed that the UCP agencies include a firm in the category applicable to the owner with the largest stake in the firm who is also involved in controlling the firm. We sought

comment on whether the Uniform Report of DBE Awards or Commitments and Payments should be the vehicle used to report the MAP–21 information.

Five commenters directly addressed this proposal. Only one of the commenters, a DBE contractor advocacy organization, opposed the collection and reporting of this information, stating that it serves no purpose. Four commenters support reporting the MAP–21 information separately from the Uniform Report and the advocacy organization suggested that the information should be submitted near the beginning of the fiscal year (October 15) to be consistent with other MAP–21 reporting requirements, as it would also be helpful for the purposes of those recipients involved in the program to have that information early. One commenter thought it would be more efficient to include it with the Uniform Report and that it could provide useful comparative data.

**DOT Response:** The Department has decided to require each State department of transportation, on behalf of the UCP, to submit the MAP–21 information to the Departmental Office of Civil Rights each year by January 1st, beginning in 2015. Most State departments of transportation are certifying agencies within the UCP; those who are not certifying agencies are, nonetheless, members of the UCP and share in the responsibility of making sure the UCP complies with DOT requirements. We agree that the information should not be reported on the Uniform Report; instead, it should be reported in a letter to the Director of the Departmental Office of Civil Rights. As indicated in the NPRM, to carry out this requirement, the UCPs would go through their statewide unified DBE directories and count the number of firms controlled, respectively, by: (1) White women, (2) minority or other men, and (3) minority women, and then convert the numbers to percentages, showing the calculations. The information reported would include the location of the firms in the State; it would not include ACDBEs in the numbers.

### Certification Provisions

#### Size Standard 49 CFR 26.65

The Department proposed to adjust the statutory gross receipts cap from \$22.41 million to \$23.98 million for inflation and to clarify that the size standard that applies to a particular firm is the one appropriate to the firm's primary industry classification. To qualify as a small business, the average annual gross receipts of the firm

(including its affiliates) over the previous three fiscal years shall not exceed this cap. Of the 23 comments received from State departments of transportation, UCPs, transit authorities, and representatives of DBEs and general contractors, most supported the increase in the size standard and a few suggested it be made effective immediately. Those that opposed the change (and some of the supporters) asked that the Department clarify what is meant by "primary industry classification."

**DOT Response:** The Department is amending the gross receipts cap for the financial assistance programs in 49 CFR Part 26 as proposed to \$23.98 million to ensure that the opportunity of small businesses to participate in the DBE program remains unchanged after taking inflation into account. Under MAP–21 Section 1101(b)(2)(A) the Secretary of Transportation is instructed to make the adjustment annually for inflation. With this adjustment, if a firm's gross receipts, averaged over the firm's previous three fiscal years, exceed \$23.98 million, then it exceeds the small business size limit for participation in the DBE program. We remind recipients that firms are not eligible as DBEs if they exceed the relevant NAICS code size limitation for the type(s) of work the firm seeks to perform in DOT-assisted contract, which may be lower than \$23.98 million and may not constitute the primary business of the firm. The term "primary industry classification" is currently defined in the DBE program regulations at 49 CFR 26.5. To avoid any confusion on the application of SBA size standards to the various NAICS codes in which a firm may be certified, we have clarified the text of § 26.65(a) so that it is not limited to the firm's primary industry classification.

#### Ownership 49 CFR 26.69

The Department proposed several changes to the rules that govern ownership of a DBE to provide greater clarity and specificity to aid recipients in addressing situations in which non-disadvantaged individuals or firms are involved with the DBE and to address concerns raised by the decision of the court in *The Grove, Inc. v. U.S. Department of Transportation*, 578 F. Supp. 2d 37 (D.D.C., 2008).

This discussion focuses on the proposed changes most commented upon. Specifically, the NPRM proposed to explicitly prohibit a non-disadvantaged owner's prior or superior rights to profits (§ 26.69(c)(3)); proposed clarifications relating to funding streams and sources of capital used to acquire an ownership interest in the firm

(§ 26.69(c)(1)); provided further specificity through examples on what constitutes capital contributions not commensurate with the DBE's value (including new examples of arrangements in which ownership fails to meet the "real, substantial, and continuing" requirements in the existing rule) (§ 26.69(c)(2)); and proposed to require that disadvantaged owners be entitled to at least 51% of dividends and other distributions (including liquidations) (§ 26.69(c)(4)). The NPRM further proposed to require that spousal renunciations be contemporaneous with applicable capital contributions or other transfers of marital or joint assets. Finally, the NPRM proposed to require close scrutiny of assets (including ownership interests in applicant firms) that disadvantaged owners obtain or other seller-nonbank financed transactions. This last proposed change would, among other specified conditions, generally require prevailing market (arm's length) terms with full recourse to the disadvantaged owners and/or to assets other than the ownership interest or an interest in the firm's profits.

The ownership proposals drew comments (33 in all) from State departments of transportation, transit authorities, UCPs, associations of minority business owners, other business owners, trade associations, counsel for DBE firms, a former DOT official, and a member of Congress. None expressed specific views on every proposal although several expressed either blanket approval or blanket reservations. Twenty commenters exclusively supported the proposals while thirteen expressed concerns with at least some of the changes.

A clear majority of recipients and UCPs supported most changes as providing clarity and ensuring program integrity. Private parties and trade associations, with some exceptions, expressed concern that the proposals overreached—by being too stringent, subjective, or burdensome to administer. More than a few commenters suggested that the proposals, if adopted, would discourage legitimate DBE participation, lead to inconsistent certification results across jurisdictions, or trap worthy but unsophisticated owners.

A transportation company opined that the "substantial and complex revisions and additions" to § 26.69 would require firm owners to attend "a workshop to understand the criteria;" would require recipients to employ staff with real estate, accounting, business management, and finance expertise; and would require the Department to

conduct nationwide training in a classroom setting. Some State transportation departments similarly objected that the careful scrutiny conditions would increase recipient time spent evaluating financial records and require hiring outside experts at added expense. A former Department official noted that this provision could create unwarranted barriers to program entry because in situations involving non-bank financing, “the list of five items required in the proposed § 26.69(k) could be quite difficult to produce.”

Regarding the proposed change to the spousal renunciation rule, a transit authority proposed that DOT scrap the rule as “unduly burdensome” and allow spousal renunciations that occur at least two years after the use of marital assets to acquire an ownership interest in an applicant firm, provided that “the transfer was not made solely for the purposes of obtaining DBE certification.” DBE firm counsel and at least one State department of transportation objected to the renunciation rule as unduly burdensome, requiring excessive owner sophistication regarding certification standards, and discriminatory against DBEs in community property states. One trade association “enthusiastically” supported the ownership changes, however, particularly the new marital assets rule, and a transportation department urged that DOT provide new guidance regarding when a spouse’s transfer is considered to be for the purpose of obtaining certification. Another transportation department feared that the renunciation rule would lead to fewer women owners qualifying for the DBE program; it requested that DOT generally “explain more specifically what types of documents” are sufficient to substantiate a firm’s capitalization, including the source of funds. Finally, an association of women contractors criticized the renunciation proposal as a Catch-22 (renunciation indicates “forethought to DBE creation”) that may be contrary to State law and current certification rules.

*DOT Response:* The Department carefully considered, evaluated, and weighed comments on both sides. We adopted some provisions as proposed (e.g., § 26.69(c)) and rejected others due to stakeholder concerns and possible unintended consequences.

We retain the existing marital asset provision of § 26.69(i) as currently written and do not adopt the proposed change to require spousal renunciation contemporaneous with the transfer. To adopt such a change might unnecessarily inhibit applicants from

allocating marital assets in such a way so that a disadvantaged spouse can establish and fund their business using marital funds. The current rule has adequate protections in place to prevent a non-disadvantaged spouse from retaining ownership of marital assets used to acquire ownership of an applicant firm or of an ownership interest in the firm. As long as the non-disadvantaged spouse irrevocably renounces and transfers all rights in the assets/ownership interest in the manner sanctioned by State law in which either spouse or the firm is domiciled (as the rule currently provides), we see no reason to require a renunciation at the time of the transfer. Recipients should not view a firm’s submission of renunciation contemporaneous with its application as precluding eligibility.

Regarding the careful scrutiny conditions in the proposed changes in § 26.69(k), we think it prudent not to finalize the revisions pending further study and review. Our proposal would have required careful scrutiny of situations where the disadvantaged owners of the firm obtain interests in a business or other assets from a seller-financed sale of the firm or in cases where a loan or proceeds from a non-financial institution was used by the owner to purchase the interest. The goal was to guard against seller-financed acquisitions (whether stock or assets) intended to disguise a non-disadvantaged owned business as a DBE firm. We agree with commenters that as written, the proposed language imposing mandatory conditions on transactions would be difficult for recipients to implement and has the potential of unfairly limiting the range of legitimate arrangements.

The Department adopts a revision we proposed to § 26.69(c)(3), which currently requires that a firm’s disadvantaged owners must “share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.” This concept has proven difficult for certifiers to implement because of the tendency to interpret the phrase “profits commensurate with their ownership interests” to mean that the disadvantaged owners must be the highest paid persons in the firm, and to tie in § 26.71(i)’s mandate to “consider remuneration” differences between disadvantaged owners and other participants in the firm. We clarify here in this preamble and in the final rule for ownership purposes of § 26.69, the disadvantaged owners should be entitled to the profits and loss commensurate with their ownership

interests; and any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm’s profits are grounds for denial of certification. This added provision is meant to be broad and is not absolute. There may be circumstances, particularly in franchise situations, where such an arrangement may be acceptable.

#### **Control 49 CFR 26.71**

Regarding control, the NPRM proposed clarifications to the rules concerning the involvement of non-disadvantaged individuals in the affairs of the firm by establishing more stringent requirements to ensure the disadvantaged owner(s) is in control of the company. To that end, the Department proposed to delineate some situations, circumstances, or arrangements (through examples) in which the involvement of a non-disadvantaged individual who is a former employer of the disadvantaged owner(s) may indicate a lack of control by the disadvantaged owner(s) and consequently may form the basis for denying certification. The examples included situations where the non-disadvantaged former employer controls the Board of Directors, contrary to existing requirements in 49 CFR 26.71(e); provides critical financial, bonding, or license support that enables the former employer to significantly influence business decisions; and loan arrangements or business relationships that cause dependence that prevents the disadvantaged owner from exercising independent judgment without great economic risk. In such cases, the recipient must determine that the relationship between the non-disadvantaged former employer and the disadvantaged individual or concern does not give the former employer “actual control or the potential to control” the DBE. The NPRM sought comment on whether there should be a presumption that non-disadvantaged owners who ostensibly transfer ownership and/or control to a disadvantaged person and remain involved with the firm in fact continue to control the firm.

Most of the commenters that addressed these proposed changes, many of whom were State departments of transportation, supported the change. Specific control-related comments included a UCP objecting to the proposed § 26.71(e) change as presuming misconduct and discouraging mentor-protégé relationships and spin-offs; and DBE counsel criticizing the proposed presumption as unnecessary and

antithetical to valid business and personal reasons for a non-disadvantaged person remaining associated with a DBE firm. A former DOT official likewise opined that the presumption could create unintentional barriers to entry “for the very firms that are intended to benefit from the program.” That official stated his view that when there is a legitimate business reason for the transfer, the firm should not be ineligible, even if DBE certification “may have been part of the motivation.” A member of Congress recommended that the Department hold “additional stakeholder input sessions,” particularly concerning paperwork and other burdens on DBE firms, applicants, and UCP/recipient staff.

*DOT Response:* As indicated in the NPRM, control is essential to program integrity designed to ensure that the benefits of the program reach the intended beneficiaries. The Department has decided to finalize the presumption of control by non-disadvantaged owners who remain involved in the company after a transfer. We emphasize that the presumption is rebuttable. Mentor-protégé relationships that conform to the guidance provided at 49 CFR 26.35 would rebut the presumption. Similarly, some of the explanations for continued involvement by the non-disadvantaged previous owner offered by one of the commenters may also rebut the presumption. For example, remaining with the firm to maintain contacts with previous customers, remaining temporarily to assist with the transfer, or maintaining a small ownership interest or minimal participation in the firm with no control of the company may rebut the presumption. Also, we have removed the phrase “actual control or the potential to control” to avoid muddying the concept; “control” is the issue.

We have removed the examples from the final rule because, upon further reflection, we believe they describe conduct that the rule itself prohibits or they are not helpful and may cause more confusion.

#### **Prequalification 49 CFR 26.73**

The Department proposed to revise the current provision at 49 CFR 26.73 to disconnect prequalification requirements (e.g., State or local conditions imposed on companies seeking to bid on certain categories of work) from certification requirements. As stated in the NPRM, the proposed change has the effect of not allowing prequalification to be used as a criterion for certification under any circumstances. This change would not prohibit the use of prequalification

requirements that may exist for certain kinds of contracts. However, the prequalification status of a firm would not be relevant to an evaluation of whether the firm meets the requirements for certification as a DBE (e.g., size, social and economic disadvantaged status of the owners, ownership, and control). We noted that prequalification requirements may not exist for doing business in all modes of transportation (e.g., highways versus transit).

Only a few commenters addressed this proposed change, with most in favor because they agree it has no relevance to certification. The opponents of the change (mostly general contractors) read this proposal as eliminating the prequalification requirements imposed under State law (e.g., Pennsylvania) for DBEs while such requirements continue to exist for non-DBEs.

*DOT Response:* The Department has decided to finalize the rule as proposed. In doing so, we reiterate that this change has no effect on existing State laws that require all contractors and subcontractors performing work on contracts let by State departments of transportation or other government entities to be prequalified. Under the final rule, the certifying entities in a State UCP are not permitted to consider whether a firm seeking certification as a DBE is or is not prequalified. Certifiers are to analyze only the factors relevant to DBE eligibility (Subpart D of the rule) and not incorporate other recipient business requirements like prequalification status in decisions pertaining to the applicant’s eligibility for certification in the DBE program, except as otherwise provided in the rules. Thus, a firm, once certified as a DBE, must satisfy any other applicable requirements imposed by the State on persons doing business with the State or in the State.

#### **Certification Procedures 26.83**

The Department proposed a variety of changes to the certification procedures that are set out at 49 CFR 26.83.

##### *Additional Information Requirements*

The Department proposed several changes to strengthen the process by which recipients evaluate the eligibility of a firm to be certified as a DBE and remain certified as a DBE. These proposed changes were intended to enable recipients to better assess the extent to which disadvantaged individuals own and control the kind of work the firm is certified to perform by:

- (1) Requiring key personnel be interviewed as part of the mandatory

- on-site review; (2) requiring the on-site visit be performed at the firm’s principal place of business; (3) clarifying what should be covered in a review of the legal structure of a firm; (4) requiring the review of lease and loan agreements, bank signature cards, and payroll records; (5) obtaining information on the amount of work the firm has performed in the various NAICS codes in which the firm seeks certification; (6) clarifying that the applicant (the firm, its affiliates, and the disadvantaged owners) must provide income tax returns (Federal only) for the last three years; and (7) expressly authorizing the certifying agency to request clarification of information contained in the application at any time during the application process.

Most of the commenters (primarily State departments of transportation) supported the idea of interviewing key personnel, though several noted (as did the opponents) the increased administrative burden it may place on agency staff and suggested it be made an optional practice instead of an across-the-board requirement. Opponents questioned the need for such interviews and expressed concern about the focus on the involvement of the disadvantaged owner “in the field,” which is part of the rationale given by the Department for requiring key personnel interviews.

The proposal to request information on the amount of work performed in the NAICS code assignments requested by an applicant generated a fair number of comments opposed to the idea. The reasons for the opposition included concerns about the burden such a requirement would impose, the discriminatory impact it may have, the extent to which it contradicts or conflicts with the requirements of 49 CFR 26.73(b)(2), and the means to be used to determine the “amount” of work. Nearly all those who commented on this provision argued that the proposal to require three years of tax returns should only apply to Federal returns; State returns were viewed as unnecessary or not useful. Lastly, some commenters representing DBEs thought the proposal expressly authorizing certifiers to request clarification of information in the application at any time was too open-ended and needed to be limited.

*DOT Response:* The Department has decided to modify its proposed amendment to 49 CFR 26.83(c)(1) to leave it to the discretion of recipients whether key personnel identified by the recipient should be interviewed as part of the on-site review, to eliminate the proposal that applicants provide

information about the amount of work the firm has performed in the NAICS codes requested by the firm, and to only require Federal tax returns for the past 3 years. It is not the intent of the Department to create unnecessary administrative burdens for applicants or certifiers. We agree that the focus on the amount of work a DBE performs in a given NAICS code could be misinterpreted and applied in a way that adversely impacts newly formed start-up companies. In the DBE program, there is no requirement that a DBE perform a specific percentage of work for NAICS code assignment purposes. We are adopting the other proposed changes in § 26.83(c)(1).

By finalizing in the rule (§ 26.83(c)(4)) what is currently implied—that certifiers may seek clarification from applicants of any information contained in the application material—we are not conferring *carte blanche* authority to certifiers to request additional information beyond that which is currently allowed and subject to prior approval from the concerned operating administration pursuant to 49 CFR 26.83(c)(7). In the context of this rule change, the word “clarification” is to be given its commonly understood dictionary meaning—to be free of confusion or to make reasonably understandable. In other words, if the application material is unclear, confusing, or conflicting, the certifying agency may ask the applicant to clarify information already provided.

#### *Certification Reviews*

Under the current rule, recipients may conduct a certification review of a firm three years from the date of the most recent certification or sooner if appropriate in light of changed circumstances, a complaint, or other information affecting the firm’s eligibility. The Department proposed to remove the reference to three years and instead clarify that a certification review should occur whenever there has been a change in the DBE’s circumstances (i.e., a notice of change filed by the DBE), whenever a recipient becomes aware of information that raises a genuine question about the continued eligibility of a firm, or after a specified number of years set forth in the UCP agreement. The important point here is that a recipient may not, as a matter of course, require all DBEs reapply for certification every three years or go through a recertification process every three years that essentially requires a DBE resubmit a new application and all the accompanying documentation to remain certified. As the rule currently states, “Once you have certified a DBE,

it shall remain certified until and unless you have removed its certification, in whole or in part through the procedures of § 26.87.”

*DOT Response:* Only a handful of commenters addressed this proposal. They uniformly supported it. The Department is finalizing the change as proposed.

#### *Annual Affidavit of No Change*

The Department proposed to require the submission every year of several additional documents to support the annual affidavit of no change DBEs currently file with recipients on the anniversary date of their certification. The additional documentation would include an updated statement of personal net worth, a record of any transfers of assets by the disadvantaged owner for less than fair market value to a family member within the preceding two years, all payments from the firm to the officers, owners, or directors, and the most recent Federal tax return.

Commenters were evenly divided among those who support the proposed change (mostly recipients) and those who oppose the change (mostly DBEs). Some commenters suggested the recipients be given the discretion to request the additional information if questions are raised about a DBE’s status and others thought the Department should develop a uniform affidavit to be used by all.

*DOT Response:* The Department has decided to retain the existing rule and expressly provide for the submission of updated Federal tax information with the annual affidavit of no change, in addition to other documentation supporting the firm’s size and gross receipts, which is currently required in 49 CFR 26.83(j) (“The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm’s size and gross receipts.”). We are not adopting the proposal to annually require the submission of documentation beyond that which is currently required. We agree that the yearly submission of the additional documentation proposed in the NPRM would be unduly burdensome for DBEs and certifiers alike, is contrary to the basic premise underlying the “no change affidavit,” and begins to look like a reexamination of eligibility. Recipients have sufficient authority under current rules to request information from a DBE in individual cases if there is reason to believe the DBE may no longer be eligible to remain certified. See 49 CFR 26.83(h). With

respect to the affidavit itself, the Department has developed a model affidavit for use by recipients that is posted on the Department’s Web site and sees no need, at this time, to require its use instead of other forms suitable for this purpose developed by recipients.

#### **Certification Denial 49 CFR 26.86**

We proposed to clarify the effect of an appeal to the Department of a certification denial decision on the start of the waiting period that limits when an applicant may reapply for certification. The proposed rule adds language that states the appeal of a denial of certification does not extend (or toll the start of) the waiting period. In other words, the waiting period begins to run the day after the final decision at the State level, regardless of whether the firm appeals that decision to the Department.

The Department received comments from State departments of transportation, one State UCP, and representatives of general contractors and DBEs. The opponents of the proposal argued that the appeal process should be allowed to resolve issues concerning applicant eligibility before the applicant is allowed to reapply, so that certifiers are not wasting time or expending resources better spent elsewhere reviewing another application from the same applicant that may present the same issues that are before the Department for decision on appeal. In contrast, supporters of the proposed change simply agreed without further comment, presumably accepting the change as clarifying in nature.

*DOT Response:* The Department believes that an applicant who appeals the denial of its application for certification should not have to wait until the appeal has been decided before it can reapply at the end of the waiting period. In many instances, the deficiency that is the subject of the appeal may be cured reasonably quickly. There are, further, various cases in which the waiting period expires before the Department can render a decision. There should be no penalty or disincentive to appealing an adverse certifier decision; the Department intends that an appellant be no worse off than an applicant who does not appeal.

#### **Decertification 49 CFR 26.87(f)**

The Department proposed revisions to the grounds on which recipients may remove a DBE’s certification to protect the integrity of the DBE program. The NPRM proposed to add three grounds for removal: (1) The certification

decision was clearly erroneous, (2) the DBE has failed to cooperate as required by 49 CFR 26.109, and (3) the DBE has exhibited a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the program. The second and third grounds for removal are not new; the proposed revision simply places them among the existing list of five grounds for removal. As explained in the NPRM, the first ground revises the existing standard by replacing “factually erroneous” with “clearly erroneous” to address “situations in which a mistake [of fact or law] was committed, in the absence of which the firm would not have been certified.” The Department also sought comment on whether the suspension or debarment of a DBE should result in automatic decertification, should cause an evaluation of the DBE for decertification purposes, or should prompt some other action.

Recipients were universally supportive of the proposal to add additional grounds for removal of a DBE from the program. Representatives of DBEs and general contractors also registered support. An organization representing a caucus of women-owned businesses in Chicago and a DBE from Alabama opposed the changes. The focus of the opposition centered on the appropriateness of allowing removal for failing to timely file an annual no change affidavits or notice of change (i.e., failure to cooperate) or removal for not performing a commercially useful function (i.e., a pattern of conduct). One commenter suggested there be a higher standard of proof (i.e., willful disregard) applied to situations that involve not filing an annual no change affidavit in recognition of the fact that many DBEs have multiple certifications and may inadvertently fail to timely file required documents.

Most of the nineteen commenters on the question concerning the relationship between decertification and suspension and debarment proceedings were recipients (i.e., State Departments of Transportation, transit authorities, organizations that represent State DOTs) that overwhelmingly supported either the automatic decertification of a DBE that is suspended or debarred for any reason or the automatic decertification of a DBE that is suspended or debarred for conduct relevant or related to the DBE program. Five commenters opposed automatic decertification, suggesting instead that suspension and debarment should trigger an immediate evaluation of the DBE or should be a factor considered by the recipient based on the circumstances. One commenter

suggested different treatment for suspensions and debarments: A debarment would result in permanent decertification, while a suspended DBE that is decertified could reapply at the end of the waiting period.

*DOT Response:* The Department has decided to make final the additional grounds for removal from the program. Two of the changes essentially represent a cross reference to existing regulations that permit removal for failure to cooperate and for a pattern of conduct indicating involvement in attempts to subvert the intent or requirements of the program. In the NPRM preamble discussion of this proposed change, we noted that the failure to cooperate covers such things as failing to send in affidavits of no change or notices of change and accompanying documents when needed. To be clear, the failure to cooperate is triggered when a DBE program participant fails to respond to a legitimate, reasonable request for information. If a DBE is notified by a recipient that it has not submitted the annual no change affidavit as required by the regulations, we would expect the DBE to respond promptly to such a request for information. Its failure to submit the requested information would be grounds for initiating a removal proceeding. Removal proceedings should not be initiated simply because the DBE failed to file the affidavit on its certification anniversary date, even though the information has been provided; nor should removal proceedings be continued once the DBE submits the requested information.

When a DBE is suspended or debarred based on a Federal, State, or local criminal indictment or conviction, or based on agency fact based proceedings, for conduct related to the DBE program (i.e., the DBE or its owners were indicted or convicted for perpetrating a fraud on the program related to the eligibility of the firm to be certified or fraud associated with the use of the DBE as a pass through or front company), the Department believes the DBE should be automatically decertified from the DBE program. Under those circumstances, recipients should not be required to initiate a separate § 26.87 decertification proceeding to remove a DBE. The suspension and debarment process affords the DBE an opportunity to be heard on the evidence of misconduct related to the DBE program that is relied upon to support the denial of bidding privileges. The same evidence would be relied upon to support decertification of the DBE, making further proceedings unnecessary. The Department believes that suspensions or debarments unrelated to the DBE program and

consequently not bringing into question the DBE's size, disadvantage, ownership, control, or pattern of conduct to subvert the requirements of the program should not result in automatic removal from the DBE program. In those cases, recipients are advised to take appropriate action to note in the UCP directory the suspended or debarred status of the DBE. Because suspension or debarment actions are not permanent, we see no reason to make a decertification action permanent. Recipients must accept an application for certification from a previously suspended or debarred firm once the action is over.

### Summary Suspension of Certification

The Department proposed to require the automatic or mandatory suspension of a DBE's certification without a hearing when a recipient has reason to believe that one or more of the disadvantaged owners needed to meet the ownership and control requirements is incarcerated or has died. As we indicted in the NPRM, a disadvantaged owner is considered necessary to the firm's eligibility if without that owner the firm would not meet the requirement of 51 percent ownership by disadvantaged individuals or the requirement that disadvantaged owners control the firm. Other material changes affecting the eligibility of the DBE to remain certified—like the sale of the firm to a new owner, the failure to notify the recipient of a material change in circumstances, or the failure to file the annual no change affidavit as currently required—may be the subject of a summary suspension (at the discretion of the recipient) but such action would not be automatic. During the period of suspension, the recipient must take steps to determine whether proceedings to remove the firm's certification should be initiated. While suspended, the DBE may not be counted toward contract goals on new contracts executed after the suspension but could continue to perform and be counted on contracts already underway. The recipient would have 30 days from receipt of information from the DBE challenging the suspension to determine whether to rescind the suspension or commence decertification proceedings through a UCP certifying entity.

Of the comments received from a combination of State departments of transportation, transit and airport authorities, and groups representing DBEs and prime contractors, almost all commenters supported this proposal as a much-needed program improvement. A group representing women-owned small businesses opposed the proposal,

arguing that suspending a DBE jeopardizes contracts that are a part of the assets of the company and consequently affects the valuation of the DBE. The group also suggested that there be some recognition of estate plans that provide for the child of the disadvantaged owner, who also may be a member of a presumptive group, to take over the firm. In such a case, the commenter posits that the DBE should remain certified if the heir submits an application within six months of the death of the disadvantaged owner. A State department of transportation did not agree that incarceration of the disadvantaged owner should result in an automatic suspension; instead, the State DOT believes the DBE should be removed from the program immediately.

There were several commenters that raised questions or suggested further clarification was needed in certain areas. For example, should the length of the period of incarceration or the reason for the incarceration matter in determining whether the DBE is suspended? Should suspended DBEs be entered in the Department's ineligibility database? A commenter also suggested that a failure to file the annual no change affidavit should not be grounds for summary suspension of a DBE, and recipients should be given more time to consider the DBE's response (60–90 days) before lifting the suspension or commencing decertification proceedings. Similarly, a State DOT suggested the automatic suspension include sale of a firm to a non-disadvantaged owner and when a DBE is under investigation by a recipient for dubious practices on its own contracts. A suspension under these circumstances would prevent the DBE from being listed on other contracts pending review or investigation. One commenter asked that we include a hold harmless provision if no decertification proceeding commenced or results.

*DOT Response:* The Department is adopting the proposed summary suspension provision. The fundamental premise underlying the summary suspension provision is that when a dramatic change in the operation of the DBE occurs that directly affects the status of the company as a DBE, swift action should be taken to address that situation to preserve the integrity of the program without compromising the procedural protections afforded DBEs to safeguard against action by recipients based on ill-founded or mistaken information. A recipient must have sufficient evidence of facts or circumstances that form the basis for its belief that a suspension of certification is in order. In cases where the recipient

learns that a disadvantaged owner whose participation is essential to the continued certification of the firm as a DBE is no longer involved in the company due to incarceration or death, suspending the certification for a short period of time (30 days from the date the DBE receives notice of the suspension) strikes an appropriate balance between program integrity and fairness concerns. It does not matter how long the disadvantaged owner is incarcerated or the reason for the incarceration. What matters is that the company appears to be no longer owned and/or controlled by disadvantaged individuals as determined by the certifying authority. If a recipient determines after hearing from the DBE that the period of incarceration has ended or will end in 30 days, the recipient will lift the suspension (i.e., reinstate the DBE's certification) without initiating removal proceedings. Similarly, when an essential disadvantaged owner dies, his or her heirs who are also members of groups presumed to be disadvantaged are not presumed to be able to demonstrate sufficient ownership or control of the company. DBE certification is not transferable and does not pass to an owner's heirs. A short suspension of the DBE's certification until the heirs submit sufficient evidence to support a continuation of the firms' DBE status seems appropriate. The sooner the evidence of continued eligibility is provided by the DBE, the shorter the period of suspension if the certifying authority agrees that the firm remains eligible.

Under the current rules, disadvantaged owners have an affirmative obligation to notify recipients within 30 days of any material change in circumstances that would affect their continued eligibility to participate in the program and to annually affirm there have been no material changes. The Department does not agree that the authority to suspend one's certification should not be exercised when a DBE fails to abide by these requirements that are essential to ensuring that only eligible DBEs are certified as such and allowed to participate in the program.

Contrary to some of the comments, the summary suspension authority is not and should not be triggered by any violation of DBE program rules by a DBE. The Department also does not believe it appropriate or consistent with fundamental fairness to suspend a DBE while an investigation is pending since it would appear to prejudice the outcome of any investigation, assuming the reasons for the investigation are relevant

to DBE program certification. Likewise, automatic decertification assumes that the likelihood or risk of error is small compared to the interest in protecting the integrity of the program such that there is little to be gained from hearing from the DBE to safeguard against inadvertent errors.

Lastly, suspensions are temporary actions taken until more information is obtained from the affected DBE. Consequently, suspensions should not be entered into the Department's ineligibility database, which is reserved for initial certification denial decisions and decertification actions taken by recipients after the DBE has been accorded a full hearing or an opportunity to be heard. We have taken steps to ensure that suspensions do not interfere with the ability of the DBE to continue working on a contract entered into before the suspension took effect. Thus, in this respect, a suspension is accorded the same treatment as the decertification of a DBE that occurs after a DBE has executed a contract. The same rationale applies. The Department is not persuaded that existing contracts that may be considered company assets will be placed in jeopardy if recipients are granted suspension authority.

#### **Certification Appeals 49 CFR 26.89**

The Department proposed clarifying amendments to the regulations governing appeals of certification decisions. The amendment would require appellants include in their letter of appeal a statement that specifies why the certification decision is erroneous, identifies the significant facts that were not considered by the certifying agency, or identifies the regulatory provision that was improperly applied. The amendment also would make clear that the Department's decision on appeal is based on the entire administrative record including the letter of appeal. The Department received a handful of comments on this proposed amendment; all of the comments supported the clarifications. The commenters included a State transportation department, a UCP certifying agency, and several individuals and organizations that represent DBEs and ACDBEs.

*DOT Response:* The Department is finalizing the substance of the proposal with a slight modification to the rule text. The entire administrative record includes the record compiled by the certifying agency from whom the appeal is taken, the letter of appeal from the appellant that contains the arguments for reversing the decision, and any supplemental material made a part of the record by the Department in its

discretion pursuant to 49 CFR 26.89(e). We hope that this minor, technical, clarifying change will dispel the notion that the Department is not to consider any information outside of the record created by the recipient, including the appellant's letter of appeal which necessarily comes after the recipient has created its record. The purpose of the appeal is to provide the appellant an opportunity to point out to the Department, through facts in the record and/or arguments in the appeal letter, why the certifying agency's decision is not "supported by substantial evidence or inconsistent with the substantive or procedural provisions of [Part 26] concerning certification." It is not an opportunity to add new factual information that was not before the certifying agency. However, it is completely within the discretion of the Department whether to supplement the record with additional, relevant information made available to it by the appellant as provided in the existing rule.

#### Other Provisions

##### Program Objectives 49 CFR 26.1

In the NPRM, the Department proposed to add to the list of program objectives: Promoting the use of all types of DBEs. This minor technical modification is intended to make clear that application of the DBE program is not limited to construction contracting; the program covers the various kinds of work covered by federally funded contracts let by DOT recipients (e.g., professional services, supplies, etc.). All of the commenters that addressed this modification supported it.

*DOT Response:* For the reasons expressed in the NPRM, the Department made this change in the final rule.

#### Definitions

The Department proposed to add six new definitions to the rule for terms used in existing provisions. The words or phrases to be defined for purposes of the DBE program include "assets;" "business, business concern, or business enterprise;" "contingent liability;" "days;" "liabilities;" and "transit vehicle manufacturer (TVM)." We also proposed to modify the existing definition of "immediate family member," "primary industry classification," "principal place of business," and the definitions of "socially and economically disadvantaged individual," and "Native American" to be in sync with the U.S. Small Business Administration use of those two terms. We invited comment on whether the definition of TVM

should include producers of vehicles to be used for public transportation purposes that receive post-production alterations or retrofitting (e.g., so-called "cutaway" vehicles, vans customized for service to people with disabilities). We also wanted to know if the scope of the existing definition of "immediate family member" is too broad. It currently includes grandchildren.

Most commenters supported all or some of the proposed definitions. We did not include an actual definition of "non-disadvantaged individual" and consequently have not added that term to 49 CFR 26.5. The definitions that generated some opposition or suggested changes were those for TVMs, immediate family member, and Native American. We focus only on these three terms for discussion. One of the few TVMs that provided comments expressed puzzlement over the Department's request for comment on whether producers of "cutaway" vehicles should be included in the TVM definition. According to the commenter, such companies, including its company that performs this type of manufacturing work, are indeed TVMs.

One commenter suggested we remove the word "immediate" from the term "family member" so that recipients may determine on a case-by-case basis whether an individual is considered an immediate family member. Another commenter thought grandparents and in-laws should be excluded, while a different commenter suggested we include "sons and daughters-in-law." We also were asked to include "live-in significant others" to recognize domestic partnerships or civil unions. Regarding the definition of Native American, one commenter did not think it should be limited to recognized tribes.

*DOT Response:* The Department has modified the definition of TVM to include companies that cutaway, retrofit, or customize vehicles to be used for public transportation purposes. We do not think a change to the current approach of specifying in the rule who is considered an "immediate family member" in favor of leaving that determination to the certifying agency to decide case-by-case is the right policy choice. However, the Department has decided to modify the existing definition of "immediate family member" to keep it in sync with the existing definition of that term in Part 23. The revised definition includes brother-in-law, sister-in-law, or registered domestic partner and civil unions recognized under State law. In addition, we are including a definition for the term "spouse" that covers domestic partnerships and civil unions

because we agree such relationships should be recognized in the DBE program.

We are finalizing the changes to the definition of Native American to incorporate the requirement that an American Indian be an enrolled member of a federally or State-recognized Indian tribe to make it consistent with the SBA definition. By statute, the term "socially and economically disadvantaged individuals" has the meaning given the term in section 8(d) of the Small Business Act and relevant subcontracting regulations issued pursuant to that Act. As explained in the SBA final rule:

This final rule clarifies that an individual must be an enrolled member of a Federally or State recognized Indian Tribe in order to be considered an American Indian for purposes of the presumptive social disadvantage. This definition is consistent with the majority of other Federal programs defining the term Indian. An individual who is not an enrolled member of a Federally or State recognized Indian Tribe will not receive the presumption of social disadvantage as an American Indian. Nevertheless, if that individual has been identified as an American Indian, he or she may establish his or her individual social disadvantage by a preponderance of the evidence, and be admitted to the [DBE program] on that basis. (76 FR 8222-01)

##### Record Keeping Requirements 49 CFR 26.11

The Department proposed to establish record retention requirements for certification related records to ensure that recipients maintain documents needed to conduct certification reviews when necessary. All records documenting a firm's compliance with Part 26 must be retained in accord with the record retention requirements in the recipient's financial assistance agreement. Only six commenters expressed a view about this proposed change. Three of the commenters supported the change, two commenters requested clarification on the kind of records to be retained and for how long, and one commenter was neutral.

*DOT Response:* The regulatory text of the final rule identifies the minimal records that must be retained. They include the application package for all certified DBEs, affidavits of no change, notices of change, and on-site reviews. Recipients are encouraged to retain any other documents that may be relevant in the event of a compliance review. The uniform administrative rules for Federal grants and cooperative agreements and sub-awards to State, local and Indian tribal governments establish a three-year record retention requirement subject to exceptions set out at 49 CFR 18.42. We

have modified the final rule to include a three year retention period as a default for records other than the minimal records specified in the rule. The 3 year retention period applied to other records may be modified as provided by applicable Federal regulations or the grant agreement, whichever is longer.

#### **DBE Program Requirement**

The current rule regarding the application of the DBE program requirement to recipients of the various operating administrations of DOT has been the source of confusion for some. The Department proposed modifications to the rule to eliminate the confusion so that recipients will be clear about their obligation to establish a program and the corresponding obligation to establish an overall DBE participation goal. For FTA and FAA recipients, you must have a DBE program if in any Federal fiscal year the cumulative value of DBE program eligible contracts you will award will exceed \$250,000 in Federal funds. In other words, when you add all the eligible Federally funded contracts you expect to award with Federal funds, the aggregate of total Federal funds to be expended will exceed \$250,000. For FHWA, the proposed modification makes clear that under FHWA's financial assistance program, its direct, primary recipients must have an approved DBE program plan, and sub-recipients are expected to operate under the primary recipient's FHWA-approved DBE program plans.

Comments generally were supportive of the proposed changes, particularly those related to the FTA and FAA clarification of the \$250,000 threshold requirement. Some of the State departments of transportation that commented requested further clarification of the FTA and FAA requirements and had questions about the proposed change applicable to FHWA recipients. For example, a State department of transportation asked that we identify or define what is an eligible contract and that we specify whether the \$250,000 threshold applies to the total Federal dollars spent in contracts or the total Federal dollars received in a fiscal year. One commenter also asked that we reconsider requiring subrecipients of FHWA funds operate under the primary recipient's approved DBE program. Lastly, in situations where funding on a project is provided by more than one operating administration, a commenter suggested that the Department specify how that situation will be handled rather than direct recipients to consult the relevant DOT agencies for guidance.

*DOT Response:* The Department has finalized the proposed revisions. Where more than one operating administration is providing funding for a project or a contract, recipients should consult the OA providing the most funding for the project or contract and the OA, in turn, will coordinate with the DOT agencies involved to determine how to proceed. The final rule applies the \$250,000 amount to the total Federal dollars to be expended by an FTA or FAA recipient in contracts funded in whole or in part with Federal assistance during the fiscal year. The rule expressly excludes from this calculation expenditures for transit vehicle purchases.

The following examples illustrate how this provision works:

A. The Hypothetical Area Transit System (HATS) receives \$500,000 in FTA assistance. It spends \$300,000 of this amount on bus purchases. It is spending \$800,000 in local funds plus the remaining \$200,000 in FTA funds to build an addition to its bus garage. Because HATS is spending less than \$250,000 in FTA funds on contracting, exclusive of transit vehicle purchases, HATS is not responsible for having a DBE program.

B. The Your County Regional Airport receives \$400,000 in FAA financial assistance. It uses \$100,000 to purchase land and expends \$300,000 of the FAA funds for contracts concerning a runway improvement project, as well as \$500,000 in local funds. The airport must have a DBE program.

In the first example, even though HATS does not have to have a DBE program, it still must comply with Subpart A requirements of 49 CFR Part 26, such as nondiscrimination (§ 26.7) and assurances (§ 26.13). Compliance with these requirements, like compliance with Title VI of the Civil Rights Act is triggered by the receipt of any amount of DOT financial assistance. In both examples, eligible contracts are federally funded prime contracts.

The requirement that subrecipients of funds from FHWA operate under the direct recipients' approved DBE program is consistent with the way FHWA administers its financial assistance program regarding other Federal requirements imposed as a condition of receiving financial assistance. Through official guidance, the Department describes how subrecipients would administer contract goals on their contracts under the umbrella of the primary recipient's DBE program and overall goals. The continued validity of that guidance is not affected by this rule change.

#### **Overall Goal Setting 49 CFR 26.45**

The Department proposed several changes to the regulations governing overall goal setting. They include: (1) Codifying the elements of a bidders list that must be documented and supported when a bidders list is used to establish the base figure for DBE availability under Step One in the goal setting analysis; (2) disallowing the use of prequalification or plan holders lists (and other such lists) as a means of determining the base figure and consider extending the prohibition to bidders lists; (3) establishing a standard for when Step Two adjustments to the base figure should not be made; (4) specifying that in reviewing recipient's overall goal submission, the operating administrations are to be guided by the goal setting principles and best practices identified by the Department; (5) clarifying that project goals may reflect a percentage of the value of the entire project or a percentage of the Federal share; and (6) strengthening and streamlining the public participation requirements for goal setting.

The overwhelming majority of the comments received on the proposed changes to 49 CFR 26.45 were directed at the proposal to disallow use of prequalification lists and other such lists, including the bidders list, to establish the relative availability of DBEs (Step One of the goal setting analysis). Over 100 commenters, many of them general contractors who submitted form letters of objection, representatives of general contractors, and a few State departments of transportation, expressed the view that both prequalification lists and bidders lists are viable data sources for identifying qualified DBEs that are ready, willing, and able to perform on federally funded transportation contracts and that disallowing the use of these data sources would produce unrealistic overall goals that are not narrowly tailored as required by the United States Supreme Court to satisfy constitutional standards. Supporters of the proposal expressed the view that such lists underestimate availability and the true continuing effects of discrimination, represent the most conservative approach, and limit DBE opportunities by restricting consideration of all available DBEs. Other commenters, recognizing the limitations and the benefits of such lists, suggested that the lists should not be the exclusive source of data relied upon to capture the pool of available DBEs. One commenter supported retaining use of the prequalification list but supported getting rid of the bidders list which it

believed is worse than the prequalification list.

Commenters opposed to identifying the elements of a true bidders list (including successful and unsuccessful DBE and non-DBE prime contractors and subcontractors) suggested it might be difficult to compile such a list (i.e., capturing the unsuccessful firms—both DBEs and non-DBEs—bidding or submitting quotes on projects). Despite that concern, of the few commenters that addressed this proposal, most commenters supported it, which reflects the longstanding view of the Department, as set forth in the official tips on goal setting, of what a true bidders list should contain. With regard to the Step Two adjustment, nine of the twelve commenters opposed the change out of a belief that it effectively eliminates adjustments based on past participation by DBEs.

Commenters were almost evenly divided over the proposal to eliminate from the public participation process the requirement that the proposed overall goal be published in general circulation media for a 45-day comment period. Those objecting to this change were mostly representatives of general contractors and some State departments of transportation who viewed this process as more valuable than the stakeholder consultation process. There was universal support among the commenters for posting the proposed and final overall DBE goal on the recipient's Web site.

*DOT Response:* The Department is retaining the bidders list as one of the approaches recipients may use to establish the annual overall DBE participation goal. To be acceptable, the bidders list must conform to the elements that we finalize in this final rule by capturing the data that identifies the firms that bid or quote on federally assisted contracts. This includes successful and unsuccessful prime contractors, subcontractors, suppliers, truckers, other service providers, etc. that are interested in competing for contracts or work. Recipients that use this method must demonstrate and document to the satisfaction of the concerned operating administration the mechanism used to capture and compile the bidders list. If the bidders list does not capture all available firms that bid or quote, it must be used in combination with other data sources to ensure that it meets the standard in the existing regulations that applies to alternative methods used to derive a base figure for the DBE availability estimate (e.g., it is “designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.”).

Prequalification lists and other such lists (i.e., plan holders lists) may be used but must be supplemented by other data sources on DBE availability not reflected in the lists. Looking only to prequalified contractors lists or similar lists to determine availability may serve only to perpetuate the effects of discrimination rather than attempt to remediate such discrimination. Thus, to summarize, a recipient may use a bidders list that meets the requirements of the final rule as the sole source in deriving its Step One base figure. However, if its bidders list does not meet these requirements, that list can still be used in determining the overall goal, but must be used in conjunction with other sources. Under no circumstances, though, may a recipient use a prequalification or plan holders list as the sole source used to derive the overall goal.

The purpose of the Step Two analysis in overall goal setting is to consider other available evidence of discrimination or its effects that may impact availability and based on that evidence consider making an appropriate adjustment to derive an overall goal that reflects the level of DBE participation one would expect in the absence of discrimination. The amendment made to the regulations through this final rule does not eliminate the discretion recipients have to make a Step Two adjustment based on past DBE participation or other evidence like econometric data that quantifies the “but for discrimination” effects on DBE availability. It recognizes, however, that where there are circumstances that indicate an adjustment is not necessary because, for example, the base figure and the level of past DBE participation are close or the DBE participation level reflects the effects of past or current noncompliance with DBE program regulations, then the evidence would not support making the adjustment. That said, it is incumbent upon recipients to explain to the operating administration why the adjustment is appropriate.

Instead of mandating publication of the proposed overall goal for a 45-day comment period, the Department decided to leave that decision to the discretion of the recipient. The proposal to eliminate this aspect of the existing public participation requirement was designed to reduce the administrative burden, expense, and delay associated with the publication requirement that is borne by recipients and often leads to few, if any, comments (i.e., not much value added). To the extent that some recipients view this as a worthwhile exercise, we see no reason to restrict

their ability to allow additional comment through this process. In response to one commenter, we have reduced the comment period from 45 days to 30 days. Those recipients that choose to publish their overall goal for comment, in addition to engaging in the required consultation with stakeholders, must complete their process well before the deadline for submitting the overall goal documentation to the operating administration for review. As stated in the NPRM, the Department believes meaningful consultation with stakeholders is an important, cost-effective means of obtaining relevant information from the public concerning the methodology, data, and analysis that support the overall DBE goal. Once again, all public participation must be completed before the overall goal submission is provided to the operating administration. Failure to complete the publication process by those recipients that choose to conduct such a process should not delay review by the operating administration.

#### **Transit Vehicle Manufacturers 49 CFR 26.49**

The Department proposed to clear up confusion that exist about the goal setting and reporting requirements that apply to Transit Vehicle Manufacturers (TVMs). Specifically, the proposed rule clarifies how TVMs are to determine their annual overall DBE goals, when TVMs must report DBE awards and achievements data, and which portion of the DBE regulations apply to TVMs. Under the proposed rule, the goal setting methodology used by TVMs must include all federally funded domestic contracting opportunities made available to non-DBEs, not just those that apply to DBEs, and only the portion of the Federal share of a procurement that is available for contracts to outside firms is to be included. In other words, the DBE goal represents a percentage of the work the TVM will contract to others and not perform in house since work performed in-house is not truly a contracting opportunity available to the DBEs or non-DBEs. The Department sought comment on whether and how the Department should encourage more of the manufacturing process to be opened to DBEs and other small businesses.

With respect to reporting awards and achievements, the Department proposed to require TVMs continuously report their contracting activity in the Uniform Reports of DBE Awards/Commitments and Payments. In addition, the Department removed any doubt that the TVMs are responsible for implementing regulatory requirements similar to DOT

recipients. There is one notable exception: TVMs do not participate in the certification process (i.e., TVMs do not perform certification functions required of recipients and are not required to be a member of a UCP), and post-award requirements need not be followed in those years when a TVM is not awarded or performing as a transit vehicle provider. Lastly, the NPRM included a provision requiring recipients to document that only certified TVMs were allowed to bid and submit the name of the successful bidder consistent with the grant agreement.

Only 12 commenters addressed various aspects of the proposed changes to the TVM provisions. Three recipients supported the proposals as a whole, while others raised questions about the recommended changes and/or questioned existing requirements for which no change was proposed (e.g., suggested requiring the application of TVM provisions to all kinds of highway contracts or opposed the requirement that only certified TVMs are permitted to bid). One commenter rejected specific areas of the proposed changes. There was an additional comment submitted by the owner of a TVM who commented that it needed the services that the DBE program provides, rather than being forced into being a provider of those services.

*DOT Response:* The Department is confident that the proposed changes will strengthen compliance with TVM provisions and oversight of TVMs by exempting manufacturers from those regulations that are not applicable to this industry. Many of the proposed changes simply clarify the intent and practical application of existing TVM provisions. For example, the existing regulations require compliance, prior to bidding, to confirm a TVM's commitment to the DBE program before it is awarded a federally-assisted vehicle procurement. This is a long-standing requirement. The proposal introduces measures that help ensure pre-bid compliance (e.g., viewing the FTA certified TVM list and submitting the successful bidder to FTA after the award). The proposed changes also confirm that TVM regulatory requirements are nearly identical to that of transit recipients. For this reason, the FTA requires DBE goals from both transit recipients and TVMs as a condition of receiving Federal funds in the case of recipients and as a condition of being authorized to submit a bid or proposal on FTA-assisted transit vehicle procurements, in the case of TVMs.

In order to provide appropriate flexibility in implementing this

provision, we must emphasize, to FTA recipients in particular, that overly prescriptive contract specifications on transit vehicle procurements—which, in effect, eliminate opportunities for DBEs in vehicle manufacturing—counter the intent of the DBE program and unduly restrict competition. Moreover, after request for proposals (RFPs) are released, FTA recipients should allow TVMs a reasonable timeframe to submit bids. To do otherwise limits the TVMs' ability to locate and utilize ready, willing, and able DBEs on FTA-assisted vehicle procurements. To lessen any administrative burdens, the FTA will continue posting a list of certified (i.e., compliant) TVMs to the FTA TVM Web page. Recipients may also request verification that a TVM has complied with the regulatory requirement by contacting the appropriate FTA Regional Civil Rights Officer—via email. FTA will respond to this request within 5 business days—via email.

#### **Means Used To Meet Overall Goals 49 CFR 26.51**

In the NPRM, we proposed to modify the rule that sets forth examples of what constitutes race-neutral DBE participation to remove as one of the examples “selection of a DBE subcontractor by a prime contractor that did not consider the DBE's status in making the award (e.g., a prime contractor that uses a strict low-bid system to award subcontracts).” We explained that it is impossible for recipients to determine if a prime contractor uses a strict low-bid system, and moreover, that such a system conflicts with the good faith efforts guidance in Appendix A that instructs prime contractors not to reject a DBE's quote over a non-DBE quote if the price difference is not unreasonable. Although not stated explicitly in the preamble, the proposed regulatory text made clear that the Department's proposal was simply to eliminate the statement “*or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts)*” from the regulatory text (emphasis added). Thus, as proposed, the Department only intended to remove this example for contracts that had a DBE goal.

Commenters, including general contractors and State departments of transportation, overwhelmingly opposed the proposed change for a variety of reasons. General contractors and organizations that represent contractors viewed this proposal as a major policy shift away from the use of

race-neutral measures to obtain DBE participation, contrary to existing regulations and relevant court decisions. One commenter actually referred to the proposal as eliminating the use of race and gender means of obtaining DBE participation through the elimination of this one example. One commenter questioned the impact this change would have in those States where DBE contract goals are not established because the overall goal can be met through race-neutral means alone. Another commenter mistakenly thought the proposed change would not allow DBE participation that exceeds a contract goal to be considered race-neutral participation as currently provided in Departmental guidance. Supporters of the proposal agreed with the explanation provided by the Department.

*DOT Response:* The Department believes that most of the opposition to this proposal stems from a misunderstanding of what the Department intended to change. The intent of the Department in the NPRM was to remove the proposed example only for contracts that had a DBE goal, not for contracts that were race-neutral. Thus, the Department did not propose nor is finalizing removing the other two examples of race-neutral DBE participation or to remove the third example for race-neutral contracts. The Department understands how the preamble to the NPRM could have led to this confusion, as it was not explicit. Certainly, had the Department proposed to remove, as an example of race-neutral participation, the “selection of a DBE subcontractor by a prime contractor that did not consider the DBE's status in making the award” in contracts that had no DBE goals, the Department would have, effectively, been eliminating the very concept of race-neutral participation.

Thus, instead of the drastic change that concerned many commenters, the revised final rule simply removes as an example of race-neutral DBE participation in contracts that have DBE goals the use of a strict low bid system to award subcontracts. The Department continues to believe that it is difficult for recipients to determine if a prime contractor uses a strict low bid system and that use of such a system when contract goals are set runs counter to the Department's good faith effort guidance in Appendix A.

However, this final rule does not mean DBE participation obtained in excess of a contract goal may never be considered race-neutral DBE participation. When DBE participation is obtained as a prime contractor

through customary competitive procurement procedures, is obtained as a subcontractor on a contract without a DBE goal, or is obtained in excess of a contract or project goal, the use of a DBE under those circumstances properly may be characterized as race-neutral DBE participation. This revision to our rule does not represent a policy shift from the existing requirement that recipients meet the maximum feasible portion of the overall goal through the use of race-neutral means of facilitating DBE participation. Indeed, if a recipient is able to meet its overall DBE participation goal without using race-conscious measures (i.e., setting contract goals), the recipient is obligated to do so under the existing regulations. The revision to 49 CFR 26.51(a) does not change that requirement.

### **Good Faith Efforts To Meet Contract Goals 49 CFR 26.53**

#### *Responsiveness vs. Responsibility*

The NPRM proposed eliminating the “responsiveness vs. responsibility” distinction for when good faith efforts (GFE) documentation, which includes specific information about DBE participation, must be submitted on solicitations with DBE contract goals. The “responsiveness” approach requires all bidders or offerors to submit the DBE participation information and other GFE documentation required by 49 CFR 26.53(b)(2) at the time of bid submission. By contrast, the “responsibility” approach allows all bidders or offerors to submit the required information at some point before a commitment to perform the contract is made to a particular bidder or offeror (e.g., before contract award). The proposed change to the rule would have removed the current discretion recipients have to choose between the two approaches and require, with one exception, the submission of all information about DBEs that will participate on the contract and the evidence of GFE made to obtain DBE participation on the contract when the bid or offer is presented.

The NPRM also put forward an alternative approach that would allow a short period of time (e.g., 24 hours) after the bid submission deadline during which the apparent successful bidder or offeror would submit its GFE documentation. Under the alternative, the GFE documentation would have to relate to the pre-bid submission efforts; no post-bid efforts would be acceptable. The Department also asked for comment as to whether the one-day period should be extended to three days.

The exception to the across-the-board responsiveness approach or the alternative approach (all of which apply to sealed bid procurements) would be in a negotiated procurement, where in the initial submission the bidders or offerors may make a contractually binding commitment to meet the DBE contract goal and provide specific DBE information and GFE documentation before final selection for the contract is made. Negotiated procurement would include alternate procurement practices such as Design Build procurements in which it is not always possible to commit to specific DBEs at the time of bid submission or contract award.

The Department received many comments on this proposal. The majority of the responses opposing the revisions were submitted by prime contractors, prime contractor associations and some State departments of transportation. Over one hundred form letters of opposition from contractors were received. Those opposing the revision cited the nature of the construction industry and recipient procurement processes as a main reason for opposition. The majority of these comments concentrated on the administrative burden of providing GFE documentation that includes DBE commitments at the time of bid. Commenters stated that because of the nature of bidding on construction contracts, such as hectic timeframes, fixed deadlines, and electronic bidding forms, it was not possible to submit DBE commitments and other GFE documentation at the time of bid. Other reasons given for disapproval included the belief that the proposed rule would limit the use of DBEs on contracts, and it would be difficult for DBEs to negotiate with multiple bidders as opposed to only the identified lowest bidder. In addition, some commenters believed it would not be possible to implement the “responsiveness” approach on “design build projects” because the design and scope of work for the project is not known at the time of bid.

The Department received comments in favor of the proposal, primarily from minority and women advocacy organizations, regional transit authorities, and some State departments of transportation that already required DBE documentation as a matter of responsiveness. Those in support of the revision primarily stated that the current practice of allowing each recipient to decide whether DBE information should be collected as a matter of responsiveness or responsibility has led to abuses of the DBE program, such as facilitating “bid

shopping” practices. A member of Congress supported this proposal stating that the current practice of allowing each recipient to decide whether DBE information should be collected as a matter of responsiveness or responsibility has led to abuses of the DBE program, without more specifics.

There were alternatives suggested by some organizations. Most of the suggestions can be grouped into three general categories: (1) Leave the “responsiveness/responsibility” distinction as is; (2) allow a short time frame for GFE documentation that includes DBE information to be submitted (1–3 days); and (3) allow a longer time frame for that information to be submitted (3–14 days). Many who opposed eliminating the “responsive/responsibility” distinction had less opposition if good faith efforts documentation could be submitted by the apparent low bidder sometime after bid submission. Most opponents expressed a need for a longer timeframe to review the quotes. In addition, general contractor organizations overwhelmingly stated that the good faith efforts documentation should only be submitted by the apparent successful bidder. There were additional comments that opposed the proposal, but they did not offer any suggestions for a different timeframe.

After the Department reopened the comment period in September 2013 and convened a listening session on December 5, 2013, to hear directly from stakeholders about the specific costs and benefits of this proposed regulatory change, general contractors overwhelmingly continued to express strong opposition to the proposal. According to the contractors, the problems presented by the proposal include, among others: (1) A failure of the Department to understand the complexities and challenges of the bidding process; (2) increased burdens placed on the limited resources available to DBEs to develop multiple quotes and engage in time-consuming negotiations before bids are due; (3) adverse impact on the willingness of general contractors to consider new, unfamiliar DBEs because of limited vetting time; (4) increased risk to prime contractors from incomplete or inaccurate DBE quotes likely to result in less DBE participation; (5) a reduction in, or elimination of, second tier subcontracting opportunities for DBEs; and (6) a deterrent to the use of DBEs in creative methods due to concerns about disclosure of confidential, proprietary information. Moreover, the American Road & Transportation Builders Association (ARTBA) and the

Associated General Contractors of America (AGC) challenged the claim of “bid shopping” as the basis for the proposed change, demanding a full explanation of the problem (if it exists) and the data relied upon to justify the proposal.

Based on a survey of 300 ARTBA members, 42% of the contractors indicated they would bid on less Federal-aid work if this (and other) proposed change is made permanent; that they would have to increase bid prices to cover additional costs (\$25,000–\$100,000 per bid); that they would have to add staff; and that the estimated cost of complying annually across the industry is in the range of \$2.5 million–\$11 billion. Forty-three percent (43%) of the members indicated that DBE plans (i.e., DBE commitments) currently are required by their State departments of transportation at the time of bid; and 37% currently submit good faith efforts documentation with their bid. The AGC acknowledged that some States currently require listing DBEs at the time of bid, but it asserts that those contacted universally responded that the bidding process is costly, burdensome, and results in lower DBE utilization.

The few State departments of transportation that submitted written comments during the reopened comment period supported allowing recipients the flexibility to permit submission of good faith efforts documentation at least 7–10 days after bids are due. Those with electronic bidding systems cited costs associated with modifying those systems to conform to changes in the rules as one more burden straining already limited resources. One State department of transportation supported the proposed change requiring good faith efforts documentation at bid opening.

A few DBEs submitted a form expressing support for the requirement that good faith efforts documentation be submitted with the bid, while others saw the change as creating an unnecessary burden that would tax resources and may result in shutting out DBEs. Before adopting an across-the-board approach, one commenter urged the Department to look carefully at other States that follow the “responsiveness” approach to assess whether it creates opportunities or closes doors. Given prime contractor opposition, the commenter thought there should be more of a factual predicate to support this proposed change.

*DOT Response:* For years the Department has been concerned about claims of “bid shopping” engaged in by some prime contractors to the detriment

of DBE and non-DBE subcontractors, suppliers, truckers, etc. and the adverse impact it has on the principle of fair competition. The meaning and practice of bid shopping is well understood within the construction industry and among public contracting entities. It occurs when a general contractor discloses the bid price of one subcontractor to a competing subcontractor in an attempt to obtain a lower bid than the one on which the general contractor based its bid to the owner. Variations include “reverse auctions” (where the subcontractors compete for the job by lowering prices) and “bid peddling” (subcontractors offering to reduce their bid to induce the contractor to substitute the subcontractor after award).

In 1992, when the Department proposed a similar change in the DBE program regulations, it believed then, as it does now, that requiring the submission of good faith efforts documentation that includes DBE information at the time bids are due (as a matter of responsiveness) is a reasonable means of reducing the bid shopping problem. Contrary to the current claims made by general contractors, the Department’s interest in revisiting this issue represents neither a “startling” change in direction for the DBE program nor a lack of understanding of the procurement process for transportation construction projects. At the same time, the Department acknowledged later in 1997 and 1999 when we finalized that proposed rulemaking, as it does now, that the responsiveness approach may be more difficult administratively for prime contractors and recipients, even though that approach was, and is, being used in some places.

One of the hallmarks of the DBE program is the flexibility afforded recipients to tailor implementation of some aspects of the program to respond to local conditions or circumstances. Indeed, the DBE program regulations cite among the objectives, the desire “to provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.” 49 CFR 26.1(g). Flexibility is recognized in many ways: For recipients, overall and contract goals are set based on local conditions, taking into account circumstances specific to a particular recipient or a particular contract; and for prime contractors, they cannot be penalized or denied a contract for failing to meet the goal, as long as documented good faith efforts are made. At what point in the procurement process the good faith efforts documentation must be

submitted is yet another example of the flexibility that the Department should not undo without more information.

To the extent that bid shopping exists, it works to the detriment of all subcontractors, DBEs and non-DBEs alike, and drives up the cost of projects to the taxpaying public. However, absent sufficient data regarding the impact of each approach on deterring bid shopping and its effects or data on the costs/benefits of each approach when implemented consistent with the rule, as well as the potential burdens argued by those opposed to the change, the Department is not prepared, at this time, to finalize the proposal to adopt an across-the-board approach. Before taking that step, we think it prudent to examine closely the “responsiveness” approach used by many recipients to determine its impact on mitigating bid shopping and on providing greater or lesser opportunities for DBE participation. We intend to undertake such a review which may lead to proposed regulatory action in the future.

While we are retaining the discretion of recipients to choose between a responsiveness or responsibility approach, we think there should be some limit to how long after bid opening bidders or offerors are allowed to submit GFE documentation that includes specific DBE information to reduce the opportunity to bid shop where it exists. This would have the effect of reducing the burden on prime contractors and recipients who use a responsibility approach from the burden allegedly caused by the proposal, while at the same time minimizing opportunities for bid shopping by restricting the amount of time truly needed to gather the necessary information. From the comments, the time period permitted by recipients that use the responsibility approach can run the gamut from 3 to 30 days. These comments present timelines similar to those found in a review the Department recently conducted of the DBE Program Plans for all 50 states, Puerto Rico and the District of Columbia.<sup>1</sup> The results of this analysis are available in the docket for this rulemaking.<sup>2</sup> This analysis shows that: (1) 30 of the State departments of transportation report that they use the responsiveness approach, although the Department notes that some variations on the responsiveness approach—a combination of responsiveness and responsibility—may actually be used by

<sup>1</sup> For purposes of this discussion, Puerto Rico and the District of Columbia are considered “States,” thus the totals add up to 52.

<sup>2</sup> See DOT Docket ID Number OST–2012–0147.

some of these recipients; (2) 20 State departments of transportation used the responsibility approach; and (3) two State departments of transportation (Puerto Rico and Florida) have completely race-neutral programs and thus do not set DBE contract goals. Of the 20 responsibility States, 17 States have a set period of time bidders or offerors are given to submit the required information, which ranges from 3 to 15 days, while three States have no set time for all contracts.<sup>3</sup> The results of this review are generally consistent with the survey conducted by ARTBA indicating that 43% of the 300 members responding stated that their State departments of transportation required submission of DBE utilization plans with the bid. We note that the term "DBE utilization plan" is not used anywhere in the DBE program regulations.

We think it reasonable ultimately to limit the time to a maximum of 5 calendar days to protect program beneficiaries and overall program integrity.<sup>4</sup> The Department believes 5 calendar days is reasonable because it is more than or equal to the time permitted by five of the responsibility states and, by definition, all of the responsiveness states. Moreover, many of the DOT recipients that commented on establishing a time limit recommended between one (1) to 7 days. Allowing a longer time frame, such as between 7 and 14 days, is too long; it increases opportunities for bid shopping to occur. However, in the final rule we have provided some time for recipients that use this revised responsibility approach to transition to the shorter time frame by January 1, 2017. The transition period is intended to provide time to put in place any necessary system modifications. Until then, recipients will be permitted up to 7 calendar days to require the submission of DBE documentation after bid opening when using a responsibility approach. The Department believes this will allow for a smoother transition to the new approach, while seemingly without encountering the administrative difficulties and added costs pointed to by some of the commenters opposed to the proposed change.

Based on the comments, there is some confusion about how the document

requirements of § 26.53(b) apply to design-build contracts. It bears repeating what the Department said in 1999 on this subject, because it remains the case today:

On design-build contracts, the normal process for setting contract goals does not fit the contract award process well. At the time of the award of the master contract, neither the recipient nor the master contractor knows in detail what the project will look like or exactly what contracting opportunities there will be, let alone the identity of DBEs who may subsequently be involved. In these situations, the recipient may alter the normal process, setting a project goal to which the master contractor commits. Later, when the master contractor is letting subcontracts, it will set contract goals as appropriate, standing in the shoes of the recipient. The recipient will exercise oversight of this process.

(64 FR 5115). The proposed change would not have applied to design-build contracts.

#### NAICS Codes

The Department proposed changes to the information to be included with bids or offers by requiring the bidders or offerors to provide the recipient with information showing that each DBE signed up by the bidder or offeror is certified in the NAICS code(s) for the kind of work the DBE will be performing. This proposed change was intended to help bidders or offerors identify firms that can qualify for DBE credit in the work area involved in the contract. This information would be submitted with the bidder's or offeror's DBE participation data.

The Department received 26 comments regarding the NAICS codes, 15 against the proposal and nine in favor of it. The comments submitted included State departments of transportation, prime contractors and contractor associations. The opponents of this proposal included mostly prime contractors and contractor associations, and a few State departments of transportation. The opponents' comments focused on a concern that the legal risk associated with including a DBE who could not perform a commercially useful function would fall on the prime contractor, meaning that the prime contractor could be the subject of investigations and charges brought by the DOT Inspector General and others, when it is the certifying agencies that should bear this responsibility. Other comments indicated that adding NAICS codes would not add any value to the process. The proponents of the proposal included advocacy groups and some State departments of transportation. Proponents believe that the NAICS code

requirement will add clarification to the process and ensure that the recipient can complete the work.

*DOT Response:* Under existing regulations, DBEs must be certified in the type of work the firm can perform as described by the most specific available NAICS code for that type of work. Certifiers (i.e., recipients or other agencies that perform the certification function) also may apply a descriptor from a classification scheme of equivalent detail and specificity that reflects the goods and services provided by the DBE (49 CFR 26.71(n)). It is the responsibility of the DBE to provide the certifier with the information needed to make an appropriate NAICS code assignment. In the new certification application form, firms are asked to describe their primary activities and the product(s) or services(s) they provide and to list applicable NAICS codes they seek. If the firm enters into new areas of work since it was first certified, it is the firm's responsibility to provide the certifier the evidence of how they qualify for the new NAICS codes. It is then incumbent upon the certifying agency to determine that the NAICS code to be assigned adequately describes the kind of work the disadvantaged owners have demonstrated they can control and it is the responsibility of the recipient of DOT funds to determine that the DBE's participation on a particular contract can be counted because the DBE is certified to perform the kind of work to be performed on that contract.

The Department has decided to make final this proposed rule change. In doing so, the Department does not intend to shift responsibility for the accuracy of NAICS code assignments from the certifier to the contractor. When a DBE submits a bid to a recipient as a prime contractor or a quote to a general contractor as a subcontractor, it is the responsibility of the DBE to ensure that the bid or quote shows that the NAICS code in which the DBE is certified corresponds to the work to be performed by the DBE on that contract. It would be in the best interest of the contractor to also have this information when it is considering DBEs interested in competing for contract opportunities where a contract goal has been set. This enables the contractor to make a reasonable determination whether it has made good faith efforts to meet the goal through the DBEs listed. Ultimately, the recipient is responsible for ensuring the DBE is certified to do the kind of work covered by the contract before DBE participation can be counted. Including this information in the bid documents should assist all parties concerned in

<sup>3</sup> Under 49 CFR 26.53(c), all GFE documentation must be submitted before committing to the performance of the contract by the bidder or offeror (i.e., before contract award).

<sup>4</sup> Due to the definition of "days" adopted in this final rule, bidders or offerors will have 5 calendar days (i.e., not business days) to submit the necessary information. Thus, if a bid is submitted on Thursday, the apparent low bidder would have until Tuesday to submit the information.

complying with DBE program requirements. Thus, it is the responsibility of the certifier to ensure that DBEs are certified only in the appropriate NAICS codes; it is the responsibility of the DBE to provide that NAICS code to the prime while the prime is putting together a bid; and it is the responsibility of the prime to provide those codes to the recipient when providing the other DBE information. It is not the responsibility of the prime to vouch for the accuracy of that certification.

#### *Replacement of a DBE*

The NPRM proposed that in the event that it is necessary to replace a DBE listed on a contract, a contractor must document the GFE taken to obtain a replacement and may be required to take specific steps to demonstrate GFE. The specific steps would include: (1) A statement of efforts made to negotiate with DBEs for specific work or supplies, including the names, address, telephone numbers, and emails of those DBEs that were contacted; (2) the time and date each DBE was contacted; (3) a description of the information provided to DBEs regarding the plans and specifications for portions of the work to be performed or the materials supplied; and (4) an explanation of why an agreement between the prime contractor and a DBE was not reached. The prime contractor would have to submit this information within 7 days of the recipient's agreement to permit the original DBE to be replaced, and the recipient must provide a written determination to the contractor stating whether or not good faith efforts have been demonstrated. Failure to comply with the GFE requirements in the rule would constitute a material breach of contract, subject to termination and other remedies provided in the contract.

Twenty-eight commenters opposed this modification to the rules. They included prime contractors, State departments of transportation, and contractor associations. Essentially, the opponents were of the view that prime contractors should not be responsible for looking beyond the original commitment for DBE replacements. Others felt that the 7 day timeframe to replace a DBE is not long enough. Some opponents suggested changing the proposal so that it is desirable to replace a DBE with a DBE, but not mandatory. Some prime contractors also stated that there is a need to be compensated for the delays to replace a DBE. Those in favor of the proposal included five commenters representing State departments of transportation, transit authorities, and DBE advocacy groups.

These commenters felt that contractors should make efforts to replace a DBE and failure to carry out the requirement to do so is a breach of contract.

*DOT Response:* When the Department amended the regulations in 2011 (the first phase of its recent focus on program improvements), we required prime contractors that terminate DBEs make GFE to find a replacement to perform at least the same amount of work under the contract to meet the contract goal established for the procurement. Thus, this GFE obligation currently exists and is not new. We agree that the GFE guidance in Appendix A used by recipients to assess the efforts made by bidders and offerors before contract award can also be used to evaluate efforts made by the contractor to replace a DBE after contract award. There is no need to separately identify steps that a recipient may require when a contractor is replacing a DBE. However, there is nothing that prevents a contractor from taking any of the steps included in the proposed amendment to the rules. Indeed, recipients may consider, as part of their evaluation of the efforts made by the contractor, whether DBEs were notified of subcontracting opportunities, whether new items of work were made available for subcontracting, what information was made available to DBEs, and what efforts were made to negotiate with DBEs.

The GFEs made by the contractor to obtain a replacement DBE should be documented and submitted to the recipient within a reasonable time after obtaining approval to terminate an existing DBE. To avoid needless delay and ensure timely action, we think 7 days is reasonable, but we have modified the rule to allow recipients to extend the time if necessary at the request of the contractor.

The existing regulations currently require a contract clause be included in prime contracts and subcontracts that make the failure by the contractor to carry out applicable requirements of 49 CFR Part 26 a material breach of contract, which may result in the termination of the contract or such other remedy as the recipient deems appropriate. See 49 CFR 26.13(b). Consequently, a contractor that fails to comply with the requirements for terminating or replacing a DBE would be in breach of contract, subject to contract sanctions that include termination of the contract. We need not replicate the provisions of § 26.13. We also will not prescribe what the appropriate contract sanctions or administrative remedies must be. However, we have revised § 26.13 to

incorporate the list of remedies we proposed as other possible contract remedies recipients should consider. Many of the suggestions are sanctions currently used by some recipients. They include withholding progress payments, liquidated damages, disqualifying the contractor from future bidding, and assessing monetary penalties.

#### *Copies of Quotes and Subcontracts*

The Department proposed to require the apparent successful bidder/offeror, as part of its GFE documentation, provide copies of each DBE and non-DBE subcontractor quote it received in situations where the bidder/offeror selected a non-DBE firm to do work sought by a DBE. This information would help the recipient determine whether there is validity to any claims by a bidder/offeror that a DBE was rejected because its quote was too high. The contractor who is awarded the contract also would be required to submit copies of all DBE subcontracts.

There were 15 organizations that commented on the proposal regarding quotes and 19 commenters on the proposal regarding subcontracts. Commenters were almost evenly divided in their support for, or opposition to, requiring the submission of quotes under the limited circumstances set out in the proposed rule. A State department of transportation noted that the submission of quotes was already being implemented in its program. One supporter suggested this requirement should apply only when the DBE contract goal is not met. Opponents raised concerns about the burden imposed and questioned the benefit to be derived since the comparison of quotes is not viewed as a useful exercise. Regarding the submission of subcontracts, the commenters overwhelming opposed making this a requirement because of the burden. One commenter suggested that the proposal appears to duplicate an existing requirement of the Federal Highway Administration (FHWA) and another commenter questioned the steps that would be taken to protect confidential or proprietary information.

*DOT Response:* The GFE guidance in Appendix A, in its current form, instructs prime contractors to consider a number of factors when negotiating with a DBE and states that the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Thus, the reasonableness of a DBE's quote as compared to a non-DBE's quote is often

an issue cited by a prime contractor in selecting a non-DBE over a DBE. The Department believes that requiring a bidder/offeror to provide, as part of the GFE documentation, subcontractor quotes received by the bidder/offeror in those instances where a DBE's quote was rejected over a non-DBE's quote will assist recipients in determining the validity of claims made by the bidder/offeror that the DBE's quote was too high or unreasonable and has therefore decided to finalize this proposal. Further, we stress that only the quote would need to be submitted in these situations, not any additional information and only in instances where a non-DBE was selected over a DBE, thus limiting the burden of this requirement.

The Department recognizes that requiring the submission of DBE subcontracts may pose unnecessary burdens on contractors and recipients. Thus, the Department has decided to modify its proposal to only require that DBE subcontracts be made available to recipients upon request when needed to ensure compliance with the requirements of 49 CFR Part 26.

#### *Good Faith Efforts Applied to Race-Neutral DBE Participation*

We sought comment on whether some of the good faith efforts provisions of the rule concerning contracts with DBE goals should apply to DBEs on contracts that do not have a DBE goal. For example, the rules that restrict termination of DBEs and that impose good faith efforts obligations to replace DBEs that are dropped from a contract or project would apply regardless of whether the DBE's participation resulted from race-conscious or race-neutral measures.

Of the 28 commenters that responded to this question, only 3 expressed support and all three supporters were DBEs or organizations representing DBEs. Three commenters also were conflicted, unsure of whether the proposal would result in benefits to DBEs. The general contracting community, many State departments of transportation, and some transit agencies expressed opposition because they believe DBEs should be treated no different than non-DBEs on contracts with no DBE goals (the primary means of obtaining measurable DBE participation through race- and gender-neutral measures), and to do otherwise is to essentially convert what began as race-neutral conduct into race-conscious conduct.

*DOT Response:* The Department agrees with the points raised by the commenters opposing this change

(specifically, that no distinction should be made between DBEs and non-DBEs when race-neutral measures are used to obtain participation) and has decided to maintain the status quo. The restrictions on terminating and replacing a DBE selected by a bidder or offeror to meet a contract goal are intended to hold the contractor to the good faith efforts commitment made to win the contract. No comparable commitment is made when DBE contract goals are not set.

#### **Trucking 49 CFR 26.55(d)**

The Department proposed to change the counting rule for trucking to allow 100% of a DBE's trucking services to be counted when the DBE uses its own employees as drivers but leases trucks from a non-DBE truck leasing company. This proposed change gives DBEs the same ability as non-DBEs to use their own drivers and supplement their fleets with leased trucks without sacrificing any loss of DBE credit because the trucks may be leased from a non-DBE leasing company. Consistent with the current prohibition on counting materials, supplies, equipment, etc., obtained from the prime contractor or its affiliates (49 CFR 26.55(a)(1)), trucks leased from the prime contractor would not be counted. As noted in the NPRM, this proposed rule change applies to counting only; it would not immunize companies from scrutiny due to potentially improper relationships between DBEs and non-DBEs that raise certification eligibility or fraud concerns.

More than 25 comments were received on this proposed change, mostly in favor of the modification. There were several commenters that believed the proposed rule would invite more fraud for an area that is one of the top means of obtaining DBE participation on Federal-aid contracts. Additional comments included expanding the definition of "employees" to expressly include those drivers that are hired by DBEs from the union hall on an as-needed basis to fulfill contracts, clarifying what constitutes ownership of trucks, eliminating the current option allowed under the rule that permits credit for trucks and drivers leased from non-DBEs, eliminating the need to obtain written consent from the operating administrations on the option chosen by the recipient; and reinforcing the restriction on not allowing a DBE to count trucks purchased or leased from the prime contractor.

*DOT Response:* The Department did not propose any changes in the NPRM to the existing rule that allows a DBE that leases trucks (and also leases the

drivers) from a non-DBE firm to receive credit for the value of transportation services provided by the non-DBE firm up to the amount of credit provided by trucks owned by DBEs that are used on the contract. This option was added to the DBE program rules in 2003 (68 Fed. Reg. 35542-02) to recognize the practical reality of leasing in the trucking business and to respond to concerns about reduced opportunities for DBEs caused by the 1999 version of the counting rule. As indicated in the 2003 final rule, a recipient may choose the one-for-one option to credit trucks and drivers leased from non-DBEs or it may limit credit to fees and commissions for work done with non-DBE lessees, consistent with the 1999 version of the rule. If a recipient chooses to count the use of trucks and drivers leased from a non-DBE firm, as provided in the existing rule, the recipient's choice should be reflected in the recipient's DBE program plan, which is subject to approval by the cognizant operating administration (OA) to ensure appropriate safeguards are taken by the recipient to prevent fraud. Contrary to the way some commenters are reading the existing rule, it does not contemplate obtaining OA consent on a transaction-by-transaction basis.

The modification to the rule that the Department makes final today simply clarifies that trucks that are leased by a DBE from a non-DBE for use by the DBE's employees should be treated no differently than other equipment a DBE may lease to conduct its business. The value of the transportation services provided by the DBE would not be adversely impacted by the fact that the equipment used by the DBE's employees is leased instead of owned. This is consistent with the existing counting rule and with the basic principle that DBE participation should be counted for work performed with a DBE firm's own forces. The term "employee" is to be given its commonly understood dictionary meaning, and "ownership" includes the purchase of a truck or trucks through conventional financing arrangements.

#### **Regular Dealer 49 CFR 26.55(e)**

The Department proposed to codify guidance issued in 2011 on how to treat the services provided by a DBE acting as a regular dealer or a transaction expediter/broker for counting purposes (i.e., crediting the work of the DBE toward the goal). The guidance makes clear that counting decisions involving a DBE acting as a regular dealer are made on a contract-by-contract basis and not based on a general description or designation of a DBE as a regular

dealer. The Department also invited an open discussion of the regular dealer concept in light of changes in the way business is conducted. Specifically, we sought comment on: (1) How, if at all, changes in the way business is conducted should result in changes in the way DBE credit is counted in supply situations?; (2) what is the appropriate measure of the value added by a DBE that does not play a traditional regular dealer/middleman role in a transaction?; and (3) do the policy considerations for the current 60% regular dealer credit actually influence more use of DBEs as contractors that receive 100% credit?

The Department received over 50 comments from prime contractors, DBEs, and recipients, many of which emphasized the need for additional clarification of, or changes to, the terminology used to describe regular dealers, middlemen, transaction expeditors, and brokers. The comments were evenly divided over whether the guidance should be codified in the regulations. Those in support agreed that the determination of whether or not a DBE is functioning as a regular dealer as defined in the existing rule should be based on the role performed by the DBE on the contract, which may vary from contract to contract. Those opposed to the contract-by-contract approach, represented mostly, but not exclusively, by prime contractors, argued that the approach reflected in the guidance is burdensome and that once a recipient determines at certification that a DBE is a supplier, a wholesaler, a manufacturer, a transaction expeditor, a middleman, or a broker, the credit allowed under the rules should be applied. To do otherwise creates inconsistency, uncertainty, and exposes the prime and the DBE to risks associated with fraud investigations in this area. It is the responsibility of the certifier, they argue, to ensure that a DBE certified as a supplier, for example (and thereby acting as a regular dealer), is, in fact, a supplier and not a transaction expeditor. Indeed, several commenters expressed the view that certifiers should be allowed to certify a DBE as a "regular dealer." Followed to its logical conclusion, once certified, how the work to be performed by the DBE is counted would be automatic without regard to what the DBE is actually doing on the contract.

Many comments addressed the changing business environment where the best method of delivering supplies ordered from a non-DBE manufacturer may in fact be drop-ship rather than delivery by the DBE regular dealer using its own trucks. One commenter stated that the requirement that a DBE own

and operate its own distribution equipment directly conflicts with industry practice and creates a greater burden and challenge to DBEs. Similarly, some maintain the requirement for an inventory or store front is outdated. The way business is conducted today, they argue, services provided by wholesalers or e-Commerce businesses do not require an inventory or a store open to the public. Several commenters indicated that they would be comfortable with the elimination of the distinct categories and only have a single distinction of a goods supplier from a non-DBE manufacturer with a set percentage of dollars that could be counted or only using fees and commissions as the amount that can be counted as done currently for transaction expeditors and brokers. To encourage greater use of DBE contractors to meet contract goals, one commenter suggested placing a cap (e.g., no more than 50%) on how much of a contract goal could be met using DBE suppliers.

There were suggestions that the Department eliminate altogether regular dealers and brokers from the rule. Others countered that any proposal to eliminate counting regular dealer participation toward contract goals would severely reduce the pool of ready, willing, and able DBEs given how often the regular dealer credit is used to meet contract goals; such a proposal, they maintain, should result in a corresponding reduction in goals. Other commenters believe that it is important to keep the regular dealer concept and consider increasing the counting percentage due to the value added services they provide. Still others thought a complete overhaul of the regular dealer provisions in the rule is needed to recognize decades of changes in the construction industry, and no modifications to the rule should be made until further analysis is done.

*DOT Response:* The Department has decided to codify the guidance on the treatment of counting decisions that involve DBEs functioning as regular dealers. This guidance is consistent with the basic counting principles set out in the rule that apply regardless of the kind of work performed by the DBE. Specifically, the counting rules apply to a specific contract in which a DBE participates based on the value of work actually performed by the DBE that involves a commercially useful function on that contract. Throughout 49 CFR 26.55 there are numerous references to "a contract," "the contract," or "that contract." In other words, counting is by definition a "contract-by-contract" determination made by recipients after

evaluating the work to be performed by the DBE on a particular contract.

The Department appreciates the thought that went into the varied comments received on the questions we posed and the overall interest in the subject. In the context of this discussion, it is important to reiterate that certification and counting are separate concepts in the DBE rule. This applies regardless of the type of work the DBE is certified to perform. It is also important to note that DBEs must be certified in the most specific NAICS code(s) for the type of work they perform and that there is no regular dealer NAICS code. Regular dealer is a term of art used in the context of the DBE program. That said, the Department believes that more analysis and discussion is needed to make informed policy decisions about appropriate modifications to the regulations governing regular dealers, transaction expeditors, and brokers. We think it more appropriate at this point to develop additional guidance to address different business scenarios rather than promulgate regulatory requirements or restrictions beyond those that currently exist. We will continue the conversation through future stakeholder meetings.

#### **Ethics and Conflicts of Interest**

The Department sought comment on whether Part 26 should be amended (or guidance issued) to add provisions concerning ethics and conflicts of interest to help play a constructive role in empowering DBE officials in resisting inappropriate political pressures. At the same time, the Department questioned whether such a provision would be effectual and whether the provision could be drafted so as not to be overly detailed. The Department also welcomed suggestions about ethics and conflicts of interest.

Less than 25 commenters elected to address this subject; the significant majority of commenters expressed support for adding ethics and conflict of interest provisions to enable DBE certification officials and others to resist inappropriate pressures. An advocacy group commended the Department for initiating a discussion about ethics. A State transportation department suggested including applicable penalties and offering protection via the Whistleblower Protection Act. An airport sponsor supported adding provisions that clarify the roles of staff who administer the selection process.

A State transit authority did not believe that effective guidance could be provided in the regulation without being overly detailed and burdensome. Moreover, the commenter recognized

that while adding such provisions would play a constructive role, they would not totally eradicate inappropriate pressure. A State transportation department directed the Department to professional codes of conduct for the fields of law and engineering as examples. An advocacy group and a DBE noted that a code of ethics might provide recipients with a “safety net” when responding to undue pressure. Another State transportation department supports the provision if DOT takes quick action against known abusers of ethics. A DBE commenter recommended a workgroup approach be utilized to prepare draft language.

*DOT Response:* There was general support among the commenters for establishing a code of ethics of some kind to insulate or protect DBE program administrators from undue pressure to take actions inconsistent with the intent and language of the DBE program rules. However, very few of the commenters made suggestions on the details of such a code or on the kind of provisions that might be added to address specific concerns. As indicated in the NPRM, recipients and their staffs are subject to State and local codes of ethics that govern public employees and officials in the performance of their official duties and responsibilities, including the responsibilities they carry out in administering the DBE program as a condition of receiving Federal financial assistance. Of course, grant recipients are subject to the common grant rules which prohibit participating in the selection, award, or administration of a contract supported by Federal funds if a conflict of interest would be involved. Because we lack sufficient information, at this point, to determine the extent to which widespread problems exist or how best to approach the issue—through regulations or guidance—the Department thinks it best to hold off on adopting ethics rules for the DBE program to supplement existing State and local ethics codes. Instead, the Department may engage stakeholders in a further discussion to aid in identifying appropriate next steps.

#### **Appendix A—Good Faith Efforts Guidance**

The Department proposed several revisions to Appendix A to Part 26—Guidance Concerning Good Faith Efforts to clarify and reinforce the GFE obligation of bidders/offerors and to provide additional guidance to recipients. We proposed to add more examples of the types of actions recipients may consider when evaluating the bidders’/offerors’ GFE to obtain DBE participation. The proposed

examples included conducting market research to identify small business contractors and suppliers and establishing flexible timeframes for performance and delivery schedules that encourage and facilitate DBE participation. We reinforced concepts that we have emphasized in communicating with recipients over the years: Namely, that a contractor’s desire to perform work with its own forces is not a basis for not making GFE and rejecting a replacement DBE that submits a reasonable quote; and reviewing the performance of other bidders should be a part of the GFE evaluation. The Department also proposed to add language specifying that the rejection of a DBE simply because it was not the low bidder is not a practice considered to be a good faith effort.

There were 25 comments collected that opposed the suggestion that flexible timeframes and schedules be established to facilitate DBE participation. The comments received were submitted by prime contractors, contractor associations, and State departments of transportation. These organizations stated that a “flexible timeframe” was unrealistic and went against the nature of the construction industry. Other organizations stated the need to further quantify what constitutes an “unreasonable quote” when making GFE to replace a DBE. There were two organizations that supported these provisions. U.S. Representative Judy Chu agreed that there can be no definitive checklist, but suggested that best practices be collected and disseminated to clarify the issue. One State department of transportation agreed that the bidder cannot reject a DBE simply due to price.

In the NPRM, we also proposed in Appendix A that DOT operating administrations may change recipients’ good faith efforts decisions. There were a few comments regarding this proposal, all in opposition. The commenters included a DBE, prime contractor, a State department of transportation, and a contractors association. The prime contractor noted that operating administrations should be involved throughout the good faith efforts review process and not after the recipient has made a decision. There were no comments in support of this proposal.

*DOT Response:* It is important to reiterate and reinforce that Appendix A is guidance to be used by recipients in considering the good faith efforts of bidders/offerors. It does not constitute a mandatory, exclusive, or exhaustive checklist. Rather, a good faith efforts evaluation looks at the “quality,

quantity, and intensity of the different kinds of efforts that the bidder has made.” The proposed revisions to the guidance made by the Department are based on experience gained since the development of the guidance in 1999 and are intended to incorporate clarifications and additional examples of the different kinds of activities to consider. We have modified the final guidance in keeping with the existing purpose and intent. The guidance also seeks to indicate what reasonably may not be viewed as a demonstration of good faith efforts. In this regard, rejecting a DBE only because it was not the low bidder is not consistent with the longstanding idea that a bidder/offeror should consider a variety of factors when negotiating with a DBE, including the fact that there may be additional costs involved in finding and using DBEs, as currently stated in the existing guidance. Similarly, the inability to find a replacement DBE at the original price is not, without more, sufficient to demonstrate GFE were made to replace the original DBE. As currently stated under the existing guidance, a firm’s price is one of many factors to consider in negotiating in good faith with interested DBEs.

The Department has decided to make no change to the current role of the operating administrations with respect to the GFE determinations made by recipients. It is the responsibility of recipients to administer the DBE program consistent with the requirements of 49 CFR Part 26, and it is the responsibility of the operating administrations to oversee recipients’ program administration to ensure compliance through appropriate enforcement action if necessary. Such action includes refusing to approve or provide funding for a contract awarded in violation of 49 CFR 26.53(a). The proposed change may confuse the relative roles and responsibilities of the recipients and the operating administrations and consequently has been removed from the final rule.

#### **Technical Corrections**

The Department is amending the following provisions in 49 CFR Part 26 to correct technical errors:

1. Section 26.3(a)—Include a reference to the Highway and Transit funds authorized under SAFETEA-LU and MAP-21.
2. Section 26.83(c)(7)—Remove the reference to the DOT/SBA MOU since the MOU has lapsed.
3. Section 26.89(a)—Amend to recognize that the DOT/SBA MOU has lapsed.

## Regulatory Analyses and Notices

### *Executive Orders 12866 and 13563 (Regulatory Planning and Review)*

This final rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of the Order. It does not create significant cost burdens, does not affect the economy adversely, does not interfere or cause a serious inconsistency with any action or plan of another agency, does not materially alter the impact of entitlements, grants, user fees or loan programs; and does not raise novel legal or policy issues. The final rule is essentially a streamlining of the provisions for implementing an existing program, clarifying existing provisions and improving existing forms. To the extent that clearer certification requirements and improved documentation can forestall DBE fraud, the rule will result in significant savings to State and local governments. This final rule does not contain significant policy-level initiatives, but rather focuses on administrative changes to improve program implementation. The Department notes that several commenters, particularly general contractors and their representatives, argued that the NPRM should have been designated as “significant.” Although the Department continues to believe that the designation of the NPRM was correct based on the intent of this rulemaking, we note that, as discussed above, we have decided to not finalize at this time many of the provisions that those commenters argued were significant changes to the DBE program.

### *Executive Order 12372 (Intergovernmental Review)*

The final rule is a product of a process, going back to 2007, of stakeholder meetings and written comment that generated significant input from State and local officials and agencies involved with the DBE program in transit, highway, and airport programs.

### *Regulatory Flexibility Act*

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), we have evaluated the effects of this final rule on small entities and anticipate that this action will not have a significant economic impact on a substantial number of small entities. The underlying DBE rule does deal with small entities: All DBEs are, by definition, small businesses. Also, some FAA and FTA recipients that implement

the program are small entities. However, the changes to the rule are primarily technical modifications to existing requirements (e.g., improved forms, refinements of certification provisions) that will have little to no economic impact on program participants. Therefore, the changes will not create significant economic effects on anyone. In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), I certify that this rule will not have a significant economic impact on a substantial number of small entities.

### *Executive Order 13132 (Federalism)*

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. As noted above, there is no substantial compliance cost imposed on State and local agencies, who will continue to implement the underlying program with administrative improvements proposed in the rule. The proposed rule does not involve preemption of State law. Consequently, we have analyzed this proposed rule under the Order and have determined that it does not have implications for federalism.

### *National Environmental Policy Act (NEPA)*

The Department has analyzed the environmental impacts of this proposed action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency’s NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). See 40 CFR 1508.4. In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. *Id.* Paragraph 3.c.5 of DOT Order 5610.1C incorporates by reference the categorical exclusions for all DOT Operating Administrations. This action is covered by the categorical exclusion listed in the Federal Highway Administration’s implementing procedures, “[p]romulgation of rules, regulations, and directives.” 23 CFR 771.117(c)(20). The purpose of this

rulemaking is to make technical improvements to the Department’s DBE program, including modifications to the forms used by program and certification-related changes. While this rule has implications for eligibility for the program—and therefore may change who is eligible for participation in the DBE program—it does not change the underlying programs and projects being carried out with DOT funds. Those programs and projects remain subject to separate environmental review requirements, including review under NEPA. The Department does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

### *Paperwork Reduction Act*

According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. This action contains additional amendments to the existing information collection requirements previously approved under OMB Control Number 2105–0510. As required by the Paperwork Reduction Act, the Department has submitted these information collection amendments to OMB for its review. The Department will announce the finalization of this information collection request in a separate **Federal Register** notice following OMB approval. The NPRM contained estimates of the burden associated with the additional collection requirements proposed in that document. Various commenters stated that the Department understated the proposed burden for the collections associated with the application form and personal net worth form. As discussed above in the relevant portions of the preamble, the Department is sensitive to those concerns and has revised those collections to minimize what information must be submitted and to simplify other aspects of the forms. For each of these information collections, the title, a description of the entity to which it applies, and an estimate of the annual recordkeeping and periodic reporting burden are set forth below.

#### 1. Application Form

Today’s final rule modifies the application form for the DBE program. In the NPRM, the Department explained that its estimate of 8 total burden hours per applicant to complete its DBE or

ACDBE certification application with supporting documentation was based on discussions the Department has had with DBEs in the past. The comments and the Department's response to those comments are discussed above in the preamble.

The number of new applications received each year by Unified Certification Program members is difficult to estimate. There is no central repository for DBE certification applications and we predict that the frequency of submissions at times vary according to construction season (high applications when the season is over), the contracting opportunities available in the marketplace, and the number of new transportation-related business formations or expansions. To get some estimate however, the Department contacted recipients during the process of developing the NPRM. The agencies we contacted reported receiving between 1–2 applications per month, 5–10 per month, or on the high end 80–100 per month. There are likely several reasons for the variance. Jurisdictions that are geographically contiguous to other states (such as Maryland) and/or have a high DBE applicant pool may receive a higher number whereas jurisdictions in remote areas of the country with smaller numbers of firms may have lower applicant requests for DBE certification. These rough numbers likely do not include requests for expansion of work categories for existing firms that are already certified.

*Frequency:* Once during initial DBE or ACDBE certification.

*Estimated Average Burden per Response:* 8 hours.

*Number of Respondents:* 9,000–9,500 applicants each year.

*Estimated Total Annual Burden Hours:* 72,000–76,000 hours per year.

## 2. PNW Form

A small business seeking to participate in the DBE and ACDBE programs must be owned and controlled by a socially and economically disadvantaged individual. When a recipient determines that an individual's net worth exceeds \$1.32 million, the individual's presumption of economic disadvantage is said to have been conclusively rebutted. In order to make this determination, the current rule requires recipients to obtain a signed and notarized statement of personal net worth from all persons who claim to own and control a firm applying for DBE or ACDBE certification and whose ownership and control are relied upon for the certification. These personal net worth statements must be accompanied by appropriate supporting

documentation (e.g., tax returns). The form finalized in this rule would replace use of an SBA form suggested in current regulations.

As discussed above in the preamble, we estimate that compiling information for and filling out this form would take approximately 2 hours, slightly longer than that for the SBA form currently in use. As explained in further detail in the above preamble, the Department has chosen not to finalize its proposal to require a PNW form with each annual affidavit of no change. Thus, the number of respondents who must submit a PNW form is the same as the number of applications.

*Frequency:* Once during initial DBE certification. For the DBE/ACDBE programs, information regarding the assets and liabilities of individual owners is necessary for recipients of grants from the Federal Transit Administration, the Federal Aviation Administration, and the Federal Highway Administration, to make responsible decisions concerning an applicant's economic disadvantage under the rule. All persons who claim to own and control a firm applying for DBE or ACDBE certification and whose ownership and control are relied upon for the certification will complete the form.

*Estimated Average Burden per Response:* 2 hours.

*Number of Respondents:* 9,000–9,500 applicants each year.

*Estimated Burden:* 18,000–19,000 hours per year for applications.

## 3. Material With Annual Affidavits of No Change

Each year, a certified firm must submit an affidavit of no change. Although the Department proposed that DBE would need to submit various additional documentation with the affidavit (e.g., an updated PNW statement and records of transfers) today's final rule only requires that the owner and the firm's (including affiliates) most recent completed IRS tax return, IRS Form 4506 (Request for Copy or Transcript of Tax Return) be submitted with the affidavit. Collection and submission of these items during the annual affidavit is estimated to take approximately 1.5 hours.

*Estimated Average Burden per Response:* 1.5 hours.

*Respondents:* The approximately 30,000 certified DBE firms.

*Burden:* Approximately 45,000 hours per year.

## 4. Reporting Requirement for Percentages of DBEs in Various Categories

The final rule implements a statutory requirement calling on UCPs to annually report the percentages of white women, minority men, and minority women who control DBE firms. To carry out this requirement, the 52 UCPs would read their existing Directories, noting which firms fell into each of these three categories. The UCPs would then calculate the percentages and email their results to the Departmental Office of Civil Rights. It would take each UCP an estimated 3 hours to comb through their Directories, and another three minutes to calculate the percentages and send an email to [DBE@DOT.GOV](mailto:DBE@DOT.GOV).

*Estimated Average Burden per Response:* 3 hours, 3 minutes.

*Respondents:* 52.

*Burden:* Approximately 158.5 hours.

## 5. Uniform Report of DBE Commitments/Awards and Payments

As part of this rulemaking, the Department is reinstating the information collection entitled, "Uniform Report of DBE Commitments/Awards and Payments," OMB Control No. 2105–0510, consistent with the changes proposed in this final rule. This collection requires that DOT Form 4630 be submitted once or twice per year by each recipient having an approved DBE program. The report form is collected from recipients by FHWA, FTA, and FAA, and is used to enable DOT to conduct program oversight of recipients' DBE programs and to identify trends or problem areas in the program. This collection is necessary for the Department to carry out its oversight responsibilities of the DBE program, since it allows the Department to obtain information from the recipients about the DBE participation they obtain in their programs.

In this final rule, the Department modified certain aspects of this collection in response to issues raised by stakeholders: (1) Creating separate forms for routine DBE reporting and for transit vehicle manufacturers (TVMs) and mega projects; (2) amending and clarifying the report's instructions to better explain how to fill out the forms; and (3) changing the forms to better capture the desired DBE data on a more continuous basis, which should also assist with recipients' post-award oversight responsibilities.

*Frequency:* Once or twice per year.

*Estimated Average Burden per Response:* 5 hours per response.

*Number of Respondents:* 1,250. The Department estimates that

approximately 550 of these respondents prepare two reports per year, while approximately 700 prepare one report per year.

Estimated Burden: 9,000 hours.

List of Subjects in 49 CFR Part 26

Administrative practice and procedure, Airports, Civil Rights, Government contracts, Grant-programs—transportation; Mass transportation, Minority Businesses, Reporting and recordkeeping requirements.

Issued this 19th day of September 2014, at Washington, DC.

Anthony R. Foxx,

Secretary of Transportation.

For the reasons set forth in the preamble, the Department of Transportation amends 49 CFR part 26 as follows:

PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

1. The authority citation for part 26 continues to read as follows:

Authority: 23 U.S.C. 304 and 324; 49 U.S.C. 2000d, et seq., 49 U.S.C. 47107, 47113, 47123; Section 1101(b) and divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405, and 23 U.S.C. 403.

2. In § 26.1, redesignate paragraphs (f) and (g) as paragraphs (g) and (h), and add new paragraph (f) to read as follows:

§ 26.1 What are the objectives of this part?

\* \* \* \* \*

(f) To promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients.

\* \* \* \* \*

3. In § 26.3, amend paragraphs (a)(1) and (2) by adding a sentence to the end of each to read as follows:

§ 26.3 To whom does this part apply?

(a) \* \* \*

(1) \* \* \* Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405.

(2) \* \* \* Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; and Divisions A and B

of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405.

\* \* \* \* \*

4. Amend § 26.5 by:

a. Adding in alphabetical order definitions for “Assets”, “Business, business concern or business enterprise”, “Contingent Liability”, and “Days”;

b. Removing the definition of “DOT/SBA Memorandum of Understanding”;

c. Revising the definition of “immediate family member”;

d. Adding in alphabetical order definition for “Liabilities”

e. Revising the definitions of “primary industry classification”, “principal place of business”, and “socially and economically disadvantaged individual”; and

f. Adding in alphabetical order definitions for “Spouse” and “Transit vehicle manufacturer (TVM)”.

The additions and revisions read as follows:

§ 26.5 What do the terms used in this part mean?

\* \* \* \* \*

Assets mean all the property of a person available for paying debts or for distribution, including one’s respective share of jointly held assets. This includes, but is not limited to, cash on hand and in banks, savings accounts, IRA or other retirement accounts, accounts receivable, life insurance, stocks and bonds, real estate, and personal property.

\* \* \* \* \*

Business, business concern or business enterprise means an entity organized for profit with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the United States economy through payment of taxes or use of American products, materials, or labor.

\* \* \* \* \*

Contingent Liability means a liability that depends on the occurrence of a future and uncertain event. This includes, but is not limited to, guaranty for debts owed by the applicant concern, legal claims and judgments, and provisions for federal income tax.

\* \* \* \* \*

Days mean calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday,

Similarly, in circumstances where the recipient’s offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

\* \* \* \* \*

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, father-in-law, mother-in-law, sister-in-law, brother-in-law, and domestic partner and civil unions recognized under State law.

\* \* \* \* \*

Liabilities mean financial or pecuniary obligations. This includes, but is not limited to, accounts payable, notes payable to bank or others, installment accounts, mortgages on real estate, and unpaid taxes.

\* \* \* \* \*

Primary industry classification means the most current North American Industry Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is available on the Internet at the U.S. Census Bureau Web site:

http://www.census.gov/eos/www/naics/.

\* \* \* \* \*

Principal place of business means the business location where the individuals who manage the firm’s day-to-day operations spend most working hours. If the offices from which management is directed and where the business records are kept are in different locations, the recipient will determine the principal place of business.

\* \* \* \* \*

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a members of groups and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual’s control.

(1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group if you require it.

(2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

(j) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

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

(iii) "Native Americans," which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;

(iv) "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 Islands (Republic of Palau), Republic of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;

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

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

(3) Being born in a particular country does not, standing alone, mean that a person is necessarily a member of one of the groups listed in this definition.

*Spouse* means a married person, including a person in a domestic partnership or a civil union recognized under State law.

*Transit vehicle manufacturer* means any manufacturer whose primary business purpose is to manufacture vehicles specifically built for public mass transportation. Such vehicles include, but are not limited to: Buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Producers of vehicles that receive post-production alterations or retrofitting to be used for public transportation purposes (e.g., so-called cutaway vehicles, vans customized for service to people with disabilities) are also considered transit vehicle manufacturers. Businesses that manufacture, mass-produce, or distribute vehicles solely for personal use and for sale "off the lot" are not considered transit vehicle manufacturers.

\* \* \* \* \*

■ 5. In § 26.11, add paragraphs (d) and (e) to read as follows:

**§ 26.11 What records do recipients keep and report?**

\* \* \* \* \*

(d) You must maintain records documenting a firm's compliance with the requirements of this part. At a minimum, you must keep a complete application package for each certified firm and all affidavits of no-change, change notices, and on-site reviews. These records must be retained in accordance with applicable record retention requirements for the recipient's financial assistance agreement. Other certification or compliance related records must be retained for a minimum of three (3) years unless otherwise provided by applicable record retention requirements for the recipient's financial assistance agreement, whichever is longer.

(e) The State department of transportation in each UCP established pursuant to § 26.81 of this part must report to the Department of Transportation's Office of Civil Rights, by January 1, 2015, and each year thereafter, the percentage and location in the State of certified DBE firms in the UCP Directory controlled by the following:

(1) Women;

(2) Socially and economically disadvantaged individuals (other than women); and

(3) Individuals who are women and are otherwise socially and economically disadvantaged individuals.

■ 6. Revise § 26.13, to read as follows:

**§ 26.13 What assurances must recipients and contractors make?**

(a) Each financial assistance agreement you sign with a DOT operating administration (or a primary recipient) must include the following assurance: The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to

the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under 49 CFR 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.).

(b) Each contract you sign with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance: The contractor, sub recipient 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 DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate, which may include, but is not limited to:

(1) Withholding monthly progress payments;

(2) Assessing sanctions;

(3) Liquidated damages; and/or

(4) Disqualifying the contractor from future bidding as non-responsible.

**§ 26.21 [Amended]**

■ 7. In § 26.21, paragraph (a)(1) add the word "primary" before the word "recipients", and in paragraphs (a)(2) and (3), remove the word "exceeding" and add in its place the words "the cumulative total value of which exceeds".

■ 8. In § 26.45, revise paragraphs (c)(2), (c)(5); (d) introductory text, (e)(3), (f)(4), and (g) to read as follows:

**§ 26.45. How do recipients set overall goals?**

\* \* \* \* \*

(c) \* \* \*

(2) *Use a bidders list.* Determine the number of DBEs that have bid or quoted (successful and unsuccessful) on your DOT-assisted prime contracts or subcontracts in the past three years. Determine the number of all businesses that have bid or quoted (successful and unsuccessful) on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number of all businesses to derive a base figure for the relative availability of DBEs in your market. When using this approach, you must establish a mechanism (documented in your goal submission) to directly capture data on DBE and non-DBE prime and

subcontractors that submitted bids or quotes on your DOT-assisted contracts.

\* \* \* \* \*

(5) *Alternative methods.* Except as otherwise provided in this paragraph, you may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market. The exclusive use of a list of prequalified contractors or plan holders, or a bidders list that does not comply with the requirements of paragraph (c)(2) of this section, is not an acceptable alternative means of determining the availability of DBEs.

(d) *Step 2.* Once you have calculated a base figure, you must examine all of the evidence available in your jurisdiction to determine what adjustment, if any, is needed to the base figure to arrive at your overall goal. If the evidence does not suggest an adjustment is necessary, then no adjustment shall be made.

\* \* \* \* \*

(e) \* \* \*

(3) In appropriate cases, the FHWA, FTA or FAA Administrator may permit or require you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects, including entire projects. Like other overall goals, a project goal may be adjusted to reflect changed circumstances, with the concurrence of the appropriate operating administration.

(i) A project goal is an overall goal, and must meet all the substantive and procedural requirements of this section pertaining to overall goals.

(ii) A project goal covers the entire length of the project to which it applies.

(iii) The project goal should include a projection of the DBE participation anticipated to be obtained during each fiscal year covered by the project goal.

(iv) The funds for the project to which the project goal pertains are separated from the base from which your regular overall goal, applicable to contracts not part of the project covered by a project goal, is calculated.

(f) \* \* \*

(4) You are not required to obtain prior operating administration concurrence with your overall goal. However, if the operating administration's review suggests that your overall goal has not been correctly calculated or that your method for calculating goals is inadequate, the operating administration may, after

consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you. In evaluating the adequacy or soundness of the methodology used to derive the overall goal, the operating administration will be guided by goal setting principles and best practices identified by the Department in guidance issued pursuant to § 26.9.

\* \* \* \* \*

(g)(1) In establishing an overall goal, you must provide for consultation and publication. This includes:

(i) Consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to establish a level playing field for the participation of DBEs. The consultation must include a scheduled, direct, interactive exchange (e.g., a face-to-face meeting, video conference, teleconference) with as many interested stakeholders as possible focused on obtaining information relevant to the goal setting process, and it must occur before you are required to submit your methodology to the operating administration for review pursuant to paragraph (f) of this section. You must document in your goal submission the consultation process you engaged in. Notwithstanding paragraph (f)(4) of this section, you may not implement your proposed goal until you have complied with this requirement.

(ii) A published notice announcing your proposed overall goal before submission to the operating administration on August 1st. The notice must be posted on your official Internet Web site and may be posted in any other sources (e.g., minority-focused media, trade association publications). If the proposed goal changes following review by the operating administration, the revised goal must be posted on your official Internet Web site.

(2) At your discretion, you may inform the public that the proposed overall goal and its rationale are available for inspection during normal business hours at your principal office and for a 30-day comment period. Notice of the comment period must include addresses to which comments may be sent. The public comment period will not extend the August 1st deadline set in paragraph (f) of this section.

\* \* \* \* \*

#### § 26.49 How are overall goals established for transit vehicle manufacturers?

(a) If you are an FTA recipient, you must require in your DBE program that each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, certify that it has complied with the requirements of this section. You do not include FTA assistance used in transit vehicle procurements in the base amount from which your overall goal is calculated.

(1) Only those transit vehicle manufacturers listed on FTA's certified list of Transit Vehicle Manufacturers, or that have submitted a goal methodology to FTA that has been approved or has not been disapproved, at the time of solicitation are eligible to bid.

(2) A TVM's failure to implement the DBE Program in the manner as prescribed in this section and throughout 49 CFR part 26 will be deemed as non-compliance, which will result in removal from FTA's certified TVMs list, resulting in that manufacturer becoming ineligible to bid.

(3) FTA recipient's failure to comply with the requirements set forth in paragraph (a) of this section may result in formal enforcement action or appropriate sanction as determined by FTA (e.g., FTA declining to participate in the vehicle procurement).

(4) FTA recipients are required to submit within 30 days of making an award, the name of the successful bidder, and the total dollar value of the contract in the manner prescribed in the grant agreement.

(b) If you are a transit vehicle manufacturer, you must establish and submit for FTA's approval an annual overall percentage goal.

(1) In setting your overall goal, you should be guided, to the extent applicable, by the principles underlying § 26.45. The base from which you calculate this goal is the amount of FTA financial assistance included in transit vehicle contracts you will bid on during the fiscal year in question, less the portion(s) attributable to the manufacturing process performed entirely by the transit vehicle manufacturer's own forces.

(i) You must consider and include in your base figure all domestic contracting opportunities made available to non-DBE firms; and

(ii) You must exclude from this base figure funds attributable to work performed outside the United States and its territories, possessions, and commonwealths.

(iii) In establishing an overall goal, the transit vehicle manufacturer must

■ 9. Revise § 26.49 to read as follows:

provide for public participation. This includes consultation with interested parties consistent with § 26.45(g).

(2) The requirements of this part with respect to submission and approval of overall goals apply to you as they do to recipients.

(c) Transit vehicle manufacturers awarded must comply with the reporting requirements of § 26.11 of this part including the requirement to submit the Uniform Report of Awards or Commitments and Payments, in order to remain eligible to bid on FTA assisted transit vehicle procurements.

(d) Transit vehicle manufacturers must implement all other applicable requirements of this part, except those relating to UCPs and DBE certification procedures.

(e) If you are an FHWA or FAA recipient, you may, with FHWA or FAA approval, use the procedures of this section with respect to procurements of vehicles or specialized equipment. If you choose to do so, then the manufacturers of this equipment must meet the same requirements (including goal approval by FHWA or FAA) as transit vehicle manufacturers must meet in FTA-assisted procurements.

(f) As a recipient you may, with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of complying through the procedures of this section.

■ 10. In § 26.51, revise paragraph (a) to read as follows:

**§ 26.51 What means do recipients use to meet overall goals?**

(a) You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating race-neutral DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal.

\* \* \* \* \*

■ 11. In § 26.53, revise paragraph (b), redesignate paragraph (f)(1) as (f)(1)(i) and add paragraph (f)(1)(ii), revise paragraphs (g) and (h), and add paragraph (j) to read as follows:

**§ 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?**

\* \* \* \* \*

(b) In your solicitations for DOT-assisted contracts for which a contract goal has been established, you must require the following:

(1) Award of the contract will be conditioned on meeting the requirements of this section;

(2) All bidders or offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:

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

(ii) A description of the work that each DBE will perform. To count toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;

(iii) The dollar amount of the participation of each DBE firm participating;

(iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal; and

(v) Written confirmation from each listed DBE firm that it is participating in the contract in the kind and amount of work provided in the prime contractor's commitment.

(vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part). The documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract; and

(3)(i) At your discretion, the bidder/offeror must present the information required by paragraph (b)(2) of this section—

(A) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or

(B) No later than 7 days after bid opening as a matter of responsibility. The 7 days shall be reduced to 5 days beginning January 1, 2017.

(ii) Provided that, in a negotiated procurement, including a design-build procurement, the bidder/offeror may make a contractually binding commitment to meet the goal at the time of bid submission or the presentation of initial proposals but provide the information required by paragraph (b)(2) of this section before the final selection for the contract is made by the recipient.

\* \* \* \* \*

(f)(1) \* \* \*

(ii) You must include in each prime contract a provision stating:

(A) That the contractor shall utilize the specific DBEs listed to perform the work and supply the materials for which each is listed unless the

contractor obtains your written consent as provided in this paragraph (f); and

(B) That, unless your consent is provided under this paragraph (f), the contractor shall not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE.

\* \* \* \* \*

(g) When a DBE subcontractor is terminated as provided in paragraph (f) of this section, or fails to complete its work on the contract for any reason, you must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal you established for the procurement. The good faith efforts shall be documented by the contractor. If the recipient requests documentation under this provision, the contractor shall submit the documentation within 7 days, which may be extended for an additional 7 days if necessary at the request of the contractor, and the recipient shall provide a written determination to the contractor stating whether or not good faith efforts have been demonstrated.

(h) You must include in each prime contract the contract clause required by § 26.13(b) stating that failure by the contractor to carry out the requirements of this part is a material breach of the contract and may result in the termination of the contract or such other remedies set forth in that section you deem appropriate if the prime contractor fails to comply with the requirements of this section.

\* \* \* \* \*

(j) You must require the contractor awarded the contract to make available upon request a copy of all DBE subcontracts. The subcontractor shall ensure that all subcontracts or an agreement with DBEs to supply labor or materials require that the subcontract and all lower tier subcontractors be performed in accordance with this part's provisions.

■ 12. In § 26.55, revise paragraph (d)(5), redesignate paragraph (d)(6) as (d)(7), and add new paragraph (d)(6) and paragraph (e)(4) to read as follows:

**§ 26.55 How is DBE participation counted toward goals?**

\* \* \* \* \*

(d) \* \* \*

(5) The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE that leases

trucks equipped with drivers from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE leased trucks equipped with drivers not to exceed the value of transportation services on the contract provided by DBE-owned trucks or leased trucks with DBE employee drivers. Additional participation by non-DBE owned trucks equipped with drivers receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the appropriate DOT operating administration.

*Example to paragraph (d)(5):* DBE Firm X uses two of its own trucks on a contract. It leases two trucks from DBE Firm Y and six trucks equipped with drivers from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. DBE credit could be awarded only for the fees or commissions pertaining to the remaining trucks Firm X receives as a result of the lease with Firm Z.

(6) The DBE may lease trucks without drivers from a non-DBE truck leasing company. If the DBE leases trucks from a non-DBE truck leasing company and uses its own employees as drivers, it is entitled to credit for the total value of these hauling services.

*Example to paragraph (d)(6):* DBE Firm X uses two of its own trucks on a contract. It leases two additional trucks from non-DBE Firm Z. Firm X uses its own employees to drive the trucks leased from Firm Z. DBE credit would be awarded for the total value of the transportation services provided by all four trucks.

\* \* \* \* \*

(e) \* \* \*

(4) You must determine the amount of credit awarded to a firm for the provisions of materials and supplies (e.g., whether a firm is acting as a regular dealer or a transaction expeditor) on a contract-by-contract basis.

\* \* \* \* \*

■ 13. In § 26.65, revise paragraph (a), and in paragraph (b), remove “in excess of \$22.41 million” and add in its place “in excess of \$23.98 million”.

The revision reads as follows:

**§ 26.65 What rules govern business size determinations?**

(a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. As a recipient, you must apply current SBA business size

standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts, including the primary industry classification of the applicant.

\* \* \* \* \*

■ 14. Revise § 26.67 to read as follows:

**§ 26.67 What rules determine social and economic disadvantage?**

(a) *Presumption of disadvantage.* (1) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

(2)(i) You must require each individual owner of a firm applying to participate as a DBE, whose ownership and control are relied upon for DBE certification, to certify that he or she has a personal net worth that does not exceed \$1.32 million.

(ii) You must require each individual who makes this certification to support it with a signed, notarized statement of personal net worth, with appropriate supporting documentation. To meet this requirement, you must use the DOT personal net worth form provided in appendix G to this part without change or revision. Where necessary to accurately determine an individual's personal net worth, you may, on a case-by-case basis, require additional financial information from the owner of an applicant firm (e.g., information concerning the assets of the owner's spouse, where needed to clarify whether assets have been transferred to the spouse or when the owner's spouse is involved in the operation of the company). Requests for additional information shall not be unduly burdensome or intrusive.

(iii) In determining an individual's net worth, you must observe the following requirements:

(A) Exclude an individual's ownership interest in the applicant firm;

(B) Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). The equity is the market value of the residence less any mortgages and home equity loan balances. Recipients must ensure that home equity loan balances are included

in the equity calculation and not as a separate liability on the individual's personal net worth form. Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes.

(C) Do not use a contingent liability to reduce an individual's net worth.

(D) With respect to assets held in vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.

(iv) Notwithstanding any provision of Federal or State law, you must not release an individual's personal net worth statement nor any documents pertaining to it to any third party without the written consent of the submitter. Provided, that you must transmit this information to DOT in any certification appeal proceeding under § 26.89 of this part or to any other State to which the individual's firm has applied for certification under § 26.85 of this part.

(b) *Rebuttal of presumption of disadvantage.* (1) An individual's presumption of economic disadvantage may be rebutted in two ways.

(i) If the statement of personal net worth and supporting documentation that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds \$1.32 million, the individual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

*Example to paragraph (b)(1)(i):* An individual with very high assets and significant liabilities may, in accounting terms, have a PNW of less than \$1.32 million. However, the person's assets collectively (e.g., high income level, a very expensive house, a yacht, extensive real or personal property holdings) may lead a reasonable person to conclude that he or she is not economically disadvantaged. The recipient may rebut the individual's presumption of economic disadvantage under these circumstances, as provided in this section, even though the individual's PNW is less than \$1.32 million.

(ii)(A) If the statement of personal net worth and supporting documentation that an individual submits under paragraph (a)(2) of this section

demonstrates that the individual is able to accumulate substantial wealth, the individual's presumption of economic disadvantage is rebutted. In making this determination, as a certifying agency, you may consider factors that include, but are not limited to, the following:

(1) Whether the average adjusted gross income of the owner over the most recent three year period exceeds \$350,000;

(2) Whether the income was unusual and not likely to occur in the future;

(3) Whether the earnings were offset by losses;

(4) Whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm;

(5) Other evidence that income is not indicative of lack of economic disadvantage; and

(6) Whether the total fair market value of the owner's assets exceed \$6 million.

(B) You must have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

(2) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged you may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Your proceeding must follow the procedures of § 26.87.

(3) In such a proceeding, you have the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. You may require the individual to produce information relevant to the determination of his or her disadvantage.

(4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$1.32 million, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage, so long as his or her PNW remains above that amount.

(c) *Transfers within two years.* (1) Except as set forth in paragraph (c)(2) of this section, recipients must attribute to an individual claiming disadvantaged

status any assets which that individual has transferred to an immediate family member, to a trust a beneficiary of which is an immediate family member, or to the applicant firm for less than fair market value, within two years prior to a concern's application for participation in the DBE program or within two years of recipient's review of the firm's annual affidavit, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(2) Recipients must not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(d) *Individual determinations of social and economic disadvantage.* Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds \$1.32 million shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. You must require that applicants provide sufficient information to permit determinations under the guidance of appendix E of this part.

■ 15. In § 26.69, revise paragraphs (a) and (c) to read as follows:

**§ 26.69 What rules govern determinations of ownership?**

(a) In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm. All transactions for the establishment and ownership (or

transfer of ownership) must be in the normal course of business, reflecting commercial and arms-length practices.

\* \* \* \* \*

(c)(1) The firm's ownership by socially and economically disadvantaged individuals, including their contribution of capital or expertise to acquire their ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Proof of contribution of capital should be submitted at the time of the application. When the contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan.

(2) Insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, mere participation in a firm's activities as an employee, or capitalization not commensurate with the value for the firm.

(3) The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits, compared to the disadvantaged owner(s), are grounds for denial.

(4) Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

*Examples to paragraph (c):* (i) An individual pays \$100 to acquire a majority interest in a firm worth \$1 million. The individual's contribution to capital would not be viewed as substantial.

(ii) A 51% disadvantaged owner and a non-disadvantaged 49% owner contribute \$100 and \$10,000, respectively, to acquire a firm grossing \$1 million. This may be indicative of a pro forma arrangement that does not meet the requirements of (c)(1).

(iii) The disadvantaged owner of a DBE applicant firm spends \$250 to file articles of incorporation and obtains a \$100,000 loan, but makes only nominal or sporadic payments to repay the loan. This type of contribution is not of a continuing nature.

\* \* \* \* \*

■ 16. In § 26.71, revise paragraphs (e) and (l) to read as follows:

**§ 26.71 What rules govern determinations concerning control?**

\* \* \* \* \*

(e) Individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

(1) Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the nondisadvantaged individual remains involved with the firm in any capacity, there is a rebuttable presumption of control by the non-disadvantaged individual unless the disadvantaged individual now owning the firm demonstrates to you, by clear and convincing evidence, that:

(1) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(2) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a nondisadvantaged individual who formerly owned and/or controlled the firm.

§ 26.73 [Amended]

■ 17. In § 26.73, in paragraph (g), remove the words “unless the recipient requires all firms that participate in its contracts and subcontracts to be prequalified” and in paragraph (h), remove “26.35” and add in its place “26.65”.

■ 18. In § 26.83, revise paragraphs (c), (h), and (j), to read as follows:

§ 26.83 What procedures do recipients follow in making certification decisions?

(c)(1) You must take all the following steps in determining whether a DBE firm meets the standards of subpart D of this part:

(i) Perform an on-site visit to the firm’s principal place of business. You must interview the principal officers and review their résumés and/or work histories. You may interview key personnel of the firm if necessary. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area. You may rely

upon the site visit report of any other recipient with respect to a firm applying for certification;

(ii) Analyze documentation related to the legal structure, ownership, and control of the applicant firm. This includes, but is not limited to, Articles of Incorporation/Organization; corporate by-laws or operating agreements; organizational, annual and board/member meeting records; stock ledgers and certificates; and State-issued Certificates of Good Standing

(iii) Analyze the bonding and financial capacity of the firm; lease and loan agreements; bank account signature cards;

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

(v) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any.

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

(vii) Obtain complete Federal income tax returns (or requests for extensions) filed by the firm, its affiliates, and the socially and economically disadvantaged owners for the last 3 years. A complete return includes all forms, schedules, and statements filed with the Internal Revenue Service.

(viii) Require potential DBEs to complete and submit an appropriate application form, except as otherwise provided in § 26.85 of this part.

(2) You must use the application form provided in Appendix F to this part without change or revision. However, you may provide in your DBE program, with the written approval of the concerned operating administration, for supplementing the form by requesting specified additional information not inconsistent with this part.

(3) You must make sure that the applicant attests to the accuracy and truthfulness of the information on the application form. This shall be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by State law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States.

(4) You must review all information on the form prior to making a decision about the eligibility of the firm. You may request clarification of information

contained in the application at any time in the application process.

(h)(1) Once you have certified a DBE, it shall remain certified until and unless you have removed its certification, in whole or in part, through the procedures of § 26.87 of this part, except as provided in § 26.67(b)(1) of this part.

(2) You may not require DBEs to reapply for certification or undergo a recertification process. However, you may conduct a certification review of a certified DBE firm, including a new on-site review, if appropriate in light of changed circumstances (e.g., of the kind requiring notice under paragraph (i) of this section or relating to suspension of certification under § 26.88), a complaint, or other information concerning the firm’s eligibility. If information comes to your attention that leads you to question the firm’s eligibility, you may conduct an on-site review on an unannounced basis, at the firm’s offices and job sites.

(j) If you are a DBE, you must provide to the recipient, every year on the anniversary of the date of your certification, an affidavit sworn to by the firm’s owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm’s circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which you have notified the recipient under paragraph (i) of this section. The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm’s size and gross receipts (e.g., submission of Federal tax returns). If you fail to provide this affidavit in a timely manner, you will be deemed to have failed to cooperate under § 26.109(c).

■ 19. In § 26.86, remove and reserve paragraph (b) and add a sentence to the end of paragraph (c) to read as follows:

§ 26.86 What rules govern recipients’ denials of initial requests for certification?

(c) \* \* \* An applicant’s appeal of your decision to the Department

pursuant to § 26.89 does not extend this period.

\* \* \* \* \*

■ 20. In § 26.87, revise paragraphs (f) and (g) to read as follows:

**§ 26.87 What procedures does a recipient use to remove a DBE's eligibility?**

\* \* \* \* \*

(f) *Grounds for decision.* You may base a decision to remove a firm's eligibility only on one or more of the following grounds:

(1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;

(2) Information or evidence not available to you at the time the firm was certified;

(3) Information relevant to eligibility that has been concealed or misrepresented by the firm;

(4) A change in the certification standards or requirements of the Department since you certified the firm;

(5) Your decision to certify the firm was clearly erroneous;

(6) The firm has failed to cooperate with you (see § 26.109(c));

(7) The firm has exhibited a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the DBE program (see § 26.73(a)(2)); or

(8) The firm has been suspended or debarred for conduct related to the DBE program. The notice required by paragraph (g) of this section must include a copy of the suspension or debarment action. A decision to remove a firm for this reason shall not be subject to the hearing procedures in paragraph (d) of this section.

(g) *Notice of decision.* Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under § 26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding. Provided that, when sending such a notice to a complainant other than a DOT operating administration, you must not include information reasonably construed as confidential business information without the written consent of the firm that submitted the information.

\* \* \* \* \*

■ 21. Add § 26.88 to read as follows:

**§ 26.88 Summary suspension of certification.**

(a) A recipient shall immediately suspend a DBE's certification without adhering to the requirements in § 26.87(d) of this part when an individual owner whose ownership and control of the firm are necessary to the firm's certification dies or is incarcerated.

(b)(1) A recipient may immediately suspend a DBE's certification without adhering to the requirements in § 26.87(d) when there is adequate evidence to believe that there has been a material change in circumstances that may affect the eligibility of the DBE firm to remain certified, or when the DBE fails to notify the recipient or UCP in writing of any material change in circumstances as required by § 26.83(i) of this part or fails to timely file an affidavit of no change under § 26.83(j).

(2) In determining the adequacy of the evidence to issue a suspension under paragraph (b)(1) of this section, the recipient shall consider all relevant factors, including how much information is available, the credibility of the information and allegations given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result.

(c) The concerned operating administration may direct the recipient to take action pursuant to paragraph (a) or (b) of this section if it determines that information available to it is sufficient to warrant immediate suspension.

(d) When a firm is suspended pursuant to paragraph (a) or (b) of this section, the recipient shall immediately notify the DBE of the suspension by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE.

(e) Suspension is a temporary status of ineligibility pending an expedited show cause hearing/proceeding under § 26.87 of this part to determine whether the DBE is eligible to participate in the program and consequently should be removed. The suspension takes effect when the DBE receives, or is deemed to have received, the Notice of Suspension.

(f) While suspended, the DBE may not be considered to meet a contract goal on a new contract, and any work it does on a contract received during the suspension shall not be counted toward a recipient's overall goal. The DBE may continue to perform under an existing contract executed before the DBE received a Notice of Suspension and may be counted toward the contract goal during the period of suspension as long

as the DBE is performing a commercially useful function under the existing contract.

(g) Following receipt of the Notice of Suspension, if the DBE believes it is no longer eligible, it may voluntarily withdraw from the program, in which case no further action is required. If the DBE believes that its eligibility should be reinstated, it must provide to the recipient information demonstrating that the firm is eligible notwithstanding its changed circumstances. Within 30 days of receiving this information, the recipient must either lift the suspension and reinstate the firm's certification or commence a decertification action under § 26.87 of this part. If the recipient commences a decertification proceeding, the suspension remains in effect during the proceeding.

(h) The decision to immediately suspend a DBE under paragraph (a) or (b) of this section is not appealable to the US Department of Transportation. The failure of a recipient to either lift the suspension and reinstate the firm or commence a decertification proceeding, as required by paragraph (g) of this section, is appealable to the U.S. Department of Transportation under § 26.89 of this part, as a constructive decertification.

■ 22. In § 26.89, revise paragraphs (a)(1) and (3), (c), and (e) to read as follows:

**§ 26.89 What is the process for certification appeals to the Department of Transportation?**

(a)(1) If you are a firm that is denied certification or whose eligibility is removed by a recipient, including SBA-certified firms, you may make an administrative appeal to the Department.

\* \* \* \* \*

(3) Send appeals to the following address: U.S. Department of Transportation, Departmental Office of Civil Rights, 1200 New Jersey Avenue SE., Washington, DC 20590-0001.

\* \* \* \* \*

(c) If you want to file an appeal, you must send a letter to the Department within 90 days of the date of the recipient's final decision, including information and setting forth a full and specific statement as to why the decision is erroneous, what significant fact that the recipient failed to consider, or what provisions of this Part the recipient did not properly apply. The Department may accept an appeal filed later than 90 days after the date of the decision if the Department determines that there was good cause for the late

filing of the appeal or in the interest of justice.

\* \* \* \* \*

(e) The Department makes its decision based solely on the entire administrative record as supplemented by the appeal. The Department does not make a de novo review of the matter and does not conduct a hearing. The Department may also supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, State, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.

\* \* \* \* \*

■ 23. Revise appendix A to part 26 to read as follows:

#### **Appendix A to Part 26—Guidance Concerning Good Faith Efforts**

I. When, as a recipient, you establish a contract goal on a DOT-assisted contract for procuring construction, equipment, services, or any other purpose, a bidder must, in order to be responsible and/or responsive, make sufficient good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

II. In any situation in which you have established a contract goal, Part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, you have the responsibility to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made, based on the regulations and the guidance in this Appendix.

The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call. Determinations should not be made using quantitative formulas.

III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (i.e., obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an

adequate good faith efforts showing. This rule specifically prohibits you from ignoring bona fide good faith efforts.

IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

A. (1) Conducting market research to identify small business contractors and suppliers and soliciting through all reasonable and available means the interest of all certified DBEs that have the capability to perform the work of the contract. This may include attendance at pre-bid and business matchmaking meetings and events, advertising and/or written notices, posting of Notices of Sources Sought and/or Requests for Proposals, written notices or emails to all DBEs listed in the State's directory of transportation firms that specialize in the areas of work desired (as noted in the DBE directory) and which are located in the area or surrounding areas of the project.

(2) The bidder should solicit this interest as early in the acquisition process as practicable to allow the DBEs to respond to the solicitation and submit a timely offer for the subcontract. The bidder should determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units (for example, smaller tasks or quantities) to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces. This may include, where possible, establishing flexible timeframes for performance and delivery schedules in a manner that encourages and facilitates DBE participation.

C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation with their offer for the subcontract.

D. (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional Agreements could not be reached for DBEs to perform the work.

(2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract

goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

E. (1) Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal. Another practice considered an insufficient good faith effort is the rejection of the DBE because its quotation for the work was not the lowest received. However, nothing in this paragraph shall be construed to require the bidder or prime contractor to accept unreasonable quotes in order to satisfy contract goals.

(2) A prime contractor's inability to find a replacement DBE at the original price is not alone sufficient to support a finding that good faith efforts have been made to replace the original DBE. The fact that the contractor has the ability and/or desire to perform the contract work with its own forces does not relieve the contractor of the obligation to make good faith efforts to find a replacement DBE, and it is not a sound basis for rejecting a prospective replacement DBE's reasonable quote.

F. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.

G. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

H. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, State, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

V. In determining whether a bidder has made good faith efforts, it is essential to scrutinize its documented efforts. At a minimum, you must review the performance of other bidders in meeting the contract goal. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts. As provided in § 26.53(b)(2)(vi), you must also require the

contractor to submit copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract to review whether DBE prices were substantially higher; and contact the DBEs listed on a contractor's solicitation to inquire as to whether they were contacted by the prime. Pro forma mailings to DBEs requesting bids are not alone sufficient to satisfy good faith efforts under the rule.

VI. A promise to use DBEs after contract award is not considered to be responsive to the contract solicitation or to constitute good faith efforts.

■ 24. Revise appendix B to part 26 to read as follows:

**Appendix B to 49 CFR Part 26—  
Uniform Report of DBE Awards or  
Commitments and Payments Form**

**INSTRUCTIONS FOR COMPLETING THE  
UNIFORM REPORT OF DBE AWARDS/  
COMMITMENTS AND PAYMENTS**

Recipients of Department of Transportation (DOT) funds are expected to keep accurate data regarding the contracting opportunities available to firms paid for with DOT dollars. Failure to submit contracting data relative to the DBE program will result in noncompliance with Part 26. All dollar values listed on this form should represent the DOT share attributable to the Operating Administration (OA): Federal Highway Administration (FHWA), Federal Aviation Administration (FAA) or Federal Transit Administration (FTA) to which this report will be submitted.

1. Indicate the DOT (OA) that provides your Federal financial assistance. If assistance comes from more than one OA, use separate reporting forms for each OA. If you are an FTA recipient, indicate your Vendor Number in the space provided.

2. If you are an FAA recipient, indicate the relevant AIP Numbers covered by this report. If you are an FTA recipient, indicate the Grant/Project numbers covered by this report. If more than ten attach a separate sheet.

3. Specify the Federal fiscal year (i.e., October 1–September 30) in which the covered reporting period falls.

4. State the date of submission of this report.

5. Check the appropriate box that indicates the reporting period that the data provided in this report covers. For FHWA and FTA recipients, if this report is due June 1, data should cover October 1–March 31. If this report is due December 1, data should cover April 1–September 30. If the report is due to the FAA, data should cover the entire year.

6. Provide the name and address of the recipient.

7. State your overall DBE goal(s) established for the Federal fiscal year of the report being submitted to and approved by the relevant OA. Your overall goal is to be reported as well as the breakdown for specific Race Conscious and Race Neutral projections (both of which include gender-conscious/neutral projections). The Race Conscious projection should be based on measures that focus on and provide benefits only for DBEs. The use of contract goals is

a primary example of a race conscious measure. The Race Neutral projection should include measures that, while benefiting DBEs, are not solely focused on DBE firms. For example, a small business outreach program, technical assistance, and prompt payment clauses can assist a wide variety of businesses in addition to helping DBE firms.

**Section A: Awards and Commitments Made During This Period**

The amounts in items 8(A)–10(I) should include all types of prime contracts awarded and all types of subcontracts awarded or committed, including: professional or consultant services, construction, purchase of materials or supplies, lease or purchase of equipment and any other types of services. All dollar amounts are to reflect only the Federal share of such contracts and should be rounded to the nearest dollar.

Line 8: Prime contracts awarded this period: The items on this line should correspond to the contracts directly between the recipient and a supply or service contractor, with no intermediaries between the two.

8(A). Provide the *total dollar amount* for all prime contracts assisted with DOT funds and awarded during this reporting period. This value should include the entire Federal share of the contracts without removing any amounts associated with resulting subcontracts.

8(B). Provide the *total number* of all prime contracts assisted with DOT funds and awarded during this reporting period.

8(C). From the total dollar amount awarded in item 8(A), provide the *dollar amount* awarded in prime contracts to certified DBE firms during this reporting period. This amount should not include the amounts sub contracted to other firms.

8(D). From the total number of prime contracts awarded in item 8(B), specify the *number* of prime contracts awarded to certified DBE firms during this reporting period.

8(E&F). This field is closed for data entry. Except for the very rare case of DBE-set asides permitted under 49 CFR part 26, all prime contracts awarded to DBEs are regarded as race-neutral.

8(G). From the total dollar amount awarded in item 8(C), provide the *dollar amount* awarded to certified DBEs through the use of Race Neutral methods. See the definition of Race Neutral in item 7 and the explanation in item 8 of project types to include.

8(H). From the total number of prime contracts awarded in 8(D), specify the *number* awarded to DBEs through Race Neutral methods.

8(I). Of all prime contracts awarded this reporting period, calculate the *percentage* going to DBEs. Divide the dollar amount in item 8(C) by the dollar amount in item 8(A) to derive this percentage. Round percentage to the nearest tenth.

Line 9: Subcontracts awarded/committed this period: Items 9(A)–9(I) are derived in the same way as items 8(A)–8(I), except that these calculations should be based on subcontracts rather than prime contracts. Unlike prime contracts, which may only be awarded, subcontracts may be either awarded or committed.

9(A). If filling out the form for general reporting, provide the total dollar amount of subcontracts assisted with DOT funds awarded or committed during this period. This value should be a subset of the total dollars awarded in prime contracts in 8(A), and therefore should never be greater than the amount awarded in prime contracts. If filling out the form for project reporting, provide the total dollar amount of subcontracts assisted with DOT funds awarded or committed during this period. This value should be a subset of the total dollars awarded or previously in prime contracts in 8(A). The sum of all subcontract amounts in consecutive periods should never exceed the sum of all prime contract amounts awarded in those periods.

9(B). Provide the total number of all subcontracts assisted with DOT funds that were awarded or committed during this reporting period.

9(C). From the total dollar amount of subcontracts awarded/committed this period in item 9(A), provide the total dollar amount awarded in sub contracts to DBEs.

9(D). From the total number of subcontracts awarded or committed in item 9(B), specify the number of sub contracts awarded or committed to DBEs.

9(E). From the total dollar amount of subcontracts awarded or committed to DBEs this period, provide the amount in dollars to DBEs using Race Conscious measures.

9(F). From the total number of subcontracts awarded or committed to DBEs this period, provide the number of sub contracts awarded or committed to DBEs using Race Conscious measures.

9(G). From the total dollar amount of subcontracts awarded/committed to DBEs this period, provide the amount in dollars to DBEs using Race Neutral measures.

9(H). From the total number of subcontracts awarded/committed to DBEs this period, provide the number of sub contracts awarded to DBEs using Race Neutral measures.

9(I). Of all subcontracts awarded this reporting period, calculate the *percentage* going to DBEs. Divide the dollar amount in item 9(C) by the dollar amount in item 9(A) to derive this percentage. Round percentage to the nearest tenth.

Line 10: Total contracts awarded or committed this period. These fields should be used to show the total dollar value and number of contracts awarded to DBEs and to calculate the overall percentage of dollars awarded to DBEs.

10(A)–10(B). These fields are unavailable for data entry.

10(C)–10(H). Combine the total values listed on the prime contracts line (Line 8) with the corresponding values on the subcontracts line (Line 9).

10(I). Of all contracts awarded this reporting period, calculate the *percentage* going to DBEs. Divide the total dollars awarded to DBEs in item 10(C) by the dollar amount in item 8(A) to derive this percentage. Round percentage to the nearest tenth.

*Section B: Breakdown by Ethnicity & Gender of Contracts Awarded to DBEs This Period*

11–17. Further breakdown the contracting activity with DBE involvement. The Total Dollar Amount to DBEs in 17(C) should equal the Total Dollar Amount to DBEs in 10(C). Likewise the total number of contracts to DBEs in 17(F) should equal the Total Number of Contracts to DBEs in 10(D).

Line 16: The “Non-Minority” category is reserved for any firms whose owners are not members of the presumptively disadvantaged groups already listed, but who are either “women” OR eligible for the DBE program on an individual basis. All DBE firms must be certified by the Unified Certification Program to be counted in this report.

*Section C: Payments on Ongoing Contracts*

Line 18(A–E). Submit information on contracts that are currently in progress. All dollar amounts are to reflect only the Federal share of such contracts, and should be rounded to the nearest dollar.

18(A). Provide the total dollar amount paid to all firms performing work on contracts.

18(B). Provide the total number of contracts where work was performed during the reporting period.

18(C). From the total number of contracts provided in 18(A) provide the total number of contracts that are currently being performed by DBE firms for which payments have been made.

18(D). From the total dollar amount paid to all firms in 18(A), provide the total dollar

value paid to DBE firms currently performing work during this period.

18(E). Provide the total number of DBE firms that received payment during this reporting period. For example, while 3 contracts may be active during this period, one DBE firm may be providing supplies or services on all three contracts. This field should only list the number of DBE firms performing work.

18(F). Of all payments made during this period, calculate the percentage going to DBEs. Divide the total dollar value to DBEs in item 18(D) by the total dollars of all payments in 18(B). Round percentage to the nearest tenth.

*Section D: Actual Payments on Contracts Completed This Reporting Period*

This section should provide information only on contracts that are closed during this period. All dollar amounts are to reflect the entire Federal share of such contracts, and should be rounded to the nearest dollar.

19(A). Provide the total number of contracts completed during this reporting period that used Race Conscious measures. Race Conscious contracts are those with contract goals or another race conscious measure.

19(B). Provide the total dollar value of prime contracts completed this reporting period that had race conscious measures.

19(C). From the total dollar value of prime contracts completed this period in 19(B), provide the total dollar amount of dollars awarded or committed to DBE firms in order

to meet the contract goals. This applies only to Race Conscious contracts.

19(D). Provide the actual total DBE participation in dollars on the race conscious contracts completed this reporting period.

19(E). Of all the contracts completed this reporting period using Race Conscious measures, calculate the percentage of DBE participation. Divide the total dollar amount to DBEs in item 19(D) by the total dollar value provided in 19(B) to derive this percentage. Round to the nearest tenth.

20(A)–20(E). Items 21(A)–21(E) are derived in the same manner as items 19(A)–19(E), except these figures should be based on contracts completed using Race Neutral measures.

20(C). This field is closed.

21(A)–21(D). Calculate the totals for each column by adding the race conscious and neutral figures provided in each row above. 21(C). This field is closed.

21(E). Calculate the overall percentage of dollars to DBEs on completed contracts. Divide the Total DBE participation dollar value in 21(D) by the Total Dollar Value of Contracts Completed in 21(B) to derive this percentage. Round to the nearest tenth.

23. Name of the Authorized Representative preparing this form.

24. Signature of the Authorized Representative.

25. Phone number of the Authorized Representative.

\*\*Submit your completed report to your Regional or Division Office.

**BILLING CODE 4910-9X-P**





Appendix F

**INFORM CERTIFICATION APPLICATION**  
**DISADVANTAGED BUSINESS ENTERPRISE (DBE) /**  
**AIRPORT CONCESSION DISADVANTAGED BUSINESS ENTERPRISE (ACDBE)**  
**49 C.F.R. Parts 23 and 26**

*Roadmap for Applicants*

**1. Should I apply?**

You may be eligible to participate in the DBE/ACDBE program if:

- The firm is a for-profit business that performs or seeks to perform transportation related work (or a concession activity) for a recipient of Federal Transit Administration, Federal Highway Administration, or Federal Aviation Administration funds.
- The firm is at least 51% owned by a socially and economically disadvantaged individual(s) who also controls it.
- The firm's disadvantaged owners are U.S. citizens or lawfully admitted permanent residents of the U.S.
- The firm meets the Small Business Administration's size standard and does not exceed \$23.98 million in gross annual receipts for DBE (\$52.47 million for ACDBEs). (Other size standards apply for ACDBE that are banks financial institutions, car rental companies, pay telephone firms, and automobile dealers.)

**2. How do I apply?**

First time applicants for DBE certification must complete and submit this certification application and related material to the certifying agency in your home state and participate in an on-site interview conducted by that agency. The attached document checklist can help you locate the items you need to submit to the agency with your completed application. If you fail to submit the required documents, your application may be delayed and/or denied. Firms already certified as a DBE do not have to complete this form, but may be asked by certifying agencies outside of your home state to provide a copy of your initial application form, supporting documents, and any other information you submitted to your home state to obtain certification or to any other state related to your certification.

**3. Where can I send my application? [INSERT UCP PARTICIPATING MEMBER CONTACT INFORMATION]**

**4. Who will contact me about my application and what are the eligibility standards?**

The DBE and ACDBE Programs require that all U.S. Department of Transportation (DOT) recipients of federal assistance participate in a statewide Unified Certification Program (UCP). The UCP is a one-stop certification program that eliminates the need for you firm to obtain certification from multiple certifying agencies within your state. The UCP is responsible for certifying firms and maintaining a database of certified DBEs and ACDBEs for DOT grantees, pursuant to the eligibility standards found in 49 C.F.R. Parts 23 and 26.

**5. Where can I find more information?**

U.S. DOT—<https://www.civilrights.dot.gov/> (This site provides useful links to the rules and regulations governing the DBE/ACDBE program, questions and answers, and other pertinent information.)

SBA—Small Business Size Standards matched to the North American Industry Classification System (NAICS): <http://www.census.gov/eos/www/naics/> and <http://www.sba.gov/content/table-small-business-size-standards>.

In collecting the information requested by this form, the Department of Transportation (Department) complies with the provisions of the Federal Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a). The Privacy Act provides comprehensive protections for your personal information. This includes how information is collected, used, disclosed, stored, and discarded. Your information will not be disclosed to third parties without your consent. The information collected will be used solely to determine your firm's eligibility to participate in the Department's Disadvantaged Business Enterprise Program as defined in 49 CFR §26.5 and the Airport Concession Disadvantaged Business Enterprise Program as defined in 49 CFR §23.3. You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477).

Under 49 C.F.R. §26.107, dated February 2, 1999 and January 28, 2011, if at any time the Department or a recipient has reason to believe that any person or firm has willfully and knowingly provided incorrect information or made false statements, the Department may initiate suspension or debarment proceedings against the person or firm under 2 CFR Parts 180 and 1200. Nonprocurement suspension and debarment, take enforcement action under 49 C.F.R. Part 31, Program Fraud and Civil Remedies, and/or refer the matter to the Department of Justice for criminal prosecution under 18 U.S.C. 1001, which prohibits false statements in Federal programs.



**INSTRUCTIONS FOR COMPLETING THE  
DISADVANTAGED BUSINESS ENTERPRISE (DBE)  
AIRPORT CONCESSIONS DISADVANTAGED BUSINESS ENTERPRISE (ACDBE)  
UNIFORM CERTIFICATION APPLICATION**

**NOTE:** All participating firms must be for-profit enterprises. If your firm is not for-profit, then you do NOT qualify for the DBE/ACDBE program and should not complete this application. If you require additional space for any question in this application, please attach additional sheets or copies as needed, making care to indicate on each attached sheet copy the section and number of this application to which it refers.

**Section 1: CERTIFICATION INFORMATION**

**A. Basic Contact Information**

- (1) Enter the contact name and title of the person completing this application and the person who will serve as your firm's contact for this application.
- (2) Enter the legal name of your firm, as indicated in your firm's Articles of Incorporation or charter.
- (3) Enter the primary phone number of your firm.
- (4) Enter a secondary phone number, if any.
- (5) Enter your firm's fax number, if any.
- (6) Enter the contact person's email address.
- (7) Enter your firm's website addresses, if any.
- (8) Enter the street address of the firm where its offices are physically located (not a P. O. Box).
- (9) Enter the mailing address of your firm, if it is different from your firm's street address.

**B. Prior/Other Certifications and Applications**

- (10) Check the appropriate box indicating whether your firm is currently certified in the DBE/ACDBE programs, and provide the name of the certifying agency that certified your firm. List the dates of any site visits conducted by your home state and any other states, or UCP members. Also provide the names of state UCP members that conducted the review.
- (11) Indicate whether your firm or any of the persons listed has ever been denied certification as a DBE, 8(a), or Small Disadvantaged Business (SDB) firm, or state and local VBE/WBE firm. Indicate if the firm has ever been decertified from one of these programs. Indicate if the application was withdrawn or whether the firm was debarred, suspended, or otherwise had its bidding privileges denied or restricted by any state or local agency, or Federal entity. If your answer is yes, identify the name of the agency, and explain fully the nature of the action in the space provided. Indicate if you have ever appealed this decision to the Department and if so, attach a copy of USDOT's final agency decision(s).

**Section 2: GENERAL INFORMATION**

**A. Business profile:**

- (1) Give a concise description of the firm's primary activities, the product(s) or services the company provides, or type of construction. If your company offers more than one product/service, list primary product or service first (attach additional sheets if necessary). This description may be used in our UCP online directory if you are certified as a DBE.

- (2) If you know the appropriate NAICS Code for the line(s) of work you identified in your business profile, enter the codes in the space provided.

- (3) State the date on which your firm was established as stated in your firm's Articles of Incorporation or charter.

- (4) State the date each person became a firm owner.

- (5) Check the appropriate box describing the manner in which you and each other owner acquired ownership of your firm. If you checked "Other," explain in the space provided.

- (6) Check the appropriate box that indicates whether your firm is "for profit." If you checked "No," then you do NOT qualify for the DBE/ACDBE program and should not complete this application. All participating firms must be for-profit enterprises. If the firm is a for-profit enterprise, provide the Federal Tax ID number as stated on your firm's Federal tax return.

- (7) Check the appropriate box that describes the type of legal business structure of your firm, as indicated in your firm's Articles of Incorporation or similar document. Identify all joint venture partners if applicable. If you checked "Other," briefly explain in the space provided.

- (8) Indicate in the spaces provided how many employees your firm has, specifying the number of employees who work on a full-time, part-time, and seasonal basis. Attach a list of employees, their job titles, and dates of employment, to your application.

- (9) Specify the firm's gross receipts for each of the past three years, as stated in your firm's filed Federal tax returns. You must submit complete copies of the firm's Federal tax returns for each year. If there are any affiliates or subsidiaries of the applicant firm or owners, you must provide these firms' gross receipts and submit complete copies of these firm(s) Federal tax returns. Affiliation is defined in 49 C.F.R. §26.5 and 13 C.F.R. Part 121.

**B. Relationships and Dealings with Other Businesses:**

- (1) Check the appropriate box that indicates whether your firm is co-located at any of its business locations, or whether your firm shares a telephone number(s), a post office box, any office space, a yard, warehouse, other facilities, any equipment, financing, or any office staff and/or employees with any other business, organization or entity of any kind. If you answered "Yes," then specify the name of the other firm(s) and fully explain the nature of your relationship with these other businesses, by identifying the business or person with whom you have any formal, informal, written, or



- oral agreement. Provide an explanation of any items shared with other firms in the space provided.
- (2) Check the appropriate box indicating whether any other firm currently has or had an ownership interest in your firm at present or at any time in the past. If you checked yes, please explain.
  - (3) Check the appropriate box that indicates whether at present or at any time in the past your firm:
    - (a) ever existed under different ownership; a different type of ownership; or a different name;
    - (b) existed as a subsidiary of any other firm;
    - (c) existed as a partnership in which one or more of the partners are were other firms;
    - (d) owned any percentage of any other firm; and
    - (e) had any subsidiaries of its own.
  - (f) served as a subcontractor with another firm constituting more than 25% of your firm's receipts.

If you answered "Yes" to any of the questions in (3)(a-f), you may be asked to explain the arrangement in detail.

#### Section 3: MAJORITY OWNER INFORMATION

Identify all individuals or holding companies with any ownership interest in your firm, providing the information requested below (if your firm has more than one owner, provide completed copies of this section for each owner):

- A. Identify the majority owner of the firm holding 51% or more ownership interest
    - (1) Enter the full name of the owner.
    - (2) Enter his/her title or position within your firm.
    - (3) Give his/her home phone number.
    - (4) Enter his/her home (street) address.
    - (5) Indicate this owner's gender.
    - (6) Identify the owner's ethnic group membership. If you checked "Other," specify this owner's ethnic group identity not otherwise listed.
    - (7) Check the appropriate box to indicate whether this owner is a U.S. citizen or a lawfully admitted permanent resident. If this owner is neither a U.S. citizen nor a lawfully admitted permanent resident of the U.S., then this owner is NOT eligible for certification as a DBE owner.
    - (8) Enter the number of years during which this owner has been an owner of your firm.
    - (9) Indicate the percentage of the total ownership this person holds, and the date acquired, including (if appropriate), the class of stock owned.
    - (10) Indicate the dollar value of this owner's initial investment to acquire an ownership interest in your firm, broken down by cash, real estate, equipment, and/or other investment. Describe how you acquired your business and attach documentation substantiating this investment.
- B. Additional Owner Information**
- (1) Describe the familial relationship of this owner to each other owner of your firm and employees.
  - (2) Indicate whether this owner performs a management or supervisory function for any other business. If you

checked "Yes," state the name of the other business and this owner's function title held in that business.

- (3) (a) Check the appropriate box that indicates whether this owner owns or works for any other firm(s) that has any relationship with your firm. If you checked "Yes," identify the name of the other business, the nature of the business, relationship, and the owner's function at the firm.
  - (b) If the owner works for any other firm, non-profit organization, or is engaged in any other activity more than 10 hours per week, please identify this activity.
- (4) Provide the personal net worth of the owner applying for certification in the space provided. Complete and attach the accompanying "Personal Net Worth Statement for DBE/ACDBE Program Eligibility" with your application. Note, complete this section and accompanying statement only for each owner applying for DBE qualification (i.e., for each owner claiming to be socially and economically disadvantaged).
- (b) Check the appropriate box that indicates whether any firm has been created for the benefit of the disadvantaged owner(s). If you answered "Yes," you may be asked to provide a copy of the trust instrument.
- (5) Check the appropriate to indicate whether any of your immediate family members, managers, or employees, own, manage, or are associated with another company. Immediate family member is defined in 49 C.F.R. §26.5. If you answered "Yes," provide the name of each person, your relationship to them, the name of the company, the type of business, and whether they own or manage the company.

#### Section 4: CONTROL

- A. Identify the firm's Officers and Board of Directors
  - (1) In the space provided, state the name, title, date of appointment, ethnicity, and gender of each officer.
  - (2) In the space provided, state the name, title, date of appointment, ethnicity, and gender of each individual serving on your firm's Board of Directors.
  - (3) Check the appropriate box to indicate whether any of your firm's officers and/or directors listed above performs a management or supervisory function for any other business. If you answered "Yes," identify each person by name, his/her title, the name of the other business in which s/he is involved, and his/her function performed in that other business.
  - (4) Check the appropriate box that indicates whether any of your firm's officers and/or directors listed above own or work for any other firm(s) that has a relationship with your firm (e.g., ownership interest, shared office space, financial investments, equipment leases, personal sharing, etc.) If you answered "Yes," identify the name of the firm, the individual's name, and the nature of his/her business relationship with that other firm.



**B. Duties of Owners, Officers, Directors, Managers and Key Personnel**

(1), (2) Specify the roles of the majority and minority owners, directors, officers, and managers, and key personnel who control the functions listed for the business. Submit resumes for each owner and non-owner identified below. State the name of the individual, title, race and gender and percentage ownership. If any, Circle the frequency of each person's involvement as follows: "always, frequently, seldom or never" in each area.

Indicate whether any of the persons listed in this section perform a management or supervisory function for any other business. Identify the person, business, and their title/function. Identify if any of the persons listed above own or work for any other firm(s) that has a relationship with this firm (e.g. ownership interest, shared office space, financial investment, equipment, leases, personnel sharing, etc.) If you answered "Yes," describe the nature of that/their business relationship with that other firm.

**C. Inventory:** Indicate firm inventory in these categories:

- (1) **Equipment and Vehicles**  
State the make and model, and current dollar value of each piece of equipment and motor vehicle held and/or used by your firm. Indicate whether each piece is either owned or leased by your firm or owner, whether it is used as collateral, and where this item is stored.
- (2) **Office Space**  
State the street address of each office space held and/or used by your firm. Indicate whether your firm or owner owns or leases the office space and the current dollar value of that property or its lease.
- (3) **Storage Space**  
State the street address of each storage space held and/or used by your firm. Indicate whether your firm or owner owns or leases the storage space and the current dollar value of that property or its lease. Provide a signed lease agreement for each property.
- D. Does your firm rely on any other firm for management functions or employee payroll?

Check the appropriate box that indicates whether your firm relies on any other firm for management functions or for employee payroll. If you answered "Yes," you may be asked to explain the nature of that reliance and the extent to which the other firm carries out such functions.

**E. Financial Banking Information**

**Banking Information.** State the name, City, and State of your firm's bank. In the space provided, identify the persons able to sign checks on this account. Provide bank authorization and signature cards.

**Bonding Information.** State your firm's bonding limits (in dollars), specifying both the aggregate and project limits.

**F. Sources, amounts, and purposes of money loaned to your firm, including the names of persons or firms guaranteeing the loan.**

State the name and address of each source, the name of person securing the loan, original dollar amount and the current balance of each loan, and the purpose for which each loan was made to your firm. Provide copies of signed loan agreements and security agreements.

**G. Contributions or transfers of assets to from your firm and to from any of its owners or another individual over the past two years:**

Indicate in the spaces provided, the type of contribution or asset that was transferred, its current dollar value, the person or firm from whom it was transferred, the person or firm to whom it was transferred, the relationship between the two persons and or firms, and the date of the transfer.

**H. Current licenses/permits held by any owner or employee of your firm.**

List the name of each person in your firm who holds a professional license or permit, the type of permit or license, the expiration date of the permit or license, and issuing State of the license or permit. Attach copies of licenses, license renewal forms, permits, and hand authority forms.

**I. Largest contracts completed by your firm in the past three years, if any.**

List the name of each owner or contractor for each contract, the name and location of the project, under each contract, the type of work performed on each contract, and the dollar value of each contract.

**J. Largest active jobs on which your firm is currently working.**

For each active job listed, state the name of the prime contractor and the project number, the location, the type of work performed, the project start date, the anticipated completion date, and the dollar value of the contract.

**AIRPORT CONCESSION (ACDBE) APPLICANTS**

Identify the concession space, address, and location at the airport, the value of the property or lease, and fee/lease payments paid to the airport. Provide information concerning any other airport concession businesses the applicant owns or any affiliate owns and/or operates, including name, location, type of concession, and start date of the concession enterprise.

**AFFIDAVIT & SIGNATURE**

The Affidavit of Certification must accompany your application for certification. Carefully read the attached affidavit in its entirety. Fill in the required information for each blank space, and sign and date the affidavit in the presence of a Notary Public, who must then notarize the form.



**Section 1: CERTIFICATION INFORMATION**

**A. Basic Contact Information**

(1) Contact person and Title: \_\_\_\_\_ (2) Legal name of firm: \_\_\_\_\_

(3) Phone #: (\_\_\_\_) \_\_\_\_\_ - \_\_\_\_\_ (4) Other Phone #: (\_\_\_\_) \_\_\_\_\_ - \_\_\_\_\_ (5) Fax #: (\_\_\_\_) \_\_\_\_\_ - \_\_\_\_\_

(6) E-mail: \_\_\_\_\_ (7) Firm Websites: \_\_\_\_\_

(8) Street address of firm (No P.O. Box): \_\_\_\_\_ City: \_\_\_\_\_ County Parish: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

(9) Mailing address of firm (if different): \_\_\_\_\_ City: \_\_\_\_\_ County Parish: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

**B. Prior/Other Certifications and Applications**

(10) Is your firm currently certified for any of the following U.S. DOT programs?  
 DBE  ACDBE Names of certifying agencies: \_\_\_\_\_

If you are certified in your home state as a DBE, ACDBE, you do not have to complete this application for other states. Ask your state UCP about the interstate certification process.

List the dates of any site visits conducted by your home state and any other states or UCP members:

Date \_\_\_\_\_ State/UCP Member \_\_\_\_\_ Date \_\_\_\_\_ State/UCP Member \_\_\_\_\_

(11) Indicate whether the firm or any persons listed in this application have ever been:

(a) Denied certification or decertified as a DBE, ACDBE, S(a), SDB, MBE/WBE firm?  Yes  No

(b) Withdrawn an application for these programs, or debarred or suspended or otherwise had bidding privileges denied or restricted by any state or local agency, or Federal entity?  Yes  No

If yes, explain the nature of the action. (If you appealed the decision to DOT or another agency, attach a copy of the decision.)

**Section 2: GENERAL INFORMATION**

**A. Business Profile:** (1) Give a concise description of the firm's primary activities and the product(s) or service(s) it provides. If your company offers more than one product/service, list the primary product or service first. Please use additional paper if necessary. This description may be used in our database and the UCP online directory if you are certified as a DBE or ACDBE.

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

(2) Applicable NAICS Codes for this line of work include: \_\_\_\_\_

(3) This firm was established on \_\_\_\_\_ (4) I/We have owned this firm since: \_\_\_\_\_

(5) Method of acquisition (Check all that apply):  
 Started new business  Bought existing business  Inherited business  Secured concession  
 Merger or consolidation  Other (explain) \_\_\_\_\_



(6) Is your firm "for profit"?  Yes  No -- **STOP!** If your firm is NOT for-profit, then you do NOT qualify for this program and should not fill out this application. Federal Tax ID# \_\_\_\_\_

(7) Type of Legal Business Structure: (check all that apply):

- Sole Proprietorship
- Partnership
- Limited Liability Company
- Applying as an ACDBE
- Limited Liability Partnership
- Corporation
- Joint Venture (Identify all JV partners \_\_\_\_\_)
- Other: Describe \_\_\_\_\_

(8) Number of employees: Full-time \_\_\_\_\_ Part-time \_\_\_\_\_ Seasonal \_\_\_\_\_ Total \_\_\_\_\_  
 (Provide a list of employees, their job titles, and dates of employment, to your application).

(9) Specify the firm's gross receipts for the last 3 years. (Submit complete copies of the firm's Federal tax returns for each year. If there are affiliates or subsidiaries of the applicant firm or owners, you must submit complete copies of these firms' Federal tax returns).

Year _____	Gross Receipts of Applicant Firm \$ _____	Gross Receipts of Affiliate Firms \$ _____
Year _____	Gross Receipts of Applicant Firm \$ _____	Gross Receipts of Affiliate Firms \$ _____
Year _____	Gross Receipts of Applicant Firm \$ _____	Gross Receipts of Affiliate Firms \$ _____

**B. Relationships and Dealings with Other Businesses**

(1) Is your firm co-located at any of its business locations, or does it share a telephone number, P.O. Box, office or storage space, yard, warehouse, facilities, equipment, inventory, financing, office staff, and/or employees with any other business, organization, or entity?  Yes  No  
 If Yes, explain the nature of your relationship with these other businesses by identifying the business or person with whom you have any formal, informal, written, or oral agreement. Also detail the items shared.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(2) Has any other firm had an ownership interest in your firm at present or at any time in the past?  
 Yes  No If Yes, explain \_\_\_\_\_

- (3) At present, or at any time in the past, has your firm:
- (a) Ever existed under different ownership, a different type of ownership, or a different name?  Yes  No
  - (b) Existed as a subsidiary of any other firm?  Yes  No
  - (c) Existed as a partnership in which one or more of the partners are/were other firms?  Yes  No
  - (d) Owned any percentage of any other firm?  Yes  No
  - (e) Had any subsidiaries?  Yes  No
  - (f) Served as a subcontractor with another firm constituting more than 25% of your firm's receipts?  Yes  No

(If you answered "Yes" to any of the questions in (2) and/or (3)(a)-(f), you may be asked to provide further details and explain whether the arrangement continues).



**Section 3: MAJORITY OWNER INFORMATION**

**A. Identify the majority owner of the firm holding 51% or more ownership interest.**

(1) Full Name: \_\_\_\_\_ (2) Title: \_\_\_\_\_ (3) Home Phone #: \_\_\_\_\_  
 \_\_\_\_\_ ( ) \_\_\_\_\_ - \_\_\_\_\_  
 (4) Home Address (Street and Number): \_\_\_\_\_ City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

(5) Gender:  Male  Female  
 (6) Ethnic group membership (Check all that apply):  
 Black  Hispanic  
 Asian Pacific  Native American  
 Subcontinent Asian  
 Other (specify) \_\_\_\_\_  
 (7) U.S. Citizenship:  
 U.S. Citizen  
 Lawfully Admitted Permanent Resident  
 (8) Number of years as owner: \_\_\_\_\_  
 (9) Percentage owned: \_\_\_\_\_ %  
 Class of stock owned: \_\_\_\_\_  
 Date acquired \_\_\_\_\_  
 (10) Initial investment to acquire ownership interest in firm:  

Type	Dollar Value
Cash	\$ _____
Real Estate	\$ _____
Equipment	\$ _____
Other	\$ _____

 Describe how you acquired your business:  
 Started business myself  
 It was a gift from: \_\_\_\_\_  
 I bought it from: \_\_\_\_\_  
 I inherited it from: \_\_\_\_\_  
 Other \_\_\_\_\_  
*(Attach documentation substantiating your investment)*

**B. Additional Owner Information**

(1) Describe familial relationship to other owners and employees:  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 (2) Does this owner perform a management or supervisory function for any other business?  Yes  No  
 If Yes, identify: Name of Business: \_\_\_\_\_ Function Title: \_\_\_\_\_  
 (3)(a) Does this owner own or work for any other firm(s) that has a relationship with this firm? (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)  Yes  No  
 Identify the name of the business, and the nature of the relationship, and the owner's function at the firm:  
 \_\_\_\_\_  
 \_\_\_\_\_  
 (b) Does this owner work for any other firm, non-profit organization, or is engaged in any other activity more than 10 hours per week? If yes, identify this activity: \_\_\_\_\_  
 (4)(a) What is the personal net worth of this disadvantaged owner applying for certification? \$ \_\_\_\_\_  
 (b) Has any trust been created for the benefit of this disadvantaged owner(s)?  Yes  No  
*(If Yes, you may be asked to provide a copy of the trust instrument).*  
 (5) Do any of your immediate family members, managers, or employees own, manage, or are associated with another company?  Yes  No If Yes, provide their name, relationship, company, type of business, and indicate whether they own or manage the company: *(Please attach extra sheets, if needed):* \_\_\_\_\_



**Section 3: OWNER INFORMATION, Cont'd.**

**A. Identify all individuals, firms, or holding companies that hold LESS THAN 51% ownership interest in the firm (Attach separate sheets for each additional owner)**

(1) Full Name: \_\_\_\_\_ (2) Title: \_\_\_\_\_ (3) Home Phone #: \_\_\_\_\_  
 \_\_\_\_\_  
 (4) Home Address (Street and Number): \_\_\_\_\_ City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

(5) Gender:  Male  Female  
 (6) Ethnic group membership (Check all that apply)  
 Black  Hispanic  
 Asian Pacific  Native American  
 Subcontinent Asian  
 Other (specify) \_\_\_\_\_  
 (7) U.S. Citizenship:  
 U.S. Citizen  
 Lawfully Admitted Permanent Resident

(8) Number of years as owner: \_\_\_\_\_  
 (9) Percentage owned: \_\_\_\_\_ %  
 Class of stock owned: \_\_\_\_\_  
 Date acquired: \_\_\_\_\_  
 (10) Initial investment to acquire ownership interest in firm:

Type	Dollar Value
Cash	\$ _____
Real Estate	\$ _____
Equipment	\$ _____
Other	\$ _____

Describe how you acquired your business:  
 Started business myself  
 It was a gift from: \_\_\_\_\_  
 I bought it from: \_\_\_\_\_  
 I inherited it from: \_\_\_\_\_  
 Other \_\_\_\_\_  
 (Attach documentation substantiating your investment)

**B. Additional Owner Information**

(1) Describe familial relationship to other owners and employees:  
 \_\_\_\_\_  
 \_\_\_\_\_  
 (2) Does this owner perform a management or supervisory function for any other business?  Yes  No  
 If Yes, identify: Name of Business: \_\_\_\_\_ Function Title: \_\_\_\_\_  
 (3)(a) Does this owner own or work for any other firm(s) that has a relationship with this firm? (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)  Yes  No  
 Identify the name of the business, and the nature of the relationship, and the owner's function at the firm:  
 \_\_\_\_\_  
 (b) Does this owner work for any other firm, non-profit organization, or is engaged in any other activity more than 10 hours per week? If yes, identify this activity: \_\_\_\_\_  
 (4)(a) What is the personal net worth of this disadvantaged owner applying for certification? \$ \_\_\_\_\_  
 (b) Has any trust been created for the benefit of this disadvantaged owner(s)?  Yes  No  
 (If Yes, you may be asked to provide a copy of the trust instrument).  
 (5) Do any of your immediate family members, managers, or employees own, manage, or are associated with another company?  Yes  No If Yes, provide their name, relationship, company, type of business, and indicate whether they own or manage. (Please attach extra sheets, if needed): \_\_\_\_\_



**Section 4: CONTROL**

**A. Identify your firm's Officers and Board of Directors** (If additional space is required, attach a separate sheet).

	Name	Title	Date Appointed	Ethnicity	Gender
<b>(1) Officers of the Company</b>	(a)				
	(b)				
	(c)				
	(d)				
<b>(2) Board of Directors</b>	(a)				
	(b)				
	(c)				
	(d)				

**(3) Do any of the persons listed above perform a management or supervisory function for any other business?**

Yes  No If Yes, identify for each:

Person: \_\_\_\_\_ Title: \_\_\_\_\_  
 Business: \_\_\_\_\_ Function: \_\_\_\_\_

Person: \_\_\_\_\_ Title: \_\_\_\_\_  
 Business: \_\_\_\_\_ Function: \_\_\_\_\_

**(4) Do any of the persons listed in section A above own or work for any other firm(s) that has a relationship with this firm?** (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)

Yes  No If Yes, identify for each:

Firm Name: \_\_\_\_\_ Person: \_\_\_\_\_

Nature of Business Relationship: \_\_\_\_\_

**B. Duties of Owners, Officers, Directors, Managers, and Key Personnel**

1. (Identify your firm's management personnel who control your firm in the following areas (Attach separate sheets as needed).)

A= Always F = Frequently	S = Seldom N = Never	Majority Owner (51% or more)				Minority Owner (49% or less)			
		Name: _____ Title: _____ Percent Owned: _____				Name: _____ Title: _____ Percent Owned: _____			
Sets policy for company direction scope of operations		A	F	S	N	A	F	S	N
Bidding and estimating		A	F	S	N	A	F	S	N
Major purchasing decisions		A	F	S	N	A	F	S	N
Marketing and sales		A	F	S	N	A	F	S	N
Supervises field operations		A	F	S	N	A	F	S	N
Attend bid opening and lettings		A	F	S	N	A	F	S	N
Perform office management (billing, accounts receivable payable, etc.)		A	F	S	N	A	F	S	N
Hires and fires management staff		A	F	S	N	A	F	S	N
Hire and fire field staff or crew		A	F	S	N	A	F	S	N
Designates profits spending or investment		A	F	S	N	A	F	S	N
Obligates business by contract credit		A	F	S	N	A	F	S	N
Purchase equipment		A	F	S	N	A	F	S	N
Signs business checks		A	F	S	N	A	F	S	N

**2. Complete for all Officers, Directors, Managers, and Key Personnel who control the following functions for the firm. (Attach separate sheets as needed).**

<b>A = Always</b> <b>S = Seldom</b> <b>F = Frequently</b> <b>N = Never</b>	Officer-Director-Manager-Key Personnel				Officer-Director-Manager-Key Personnel			
	Name: _____ Title: _____ Race and Gender: _____ Percent Owned: _____				Name: _____ Title: _____ Race and Gender: _____ Percent Owned: _____			
Sets policy for company direction scope of operations	A	F	S	N	A	F	S	N
Bidding and estimating	A	F	S	N	A	F	S	N
Major purchasing decisions	A	F	S	N	A	F	S	N
Marketing and sales	A	F	S	N	A	F	S	N
Supervises field operations	A	F	S	N	A	F	S	N
Attend bid opening and lettings	A	F	S	N	A	F	S	N
Perform office management (billing, accounts receivable payable, etc.)	A	F	S	N	A	F	S	N
Hires and fires management staff	A	F	S	N	A	F	S	N
Hire and fire field staff or crew	A	F	S	N	A	F	S	N
Designates profits spending or investment	A	F	S	N	A	F	S	N
Obligates business by contract credit	A	F	S	N	A	F	S	N
Purchase equipment	A	F	S	N	A	F	S	N
Signs business checks	A	F	S	N	A	F	S	N

Do any of the persons listed in B1 or B2 perform a management or supervisory function for any other business? If Yes, identify the person, the business, and their title/function: \_\_\_\_\_

Do any of the persons listed above own or work for any other firm(s) that has a relationship with this firm? (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.) If Yes, describe the nature of the business relationship: \_\_\_\_\_

**C. Inventory:** Indicate your firm's inventory in the following categories (Please attach additional sheets if needed):

**1. Equipment and Vehicles**

Make and Model	Current Value	Owned or Leased by Firm or Owner?	Used as collateral?	Where is item stored?
1. _____				
2. _____				
3. _____				
4. _____				
5. _____				
6. _____				
7. _____				
8. _____				
9. _____				

**2. Office Space**

Street Address	Owned or Leased by Firm or Owner?	Current Value of Property or Lease
_____		
_____		
_____		



**3. Storage Space** *(Provide signed lease agreements for the properties listed)*

Street Address	Owned or Leased by Firm or Owner?	Current Value of Property or Lease
_____	_____	_____
_____	_____	_____

**D. Does your firm rely on any other firm for management functions or employee payroll?**  Yes  No

**E. Financial/Banking Information** *(Provide bank authorization and signature cards)*

Name of bank: \_\_\_\_\_ City and State: \_\_\_\_\_  
 The following individuals are able to sign checks on this account: \_\_\_\_\_

Name of bank: \_\_\_\_\_ City and State: \_\_\_\_\_  
 The following individuals are able to sign checks on this account: \_\_\_\_\_

**Bonding Information:** If you have bonding capacity, identify the firm's bonding aggregate and project limits:  
 Aggregate limit \$ \_\_\_\_\_ Project limit \$ \_\_\_\_\_

**F. Identify all sources, amounts, and purposes of money loaned to your firm including from financial institutions. Identify whether you the owner and any other person or firm loaned money to the applicant DBE/ACDBE. Include the names of any persons or firms guaranteeing the loan, if other than the listed owner. (Provide copies of signed loan agreements and security agreements).**

Name of Source	Address of Source	Name of Person Guaranteeing the Loan	Original Amount	Current Balance	Purpose of Loan
1. _____	_____	_____	_____	_____	_____
2. _____	_____	_____	_____	_____	_____
3. _____	_____	_____	_____	_____	_____

**G. List all contributions or transfers of assets to/from your firm and to/from any of its owners or another individual over the past two years (Attach additional sheets if needed):**

Contribution/Asset	Dollar Value	From Whom Transferred	To Whom Transferred	Relationship	Date of Transfer
1. _____	_____	_____	_____	_____	_____
2. _____	_____	_____	_____	_____	_____
3. _____	_____	_____	_____	_____	_____

**H. List current licenses/permits held by any owner and/or employee of your firm (e.g. contractor, engineer, architect, etc.)(Attach additional sheets if needed):**

Name of License/Permit Holder	Type of License/Permit	Expiration Date	State
1. _____	_____	_____	_____
2. _____	_____	_____	_____
3. _____	_____	_____	_____



I. List the three largest contracts completed by your firm in the past three years, if any:

Name of Owner/Contractor	Name/Location of Project	Type of Work Performed	Dollar Value of Contract
1. _____	_____	_____	_____
2. _____	_____	_____	_____
3. _____	_____	_____	_____

J. List the three largest active jobs on which your firm is currently working:

Name of Prime Contractor and Project Number	Location of Project	Type of Work	Project Start Date	Anticipated Completion Date	Dollar Value of Contract
1. _____	_____	_____	_____	_____	_____
2. _____	_____	_____	_____	_____	_____
3. _____	_____	_____	_____	_____	_____

**AIRPORT CONCESSION (ACDBE) APPLICANTS ONLY MUST COMPLETE THIS SECTION**

Identify the following information concerning the ACDBE applicant firm:

<u>Concession Space</u>	<u>Address/ Location at Airport</u>	<u>Value of Property or Lease</u>	<u>Fees/Lease Payments Paid to the Airport</u>

Provide information concerning any other airport concession businesses the applicant firm or any affiliate owns and/or operates, including name, location, type of concession, and start date of concession

<u>Name of Concession</u>	<u>Location</u>	<u>Type of Concession</u>	<u>Start Date of Concession</u>



**AFFIDAVIT OF CERTIFICATION**

*This form must be signed and notarized for each owner upon which disadvantaged status is relied.*

**A MATERIAL OR FALSE STATEMENT OR OMISSION MADE IN CONNECTION WITH THIS APPLICATION IS SUFFICIENT CAUSE FOR DENIAL OF CERTIFICATION, REVOCATION OF A PRIOR APPROVAL, INITIATION OF SUSPENSION OR DEBARMENT PROCEEDINGS, AND MAY SUBJECT THE PERSON AND/OR ENTITY MAKING THE FALSE STATEMENT TO ANY AND ALL CIVIL AND CRIMINAL PENALTIES AVAILABLE PURSUANT TO APPLICABLE FEDERAL AND STATE LAW.**

I \_\_\_\_\_ (full name printed),  
swear or affirm under penalty of law that I am  
\_\_\_\_\_ (title) of the applicant firm  
\_\_\_\_\_ and that I

have read and understood all of the questions in this application and that all of the foregoing information and statements submitted in this application and its attachments and supporting documents are true and correct to the best of my knowledge, and that all responses to the questions are full and complete, omitting no material information. The responses include all material information necessary to fully and accurately identify and explain the operations, capabilities and pertinent history of the named firm as well as the ownership, control, and affiliations thereof.

I recognize that the information submitted in this application is for the purpose of inducing certification approval by a government agency. I understand that a government agency may, by means it deems appropriate, determine the accuracy and truth of the statements in the application, and I authorize such agency to contact any entity named in the application, and the named firm's bonding companies, banking institutions, credit agencies, contractors, clients, and other certifying agencies for the purpose of verifying the information supplied and determining the named firm's eligibility.

I agree to submit to government audit, examination and review of books, records, documents and files, in whatever form they exist, of the named firm and its affiliates, inspection of its place(s) of business and equipment, and to permit interviews of its principals, agents, and employees. I understand that refusal to permit such inquiries shall be grounds for denial of certification.

If awarded a contract, subcontract, concession lease or sublease, I agree to promptly and directly provide the prime contractor, if any, and the Department, recipient agency, or federal funding agency on an ongoing basis, current, complete and accurate information regarding (1) work performed on the project; (2) payments; and (3) proposed changes, if any, to the foregoing arrangements.

I agree to provide written notice to the recipient agency or Unified Certification Program of any material change in the information contained in the original application within 30 calendar days of such change (e.g., ownership changes, address telephone number, personal net worth exceeding \$1.32 million, etc.).

I acknowledge and agree that any misrepresentations in this application or in records pertaining to a contract or subcontract will be grounds for terminating any contract or subcontract which may be awarded; denial or revocation of certification; suspension and debarment; and for initiating action under federal and or state law concerning false statement, fraud or other applicable offenses.

I certify that I am a socially and economically disadvantaged individual who is an owner of the above-referenced firm seeking certification as a Disadvantaged Business Enterprise or Airport Concession Disadvantaged Business Enterprise. In support of my application, I certify that I am a member of one or more of the following groups, and that I have held myself out as a member of the group(s): (Check all that apply):

- Female     Black American     Hispanic American
- Native American     Asian-Pacific American
- Subcontinent Asian American     Other (specify) \_\_\_\_\_

I certify that I am socially disadvantaged because I have been subjected to racial or ethnic prejudice or cultural bias, or have suffered the effects of discrimination, because of my identity as a member of one or more of the groups identified above, without regard to my individual qualities.

I further certify that my personal net worth does not exceed \$1.32 million, and that I am economically disadvantaged because my ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially and economically disadvantaged.

I declare under penalty of perjury that the information provided in this application and supporting documents is true and correct.

Signature \_\_\_\_\_ (Date) \_\_\_\_\_  
(DBE/ACDBE Applicant) (Date)

**NOTARY CERTIFICATE**



### UNIFORM CERTIFICATION APPLICATION SUPPORTING DOCUMENTS CHECKLIST

In order to complete your application for DBE or ACDBE certification, you must attach copies of all of the following REQUIRED documents. A failure to supply any information requested by the TCP may result in your firm denied DBE/ACDBE certification.

**Required Documents for All Applicants**

- Resumes (that include places of employment with corresponding dates), for all owners, officers, and key personnel of the applicant firm
- Personal Net Worth Statement for each socially and economically disadvantaged owners comprising 51% or more of the ownership percentage of the applicant firm
- Personal Federal tax returns for the past 3 years, if applicable, for each disadvantaged owner
- Federal tax returns (and requests for extensions) filed by the firm and its affiliates with related schedules, for the past 3 years.
- Documented proof of contributions used to acquire ownership for each owner (e.g., *both sides of cancelled checks*)
- Signed loan and security agreements, and bonding forms
- List of equipment and/or vehicles owned and leased including VIN numbers, copy of titles, proof of ownership, insurance cards for each vehicle.
- Title(s), registration certificate(s), and U.S. DOT numbers for each truck owned or operated by your firm
- Licenses, license renewal forms, permits, and haul authority forms
- Descriptions of all real estate (including office storage space, etc.) owned/leased by your firm and documented proof of ownership signed leases
- Documented proof of any transfers of assets to/from your firm and/or to/from any of its owners over the past 2 years
- DBE/ACDBE and SBA 8(a), SDB, MBE/WBE certifications, denials, and/or de-certifications, if applicable, and any U.S. DOT appeal decisions on these actions.
- Bank authorization and signatory cards
- Schedule of salaries (or other remuneration) paid to all officers, managers, owners, and/or directors of the firm
- List of all employees, job titles, and dates of employment.
- Proof of warehouse storage facility ownership or lease arrangements

**Partnership or Joint Venture**

- Original and any amended Partnership or Joint Venture Agreements

**Corporation or LLC**

- Official Articles of Incorporation (signed by the state official)
- Both sides of all corporate stock certificates and your firm's stock transfer ledger
- Shareholders' Agreement(s)
- Minutes of all stockholders and board of directors meetings

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- Corporate by-laws and any amendments
- Corporate bank resolution and bank signature cards
- Official Certificate of Formation and Operating Agreement with any amendments (for LLCs)

**Optional Documents to Be Provided on Request**


*The TCP to which you are applying may require the submission of the following documents. If requested to provide these documents, you must supply them with your application or at the on-site visit.*

- Proof of citizenship
- Insurance agreements for each truck owned or operated by your firm
- Audited financial statements (if available)
- Personal Federal Tax returns for the past 3 years, if applicable, for other disadvantaged owners of the firm.
- Trust agreements held by any owner claiming disadvantaged status
- Year-end balance sheets and income statements for the past 3 years (or life of firm, if less than three years)

**Suppliers**

- List of product lines carried and list of distribution equipment owned and/or leased

■ 26. Add appendix G to part 26 to read Appendix G to Part 26—Personal Net Worth Statement as follows:

	<b>U.S. Department of Transportation</b>	<b>Personal Net Worth Statement For DBE/ACDBE Program Eligibility</b> As of _____	OMB APPROVAL NO: EXPIRATION DATE:		
This form is used by all participants in the U.S. Department of Transportation's Disadvantaged Business Enterprise (DBE) Programs. Each individual owner of a firm applying to participate as a DBE or ACDBE, whose ownership and control are relied upon for DBE certification must complete this form. Each person signing this form authorizes the Unified Certification Program (UCP) recipient to make inquiries as necessary to verify the accuracy of the statements made. The agency you apply to will use the information provided to determine whether an owner is economically disadvantaged as defined in the DBE program regulations 49 C.F.R. Parts 23 and 26. <b>Return form to appropriate UCP certifying member, not U.S. DOT.</b>					
Name		Business Phone			
Residence Address (As reported to the IRS) City, State and Zip Code		Residence Phone			
Business Name of Applicant Firm					
Spouse's Full Name (Marital Status: Single, Married, Divorced, Union)					
<b>ASSETS</b>		<b>LIABILITIES</b>			
(Omit Cents)		(Omit Cents)			
Cash and Cash Equivalents	\$	Loan on Life Insurance (Complete Section 5)	\$		
Retirement Accounts (IRAs, 401Ks, 403Bs, Pensions, etc.) (Report full value minus tax and interest penalties that would apply if assets were distributed today) (Complete Section 3)	\$	Mortgages on Real Estate Excluding Primary Residence Debt (Complete Section 4)	\$		
Brokerage, Investment Accounts	\$	Notes, Obligations on Personal Property (Complete Section 6)	\$		
Assets Held in Trust	\$	Notes & Accounts Payable to Banks and Others (Complete Section 2)	\$		
Loans to Shareholders & Other Receivables (Complete section 6)	\$	Other Liabilities (Complete Section 8)	\$		
Real Estate Excluding Primary Residence (Complete Section 4)	\$	Unpaid Taxes (Complete Section 8)	\$		
Life Insurance (Cash Surrender Value Only) (Complete Section 5)	\$				
Other Personal Property and Assets (Complete Section 6)	\$				
Business Interests Other Than the Applicant Firm (Complete Section 7)	\$				
Total Assets	\$	Total Liabilities	\$		
		<b>NET WORTH</b>			
<b>Section 2. Notes Payable to Banks and Others</b>					
Name of Noteholder(s)	Original Balance	Current Balance	Payment Amount	Frequency (monthly, etc.)	How Secured or Endorsed Type of Collateral



Section 6. Other Personal Property and Assets (Use attachments as necessary)				
Type of Property or Asset	Total Present Value	Amount of Liability (Balance)	Is this asset insured?	Lien or Note amount and Terms of Payment
Automobiles and Vehicles (including recreation vehicles, motorcycles, boats, etc.) Include personally owned vehicles that are leased or rented to businesses or other individuals				
Household Goods / Jewelry				
Other (List)				
Accounts and Notes Receivables				

**Section 7. Value of Other Business Investments, Other Businesses Owned (excluding applicant firm)**  
Sole Proprietorships, General Partners, Joint Ventures, Limited Liability Companies, Closely-held and Public Traded Corporations

**Section 8. Other Liabilities and Unpaid Taxes (Describe)**

**Section 9. Transfer of Assets: Have you within 2 years of this personal net worth statement, transferred assets to a spouse, domestic partner, relative, or entity in which you have an ownership or beneficial interest including a trust? Yes  No  If yes, describe**

I declare under penalty of perjury that the information provided in this personal net worth statement and supporting documents is complete, true and correct. I certify that no assets have been transferred to any beneficiary for less than fair market value in the last two years. I recognize that the information submitted in this application is for the purpose of inducing certification approval by a government agency. I understand that a government agency may, by means it deems appropriate, determine the accuracy and truth of the statements in the application and this personal net worth statement, and I authorize such agency to contact any entity named in the application or this personal financial statement, including the names banking institutions, credit agencies, contractors, clients, and other certifying agencies for the purpose of verifying the information supplied and determining the named firm's eligibility. I acknowledge and agree that any misrepresentations in this application or in records pertaining to a contract or subcontract will be grounds for terminating any contract or subcontract which may be awarded, denial or revocation of certification, suspension and debarment, and for initiating action under federal and/or state law concerning false statement, fraud or other applicable offenses.

**NOTARY CERTIFICATE:**  
(Insert applicable state acknowledgment, affirmation, or oath)

Signature (DBE/ACDBE Owner): \_\_\_\_\_ Date: \_\_\_\_\_

In collecting the information requested by this form, the Department of Transportation complies with Federal Freedom of Information and Privacy Act (5 U.S.C. 552 and 552a) provisions. The Privacy Act provides comprehensive protections for your personal information. This includes how information is collected, used, disclosed, stored, and discarded. Your information will not be disclosed to third parties without your consent. The information collected will be used solely to determine your firm's eligibility to participate in the Disadvantaged Business Enterprise (DBE) Program or Airport Concessionaire DBE Programs as defined in 49 C.F.R. Parts 23 and 26. You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477).



**General Instructions for Completing the  
Personal Net Worth Statement  
for DBE/ACDBE Program Eligibility**

Please do not make adjustments to your figures pursuant to U.S. DOT regulations 49 C.F.R. Parts 23 and 26. The agency that you apply to will use the information provided on your completed Personal Net Worth (PNW) Statement to determine whether you meet the economic disadvantage requirements of 49 C.F.R. Parts 23 and 26. If there are discrepancies or questions regarding your form, it may be returned to you to correct and complete again.

An individual's personal net worth according to 49 C.F.R. Parts 23 and 26 includes only his or her own share of assets held separately, jointly, or as community property with the individual's spouse and excludes the following:

- Individual's ownership interest in the applicant firm;
- Individual's equity in his or her primary residence;
- Tax and interest penalties that would accrue if retirement savings or investments (e.g., pension plans, Individual Retirement Accounts, 401(k) accounts, etc.) were distributed at the present time.

Indicate on the form if any items are jointly owned. If the personal net worth of the majority owner(s) of the firm exceeds \$1.32 million, as defined by 49 C.F.R. Parts 23 and 26, the firm is not eligible for DBE or ACDBE certification. If the personal net worth of the majority owner(s) exceeds the \$1.32 million cap at any time after your firm is certified, the firm is no longer eligible for certification. Should that occur, it is your responsibility to contact your certifying agency in writing to advise that your firm no longer qualifies as a DBE or ACDBE. You must fill out all line items on the Personal Net Worth Statement.

If necessary, use additional sheets of paper to report all information and details. If you have any questions about completing this form, please contact one of the U.C.P. certifying agencies.

#### Assets

All assets must be reported at their current fair market values as of the date of your statement. *Appraiser's assessed value for real estate, for example, is not acceptable.* Assets held in a trust should be included.

**Cash and Cash Equivalents:** On page 1, enter the total amount of cash or cash equivalents in bank accounts, including checking, savings, money market, certificates of deposit held domestic or foreign. Provide copies of the bank statement.

**Retirement Accounts, IRA, 401(k), 403(b), Pension:** On page 1, enter the full value minus tax and interest penalties that would apply if assets were distributed as of the date of the form. Describe the number of shares, name of securities, cost, market value, date of quotation, and total value in section 3 on page 2.

**Brokerage and Custodial Accounts, Stocks, Bonds, Retirement Accounts:** Report total value on page 1, and on page 2, section 3, enter the name of the security, brokerage account, retirement account, etc., the cost, market value of the asset, the date of quotation, and total value as of the date of the PNW statement.

**Assets Held in Trust:** Enter the total value of the assets held in trust on page 1, and provide the names of beneficiaries and trustees, and other information in Section 6 on page 3.

**Loans to Shareholders and Other Receivables not listed:** Enter amounts loaned to you from your firm from any other business entity in which you hold an ownership interest, and other receivables not listed above. Complete Section 6 on page 3.

**Real Estate:** The total value of real estate excluding your primary residence should be listed on page 1. In section 4 on page 2, please list your primary residence in column 1, including the address, method of acquisition, date of acquisition, names of deed, purchase price, present fair market value, source of market valuation, names of all mortgage holder(s), mortgage account number, and balance, equity line of credit balance, and amount of payment. List this information for all real estate held. Please ensure that this section contains all real estate owned, including rental properties, vacation properties, commercial properties, personal property leased or rented for business purposes, farm properties and any other income producing properties, etc. Attach additional sheets if needed.

**Life Insurance:** On page 1, enter the cash surrender value of this asset. In section 5 on page 2, enter the name of the insurance company, the face value of the policy, cash surrender value, beneficiary names, and loans on the policy.

**Other Personal Property and Assets:** Enter the total value of personal property and assets you own on page 1. Personal property includes motor vehicles, boats, trailers, jewelry, furniture, household goods, collectibles, clothing, and personally owned vehicles that are leased or rented to businesses or other individuals. In section 6 on page 3, list these assets and enter the present value, the balance of any liabilities, whether the asset is insured, and then or more information and terms of payments. For accounts and notes receivable, enter the total value of all monies owed to you personally, if any. This should include shareholder loans to the applicant firm, if those exist. If the asset is insured, you may be asked to provide a copy of the policy. You may also be asked to provide a copy of any liens or notes on the property.

**Other Business Interests Other than Applicant Firm:** On page 1, enter the total value of your other business investments (excluding the applicant firm). In section 7 on page 3, enter information concerning the businesses you

hold an ownership interest in, such as sole proprietorships, partnerships, joint ventures, corporations, or limited liability corporations (other than the applicant firm). Do not reduce the value of these entries by any loans from the outside firm to the DBE/ACDBE applicant business.

#### Liabilities

**Mortgages on Real Estate:** Enter the total balance on all mortgages payable on real estate on page 1.

**Loans on Life Insurance:** Enter the total value of all loans due on life insurance policies on page 1, and complete section 5 on page 2.

**Notes & Accounts Payable to Bank and Others:** On page 1, section 2, enter details concerning any liability, including name of noteholders, original and current balances, payment terms, and security collateral information. The entries should include automobile installment accounts. This should not, however, include any mortgage balances as this information is captured in section 4. Do not include loans for your business or mortgages for your properties in this section. You may be asked to submit copy of note security agreement, and the most recent account statement.

**Other Liabilities:** On page 1, enter the total value due on all other liabilities not listed in the previous entries. In section 5, page 3, report the name of the individual obligated, names of co-signers, description of the liability, the name of the entity owed, the date of the obligation, payment amounts and terms. **Note:** Do not include contingent liabilities in this section. Contingent liabilities are liabilities that belong to you only if an event(s) should occur. For example, if you

have co-signed on a relative's loan, but you are not responsible for the debt until your relative defaults, that is a contingent liability. Contingent liabilities do not count toward your net worth until they become actual liabilities.

**Unpaid Taxes:** Enter the total amount of all taxes that are currently due, but are unpaid on page 1, and complete section 8 on page 3. Contingent tax liabilities or anticipated taxes for current year, should not be included. Describe in detail the name of the individual obligated, names of co-signers, the type of unpaid tax, to whom the tax is payable, due date, amount, and to what property, if any, the tax lien attaches. If none, state "NONE." You must include documentation, such as tax liens, to support the amounts.

#### Transfers of Assets:

**Transfers of Assets:** If you checked the box indicating yes on page 3 in this category, provide details on all asset transfers (within 2 years of the date of this personal net worth statement) to a spouse, domestic partner, relative, or entity in which you have an ownership or beneficial interest including a trust. Include a description of the asset; names of individuals on the deed, title, note or other instrument indicating ownership rights; the names of individuals receiving the assets; and their relation to the transferor; the date of the transfer; and the value or consideration received. Submit documentation requested on the form related to the transfer.

#### Attainvit

Be sure to sign and date the statement. The Personal Net Worth Statement must be notarized.

## Memorandum



**To:**  
SABRINA WATTS-JEFFERSON  
Acting Assistant Director  
Office of Civil Rights Caltrans

**Date:** June 29, 2020

**File:** P3010-0652

**From:**  
RHONDA L. CRAFT  
Inspector General  
**Independent Office of Audits and Investigations**  
P.O. BOX 942874, MS-2  
Phone (916) 323-7111  
Fax (916) 323-7123  
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<https://ig.dot.ca.gov>

**Subject: Final Audit Report For Good Faith Efforts**

Attached is the Independent Office of Audits and Investigations' final audit report on the Good Faith Efforts Audit. Your response has been included as part of the final report. This report is intended for your information and for Department Management.

Please provide our office with status reports on the implementation of your audit finding dispositions 60, 180, and 360 days subsequent to the transmittal date of this memorandum.

Senate Bill 1 requires the Inspector General to report at least annually, or upon request, to the Governor, the Legislature, and the California Transportation Commission with a summary of audit findings and recommendations. The summary along with this report and the status reports will be posted on the Independent Office of Audits and Investigations' Internet Web site.

SABRINA WATTS-JEFFERSON

June 29, 2020

Page 2

We thank you and your staff for their assistance provided during this audit. If you have any questions or need additional information, please contact Alice Lee, Audit Chief, at (916) 323-7953, or me at (916) 323-7863.

Attachment

c: Toks Omishakin, Director, Caltrans

James E. Davis, Chief Deputy Director, Caltrans

Elissa Konove, Deputy Secretary, California Transportation Agency

Mitch Weiss, Executive Director, California Transportation Commission

Aimee Kratovil, Director of Program Analysis, Federal Highway Administration

Will McClure, Civil Rights Program Manager, Federal Highway Administration

Diana Antony, Chief Deputy Inspector General

Debbie Lumpkin, Deputy Inspector General of Diversity

Alice Lee, Audit Chief

David Wong, Audit Manager

Barbara Nolan, Lead Auditor

Tejwant Kaur, Auditor

Rhonda L. Craft, Inspector General

## Good Faith Efforts Audit

### Background

Good Faith Effort (GFE) is a process where a bidder on a federally-funded project demonstrates compliance with requirements for Disadvantaged Business Enterprise (DBE) participation goals. Bidders can demonstrate GFE either by showing they obtained enough DBE commitments to meet the participation goal, or if the goal is not met, they can document how adequate efforts were made to meet the goal. A DBE is a for-profit small business that is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged and whose management and daily business operations are controlled by one or more of the disadvantaged individuals who own it.

As required by federal regulation, Caltrans sets an overall goal for DBE participation on its federally-assisted contracts. The current goal is 17.6 percent. In order to meet this overall goal, individual contract goals for DBE participation are established on federally-funded contracts that have subcontracting possibilities. When a DBE participation goal is established, the contract award can only be made to the winning bidder if Caltrans determines the bidder documented GFE to meet the goal.

### Key Findings

Caltrans GFE policies and procedures generally comply with federal regulations and Caltrans generally complies with GFE requirements through its policies and procedures such as the Caltrans DBE Program Plan, and the Office of Civil Rights' (OCR) Operational Procedure and Administrative Reconsideration Guidelines. However, we found 12 of 65 (18%) DBEs tested were not certified for the correct NAICS code to count toward DBE contract participation goals.

### Key Recommendations

- Caltrans should update its Standard Specifications and Statement of Qualification Submittal Instructions for bidders to state that appropriate NAICS codes are required to count for DBE participation work on contracts.
- Caltrans should expand OCR's operational procedures to include steps that ensure DBEs are certified for the NAICS code(s) applicable to the kind of work performed on the contract so that DBEs are properly counted towards DBE participation goals.
- OCR should confirm with FHWA if Caltrans' current GFE procedure to allow either a work code or NAICS code certification is acceptable for meeting DBE contract participation goals.



# California Department Of Transportation Good Faith Efforts

AUDIT REPORT

P3010-0652

JUNE, 2020



**PREPARED BY:**

Independent Office of Audits and Investigations – MS 2

Post Office Box 942874

Sacramento, California 94274-0001

<https://ig.dot.ca.gov>

**AUDIT TEAM:**

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P3010-0652

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**Attachment C**

**IOAI'S Comments on the Response from the Office of Civil Rights**

## **Summary, Objectives, Scope, Background, Methodology**

### **Summary**

The Independent Office of Audits and Investigations completed an audit of the California Department of Transportation's (Caltrans) Good Faith Efforts policy, practices, and procedures. For federally-assisted contracts, bidders are responsible to make adequate good faith efforts (GFE) to meet Caltrans' established Disadvantaged Business Enterprise (DBE) participation goal for contracts. To demonstrate GFE, bidders are required to either 1) document enough DBE participation to meet the contract goal or 2) if the goal is not met, document that it made adequate effort to meet the goal. Caltrans is responsible for determining whether bidders made adequate GFE to be awarded a contract. Our audit found that Caltrans policies and procedures generally comply with federal GFE regulations, and the policies and procedures are followed; however, improvements can be made to ensure DBEs are certified with specific federally required codes associated with the kind of work the contractor would perform on a contract.

### **Objectives And Scope**

The objectives of the audit were to determine if:

- Caltrans' Disadvantaged Business Enterprise (DBE) policy and procedures comply with federal regulations for determining GFE.
- Caltrans is following its GFE policy and procedures.

The scope of the audit included reviewing GFE determinations on federally funded contracts awarded between October 1, 2018 and September 30, 2019. The extent of our audit covered the GFE process between advertisement and award. Our audit did not cover processes related to GFE that take place prior to advertising such as DBE goal setting or after contract award, such as the monitoring of DBE utilization.

We conducted our audit from December 18, 2019 through March 24, 2020. Changes after these dates were not tested, and accordingly, our conclusions do not pertain to changes arising after March 24, 2020.

## Background

GFE is a process where the winning bidder on a federally-funded project demonstrates compliance with requirements for DBE participation goals. Bidders can demonstrate these efforts in one of two ways; 1) the bidder can show they obtained enough DBE commitments to meet the participation goal, or 2) if the bidder does not meet the goal, it can document how adequate efforts were made to meet the goal. A DBE is a for-profit small business that is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged and whose management and daily business operations are controlled by one or more of the disadvantaged individuals who own it.

As a recipient of federal financial assistance from the United States Department of Transportation, Caltrans is required by federal law to establish and implement a DBE program. The DBE program is designed to remedy ongoing and past discrimination in federal-assisted highway, transit and airport contracts. Among its objectives is the use of DBEs in all types of federally-assisted contracts and procurement activities. As required by federal regulation, Caltrans sets an overall DBE goal triennially. Currently, the overall goal is 17.6 percent of all federal contract dollars. In order to meet the overall goal, individual contract goals for DBE participation are established on federally-funded contracts that have subcontracting possibilities. Individual contract goals are based on the type and location of the contract work and the availability of DBEs to perform the particular type of work. The contract goal is set and approved by Caltrans Office of Civil Rights (OCR) prior to contract advertisement. When a DBE participation goal is established, the contract award can only be made to the winning bidder if OCR determines GFE was met by the bidder either meeting the goal or documenting an adequate GFE to meet the goal. The award cannot be denied to a bidder who failed to meet the goal but documented adequate GFE to meet the goal.

If a winning bidder does not meet the goal and does not document adequate GFE to meet the goal, the bidder must be provided an opportunity for administrative reconsideration. As part of the reconsideration, the bidder has the opportunity to provide written documentation or argument to support how it either met the goal or how it demonstrated adequate GFE. Caltrans then provides the DBE with a written response and explanation on its reconsideration decision. Caltrans' GFE determination process is shown in the flowchart at Attachment A.

OCR, the program responsible for GFE review procedures, developed the DBE Program Plan, Operational Procedure and Administrative Reconsideration Guidelines to comply with federal regulations and to provide guidance for

Caltrans to determine whether a DBE demonstrates GFE. The Caltrans Division of Engineering Services is responsible for awarding major construction contracts and the Division of Procurement and Contracts is responsible for awarding other contracts such as minor construction contracts, architecture and engineering, and service contracts.

### **Methodology**

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

We reviewed Caltrans GFE policies and procedures for compliance with Title 49 of the Code of Federal Regulations, Part 26 (49 CFR 26) and Appendix A to 49 CFR 26. We reviewed OCR documentation to support that GFE was met either through 1) the winning bidder meeting the DBE participation goals or 2) the winning bidder not meeting the goal but showing that adequate effort was made to meet the goal. For bidders that OCR determined did not show GFE, we reviewed the files to determine if the bidders were offered an opportunity for reconsideration.

For the audit period of October 1, 2018 to September 30, 2019, Caltrans awarded a total of 296 contracts that had DBE participation goals. This consisted of 239 major construction contracts and 57 other contracts. To determine if GFE determinations were supported, we tested a sample size of 30 contracts; 24 major construction contracts and six other contracts, representing about 10 percent from each type of contract. Of the 30 samples, 16 contracts were awarded to winning bidders that met the DBE participation goal and 14 contracts were awarded to winning bidders that did not meet the participation goal but were determined to have documented adequate GFE.

Federal requirements state that for DBEs to count towards meeting participation goals, they must have a North American Industry Classification System (NAICS) code (a six-digit code used by state and federal agencies to classify business activities within an industry) for the work performed on the contract. Therefore, we selected 16 contracts out of the 30, which included a total of 65 participating DBEs, to determine if each of the DBEs were certified for the federally required NAICS code associated with the DBE's work code to be performed.

**Views of Responsible Officials**

We requested and received a written response from the OCR who disagreed with the finding and recommendations. Please see Attachment B for the response and Attachment C for the Independent Office of Audits and Investigations' comments to the response.

## Results, Findings and Recommendations

### Results

Based on our testing, we determined Caltrans GFE policies and procedures generally comply with federal regulations and Caltrans generally complies with GFE requirements through its policies and procedures such as the Caltrans DBE Program Plan, and the Office of Civil Rights' (OCR) Operational Procedure and Administrative Reconsideration Guidelines. We found that Caltrans' procedures generally assessed GFE properly for bidders that met Disadvantaged Business Enterprises (DBE) participation goals as well as for bidders that did not meet participation goals. Additionally, when bidders did not show GFE, we found adequate documentation to reasonably support OCR's determination. We also determined Caltrans appropriately offered reconsideration when the bidder did not document adequate GFE.

However, as noted below, we found instances where Caltrans did not document that DBEs were certified for the specific NAICS code associated with the Caltrans work code identified by the prime bidder.

### **FINDING 1 – DBEs Are Not Certified For The Specific NAICS Code Required To Count Towards DBE Participation Goals**

We selected 16 contracts with 65 DBEs to determine if the DBEs were certified with the specific NAICS code required for the work activity or work code identified by the winning contract bidder. We found 12 out of 65 (18%) DBEs were not certified for the correct NAICS code to count toward DBE participation goals.

Caltrans' Standard Specifications for construction contractors and Statement of Qualifications (SOQ) Submittal Instructions for architectural and engineering contracts do not require NAICS codes but allows prime contractors the option to use either a NAICS code or a Caltrans work code on the DBE commitment form. Though federal regulation allows contractors to use other codes in addition to NAICS codes, such as Caltrans work codes, federal NAICS codes are always required to count toward DBE participation goals.

Without an applicable NAICS code, DBE participation percentages may be improperly counted towards satisfying GFE when meeting the contract goal. In addition, though not directly related to GFE, if DBEs are not properly certified in

a NAICS code, they are unable to use the certification in other states to bid on projects within that same NAICS code's work activity.

49CFR26.53(b) states, "In your solicitations for DOT-assisted contracts for which a contract goal has been established, you must require the following: A description of the work that each DBE will perform. To count toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract."

### **Recommendations**

- A. OCR, the Division of Engineering Services, and the Division of Procurement and Contracts should work together to update the Standard Specifications and SOQ Submittal Instructions to state that the appropriate NAICS codes are required to count for DBE participation work on contracts.
- B. OCR should expand operational procedures to include steps that ensure DBEs are certified for the NAICS code(s) applicable to the kind of work performed on the contract so that DBEs are properly counted towards DBE participation goals.
- C. OCR should confirm with FHWA if Caltrans' current GFE procedure to allow either a work code or NAICS code certification is acceptable for meeting DBE contract participation goals.

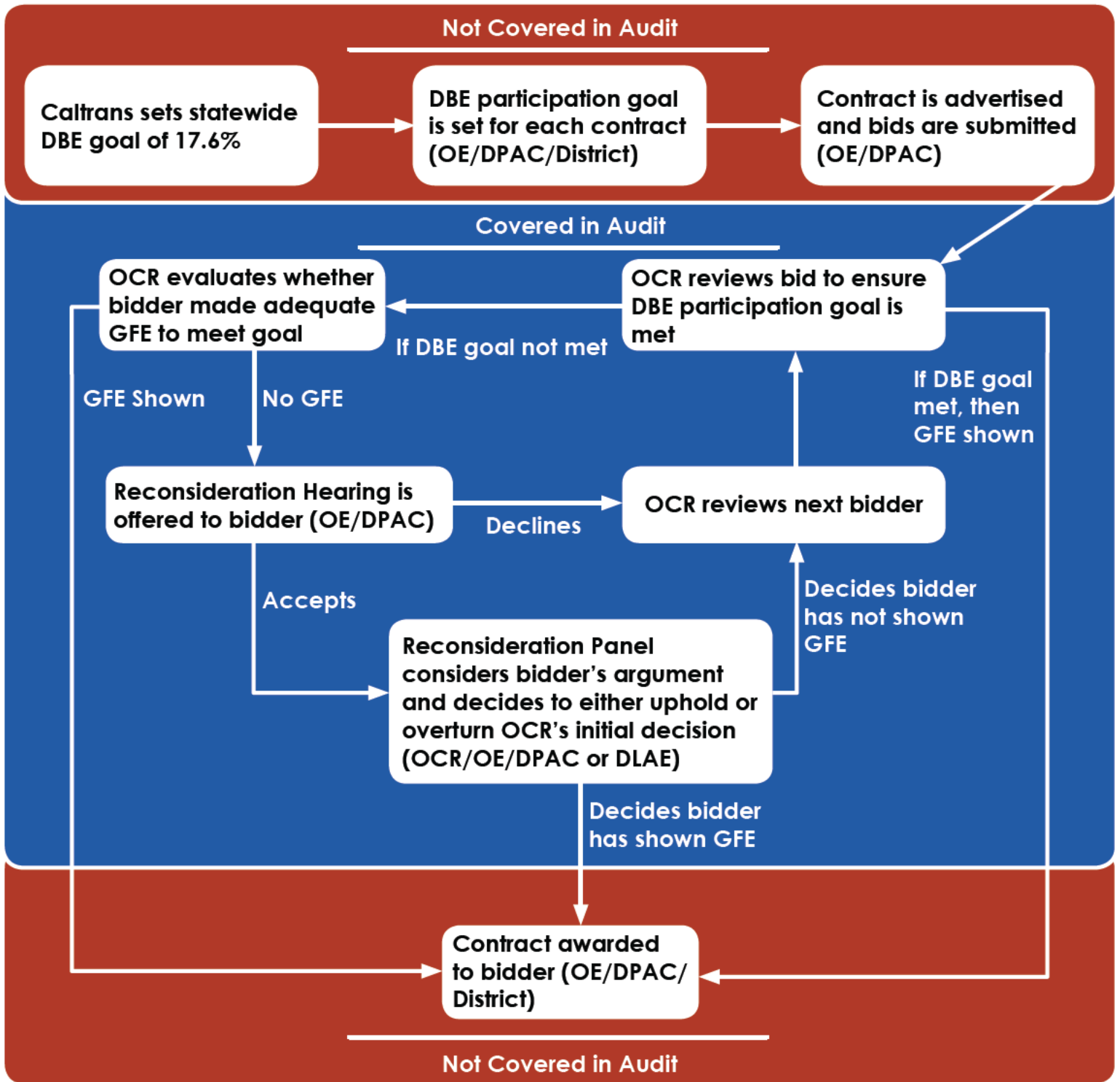
### **Caltrans' Office of Civil Rights' Response**

The OCR disagrees with the finding and recommendations A and B. Please see Attachment B for details of their response. For brevity purposes, the OCR's attachments to their response were not included in this audit report.

### **Analysis of Caltrans' Office of Civil Rights' Response**

The support provided by OCR in their response does not show FHWA's approval to allow Caltrans to waive the NAICS code requirement. However, OCR responded that they will confirm with FHWA on whether their current practice is acceptable; the audit report was edited to include this as a recommendation. Please see Attachment C for IOAI's comments to OCR's response.

## ATTACHMENT A GFE PROCESS FLOWCHART



**Key**  
 DBE = Disadvantaged Business Enterprise  
 GFE = Good Faith Effort

OCR = Office of Civil Rights  
 OE = Office of Engineering  
 DPAC = Division of Procurement and Contracts

## Attachment B

State of California  
Independent Office of Audits And Investigations

California State Transportation Agency

*Making Conservation a California  
Way of Life*

### Memorandum

**To:**  
RHONDA L. CRAFT  
Inspector General  
**Independent Office of Audits and Investigations**

**Date: June 12, 2020**

**From:**  
SABRINA WATTS-JEFFERSON  
Acting Assistant Director  
Office of Civil Rights Caltrans

**Subject: Office of Civil Rights Response to Good Faith Effort Audit**

Thank you for the opportunity to provide a response to the draft report on Good Faith Effort. the objective of the audit was to determine if 1) Caltrans' Disadvantaged Business Enterprises (DBE) policy and procedures comply with federal regulations for determining good faith efforts (GFE) and 2) Caltrans is following its GFE policy and procedures. The Office of Civil Rights(OCR) is pleased that the auditors determined that Caltrans GFE policies and procedures generally comply with federal regulations and Caltrans generally complies with GFE requirements through its policies and procedures.

The auditors reviewed the Caltrans GFE policy and procedures and provided one finding and general recommendations. OCR believes the lack of understanding of a broader overview of the DBE program plan, the program's historic use of North American Industry Classification System (NAICS) code and its supplemental Work Codes and the continued working relationship with FHWA in the DBE program plan development, led to a finding that is only tangentially related to the GFE process. As a result, OCR needs to disagree with the finding in the Draft GFE Audit report submitted to OCR on May 18, 2020.

1. The finding, which in our opinion is DBE Certification centric, states, "DBE's are not certified for the specific NAICS code required to count towards DBE participation goals." The audit further states, "Without an applicable NAICS code, DBE participation percentages may be improperly counted towards satisfying GFE when meeting the contract goal." OCR disagrees with this finding based on the current practice of the use of NAICS Code and Work Codes to determine both certification and counting DBE participation.

"Provide a safe, sustainable, integrated and efficient transportation system to enhance California's economy and livability"

For historical perspective, the use of both NAICS Code and Work Codes - a descriptor from a classification scheme of equivalent detail and specificity (49 CFR 26.71 (n)(1)) - by Caltrans to certify firms and count towards DBE participation goals has been the practice for over 20 years. In 2018, the Caltrans Standard Specifications, Section 2, "Bidding," was revised to allow the Prime Contractor to supply the DBE firm's NAICS code or Work Codes in its DBE commitment submittal to assist with DBE participation in Caltrans projects.

2. Attached is documentation of communication between the FHWA and OCR that reinforces the collaborative work between FHWA and OCR to develop a DBE program that is narrowly tailored yet maximizes DBE participation in the state. The documentation includes notes from the previous FHWA Civil Rights Manager, Mr. Lance Yokota. The 2011 notes from Mr. Yokota indicates that he understood Caltrans DBE goal setting methodology and good faith effort procedures, which includes the use of work codes instead of NAICS codes.

2. Also attached is a training module presented by Mr. Yokota on Good Faith Effort. Slide 25 shows the trainee how to look at a work code to determine DBE participation. The challenge with the exclusive use of NAICS codes is the broad nature of the NAICS codes. Their exclusive use limits the participation of smaller DBE firms that are unable to receive certification under a broad NAICS code due to its greater requirements for certification. However, the same DBE firm can work on Caltrans projects as a certified DBE firm under a work code increasing the utilization of smaller DBE's companies throughout California.

The audit report also states, "thought not directly related to GFE, if DBEs are not properly certified in a NAICSs code, they are unable to use the certification in other states to bid on projects within that same NAICS code's work activity. With a properly certified NAICS code, a DBE's certification from Texas may be valid for the same type of work in California and vice versa. Within California, certifications and NAICS codes can also be used between different government agencies."

3. While we understand how this assumption can be made, this is not a completely accurate statement as interstate certification is more nuanced than a carte blanche reciprocity. Interstate Certification is based on 49 CFR 26.85 et al. and like most states, Caltrans has taken the option to certify out of state firms on a case-by-case basis as stipulated in §26.85(c). Caltrans does not allow for blanket approval solely based on the DBE firm holding a different state's certification under a NAICS code (§26.85(b)).

The reason being, some states have different requirements when it comes to licensing or qualification issues of applicant. For that reason, as §26.85(d) (iv) states, "...the State law of State B requires a result different from that of the State law of State A," one cannot assume what's valid in one state will be valid in another.

Within California, the certification process is jointly controlled by a group of certification agencies - the California United Certification Program (CUCP) - that reach consensus when determining changes to the certification processes. If Caltrans changes its certification process, the CUCP agencies need to have a voice in the implementation of the changes in the certification processes without consensus from other agencies.

4. Based on the June 4, 2020, meeting between OCR and on of A&I's concerns regarding Caltrans use of work codes centers around the lack of written documentation of FHWA concurrence. OCR will work with existing FHWA Civil Rights Manager to confirm that our current practice is acceptable.

5. In closing, to limit Caltrans ability to use work codes and require NAICS codes hurts Caltrans ability to include a wider array of DBE firms in California, prevents Caltrans from have a narrowly tailored DBE program as required by the FHWA, and meetings for past two years. The number of contracts approved based on GFE are minimal (statistically insignificant) compared to those that meet the goal requirement via prime contractors GFE process. Changes to the current practices will result in the need for a new DBE Program Plan, a complete change in the DBE goal setting process, coordination with the CUCP and changes to all related policies that involve the Division of Project Delivery, the Division of Procurement and Contracts, and the Division of Local Assistance.

If you have any questions, please contact me at (916) 926-3120 or at [Sabrina.Watts-Jefferson@dot.ca.gov](mailto:Sabrina.Watts-Jefferson@dot.ca.gov).

#### Attachments

1. 2011 note from Lance Yokota, FHWA
2. GFE Training Power Point from Lance Yokota, FHWA

c: James E. Davis, Chief Deputy Director, California Department of Transportation

Shira Rajenda, Deputy Division Chief, Program/Project Management  
and Office Engineer

David Prizmich, Division Chief, Division of Procurement and Contracts

Debbie E. Lumpkin, Deputy Inspector General of Diversity, Independent  
Office of Audits and Investigations

William Lewis, Assistant Director, Independent Office of Audits and  
Investigations

Diana Antony, Chief Deputy Inspector General, Independent Office of  
Audits and Investigations

Alice Lee, Chief, Office of Project Delivery, Independent Office of Audits  
and Investigations

David Wong, Audit Manager, Office of Project Delivery, Independent  
Office of Audits and Investigations

## ATTACHMENT C

### IOAI'S Comments on the Response from the Office of Civil Rights

To provide clarity and perspective, we are commenting on the Office of Civil Rights' (OCR) response to our audit. The numbers below correspond to the numbers we have placed in the margin of OCR's response.

1. Though OCR's current practice allows the use of NAICS codes and work codes for certification and DBE goal setting, it does not require in all instances the use of a NAICS code as required by 49 CFR 26.53(b)(2)(ii). Based on our audit of OCR's practices, we found the OCR Contract Evaluation Branch determines DBE participation based on the DBE having either a work code **or** a NAICS code but not always requiring a NAICS code. The OCR's Contract Evaluation Branch Manager during the audit period stated that if a DBE was certified with a work code appropriate for the work to be performed on the contract, staff would perform no further review to determine whether the DBE was also certified in an applicable NAICS code.

2. As early as February 2020, IOAI requested documentation to support OCR's claim that the Federal Highway Administration (FHWA) approved the use of work codes instead of NAICS codes. The information was not provided during the audit. In its June 2020 response, OCR provided an email communication dated 1/3/11 and a power point presentation from 2005 titled "Tips for Evaluating Good Faith Efforts" from a former FHWA Civil Rights Manager as evidence. These documents, however, do not state FHWA's approval of the use of work codes instead of NAICS codes. The email communication does not specifically mention or reference work codes or NAICS codes. In addition, the power point slide (#25) that OCR provided showed trainees how to look at work codes to determine DBE participation but also clearly identified on the slide, a NAICS code associated with each work code.

Additionally, OCR states that the challenges of being required to exclusively use NAICS codes is the broad nature of the codes. However, the audit is not recommending the exclusive use of NAICS codes over work codes. As stated in our report, the federal regulation allows work codes in addition to required NAICS codes.

3. The IOAI understands that Caltrans certifications may not always be accepted by other states due to reasons such as differing licensing requirements. However, at a minimum, all DBEs are required to be certified with the proper NAICS code(s) associated with the work to be performed on a contract. The report was edited to remove the following: "With a properly certified NAICS code, a DBE's certification from Texas may be valid for the same type of work in California and vice versa. Within California, certifications and NAICS codes can also be used between different government agencies."

4. In working with the FHWA to confirm if Caltrans' current practice is acceptable, OCR should be clear to communicate that the current GFE process does not include verifying DBEs are certified for the NAICS code specifically associated with the work code used to meet DBE contract participation goals.

5. OCR states IOAI's recommendation limits Caltrans ability to use work codes and that by requiring NAICS codes, it hurts Caltrans ability to include a wider array of DBE firms in California, prevents Caltrans from having a narrowly tailored DBE program as required by FHWA, and prevents Caltrans from meeting its overall DBE goal. IOAI's recommendation is based on 49 CFR 26.71(n)(1), which does not limit the use of work codes but allows the use of work codes in addition to required NAICS codes, and 49 CFR 26.53(b)(2)(ii) that states that appropriate NAICS codes are required to count for DBE participation work on contracts. Additionally, 49 CFR 26.53(b)(2)(ii) specifically requires a NAICS code to count towards meeting DBE contract goals.

**WRITTEN EXPLANATION OF THE ALLEGED DISCRIMINATORY ACTION AGAINST (b) (6)**

(b) (6) is alleging State of California Department of Transportation (Caltrans) is denying the benefits of and is allowing their staff to discriminate under the Federal Highway Administration (FHWA) Title VI Program.

State of California Department of Transportation Caltrans selects its consultant under the State of California Mini Brooks Act (California Government Code 4525-4529) which is also known as Qualifications Based Selection (QBS). The selection is very subjective and can be manipulated to who they want to select for the contract. This also leads to who they want to discriminate against.

(b) (6) submitted a Statement of Qualifications to the Caltrans for Contract Number (b) (6) for Caltrans, Division of Right of Way, District 8 On-Call Contract on (b) (6). On (b) (6) received an email from Michelle Nelson (Caltrans Contract Manager) informing (b) (6) was shortlisted to interview for Contract Number (b) (6). On July 14, 2020, (b) (6) received an email from Michelle Nelson (Caltrans Contract Manager) that (b) (6) was not selected for the contract. From July 14, 2020 to September 8, 2020, Caltrans and the selected firm negotiated and approved the contract on September 8, 2020. On September 8, 2020, (b) (6) requested the Statement of Qualifications submittal from the winning selected consultant. During this time, (b) (6) could not review the Statement of Qualification to see if (b) (6) was not the most qualified firm until September 11, 2020, (b) (6) received the Statement of Qualifications submittal from Caltrans to review.

On September 11, 2020, (b) (6) reviewed the Caltrans winning consultant Statement of Qualifications and compared it to (b) (6) Statement of Qualifications. After reviewing the Statements of Qualification, (b) (6) is alleging Caltrans and its employees are excluding (b) (6) from participation in and be denied the benefits of and be subject to discrimination under the Federal Highway Administration (FHWA) Title VI Program.

On September 12, 2020, (b) (6) reviewed the Statement of Qualification submitted by Psomas and Associates and (b) (6). (b) (6) was the most qualified firm that submitted on this contract. Caltrans is not interested in looking into the allegation of misconduct by its staff and will allow it to continue. Caltrans does not have a very good track record of hiring small businesses to provide professional service on any federal or state projects. Most nationwide small businesses are owned by Minority or Woman. Please see **Attachment B - History of (b) (6) and Caltrans.**

The lead person on the selection team Person A, Caltrans Principal Transportation Surveyor, has known the owners of (b) (6) for over 35 years while working at Caltrans. Person A selects the other Caltrans reviewer of the selection team. Basically, he is the person who selects the consultant. I am alleging he is the person who is discriminating against (b) (6). In September 2020, (b) (6) filed a protest on the selection of the consultant following in September. Caltrans is not interested in investigating the blatant violation of Federal Highway Administration (FHWA) Title VI Program.

This is not the first time the Caltrans has discriminated against (b) (6) or other small firms. This has happened in 2010, 2013, 2014 and 2017 on Traffic Design Contracts, Right of Way Engineering Contracts, Land Surveying Contracts, and other contracts.

The people listed below are the alleged State personnel that have performed the discrimination:

- Person A, Caltrans Senior Transportation Surveyor
- Person B, Caltrans Senior Transportation Surveyor
- Person C, Caltrans Senior Transportation Surveyor
- Person D, Caltrans Senior Transportation Surveyor
- Person F, Caltrans Senior Transportation Surveyor
- State of California, Department of Transportation
- District 08 Administration Department
- District 08 Right of Way Department
- Headquarters Division of Procurement and Contracts

I would like to be included in a Whistleblower Protection status if (b) (6) can prove that Caltrans discriminated against (b) (6). Caltrans will not provide us any opportunity to participate in any work concerning federal or state funded projects. I have additional information concerning past discrimination of Caltrans against small and minority business. Previously in the 1990's, most of the small contracts that Caltrans would issue went to small firms. Now the large firms are being selected for the small contracts.

**Contact Information**

Company – (b) (6)  
Owners - (b) (6)  
Address - (b) (6) San Bernardino, CA 92408  
Phone – (b) (6)  
Cell Phone – (b) (6)  
Email – (b) (6)  
Email – (b) (6)

**(b) (6) COMPLAINT TO CALTRANS**

On Friday (b) (6) we had a debriefing on (b) (6). The purpose of a debriefing is to provide a Consultant with information about the interview, how they may improve their SOQ and be more competitive in the future. (b) (6) will never obtain a Caltrans contract if the current Caltrans staff is involved in the Consultant selection process. I am asking Caltrans to review the score sheets with the SOQ's for this contract. I am available to present both (Selected Consultant and (b) (6)) Statements of Qualification to your staff and go over how (b) (6) is better qualified for this Contract.

I received a call from District 06 regarding a Surveying Contract and why we did not submit our SOQ on this particular contract. It appears only a few consultants submitted their SOQ. I informed her, (b) (6) was not prepared to spend over \$20,000 as an exercise for not getting selected. The Consultant selection process is broken, and it needs fixing as it will save the State of California millions of dollars.

I approached you at a Caltrans Small Business Meeting in 2018 to express my concerns on the selection of a fraudulent Consultant on (b) (6). At that time, I was letting you know I was filing a Title VI complaint with the Federal Highway Administration. I did not end up filing the complaint. In June 2020, the contract was renewed as (b) (6). I knew (b) (6) would get short listed but not selected. In July, another consultant was selected over (b) (6) for this contract. (b) (6) has been working on the California High Speed Rail project providing Right of Way Engineering services for the past 6 years.

(b) (6) filed a protest with DPAC in September 2020. Caltrans DPAC rejected the claim as not being submitted in time. The rule on submission of a claim is a Catch 22 scenario. In order to protest the selection of the most highly qualified firm, a prospective Consultant must file a protest within 7 business days after the selection of the most highly qualified firm and include a written statement of the grounds, legal authority and facts in support of the protest. To obtain facts to support the protest, a prospective Consultant must wait until after contract execution with the selected Consultant in order to obtain a copy of their SOQ. The timeline from Consultant Selection to Negotiations to Contract Execution consists of up to 4 business days from Consultant selection to submit a complete financial document package, a negotiation meeting of up to 7 calendar days after submission of a complete financial documents package, plus additional days from accepted negotiations to final contract execution. Based off of this timeline, it is not feasible for a prospective Consultant to obtain a copy of the Selected Consultant's SOQ to use as supporting evidence and meet the time frame to submit a protest regarding selection of most highly qualified firm.

I would like to give you the information on how District 08 selects a nonqualified consultant over a qualified consultant on a Professional Service contract for Caltrans District 08 Right of Way Engineering.

(b) (6) was the most qualified Consultant who submitted on this SOQ.

1. **Selected Consultant** – Submitted a fraudulent Statement of Qualifications – Violation of State & Federal Law. The main project in the selected consultant SOQ is Caltrans 08A2868. This contract is a field surveying contract and not a Right of Way Engineering Contract. The ranking sheet form ADM2027 does not show this as a weakness for the selected consultant on the resumes.

2. **Selected Contract Manager** – Does not have the five years of experience as a Contract Manger for similar Right of Way Engineering Service contracts as required in the Request for Qualifications – Violation of State Law
3. **Contract Manager** – Does not have the Right of Way Engineering experience performing mapping and legal description. – Violation of State Contract Code
4. **Task Order Manager** - Does not have the Right of Way Engineering experience performing mapping and legal description. – Violation of State Contract Code
5. **Project staffing** for this contract required:
  - a. 1-2 Project Surveyors
  - b. 1-3 Survey Assistants
  - c. 1-3 Survey Technicians

The selected Consultant submitted:

1. **Project Surveyors** - 5 Licensed Land Surveyors.
2. **Survey Assistants** – 3 Licensed Land Surveyors, **No Land Surveyor-In-Training (LSIT) as the RFQ required.** For an Licensed Land Surveyor assigned as Survey Assistant, Caltrans will be paying \$140.09 to \$159.52 per hour to each of the Licensed Land Surveyor and not paying true Survey Assistant wages of \$99 to \$106 per hour. That is about \$40 to \$60 more per hour times 3. This is a high cost for a Survey Assistant. The three LS's would not know how to operate Civil3d cadd software on the project or Caltrans Right of Way Mapping project..
3. **Survey Technicians** – 1 Land Surveyor-In-Training (LSIT) and 2 Survey Technicians

(b) (6) submitted:

1. **Contract Manager** – Professional Licensed Civil Engineer and Licensed Land Surveyor with 33 years as a Contract Manager as **RFQ required.**
2. **Project Surveyor** – 3 Licensed Land Surveyors with one also being a Professional Licensed Civil Engineer. In addition, (b) (6) had submitted the former (b) (6)
3. **Survey Assistant** – 5 Licensed Land Surveyor-In-Training as the **RFQ required.**
4. **Survey Technicians** – 2 Licensed Land Surveyor-In-Training and 2 Engineer-In-Training.

I would like for Caltrans or your office to perform an audit to verify that the selected Consulnt was indeed the most quified as required by California Law.

In reviewing form ADM 2027 & 2028, the Caltrans Reviewer was very critical of (b) (6) SOQ and very inlient with the selected Consulnt's SOQ. In the selected Consulnt's SOQ, various resumes (see staff names below) listed Caltrans Project 08A2868 which is Land Surveying Services and not Right of Way Engineering contract.

- |                  |                      |
|------------------|----------------------|
| • Sean Smith     | • Jesus Ulloa        |
| • Cliff Simental | • Angel Perez        |
| • William Estapa | • Christian Zamora   |
| • Jeremy Evans   | • Bernard Bingwen Xu |

Furthermore, these resumes listed Right of Way Surveys and Mapping and some acquisition documments as being part of Contract 08A2868.

I will be sending (b) (6) formal Title VI complaint to the Federal Highway Adminatration this week. I will also submit (b) (6) complaint to the California Governors Office; California Auditor; California Attorney General; Caltrans Director - Toks Omishakin; Caltrans Chief Deputy Director - James E. Davis; Acting Chief of Staff - Kimberly Ellis-Erickson; Deputy Director of Finance/Chief Fincial Officer – Steve Keck; Division Chief of Right of Way and Land Surveys - Kimberly Ellis-Erickson; Independent Office of Audits and Investigation - Rhonda Craft; District 08 Director - Michael Beauchamp; District 08 District Deputy Director Right of Way – Rebecca Guirado; District 08 Deputy Director Administration - Kevin Strough; 40<sup>th</sup>

## ATTACHMENT C

District Assembly member - James C. Ramos; 47th Assembly Assembly Member – Eloise Gomez Reyes; District 20 State Senator - Connie M. Leyva; and District 23 State Senator - Mike Morrell.

Toks.Omishakin@dot.ca.gov;James.Davis@dot.ca.gov;Kimberly.Ellis-Erickson@dot.ca.gov;Steve.Keck@dot.ca.gov;Rhonda@Craft@dot.ca.gov;Michael.Beauchamp@dot.ca.gov;Rebecca.Guirado@dot.ca.gov;Kevin Strough@dot.ca.gov ;Rob.Gunn@dot.ca.gov

**From:** [Lacayo, Erik \(FHWA\)](#)  
**To:** (b) (6)  
**Cc:** [Chandler, David \(FHWA\)](#)  
**Bcc:** [Mcwhorter, Nichole \(FHWA\)](#); [Mann, Arianne \(FHWA\)](#)  
**Subject:** FHWA Complaint DOT# 2021-0065  
**Date:** Wednesday, May 12, 2021 12:03:00 PM

---

(b) (6),

I am writing in regard to the discrimination complaint you filed with us on March 2, 2021. After an initial review, we are referring your complaint to FHWA's DBE Program team because the complaint alleges harms to your business. If you have any future questions about the status of your complaint, you may contact David Chandler with the DBE team at [david.chandler@dot.gov](mailto:david.chandler@dot.gov).

Thanks,

**Erik Lacayo**

Title VI Program Analyst  
Federal Highway Administration  
Office of Civil Rights  
(202) 913-3926  
[erik.lacayo@dot.gov](mailto:erik.lacayo@dot.gov)

(b) (6)

March 01, 2021

Federal Highway Administration  
United States Department of Transportation  
1200 New Jersey Avenue SE  
Washington, DC 20590

RE: Title VI Complaint Against California Department of Transportation (Caltrans)

To whom it concerns,

(b) (6) is a Small Business Enterprise (SBE) certified by the Department of General Services (Cert No. (b) (6)) located in the City of San Bernardino, CA. (b) (6) has been providing civil engineering, land surveying, and other related professional services for more than 30 years.

(b) (6) Prior to forming (b) (6), both owners worked at the State of California Department of Transportation (Caltrans). (b) (6)

(b) (6) The majority of (b) (6) contracts are with State and Local Government Agencies as well as Municipalities.

Caltrans is obligated to have an even playing field in contracting and procurement as stipulated by their funding agreement with the United States Department of Transportation (USDOT). They do not. Caltrans/CUCP is covering up the Disadvantage Business Enterprise (DBE) fraud and allowing these firms to take most sub roles on federally funding contracts warranting a Compliant due to 49CFR Part 26 violations and Civil Rights violation according to the Civil Rights Act of 1964 for creating an uneven playing field.

Caltrans procurement process is a tightly controlled process that is not an even playing field, only few companies and specific individuals connected to Caltrans Management have been selected. Caltrans controls this process in several ways not in favor of SBE and DBE firms:

**1 – Controlled RFP Process & refusal to provide relevant information:**

When Caltrans issues a professional services Request for Proposals or Qualifications (RFP or RFQ), all you get is a link to download the RFP. Caltrans does not conduct any pre-proposal meetings to see who is interested in proposing like what the other public agencies do. When SBE and DBE firms request the plan holder list that downloaded the RFP from Caltrans website so we can contact them for teaming opportunities, Caltrans informs the SBE and DBE firms that Caltrans does not have the plan holder list or a list of whom downloaded the RFP. In past years, you were able to download the bidders list to review

(b) (6)

firms that were interested in teaming opportunities. Yet Caltrans is quite capable of issuing the addendums and email it to the plan holder list. Caltrans has chosen not to provide this information to SBE and DBE firms to control whom gets selected and effectively create an uneven playing field.

What this control resulted in is the same primes and the same subs being proposed over and over and winning the same contracts. It also keeps the pool of proposer primes and subs close to the ones with connections to Caltrans upper management and procurement staff that controls this process.

## **2 – Corruption by Caltrans Insiders:**

Two well-known and proven examples are Person 1 and Person 2. Person 1 was the former Caltrans District A Senior Project Manager in charge of procurement in District A. He was involved in bribes and fixing contracts and several law suits filed against him by DBE firms. Caltrans gave him an option of resigning or getting fired. He resigned and is now one of Caltrans District A and B consultants.

Person 2 is a public official and the actual owner of COMPANY C. The origins of Company C goes back to the day it started as COMPANY A, Caltrans DBE in 2006, the wife/front owner migrated to the US in 2006, in 2007 she won a \$11M, in 2008 another \$10 and in 2009 another \$12M.

To obtain the DBE certification by Caltrans, they had to hide assets. COMPANY A owners falsified County real estate transaction recordings to transfer assets from the wife to the husband for DBE application with Caltrans and claiming a "dissolution of marriage" so they would not pay transfer taxes, effectively defrauded both the County, State and Federal government.

After more than \$30M in Caltrans District A contracts in 3-4 years by paying District A Procurement team, Person 1 paid to play, who was eventually forced out and District A was prevented and banned from any procurement for 3 years, COMPANY A was sold to Company B. A company that never had a CM contract with Caltrans and now they do with Person 2.

Company B and Company C started getting contracts after hiring Person 3 the wife of Caltrans District A Construction Area Manager Person 4 (responsible for Caltrans District A CM) as their employee while working for Caltrans as a consultant (they both carry different last name for typical Caltrans concealment, not the first couple working on opposite sides on the same project including District C Chief Deputy Director Person 4 signing a contract for his wife company)

Company C was created by a Company B staff as a front and controlled by Person 2, Company B Senior Vice President and used as a sub to Company A on Caltrans District A and District B contracts.

After enriching PPM with Caltrans federally funded contracts, Person 2 leaves Company B and Company C is now officially controlled by the Person 2 and the front employee that registered Company C initially with the State of California is an employee of the company.

Person 2 expand his financial ties with Caltrans District B staff as he did with District A and in the same manner, hiring relatives, trips, paybacks, etc.

Elevated his back door dealings when he was elected for an elected position in a local city. PPM was included on every District B federally funded Construction Management contracts.

Both Person 2 and Person 1 have been reported to have harassed other SBE and DBE staff, calling them asking them to leave their employers and join Person 1 or Person 2 companies on the same Caltrans projects. Other staff reported that both Person 2 and Person 1 threatened them if they do not work for them, "they will never get a job at Caltrans".

Keep in mind Person 2 has no related degree in engineering or construction or licensed in the State of California that qualify him for professional services as required by Caltrans and the State Statutes. Because he is so connected to Caltrans upper management and is currently a local City Engineer, and former District A Chief Deputy. City 1 is part of District B and City 1 have common projects and funding while Person 2 is playing both as a Public Official and consultant on Federally funded projects.

### **3 – Ignoring State license requirement and DBE NAICS Codes:**

It is well known Caltrans and CUCP has a certified company that are not in compliance with the 49CFR Part 26. The list is extensive, and the fraud has reached a system wide meltdown and is being covered up. I and many others smaller firms have complained about it for years and no one has done anything about it.

Caltrans and the CUCP issued DBE certification for professional services including Engineering, Construction Management and Testing and Inspection to companies where the 51% owner is not licensed in the State of California effectively allowing political science major, lawyers, yoga instructors, schoolteachers to engage in engineering and construction on Federally funded projects for political pay offs.

When this issue was made public, Caltrans came up with a strange ruling, granting one such company Safework 50% DBE credit on their District A contract with Company 3. The owner of the firm is not licensed by the State of California for Architecture & Engineering (A&E) professional services.

Other cases, Caltrans ignores it all together. They issued NAICS Code DBEs without a supportive State license and in many other cases account various NAICS Codes completely unrelated to the services provided and account them for the project DBE goals.

Company names can be provided at a later time.

### **4 – The Only Other Alternative is also a Dead End:**

In light of SBE and DBE firms inability to effectively join the closed circle of large primes constantly winning these contracts due to the uneven playing field created by Caltrans that service only the larger firms and their insiders. Complicated by a convoluted and corruption in the DBE program, the only alternative is to try to prime on these A&E RFPs. But this process with (b) (6) and many other smaller firms failed for years and smaller firms that are qualified and duly licensed by the State of California and are able to win similar contracts with other Public Agencies still cannot win a dime with Caltrans for the last 15 years.

### **5 – Detrimental Effects on SBE & DBE:**

The primary reason why (b) (6) and other highly qualified SBE and DBE firms duly licensed firms failed to win Caltrans A&E contracts is the fact Caltrans ask for Caltrans type experience and hand-pick Project managers that are effectively connected with Caltrans upper management like Person 2 and Person 1. Caltrans allows unlicensed firms to participate and deems them more qualified than other SBE and DBE that went to school and majored in engineering or construction and took and passed the State professional exam to be considered licensed firms. Qualification based selection and the Brooks Act is ignored when it comes to this point favoring unfit and unlicensed firms to provide A&E services. Caltrans do not care if Person 2 has a license or not as long as continue to hire Caltrans senior staff wife and relatives and Caltrans have awarded him Prime contracts both in District A and B.

(b) (6)

So, if you have been working with Caltrans you are guaranteed to continue working even if you are not in compliance with the State Professional Statutes and you will continue to work with Caltrans using the wrong NAICS codes that are not in line with A&E. On the other hand, if your licensed by the State and hold the correct NAICS Code but have not worked with Caltrans in the last 5 years, you cannot prime or have the opportunity to be a sub since you are not part of the Caltrans Club membership. If you prime, they will find reasons to disqualify you since you cannot meet the minimum RFP requirement for lack of previous work according to Caltrans. This created an uneven playing field.

#### 6 – HKA Actual Experience with Caltrans Procurement:

On (b) (6) submitted its Statement of Qualifications (SOQ) to Caltrans for the advertised (b) (6). On (b) (6) received an email from Michelle Nelson (Caltrans Contract Analyst) informing that (b) (6) was shortlisted to interview on (b) (6). On (b) (6) received an email from Michelle Nelson regarding the Consultant selection results. The results indicated Psomas was the highest qualified Consultant for this Contract.

(b) (6) is exercising its right to file a complaint under Title VI of the Civil Rights Act of 1964 against Caltrans for discrimination based on race. In the last seven years, (b) (6) has submitted and interviewed on six similar contracts issued by Caltrans District 08. Four of those contracts were awarded to Psomas while the other two were awarded to Guida Surveying Inc. (a SBE firm) and WSP Global (a global firm). See table below.

Caltrans Contract #	Services	Winning Firm	Year RFQ Issued
08A3201	On-Call for Right of Way Engineering Services	Psomas	2020
08A2868	On-Call Land Surveying Services	Psomas	2017
08A2871	On-call Right of Way Engineering Support Services	Guida Surveying Inc.	2017
08A2802	Land Surveying Support Services	Psomas	2017
08A2427	Conventional Land Surveying	Psomas	2014
08A2462	On-Call Right of Way Engineering Support Services	WSP Global Inc.	2014

In California, small businesses represent 99.8 percent of all businesses in the state of which 2.1 million are minority-owned. From the previous similar contracts that were awarded, **only one contract** was awarded to a Small Business and the others were awarded to a non-small business. (b) (6) is at least if not better qualified than the firms that were awarded the contract.

I know (b) (6) has been discriminated on contracting opportunities not only at Caltrans, but other local agencies. I will list the items Caltrans has provided a no or poor oversight of Federal Department of Transportation (DOT) Grant Programs.

1. Title VI of the Civil Rights Act of 1964
2. 49 CFR Part 26 — PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS
  - a. To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs.
  - b. To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts.

(b) (6)

(b) (6)

- c. To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law.
  - d. To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs.
  - e. To help remove barriers to the participation of DBEs in DOT-assisted contracts.
  - f. To promote the use of DBEs in all types of federally assisted contracts and procurement activities conducted by recipients.
  - g. To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
  - h. To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.
3. 49 CFR §26.37 - Prompt Payment
  4. 49 CFR §26.39 - Fostering small business participation.
  5. Poor oversight of firms that are certified Disadvantaged Business Enterprises in California. I can provide a list of companies if needed.

I have attached several documents supporting my allegations for your review. If you have any questions regarding this matter or need additional information, please feel free to contact me by phone at (b) (6)

Thank you for your time and consideration.

Sincerely,

(b) (6)

Enclosures:  
Attachment A-C  
Attachment 1 – 18

(b) (6)

**DEPARTMENT OF TRANSPORTATION**

OFFICE OF CIVIL RIGHTS  
1823 14<sup>TH</sup> STREET, MS-79  
SACRAMENTO, CA 95811  
PHONE (916) 324-1700  
FAX (916) 324-1862  
TTY 711  
www.dot.ca.gov



*Making Conservation  
a California Way of Life.*

October 29, 2020

Federal Highway Administration  
California Division  
Attn: Scott Carson, Civil Rights Program Specialist  
650 Capitol Mall, Suite 4-100  
Sacramento, CA 95814

Dear Mr. Carson:

The Caltrans Office of Civil Rights (OCR), Title VI Branch received a complaint from (b) (6), alleging discrimination on the basis of race, color, or national origin by Caltrans during the selection process for several Caltrans Architectural & Engineering (A&E) contracts that contain Federal-Aid funds.

Please see the document provided by the complainant.

If you have any questions, please do not hesitate to contact me at the phone number listed below.

Sincerely,

A handwritten signature in cursive script that reads "Glenda M. Collins".

Glenda M. Collins  
Title VI Branch Manager  
Office of Civil Rights  
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## Tran, Loi P@DOT

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**From:** (b) (6)  
**Sent:** Wednesday, October 21, 2020 3:24 PM  
**To:** David.Prizmich@dot.ca.gov; Ochoco, Aaron B@DOT; Collins, Glenda@DOT; Title VI@DOT  
**Cc:** Omishakin, Toks@DOT; Davis, James E@DOT; Kimberly.Ellis-Erickson@dot.ca.gov; Steve.Keck@dot.ca.gov; Craft, Rhonda@DOT; Michael.Beauchamp@dot.ca.gov; Guirado, Rebecca R@DOT; Kevin; Rob.Gunn@dot.ca.gov; Davis, James E@DOT  
**Subject:** Title VI of the Civil Rights Act of 1964 Discrimination on Caltrans A&E contracts.

**EXTERNAL EMAIL. Links/attachments may not be safe.**

On (b) (6) we had a debriefing on Contract (b) (6). The purpose of a debriefing is to provide a Consultant with information about the interview, how they may improve their SOQ and be more competitive in the future. (b) (6) will never obtain a Caltrans contract if the current Caltrans staff is involved in the Consultant selection process. I am asking Caltrans to review the score sheets with the SOQ's for this contract. I am available to present both (Selected Consultant and (b) (6)) Statements of Qualification to your staff and go over how (b) (6) is better qualified for this Contract.

I received a call from District 06 regarding a Surveying Contract and why we did not submit our SOQ on this particular contract. It appears only a few consultants submitted their SOQ. I informed her, (b) (6) was not prepared to spend over \$20,000 as an exercise for not getting selected. The Consultant selection process is broken, and it needs fixing as it will save the State of California millions of dollars.

I approached you at a Caltrans Small Business Meeting in 2018 to express my concerns on the selection of a fraudulent Consultant on District 08 Right of Way Engineering Contract No. 08A2871. At that time, I was letting you know I was filing a Title VI complaint with the Federal Highway Administration. I did not end up filing the complaint. In June 2020, the contract was renewed as Contract (b) (6). I knew (b) (6) would get short listed but not selected. In July, another consultant was selected over (b) (6) for this contract. (b) (6) has been working on the California High Speed Rail project providing Right of Way Engineering services for the past 6 years.

(b) (6) filed a protest with DPAC in September 2020. Caltrans DPAC rejected the claim as not being submitted in time. The rule on submission of a claim is a Catch 22 scenario. In order to protest the selection of the most highly qualified firm, a prospective Consultant must file a protest within 7 business days after the selection of the most highly qualified firm and include a written statement of the grounds, legal authority and facts in support of the protest. To obtain facts to support the protest, a prospective Consultant must wait until after contract execution with the selected Consultant in order to obtain a copy of their SOQ. The timeline from Consultant Selection to Negotiations to Contract Execution consists of up to 4 business days from Consultant selection to submit a complete financial document package, a negotiation meeting of up to 7 calendar days after submission of a complete financial documents package, plus additional days from accepted negotiations to final contract execution. Based off of this timeline, it is not feasible for a prospective Consultant to obtain a copy of the Selected Consultant's SOQ to use as supporting evidence and meet the time frame to submit a protest regarding selection of most highly qualified firm.

I would like to give you the information on how District 08 selects a nonqualified consultant over a qualified consultant on a Professional Service contract for Caltrans District 08 Right of Way Engineering.

(b) (6) was the most qualified Consultant who submitted on this SOQ.

1. **Selected Consultant** – Submitted a fraudulent Statement of Qualifications – Violation of State & Federal Law. The main project in the selected consultant SOQ is Caltrans 08A2868. This contract is a field surveying contract

and not a Right of Way Engineering Contract. The ranking sheet form ADM2027 does not show this as a weakness for the selected consultant on the resumes.

2. **Selected Contract Manager** – Does not have the five years of experience as a Contract Manger for similar Right of Way Engineering Service contracts as required in the Request for Qualifications – Violation of State Law
3. **Contract Manager** – Does not have the Right of Way Engineering experience performing mapping and legal description. – Violation of State Contract Code
4. **Task Order Manager** - Does not have the Right of Way Engineering experience performing mapping and legal description. – Violation of State Contract Code
5. **Project staffing** for this contract required:
  - a. 1-2 Project Surveyors
  - b. 1-3 Survey Assistants
  - c. 1-3 Survey Technicians

The selected Consultant submitted:

1. **Project Surveyors** - 5 Licensed Land Surveyors.
2. **Survey Assistants** – 3 Licensed Land Surveyors, **No Land Surveyor-In-Training (LSIT) as the RFQ required.** For an Licensed Land Surveyor assigned as Survey Assistant, Caltrans will be paying \$140.09 to \$159.52 per hour to each of the Licensed Land Surveyor and not paying true Survey Assistant wages of \$99 to \$106 per hour. That is about \$40 to \$60 more per hour times 3. . This is a high cost for a Survey Assistant. The three LS's would not know how to operate Civil3d cadd software on the project or Caltrans Right of Way Mapping project..
3. **Survey Technicians** – 1 Land Surveyor-In-Training (LSIT) and 2 Survey Technicians

(b) (6) submitted:

1. **Contract Manager** – Professional Licensed Civil Engineer and Licensed Land Surveyor with 33 years as a Contract Manager as **RFQ required.**
2. **Project Surveyor** – 3 Licensed Land Surveyors with one also being a Professional Licensed Civil Engineer. In addition, (b) (6) had submitted the (b) (6).
3. **Survey Assistant** – 5 Licensed Land Surveyor-In-Training as the **RFQ required.**
4. **Survey Technicians** – 2 Licensed Land Surveyor-In-Training and 2 Engineer-In-Training.

I would like for Caltrans or your office to perform an audit to verify that the selected Consulnt was indeed the most qualified as required by California Law.

In reviewing form ADM 2027 & 2028, the Caltrans Reviewer was very critical of (b) (6) SOQ and very linient with the selected Consulnt's SOQ. In the selected Consulnt's SOQ, various resumes (see staff names below) listed Caltrans Project 08A2868 which is Land Surveying Services and not Right of Way Engineering contract.

- Sean Smith
- Cliff Simental
- William Estapa
- Jeremy Evans
- Jesus Ulloa
- Angel Perez
- Christian Zamora
- Bernard Bingwen Xu

Furthermore, these resumes listed Right of Way Surveys and Mapping and some acquisition documents as being part of Contract 08A2868. Contract (b) (6) did not have a field surveying in the scope of services.

I will be sending (b) (6) formal Title VI complaint to the Federal Highway Administration this week. I will also submit (b) (6) complaint to the Federal Highway Administration, Federal Department of Justice, California Governors Office; California Auditor; California Attorney General; Caltrans Director - Toms Omishakin; Caltrans Chief Deputy Director - James E. Davis; Acting Chief of Staff - Kimberly Ellis-Erickson; Deputy Director of Finance/Chief Financial Officer – Steve Keck; Division Chief of Right of Way and Land Surveys - Kimberly Ellis-Erickson; Independent Office of Audits and Investigation - Rhonda Craft; District 08 Director - Michael Beauchamp; District 08 District Deputy Director Right of Way – Rebecca Guirado; District 08 Deputy Director Administration - Kevin Strough; 40<sup>th</sup> District Assembly member - James C. Ramos; 47<sup>th</sup> Assembly Member – Eloise Gomez Reyes; District 20 State Senator - Connie M. Leyva; and District 23 State Senator - Mike Morrell.

I am not letting this pass as on other Caltrans A&E contracts (b) (6) has submitted on. Title VI of the Civil Rights Act of 1963 prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives Federal funds or other Federal financial assistance. Caltrans is in violation of Title VI for discrimination.

Let me know if Caltrans is prepared to get the true facts on District 08 discrimination.

(b) (6)