



# Construction Policy Bulletin

## CPB 09-3 Race-Conscious/Race-Neutral Disadvantaged Business Enterprise Program

References: *Construction Manual* Section 8-3, "Disadvantaged Business"  
*Construction Manual* Section 8-301C, "Substitution Process"  
Code of Federal Regulations Title 49, Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs"  
Contract Special Provisions Section 2-1.02B, "UDBE Commitment Submittal"  
Contract Special Provisions Section 5-1.086, "Performance of UDBEs"

Effective Date: April 2, 2009

Approved:

A handwritten signature in black ink, appearing to read 'Mark Leja', written over a horizontal line.

MARK LEJA  
Chief  
Division of Construction

Approval Date: April 1, 2009

## Background

The Department of Transportation (Caltrans) encourages the use of Disadvantaged Business Enterprise (DBE) contractors on its federal-aid contracts. Before May 2006, Caltrans maintained a wholly race-conscious DBE program in which specific DBE contract goals were established as a condition of contract award. A 2005 Ninth Circuit Court of Appeals decision (*Western States Paving Co. vs. Washington State Department of Transportation*) required documentary evidence of discrimination in the transportation contracting industry as a condition of implementing a race-conscious DBE program. In May 2006, as a result of the decision, Caltrans implemented a wholly race-neutral DBE program that does not establish specific DBE goals as a condition of contract award. The race-neutral DBE program supports all small businesses.

Caltrans conducted a study of the use of available DBEs on its transportation projects in an effort to establish whether disparity existed in the use of one or more particular DBE type over another. The study indicated that four specific groups in the DBE community were not obtaining work in proportion to their availability. These groups are defined as underutilized disadvantaged businesses or UDBEs. A UDBE is a firm that meets the definition of a DBE as specified in Title 49 Code of Federal Regulations, Part 26 (49CFR26) and is in one of the following underutilized disadvantaged groups: Black American, Asian-Pacific American, Women, and Native American. To encourage the use of the four targeted groups, Caltrans applied for and received approval from the Federal Highway Administration and the U.S. Department of Transportation for a mixed component, race-conscious and race-neutral, DBE program. The statewide 2008/2009 goal for Caltrans is a total of 13.5 percent of which 6.75 percent will be for race-conscious UDBE participation and 6.75 percent will be for race-neutral DBE participation. Caltrans' goal can change yearly, while the proportion between race-conscious and race-neutral can change throughout the year.

Effective February 27, 2009, Caltrans implemented the race-conscious component of the DBE program. Federal-aid contracts will now contain varying percentages of UDBE participation goals that successful bidders will be required to meet or, alternatively, perform a good-faith effort to meet as a condition of award of the contract. Only UDBEs will count toward the contract participation goal.

Under the race-neutral component of the program, Caltrans will continue to encourage the use of DBEs on its projects. Caltrans will not set race-neutral DBE contract goals, but all DBEs used on the project will be counted toward the statewide participation goal.

### **Existing Procedure**

Under the race-neutral DBE program, contracts do not include a DBE commitment goal, although there is a 10 percent aspirational goal. Successful bidders are required to submit the "CALTRANS Bidder-DBE Information" form when returning the approved contract. Proof of a good faith effort is not required if a prime contractor does not use a DBE. When a DBE is used, a separate substitution process is not required. Contractors must submit form CEM-2402(F), "Final Report-Utilization of Disadvantaged Business Enterprises (DBE), First-Tier Subcontractors," and form CEM-2403(F), "Disadvantaged Business Enterprises (DBE) Certification Status Change," on all contracts with DBE participation. To be counted for participation, all DBEs used on projects must perform a commercially useful function.

### **New Procedure**

Construction Policy Directive 06-5 is rescinded, and Construction Policy Bulletin 06-7 is revised and replaced in its entirety by this CPB 09-3.

For all federal-aid contracts, bidders will be required to submit a "CALTRANS Bidder-DBE Information" form listing the DBEs participating in the contract work. In addition, for those contracts with UDBE goals, bidders will be required to submit a "CALTRANS Bidder-UDBE Commitment" form listing the UDBEs participating in the contract work. Using the information contained in these forms, resident engineers and inspectors monitor the work to ensure that the listed UDBEs perform the items of work specified at the time of bid opening and that no improper substitutions occur. If a prime contractor does not appear to be meeting the UDBE commitment, the resident engineer must provide the contractor with written notice of the apparent failure to meet the commitment. If the contractor fails to comply with the written notice, the dollar value of the proposed UDBE participation to date is withheld from the next progress estimate. In addition, resident engineers and inspectors must ensure that each UDBE and DBE is performing a commercially useful function.

### **UDBE Substitutions**

Prime contractors must submit requests for substitution of a listed UDBE in writing to the resident engineer. The request must cite one of the seven reasons outlined in Section 5-1.086, "Performance of UDBEs," of the special provisions. The prime contractor is required to replace the listed UDBE with another certified UDBE or perform a good-faith effort to do so to the extent needed to meet the contract goal. A good-faith effort requires that the contractor address the eight information and supporting document items identified in the special provisions under "Disadvantaged Business Enterprises." The prime contractor's good-faith effort must be reviewed and approved by the district construction division

chief before approval of a substitution request. If the prime contractor fails to conduct a good-faith effort to replace a listed UDBE with another UDBE, the substitution request must be denied.

When resident engineers receive a request for substitution, they must provide the listed UDBE with written notice of the prime contractor's request to substitute. The written notice must allow the listed UDBE at least five days to object to the substitution. If the UDBE objects and provides a timely response, the district must conduct a hearing on the substitution request. The prime contractor and UDBE must be provided with at least five days' written notice of the scheduled hearing. If the UDBE does not object to the substitution or does not respond within the five-day timeframe, the resident engineer must give the prime contractor written notice of the substitution approval. For approval of the substitution, the resident engineer must complete form CEM-2401, "Substitution Report for Underutilized Disadvantaged Business Enterprise/Disadvantaged Business Enterprise."

If the prime contractor replaces a listed UDBE without approval from the resident engineer, payment for the item(s) of work committed to the UDBE must be withheld from the next progress payment. The resident engineer must send the prime contractor written notice of the improper substitution and payment withhold. If the UDBE is also a listed subcontractor pursuant to the Subletting and Subcontracting Fair Practices Act (the Act), the substitution process must comply with Sections 4100-4113 of the Public Contract Code and Section 3-801C (5), "Hearing Process for Substitution Violations," of the *Construction Manual*. If found in violation of the Act, the hearing officer may also assess the prime contractor a penalty of up to 10 percent of the subcontract amount.

If the contractor's UDBE attainment meets or exceeds the contract goal, the withheld contract funds should be returned at the time the proposed final estimate is prepared. If the contractor's UDBE attainment falls short of the contract goal, only the amount of the withheld funds necessary to meet the contract goal is permanently withheld. Monies in excess of the contract goal must be returned to the contractor. Any assessed penalties are not returned.

### **DBE Substitutions**

Under the race-neutral component of the DBE program, no separate substitution process is required if the prime contractor chooses not to use a listed DBE. However, if that DBE is a listed subcontractor pursuant to the Act, the substitution process must comply with Sections 4100-4113 of the Public Contract Code and Section 3-801C, "The Subletting and Subcontracting Fair Practices Act," of the *Construction Manual*. The contractor notifies the resident engineer in writing of any changes of its anticipated DBE participation before commencement of the DBE's work.

### **Commercially Useful Function Assessment**

A DBE performs a commercially useful function when it is responsible for execution of the work on the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. These responsibilities include material and supply price negotiating, installation, and payment. To make the determination, the resident engineer evaluates whether the amount that the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work. The resident engineer also evaluates the amount of work subcontracted, industry practices, and other relevant factors. Consult the district labor compliance officer for assistance in conducting an evaluation. A DBE whose role is limited to transferring funds, (a "pass-through") is not performing a commercially useful function.

### **Reporting Requirements**

Caltrans will require submittal of form CEM-2402(F), "Final Report—Utilization of Disadvantaged Business Enterprises (DBE), First-Tier Subcontractors," and form CEM-2403(F), "Disadvantaged Business Enterprises (DBE) Certification Status Change," on all federal-aid contracts. Caltrans will also continue to require submittal of form CEM-2404(F), "Monthly UDBE Trucking Verification," on contracts with UDBE trucking commitments.

CEM-2401, CEM 2402(F), and CEM 2404(F) have been revised. Copies of all the forms are attached to this bulletin and are available online at

<http://www.dot.ca.gov/hq/construc/forms.htm>

If you have questions regarding this bulletin, please contact Angela Shell, Division of Construction, at [angela\\_shell@dot.ca.gov](mailto:angela_shell@dot.ca.gov) or (916) 654-3501.

#### Attachments:

CEM-2401, "Substitution Report for Underutilized Disadvantaged Business Enterprise/  
Disadvantaged Business Enterprise"

CEM-2402(F), "Final Report—Utilization of Disadvantaged Business Enterprises (DBE), First-Tier Subcontractors"

CEM-2403(F), "Disadvantaged Business Enterprises (DBE) Certification Status Change"

CEM-2404(F), "Monthly UDBE Trucking Verification"