

**DISADVANTAGED BUSINESS ENTERPRISE  
(DBE)**

**RACE-NEUTRAL**

**IMPLEMENTATION AGREEMENT**

**FOR  
THE CITY OF MODESTO**

**FISCAL YEAR 2008 - 2009**

## **DISADVANTAGED BUSINESS ENTERPRISE (DBE) RACE-NEUTRAL IMPLEMENTATION AGREEMENT**

For the City of Modesto, hereinafter referred to as “RECIPIENT.”

### **I Definition of Terms**

The terms used in this agreement have the meanings defined in 49 CFR §26.5.

### **II Objective/Policy Statement (§26/1. 26/23)**

The RECIPIENT intends to receive federal financial assistance from the U.S. Department of Transportation (DOT) through the California Department of Transportation (Caltrans), and as a condition of receiving this assistance, the RECIPIENT will sign the California Department of Transportation’s Disadvantaged Business Enterprise Implementation Agreement (hereinafter referred to as Agreement). The RECIPIENT agrees to implement the State of California, Department of Transportation Disadvantaged Business Enterprise (DBE) Program Plan (hereinafter referred to as the DBE Program Plan) as it pertains to local agencies. The DBE Program Plan is based on U.S. Department of Transportation (DOT), 49 CFR, Part 26 requirements.

It is the policy of the RECIPIENT to ensure that DBEs, as defined in Part 26, have an equal opportunity to receive and participate in DOT-assisted contracts. It is also their policy:

- To ensure nondiscrimination in the award and administration of DOT-assisted contracts.
- To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts.
- To ensure that their annual overall DBE participation percentage is narrowly tailored, in accordance with applicable law.
- To ensure that only firms that fully meet 49 CFR, Part 26 eligibility standards are permitted to participate as DBEs.
- To help remove barriers to the participation of DBEs in DOT-assisted contracts.
- To assist the development of firms that can compete successfully in the market place outside the DBE Program.

Isaac Khoshaba, Senior Civil Engineering Assistant, is delegated as the DBE Liaison Officer. In that capacity, Isaac Khoshaba is responsible for implementing all aspects of the DBE Program. Implementation of the DBE Program is accorded the same priority as compliance with all other legal obligations incurred by the City of Modesto in its financial assistance agreements with the California Department of Transportation (Caltrans).

**III Nondiscrimination (§26.7)**

RECIPIENT will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR, Part 26 on the basis of race, color, sex, or national origin. In administering the local agency components of the DBE Program Plan, the RECIPIENT will not, directly, or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the DBE Program Plan with respect to individuals of a particular race, color, sex, or national origin.

**IV Annual DBE Submittal Form (§26.21)**

The RECIPIENT will provide to Caltrans' District Local Assistance Engineer (DLAE) a completed DBE Annual Submittal Form by June 1 of each year for the following Federal Fiscal Year (FFY). This form includes an Annual Anticipated DBE Participation Level (AADPL), methodology for establishing the AADPL, the name, telephone number, and electronic mailing address of the designated DBELO, and the choice of Prompt Pay Provision to be used by the RECIPIENT for the following FFY.

**V Race-Neutral Means of Meeting the Annual DBE Goal (§26.51)**

RECIPIENT will assist Caltrans to achieve its Overall Statewide DBE Goal by race neutral means that may include, but are not limited to the following:

1. Advertising solicitations, scheduling bidding periods and opening times, and packaging quantities, specifications, and delivery schedules in ways that facilitate DBE and other small business participation.
2. Providing assistance to DBE and small businesses in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, and providing services to help DBEs and other small businesses obtain bonding and financing).
3. Providing technical assistance and other services to DBE and small businesses.
4. Providing information and communication programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs and other small businesses on recipient mailing lists of bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors including DBE's and small businesses; providing the information in languages other than English, where appropriate).

5. Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses.
6. Providing services to help DBEs and other small businesses improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency.
7. Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has been historically low.
8. Assisting DBEs and other small businesses to develop their capability to utilize emerging technology and conduct business through electronic media.
9. Implementing or developing a mentor-protégé program.

#### **VI Quotas (§26.43)**

RECIPIENT will not use quotas or set-asides in any way in the administration of the local agency component of the DBE Program Plan.

#### **VII DBE Liaison Officer (DBELO) (§26.25)**

RECIPIENT has designated a DBE Liaison Officer. The DBELO is responsible for implementing the DBE Program Plan, as it pertains to the RECIPIENT, and ensures that the RECIPIENT is fully and properly advised concerning DBE Program Plan matters. The DBELO has direct, independent access to the City Manager of the RECIPIENT concerning DBE Program Plan matters. The DBELO will work independently on DBE issues, but will have available to him/her as many part-time assistants as necessary to meet the guidelines of the Program Plan. The name, address, telephone number, electronic mail address, and an organization chart displaying the DBELO's position in the organization are found in Attachment 1 to this Agreement. This information will be updated annually and included on the DBE Annual Submittal Form.

The DBELO is responsible for developing, implementing, and monitoring the RECIPIENT's requirements of the DBE Program Plan in coordination with other appropriate officials. Duties and responsibilities include the following:

1. Gathers and reports statistical data and other information as required.
2. Reviews third party contracts and purchase requisitions for compliance with this program.
3. Works with all departments to determine projected Annual Anticipated DBE Participation Level.
4. Ensures that bid notices and requests for proposals are made available to DBEs in a timely manner.
5. Analyzes DBE participation and identifies ways to encourage participation through race-neutral means.

6. Participates in pre-bid meetings.
7. Advises the CEO/governing body on DBE matters and DBE race-neutral issues.
8. Provides DBEs with information and recommends sources to assist in preparing bids, obtaining bonding and insurance.
9. Plans and participates in DBE training seminars.
10. Provides outreach to DBEs and community organizations to fully advise them of contracting opportunities.

### **VIII Federal Financial Assistance Agreement Assurance (§26.13)**

RECIPIENT will sign the following assurance, applicable to and to be included in all DOT-assisted contracts and their administration as part of the program supplement agreement for each project:

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 of 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 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.).

### **IX DBE Financial Institutions (§26.27)**

It is the policy of the RECIPIENT to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions, and to encourage prime contractors on DOT-assisted contracts to make use of these institutions.

Information on the availability of such institutions can be obtained from the DBELO. The Caltrans' Disadvantaged Business Enterprise Program may offer assistance to the DBELO.

### **X Directory (§26.31)**

RECIPIENT will refer interested persons to the Unified Certification Program DBE directory available from the Caltrans Disadvantaged Business Enterprise Program's website at [www.dot.ca.gov/hq/bep](http://www.dot.ca.gov/hq/bep).

## **XI Required Contract Clauses (§26.13, 26.29)**

RECIPIENT ensures that the following clauses or equivalent will be included in each DOT-assisted prime contract:

### **A. Contract Assurance**

The contractor 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 recipient deems appropriate.

### **B. Prompt Payment**

#### Prompt Progress Payment to Subcontractors

A prime contractor or subcontractor shall pay to any subcontractor not later than 10-days of receipt of each progress payment, in accordance with the provision in Section 7108.5 of the California Business and Professions Code concerning prompt payment to subcontractors. The 10-days is applicable unless a longer period is agreed to in writing. Any delay or postponement of payment over 30-days may take place only for good cause and with the agency's prior written approval. Any violation of Section 7108.5 shall subject the violating contractor or subcontractor to the penalties, sanctions, and other remedies of that Section. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies, otherwise available to the contractor or subcontractor in the event of a dispute involving late payment or nonpayment by the contractor, deficient subcontractor performance, and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

#### Prompt Payment of Withheld Funds to Subcontractors

The local agency shall include either (1), (2), or (3) of the following provisions [local agency equivalent will need Caltrans approval] in their federal-aid contracts to ensure prompt and full payment of retainage [withheld funds] to subcontractors in compliance with 49 CFR 26.29.

1. No retainage will be held by the agency from progress payments due to the prime contractor. Prime contractors and subcontractors are prohibited from holding retainage from subcontractors. Any delay or postponement of payment may take place only for good cause and with the agency's prior written approval. Any violation of these provisions shall subject the violating contractor or subcontractor to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business and Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies, otherwise available to the contractor or subcontractor in the event of a dispute involving late payment or nonpayment by the contractor, deficient subcontractor performance, and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

2. No retainage will be held by the agency from progress payments due the prime contractor. Any retainage kept by the prime contractor or by a subcontractor must be paid in full to the earning subcontractor in 30-days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment may take place only for good cause and with the agency's prior written approval. Any violation of these provisions shall subject the violating contractor or subcontractor to the penalties, sanctions, and remedies specified in Section 7108.5 of the California Business and Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies, otherwise available to the contractor or subcontractor in the event of a dispute involving late payment or nonpayment by the contractor, deficient subcontractor performance, and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

3. The agency shall hold retainage from the prime contractor and shall make prompt and regular incremental acceptances of portions, as determined by the agency of the contract work and pay retainage to the prime contractor based on these acceptances. The prime contractor or subcontractor shall return all monies withheld in retention from all subcontractors within 30-days after receiving payment for work satisfactorily completed and accepted including incremental acceptances of portions of the contract work by the agency. Any delay or postponement of payment may take place only for good cause and with the agency's prior written approval. Any violation of these provisions shall subject the violating prime contractor to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies, otherwise available to the contractor or subcontractor in the event of: a dispute involving late payment or nonpayment by the contractor; deficient subcontractor performance; and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

#### **XIV Local Assistance Procedures Manual**

The RECIPIENT will advertise, award, and administer DOT-assisted contracts in accordance with the most current published Local Assistance Procedures Manual (LAPM).

#### **XV Bidders List (§26.11)**

The RECIPIENT will create and maintain a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on its DOT-assisted contracts. The bidders list will include the name, address, DBE/non-DBE status, age, and annual gross receipts of the firms.

**XVI Reporting to the DLAE**

RECIPIENT will promptly submit a copy of the Local Agency Bidder-DBE Information (Exhibit 15-G or Exhibit 10-O of the LAPM) to the DLAE at the time of execution of consultant or construction contract award.

RECIPIENT will promptly submit a copy of the Final Utilization of DBE participation to the DLAE using Exhibit 17-F of the LAPM immediately upon completion of the contract for each consultant or construction contract.

**XVII Certification [§26.83(a)]**

RECIPIENT ensures that only DBE firms currently certified by the California Unified Certification Program will participate as DBEs on DOT-assisted contracts.

**XVIII Confidentiality**

RECIPIENT will safeguard from disclosure to third parties, information that may reasonably be regarded as confidential business information consistent with Federal, State, and local laws.

\_\_\_\_\_ Date: \_\_\_\_\_ Telephone Number: (209) 577.5224  
Greg Nyhoff, City Manager

This California Department of Transportation's Disadvantaged Business Enterprise Program Plan Implementation Agreement is accepted by:

\_\_\_\_\_ Date: \_\_\_\_\_  
Sinaren Pheng, District X DLAE

Distribution (1) Original – DLAE  
(2) Copy-local agency after signing by DLAE

DBE Race-neutral Implementation Agreement for Local Agencies (05/01/06)

**Exhibit 9-B Local Agency DBE Annual Submittal Form**

TO: CALTRANS DISTRICT 10  
District Local Assistance Engineer

The amount of the Annual Anticipated DBE Participation Level (AADPL) and methodology are presented herein, in accordance with Title 49 of the Code of Federal Regulations, Part 26, and the State of California, Department of Transportation Disadvantaged Business Enterprise (DBE) Program Plan.

The City of Modesto, submits our AADPL information. We have established an AADPL of 10.56% for the Federal Fiscal Year 08/09, beginning on October 1, 2008 and ending on September 30, 2009.

Methodology

1. DOT-Assisted Contracting Program for FFY 2008-09

The following table summarizes the types of Contractors Available information, plus gives the estimated dollar value and percent of this year's (2008-09 Federal Fiscal Year) work-by-work category.

Table A

Work Category	DBE Contractors Available	DBE plus Non-DBE Contractors Available*	% DBE Contractors Available	Estimated Dollar Value	% of Federal Funding By Work Category
Consultants	12	112	11.00%	\$10,273,886	8.5 %
Road Construction	19	274	6.93%	\$ 1,549,169	15%
			Total	\$11,823,055	100%

\*The SIC code information does not adequately distinguish between the various trucking and hauling firms to isolate those involved in road and bridge construction, so we have eliminated the DBE trucking firms to eliminate any imbalance in either direction in our base figure equation.

2. Goal Methodology

Step 1: Determination of a Base Figure (26.45)

The DBE percent goal is that it is the number of Disadvantaged Business Enterprise (DBE) firms available to do projects that are funded by the Federal Highway Administration divided by the total number of firms available to do projects funded by the Federal Highway Administration, times 100%.

$$\text{DBE Percent Goal} = \frac{\text{DBE firms available}}{\text{Total number of firms available}} \times 100\%$$

The percentage of DBEs varies with the type of work performed by the firm – the ratio of DBE plumbers to the total number of plumbers is apt to be different than the ratio of DBE traffic consultants to the total number of traffic consultants. We broke out three types of projects – Consultant, Road Construction, and Bridge Construction – and calculated DBE percent goals for each type. The City’s annual goal is the sum of the DBE percent goal for each type of project times the percent of work for each type of project.

**DBE Firms Available**

The California Department of Transportation (Caltrans) maintains a list of certified minority contractors. The Caltrans DBE Directory contains some 5,000 entries – one for each firm for each type of work they do, and for how they were registered. Thus a firm called AAA Inc., that does concrete work and asphalt work and is registered both as a Minority Business Enterprise (MBE) and as a Woman owned Business Enterprise (WBE) would have the following 4 entries:

<u>Program</u>	<u>Work Type</u>	<u>Firm</u>	<u>City</u>	<u>Zip</u>
DBE	CONCRETE WORK	AAA Inc.	MODESTO	95355
DBE	ASPHALT WORK	AAA Inc.	MODESTO	95355
WBE	CONCRETE WORK	AAA Inc.	MODESTO	95355
WBE	ASPHALT WORK	AAA Inc.	MODESTO	95355

Entries meeting the following criteria were extracted from the directory and reported in Attachment 3:

- Program Type – DBE (only the DBE Program is recognized by the Federal Government)
- Work Type – relevant to consulting, road construction, or bridge construction
- Zip – 952XX or 953XX

The number of firms doing consulting, road construction, and bridge construction were manually tallied as shown in Attachment 3. In Stanislaus County, Merced County, San Joaquin County, Tuolumne County, and Calaveras County there are 12 firms listed as consultants, 19 firms listed as doing road construction, and 21 listed as doing bridge construction.

**Total Number of Firms Available**

This information was derived from the US Census Bureau’s Business Pattern Database. It is shown in Attachment 4 and should be self-explanatory. The Census Bureau last updated this information in 2002.

**Percent Work for Each Type of Project**

Projects proposed for Federal funding for the 2005-2006 fiscal year have been submitted to StanCOG. In Attachment 2, the amount of federal funding is estimated for each line and assigned to either the consultant, the road construction, or the bridge consultant column. The percent work for each type of project is calculated as the total federal work for each type of project divided by the total amount of federal work in the budget year.

### Base Calculation of the Annual Goal

The base calculation of the overall annual program proceeds as shown below:

Base Figure = [Percent work by consultants x (DBE consultants/Total Consultants) ] + [Percent work for road construction x (DBE road contractors/Total road contractors)] + [Percent work for bridge construction x (DBE bridge contractors/Total bridge contractors)].

Base Figure = [0.85\*12/112+0.15\*19/274+.000\*21/399]

Base Figure = [0.85\*0.112+0.15\*0.0693+.000\*0.526]

Base Figure = 0.014+0.06+0=10.15% or 10.56%

(In Modesto, 85% of the Federal highway funds will go to consultants, 15% to road construction this year.)

### Step 2: Adjusting the Base Figure

Upon establishing the Base Figure, Modesto reviewed and assessed other known relevant evidence to determine what adjustments, if any, were needed to narrowly tailor the Base Figure to Modesto's marketplace. Factors considered in determining Modesto's DBE participation included the following:

We previously relied on data generated by Stanislaus County as part of their 2000-01 DBE goal development. They maintained records of previous DBE participation over a large variety of federally funded projects and over a multi-year basis. This analysis produced a DBE goal of 14.0% for 2007-2008 and 10.56% for 2008-2009 for Modesto.

Based on Caltrans' DBE Adoption, the Advisory Goal is 10.56%. Caltrans' DBE adopted program is available at the following web site: [www.dot.ca.gov/dist10](http://www.dot.ca.gov/dist10).

### 3. DBE Availability Advisory

The DBE Availability Advisory is 10.56%, utilizing race-neutral methods, including to make efforts to assure that bidding and contract requirements facilitate participation by DBEs and other small businesses; unbundling large contracts to make them more accessible to small businesses; encouraging prime contractors to subcontract portions of the work that they might otherwise perform themselves; and providing technical assistance, and other support services to facilitate consideration of DBEs and other small businesses.

4. Public Participation in Setting Overall Annual DBE Goals

In conformance with Public Participation Regulatory Requirements of 49 CFR Part 26.45 and Caltrans Local Assistance Procedures Manual (LAPM) Chapter 9, this goal analysis has been reviewed with minority recruitment centers, community organizations, and other U.S. DOT recipients. These entities are knowledgeable about the availability of disadvantaged and non-disadvantaged businesses and the effects of discrimination on contracting opportunities for DBEs within Modesto's market place.

Disadvantaged Business Enterprise Liaison Office (DBELO)

The RECIPIENT has designated the following individual as the DBE Liaison Officer:

Mr. Isaac Khoshaba  
City of Modesto  
Public Works Department-Traffic Engineering & Operations  
1010 10<sup>th</sup> Street  
Modesto, CA 95354  
Telephone (209) 571-5581  
Fax (209) 571-5575  
e-mail [ikhoshaba@modestogov.com](mailto:ikhoshaba@modestogov.com).

Prompt Pay

Federal regulation (49CFR 26.29) requires one of three methods be used in federal aid contracts to ensure prompt and full payment of any retainage, kept by the prime contractor or subcontractor, to a subcontractor.

Submitted by:

\_\_\_\_\_  
Greg Nyhoff, City Manager

\_\_\_\_\_  
Date

\_\_\_\_\_  
Sinaren Pheng, District X DLAE

\_\_\_\_\_  
Date

Distribution (1) Original – DLAE  
(2) Copy-local agency after signing by DLAE

DBE Annual Submittal Form (05/01/06)

(Attachment)

**Prompt Payment of Withheld Funds to Subcontractors**

Federal regulation (49 CFR 26.29) requires one of the following three methods be used in federal-aid contracts to ensure prompt and full payment of any retainage kept by the prime contractor or subcontractor to a subcontractor.

*Please check the box of the method chosen by the local agency to ensure prompt and full payment of any retainage.*

- No retainage will be held by the agency from progress payments due to the prime contractor. Prime contractors and subcontractors are prohibited from holding retainage from subcontractors. Any delay or postponement of payment may take place only for good cause and with the agency's prior written approval. Any violation of these provisions shall subject the violating contractor or subcontractor to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business and Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies, otherwise available to the contractor or subcontractor in the event of a dispute involving late payment or nonpayment by the contractor, deficient subcontractor performance, and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors
- No retainage will be held by the agency from progress payments due the prime contractor. Any retainage kept by the prime contractor or by a subcontractor must be paid in full to the earning subcontractor in 30-days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment may take place only for good cause and with the agency's prior written approval. Any violation of these provisions shall subject the violating contractor or subcontractor to the penalties, sanctions, and remedies specified in Section 7108.5 of the California Business and Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies, otherwise available to the contractor or subcontractor in the event of a dispute involving late payment or nonpayment by the contractor, deficient subcontractor performance, and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.
- The agency shall hold retainage from the prime contractor and shall make prompt and regular incremental acceptances of portions, as determined by the agency of the contract work and pay retainage to the prime contractor based on these acceptances. The prime contractor or subcontractor shall return all monies withheld in retention from all subcontractors within 30 days after receiving payment for work satisfactorily completed and accepted including incremental acceptances of portions of the contract work by the agency. Any delay or postponement of payment may take place only for good cause and with the agency's prior written approval. Any violation of these provisions shall subject the violating prime contractor to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise available to the contractor or subcontractor in the event of: a dispute involving late payment or nonpayment by the contractor; deficient subcontractor performance and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.