

**RESOLUTION NO. 4338**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SOLEDAD  
AUTHORIZING THE CITY MANAGER TO ENTER  
INTO A DISADVANTAGED BUSINESS ENTERPRISE (DBE)  
RACE-NEUTRAL IMPLEMENTATION AGREEMENT WITH  
THE STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION**

**WHEREAS**, the Ninth Circuit Court of Appeals, in a decision regarding the Washington State Department of Transportation, determined that sufficient evidence must exist to support the use of race-conscious measures on federal-aid contracts; and

**WHEREAS**, the State of California Department of Transportation (Caltrans) conducted an assessment of its DBE Program, including an extended public comment period, and determined that the use of race-conscious programs and goals could violate the Ninth Circuit ruling, which is the controlling authority for California; and

**WHEREAS**, as of May 1, 2006, Caltrans adopted and began implementing the California Department of Transportation Race-Neutral DBE Program Plan at both the state and local level; and

**WHEREAS**, the Caltrans Race-Neutral DBE Program replaces the existing Caltrans Race-Conscious DBE program; and

**WHEREAS**, local agencies no longer have their own separate DBE programs, but must instead complete a Disadvantaged Business Enterprise Race-Neutral implementation Agreement between the local agency and Caltrans; and

**WHEREAS**, rather than establishing their own DBE goals, local agencies are now required to calculate an Annual Anticipated DBE Participation Level (AADPL) based on factors set forth in the Local Programs Procedures, which revise the Local Assistance Procedures Manual to provide for solely race-neutral program, and to submit the AADPL to Caltrans for the relevant federal funding year; and

**WHEREAS**, in order to comply with the new Caltrans Race-Neutral DBE Program, local agencies must also make certain changes to all federal-aid contracts, including the addition of certain boiler plate revisions for all federal-aid construction contracts, and the inclusion of new exhibits to all federal-aid consultant contracts.

**NOW THEREFORE, BE IT HEREBY RESOLVED** by the City Council of the City of Soledad as follows:

**Section 1.** The City of Soledad hereby adopts its Race-Neutral DBE Program and authorizes the City Manager or her designee to execute the Disadvantaged Business Enterprise Race-Neutral Implementation Agreement.

**Section 2.** The City of Soledad hereby adopts 1% as its Annual Anticipated DBE Participation Level (AADPL) for federal funding year 2008-2009, based on the adopted methodology.

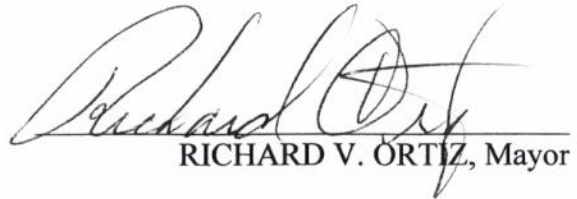
**PASSED AND ADOPTED** by the City Council of the City of Soledad at a regular meeting duly held on the 18<sup>th</sup> day of February 2009, by the following vote:

AYES, and in favor thereof, Councilmembers: Richard J. Perez, Juan Saavedra, Patricia Stephens, Mayor Pro Tem Martha Camacho, Mayor Richard Ortiz

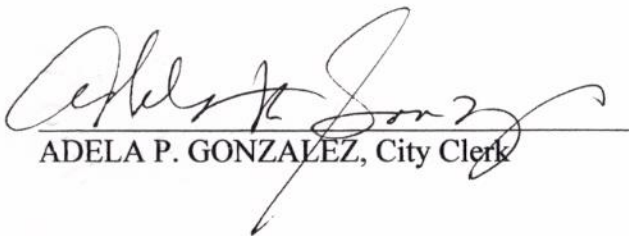
NOES, Councilmembers: None

ABSTAIN, Councilmembers: None

ABSENT, Councilmembers: None

  
RICHARD V. ORTIZ, Mayor

ATTEST:

  
ADELA P. GONZALEZ, City Clerk

**Exhibit 9-A Disadvantaged Business Enterprise Race-Neutral Implementation Agreement**

**CITY OF SOLEDAD**

**DISADVANTAGED BUSINESS ENTERPRISE**

**RACE-NEUTRAL**

**IMPLEMENTATION AGREEMENT**

**FEDERAL FISCAL YEAR 2008/2009**

**October 1, 2008 through September 30, 2009**

**DISADVANTAGED BUSINESS ENTERPRISE  
RACE-NEUTRAL IMPLEMENTATION AGREEMENT**

For the City of Soledad, 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 DBE's 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.

**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 the Caltrans District Local Assistance Engineer (DLAE) a completed *Local Agency DBE Annual Submittal Form* (Exhibit 9-B) 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, phone 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 using race-neutral means of facilitating DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, 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).

Caltrans, through the California Construction Contracting Program (CCCP), is offering free training, counseling and resources to assist small businesses to be successful in bidding and winning Caltrans and local agency construction contracts. The City of Soledad will market this program on their website to small businesses in our area. The website address for the CCCP is <http://www.buildcalifornia.org>.

Race-neutral means include, but are not limited to, the following:

1. Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses, participation (e.g., unbundling large contracts to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces);
2. Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing);
3. Providing technical assistance and other services;
4. Carrying out 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; provision of 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 types 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 historically been low;

8. Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and
9. Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

#### **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. RECIPIENT has assigned Peter Le, P.E., Acting City Engineer, as DBELO. The name, address, telephone number, electronic mail address, and an organization chart displaying the DBELO's position in the organization are found in Attachment "A" 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 DBE's 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 DBE's 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 DBE's 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.). [Language is used verbatim, as it is stated in §26.13(a).]

### **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.

[Language used verbatim, as is stated in §26.13(b).]

#### **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 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.

### **C. MANDATORY PRE-BID MEETINGS**

Following Caltrans instructions, Mandatory Pre-Bid Meetings will be incorporated into construction contracts as another race neutral measure.

#### **XII 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).

#### **XIII 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.

#### **XIV Reporting to the DLAE**

RECIPIENT will promptly submit a copy of the Local Agency Bidder-DBE Information (Exhibit 15-G "Local Agency Bidder-DBE (Construction Contracts) – Information" or Exhibit 10-O "Local Agency Proposer/Bidder-DBE (Consultant Contracts)-Information" 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 "Final Report – Utilization of Disadvantaged Business Enterprises (DBE), First-Tier Subcontractors" of the LAPM immediately upon completion of the contract for each consultant or construction contract.

#### **XV 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.

#### **XVI 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.

By \_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

Peter Le, P.E.  
Acting City Engineer  
City of Soledad

(831) 223-5175  
Phone Number

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

\_\_\_\_\_  
Signature of DLAE

Reinie Jones, DLAE DBE Program  
Caltrans District 5 - Local Assistance

Distribution: (1) Original – DLAE  
(2) Signed copy by the DLAE – Local Agency

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

TO: CALTRANS DISTRICT 5  
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 Soledad submits our AADPL information. We have established an AADPL of 1.00% for the Federal Fiscal Year 2008-09, beginning on October 1, 2008 and ending on September 2009.

Methodology – The City of Soledad utilized the two-step methodology to calculate their DBE goal for FFY 2008-09. The base figure was determined using the following:

- amount of federal funding
- the Caltrans DBE Database Directory of certified firms filtered to represent only those DBE firms within the City's market area counties of Monterey, Santa Clara and Santa Cruz
- the Census Bureau Business Pattern Database using the same geographical market area

See Attachment B, Sections A-D for calculation of the AADPL.

Disadvantaged Business Enterprise Liaison Officer (DBELO)

The City of Soledad has designated Peter Le P.E., Acting City Engineer, as DBELO.

Address:	City of Soledad	Phone:	(831) 223-5175
	248 Main Street	Email:	peter@cityofsoledad.com
	P. O. Box 146	Fax:	(831) 678-3965
	Soledad, CA 93960		

Prompt Pay

As required by Federal Regulation 49 CFR 26.29 whereas one of three prompt payment methods must be selected for use in federal-aid transportation projects, the following Prompt Payment of Withheld Funds to Subcontractors form has been checked to indicate the method chosen by the City of Soledad to ensure prompt and full payment of any retainage.

\_\_\_\_\_  
Signature

Peter Le, P. E., Acting City Engineer  
City of Soledad

\_\_\_\_\_  
Date

(831) 223-5175  
Phone Number

\_\_\_\_\_  
Signature of Caltrans District Local Assistance Engineer [DLAE]

\_\_\_\_\_  
Date

### **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 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.

