

AGREEMENT

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THIS AGREEMENT is made and entered, in duplicate, as of December 15, 2005 for reference purposes only, pursuant to a minute order adopted by the City Council of the City of Long Beach at its meeting on December 13, 2005, by and between FRED DARLAND, an individual, with a place of business at 44850 Raven Lane, Mendocino, CA 95460 ("Consultant"), and the CITY OF LONG BEACH, a municipal corporation ("City").

WHEREAS, the City requires specialized services requiring unique skills to be performed in connection with maintenance of software and web hosting ("Project"); and

WHEREAS, City has selected Consultant in accordance with City's administrative procedures and City has ascertained that Consultant is qualified, licensed, if so required, and experienced in performing such specialized services; and

WHEREAS, City desires to have Consultant perform these services, and Consultant is willing and able to do so on these terms and conditions;

NOW, THEREFORE, in consideration of the mutual terms, covenants, and conditions in this Agreement, the parties agree as follows:

1. SCOPE OF WORK OR SERVICES.

A. Consultant shall furnish specialized services more particularly set forth in Exhibit "A", attached to this Agreement and incorporated by this reference, in accordance with the standards of the profession, and City shall pay for services in the manner described below, not to exceed \$200,000.00, at the rate of \$70.00 per hour.

B. Consultant may select the time and place of performance hereunder provided, however, that access to City documents, records, and the like, if needed by Consultant, shall be available only during City's normal business hours and provided that milestones for performance, if any, are met.

C. Consultant has requested to receive regular payments. City shall pay Consultant in due course of payments following receipt from Consultant and approval by

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City Attorney of Long Beach
333 West Ocean Boulevard
Long Beach, California 90802-4664
Telephone (562) 570-2200

1 City of invoices showing the services or task performed, the time expended (if billing is
2 hourly), and the name of the Project. Consultant shall certify on the invoices that
3 Consultant has performed the services in full conformance with this Agreement and is
4 entitled to receive payment. Each invoice shall be accompanied by a progress report
5 indicating the progress to date of services performed and covered by said invoice,
6 including a brief statement of any Project problems and potential causes of delay in
7 performance, and listing those services that are projected for performance by Consultant
8 during the next invoice cycle. Where billing is done and payment is made on an hourly
9 basis, the parties acknowledge that such arrangement is either customary practice for
10 Consultant's profession, industry, or business, or is necessary to satisfy audit and legal
11 requirements which may arise due to the fact that City is a municipality.

12 D. Consultant represents that Consultant has obtained all necessary
13 information on conditions and circumstances that may affect performance hereunder and
14 has conducted site visits, if necessary.

15 E. **CAUTION:** Consultant shall not begin work until this Agreement has been
16 signed by both parties and until Consultant's evidence of insurance has been delivered to
17 and approved by the City.

18 2. TERM. The term of this Agreement shall commence at midnight on
19 October 1, 2005, and shall terminate at 11:59 p.m. on September 30, 2008, unless sooner
20 terminated as provided in this Agreement, or unless the services to be performed or the
21 Project is completed sooner.

22 3. COORDINATION AND ORGANIZATION. Consultant shall coordinate
23 performance with City's representative, if any, named in Exhibit "B", attached to this
24 Agreement and incorporated by this reference. Consultant shall advise and inform City's
25 representative of the work in progress on the Project in sufficient detail so as to assist
26 City's representative in making presentations and in holding meetings for the exchange of
27 information. City shall furnish to Consultant information or materials, if any, described in
28 Exhibit "C" attached and incorporated by this reference..

1 4. INDEPENDENT CONTRACTOR. In performing services, Consultant is
2 and shall act as an independent contractor and not an employee, representative, or agent
3 of City. Consultant shall have control of Consultant's work and the manner in which it is
4 performed. Consultant shall be free to contract for similar services to be performed for
5 others during this Agreement provided, however, that Consultant acts in accordance with
6 Section 9 and Section 11 of this Agreement. Consultant acknowledges and agrees that
7 a) City will not withhold taxes of any kind from Consultant's compensation, b) City will not
8 secure workers' compensation or pay unemployment insurance to, for or on Consultant's
9 behalf, and c) City will not provide and Consultant is not entitled to any of the usual and
10 customary rights, benefits or privileges of City employees. Consultant expressly warrants
11 that neither Consultant nor any of Consultant's employees or agents shall represent
12 themselves to be employees or agents of City.

13 5. INSURANCE. As a condition precedent to the effectiveness of this
14 Agreement, Consultant shall procure and maintain at Consultant's expense for the duration
15 of this Agreement from insurance companies that are admitted to write insurance in
16 California or from authorized non-admitted insurance companies that have ratings of or
17 equivalent to A:VIII by A.M. Best Company the following insurance:

18 (a) Commercial general liability insurance (equivalent in scope to ISO
19 form CG 00 01 11 85 or CG 00 01 11 88) in an amount not less than One
20 Million Dollars (\$1,000,000) per each occurrence and Two Million
21 Dollars (\$2,000,000) general aggregate. Such coverage shall include but not
22 be limited to broad form contractual liability, cross liability, independent
23 contractors liability, and products and completed operations liability. The
24 City, its officials, employees and agents shall be named as additional
25 insureds by endorsement (on City's endorsement form or on an endorsement
26 equivalent in scope to ISO form CG 20 10 11 85 or CG 20 26 11 85), and
27 this insurance shall contain no special limitations on the scope of protection
28 given to the City, its officials, employees and agents.

1 (b) Workers' Compensation insurance as required by the Labor Code
2 of the State of California and employer's liability insurance in an amount not
3 less than One Million Dollars (\$1,000,000).

4 (c) Professional liability or errors and omissions insurance in an
5 amount not less than One Million Dollars (\$1,000,000) per claim.

6 (d) Commercial automobile liability insurance (equivalent in scope to
7 ISO form CA 00 01 06 92), covering Auto Symbol 1 (Any Auto) in an amount
8 not less than Five Hundred Thousand Dollars (\$500,000) combined single
9 limit per accident.

10 Any self-insurance program, self-insured retention, or deductible must be
11 separately approved in writing by City's Risk Manager or designee and shall protect City,
12 its officials, employees and agents in the same manner and to the same extent as they
13 would have been protected had the policy or policies not contained retention or deductible
14 provisions. Each insurance policy shall be endorsed to state that coverage shall not be
15 reduced, non-renewed, or canceled except after thirty (30) days prior written notice to City,
16 and shall be primary and not contributing to any other insurance or self-insurance
17 maintained by City. Consultant shall notify the City in writing within five (5) days after any
18 insurance required herein has been voided by the insurer or cancelled by the insured. If
19 this coverage is written on a "claims made" basis, it must provide for an extended reporting
20 period of not less than one year, commencing on the date this Agreement expires or is
21 terminated, unless Consultant guarantees that Consultant will provide to the City evidence
22 of uninterrupted, continuing coverage for a period of not less than three (3) years,
23 commencing on the date this Agreement expires or is terminated.

24 Consultant shall require that all contractors and subcontractors which
25 Consultant uses in the performance of services maintain insurance in compliance with this
26 Section unless otherwise agreed in writing by City's Risk Manager or designee.

27 Prior to the start of performance, Consultant shall deliver to City certificates
28 of insurance and required endorsements for approval as to sufficiency and form. In

1 addition, Consultant, shall, within thirty (30) days prior to expiration of the insurance,
2 furnish to City certificates of insurance and endorsements evidencing renewal of such
3 insurance. City reserves the right to require complete certified copies of all policies of
4 Consultant and Consultant's contractors and subcontractors, at any time. Consultant shall
5 make available to City's Risk Manager or designee all books, records and other information
6 relating to the insurance coverage, during normal business hours.

7 Any modification or waiver of these insurance requirements shall only be
8 made with the approval of City's Risk Manager or designee. Not more frequently than
9 once a year, the City's Risk Manager or designee may require that Consultant,
10 Consultant's contractors and subcontractors change the amount, scope or types of
11 coverages if, in his or her sole opinion, the amount, scope, or types of coverages are not
12 adequate.

13 The procuring or existence of insurance shall not be construed or deemed
14 as a limitation on liability relating to Consultant's performance or as full performance of or
15 compliance with the indemnification provisions of this Agreement.

16 6. ASSIGNMENT AND SUBCONTRACTING. This Agreement contemplates
17 the personal services of Consultant and the parties acknowledge that a substantial
18 inducement to City for entering this Agreement was and is the professional reputation and
19 competence of Consultant. Consultant shall not assign his rights or delegate his duties
20 under this Agreement, or any interest in this Agreement, or any portion of it, without the
21 prior approval of City, except that Consultant may with the prior approval of the City
22 Manager of City, assign any moneys due or to become due the Consultant under this
23 Agreement. Any attempted assignment or delegation shall be void, and any assignee or
24 delegate shall acquire no right or interest by reason of such attempted assignment or
25 delegation. Furthermore, Consultant shall not subcontract any portion of his performance
26 without the prior approval of the City Manager or designee, nor substitute an approved
27 subcontractor without prior approval to the substitution. Nothing stated in this Section 6
28 shall prevent Consultant from employing as many employees as Consultant deems

1 necessary for performance of this Agreement.

2 7. CONFLICT OF INTEREST. Consultant, by executing this Agreement,
3 certifies and shall obtain similar certifications from Consultant's employees and approved
4 subcontractors that, at the time Consultant executes this Agreement and for its duration,
5 Consultant does not and will not perform services for any other client which would create
6 a conflict, whether monetary or otherwise, as between the interests of City under this
7 Agreement and the interests of such other client.

8 8. MATERIALS. Consultant shall furnish all labor and supervision, supplies,
9 materials, tools, machinery, equipment, appliances, transportation, and services necessary
10 to or used in the performance of Consultant's obligations hereunder, except as stated in
11 Exhibit "C".

12 9. TERMINATION. Either party shall have the right to terminate this
13 Agreement for any reason or no reason at any time by giving fifteen (15) calendar days
14 prior notice to the other party. In the event of termination under this Section, City shall pay
15 Consultant for services satisfactorily performed and costs incurred up to the effective date
16 of termination for which Consultant has not been previously paid. The procedures for
17 payment in Section 1.B. with regard to invoices shall apply.

18 10. AMENDMENT. This Agreement, including all Exhibits, shall not be
19 amended, nor any provision or breach hereof waived, except in writing signed by the
20 parties which expressly refers to this Agreement.

21 11. LAW. This Agreement shall be governed by and construed pursuant to
22 the laws of the State of California (except those provisions of California law pertaining to
23 conflicts of laws). Consultant shall comply with all laws, ordinances, rules and regulations
24 of and obtain such permits, licenses, and certificates required by all federal, state and local
25 governmental authorities.

26 12. ENTIRE AGREEMENT. This Agreement, including all Exhibits,
27 constitutes the entire understanding between the parties and supersedes all other
28 agreements, oral or written, with respect to the subject matter herein.

1 13. INDEMNITY. Consultant shall, with respect to services performed in
2 connection with this Agreement, indemnify and hold harmless the City, its Boards,
3 Commissions, and their officials, employees and agents (collectively in this Section, "City")
4 from and against any and all liability, claims, demands, damage, loss, causes of action,
5 proceedings, penalties, costs and expenses (including attorney's fees, court costs, and
6 expert and witness fees) (collectively "Claims" or individually "Claim"). Claims include
7 allegations and include by way of example but are not limited to: Claims for property
8 damage, personal injury or death arising in whole or in part from any negligent act or
9 omission of Consultant, its officers, employees, agents, sub-consultants, or anyone under
10 Consultant's control (collectively "Indemnitor"); Consultant's breach of this Agreement;
11 misrepresentation; willful misconduct; and Claims by any employee of Indemnitor relating
12 in any way to worker's compensation. Independent of the duty to indemnify and as a
13 free-standing duty on the part of Consultant, Consultant shall defend City and shall
14 continue such defense until the Claim is resolved, whether by settlement, judgment or
15 otherwise. No finding or judgment of negligence, fault, breach, or the like on the part of
16 Indemnitor shall be required for the duty to defend to arise. Consultant shall notify the City
17 of any claim within ten (10) days. Likewise, City shall notify Consultant of any claim, shall
18 tender the defense of such claim to Consultant, and shall assist Consultant, as may be
19 reasonably requested, in such defense.

20 14. AMBIGUITY. In the event of any conflict or ambiguity between this
21 Agreement and any Exhibit, the provisions of this Agreement shall govern.

22 15. COSTS. If there is any legal proceeding between the parties to enforce
23 or interpret this Agreement or to protect or establish any rights or remedies hereunder, the
24 prevailing party shall be entitled to its costs and expenses, including reasonable attorneys'
25 fees and court costs (including appeals).

26 16. NONDISCRIMINATION. In connection with performance of this
27 Agreement and subject to applicable rules and regulations, Consultant shall not
28 discriminate against any employee or applicant for employment because of race, religion,

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1 national origin, color, age, sex, sexual orientation, AIDS, HIV status, handicap, or disability.
2 Consultant shall ensure that applicants are employed, and that employees are treated
3 during their employment, without regard to these bases. Such actions shall include, but
4 not be limited to, the following: Employment, upgrading, demotion or transfer, recruitment
5 or recruitment advertising, layoff or termination, rates of pay or other forms of
6 compensation, and selection for training, including apprenticeship.

7 It is the policy of City to encourage the participation of Disadvantaged,
8 Minority and Women-owned Business Enterprises in City's procurement process, and
9 Consultant agrees to use its best efforts to carry out this policy in the award of all approved
10 subcontracts to the fullest extent consistent with the efficient performance of this
11 Agreement. Consultant may rely on written representations by subcontractors regarding
12 their status. City's policy is attached as Exhibit "D" hereto. Consultant shall report to City
13 in May and in December or, in the case of short-term agreements, prior to invoicing for final
14 payment, the names of all sub-consultants engaged by Consultant for this Project and
15 information on whether or not they are a Disadvantaged, Minority or Women-Owned
16 Business Enterprise, as defined in Section 8 of the Small Business Act (15 U.S.C.
17 Sec. 637).

18 17. NOTICES. Any notice or approval given by either party shall be in writing
19 and personally delivered or deposited in the U.S. Postal Service, first class, postage
20 prepaid, addressed to Consultant at the address first stated herein, and to the City at 333
21 West Ocean Boulevard, Long Beach, California 90802 Attention: City Manager with a copy
22 to the City Engineer at the same address. Notice of change of address shall be given in
23 the same manner as stated for other notices. Notice shall be deemed given on the date
24 deposited in the mail or on the date personal delivery is made, whichever occurs first.

25 18. COVENANT AGAINST CONTINGENT FEES. Consultant warrants that
26 Consultant has not employed or retained any entity or person to solicit or obtain this
27 Agreement and that Consultant has not paid or agreed to pay any entity or person any fee,
28 commission, or other monies based on or from the award of this Agreement. If Consultant

1 breaches this warranty, City shall have the right to terminate this Agreement immediately
2 notwithstanding the provisions of Section 10 hereof or, in its discretion, to deduct from
3 payments due under this Agreement or otherwise recover the full amount of such fee,
4 commission, or other monies.

5 19. WAIVER. The acceptance of any services or the payment of any money
6 by City shall not operate as a waiver of any provision of this Agreement, or of any right to
7 damages or indemnity stated in this Agreement. The waiver of any breach of this
8 Agreement shall not constitute a waiver of any other or subsequent breach of this
9 Agreement.

10 20. CONTINUATION. Termination or expiration of this Agreement shall not
11 affect rights or liabilities of the parties which accrued prior to termination or expiration of
12 this Agreement.

13 21. TAX REPORTING. As required by federal and state law, City is
14 obligated to and will report the payment of compensation to Consultant on
15 Form 1099-Misc. Consultant shall be solely responsible for payment of all federal and
16 state taxes resulting from payments under this Agreement. Consultant's Employer
17 Identification Number is [REDACTED] If Consultant has a Social Security Number rather
18 than an Employer Identification Number, then Consultant shall submit that Social Security
19 Number in writing to City's Accounts Payable, Department of Financial Management.
20 Consultant acknowledges and agrees that City has no obligation to pay Consultant until
21 Consultant provides one of these Numbers.

22 22. ADVERTISING. Consultant shall not use the name of City, its officials
23 or employees in any advertising or solicitation for business, nor as a reference, without the
24 prior approval of the City Manager or designee.

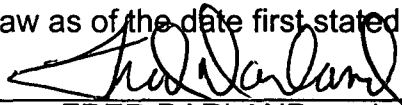
25 23. AUDIT. City shall have the right at all reasonable times during the term
26 of this Agreement and for a period of five (5) years after termination or expiration of this
27 Agreement to examine, audit, inspect, review, extract information from, and copy all books,
28 records, accounts, and other documents of Consultant relating to this Agreement.

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24. THIRD PARTY BENEFICIARY. This Agreement is not intended or designed to or entered for the purpose of creating any benefit or right for any person or entity of any kind that is not a party to this Agreement.

IN WITNESS WHEREOF, the parties have caused this document to be duly executed with all formalities required by law as of the date first stated above.

_____, 2006



FRED DARLAND, an individual

"Consultant"
CITY OF LONG BEACH, a municipal corporation

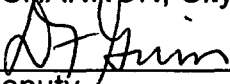
1/19/, 2006

By 

City Manager

"City"

This Agreement is approved as to form on 1/18, 2006.

ROBERT E. SHANNON, City Attorney
By 

Senior Deputy

Robert E. Shannon
City Attorney of Long Beach
333 West Ocean Boulevard
Long Beach, California 90802-4664
Telephone (562) 570-2200

EXHIBIT "A"

SCOPE OF SERVICES

Consultant shall update the City's specialized software known as "The Works", shall develop modifications to that software as requested by the City's representative or designee, shall develop and implement new software to track the City's permit process as requested by the City's representative or designee, shall provide ongoing maintenance of "The Works" and of new software developed by Consultant, shall perform other software-related tasks as requested by the City's representative or designee, and shall support the City's use of an electronic drawing viewer.

EXHIBIT "B"

The City's representative is Mark Christoffels, whose telephone is 562-570-6771.

There is no Exhibit "C".

**CITY OF LONG BEACH
DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM**

The City Council of the City of Long Beach adopted the City of Long Beach Disadvantaged-, Minority, and Women-Owned Business Enterprise Program on February 2, 1988. The program satisfies the requirement of funds awarded by the U.S. Department of Transportation ("DOT") of 49 CFR Part 26.23 and states in part,

"It is the policy of the City of Long Beach to utilize Disadvantaged-, Minority-, and Women-Owned Business Enterprises (DBEs, MBEs and WBEs) in all aspects of contracting relating to construction, materials and services, professional services, land development-related activities and leases and concessions.

This policy applies to all City departments reporting to the City Manager who may, by their authority, award contacts in those areas.

The City is fully committed to encouraging the participation of Disadvantaged-, Minority-, and Women-owned businesses in all phases of construction, materials and services, professional services, land development, leases and concessions contracting."

In the expenditure of funds awarded by the U.S. Department of Transportation ("DOT"), it is the policy of the City of Long Beach to utilize Disadvantaged Business Enterprises (DBEs) and firms as defined in 49 CFR Part 26 in all aspects of contracting the maximum extent feasible. This policy, which is fully described herein, constitutes the City's commitment to substantially increase DBE utilization in all program activities funded wholly or in part by any U.S. DOT modal element.

Definitions of Terms

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

Objectives/Policy Statement (§§26.1, 26.23)

The City of Long Beach (City) has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26. The City has received Federal financial assistance from the Department of Transportation, and as a condition of receiving this assistance, the City will sign an assurance that it will comply with 49 CFR Part 26 for each project.

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

1. To ensure nondiscrimination in the award and administration of DOT assisted contracts;
2. To create a level playing field on which DBEs can compete fairly for DOT assisted contracts;
3. To ensure that the DBE Program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
5. To help remove barriers to the participation of DBEs in DOT assisted contracts; and
6. To assist the development of firms that can compete successfully in the marketplace outside the DBE Program.

The City's Purchasing Agent has been designated as the DBE Liaison Officer. In that capacity, the City Purchasing Agent 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 in its financial assistance agreements with DOT or its designees.

The City has disseminated this policy statement to the City Council and to City departments that receive DOT funding. The City has distributed this statement to DBE and non-DBE business communities that perform work for us on DOT assisted contracts by mail and through publication of this statement .

Nondiscrimination. (§26.7)

The City 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 its DBE program, the City 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 with respect to individuals of a particular race, color, sex, or national origin.

DBE Program Updates (§26.21)

The City will continue to carry out this program until all funds from DOT financial assistance on specific projects have been expended. The City will provide to DOT, or its designees, updates representing significant changes in the program.

Quotas (§26.43)

The City does not and will not use quotas in any way in the administration of its DBE program.

DBE Liaison Officer (§26.45)

The City has designated Mr. David Gonzalez, the City Purchasing Agent, as the DBE Liaison Officer, 333 W. Ocean Boulevard, Plaza Level, Long Beach, California 90802 (562)570-6663. In that capacity, the City Purchasing Agent is responsible for implementing all aspects of the DBE program and ensuring that the City complies with all provisions of 49 CFR Part 26. The City Purchasing Agent has direct, independent access to the City Manager concerning DBE program matters.

The DBE Liaison Officer is responsible for developing, implementing and monitoring the DBE program, in coordination with other appropriate officials. Duties and responsibilities include, but are not limited to, the following:

- Develops and carries out technical assistance programs for DBE's, including referrals to supportive services.

- Arranges solicitations, time for the presentation of bid, quantities, specifications, and delivery schedules, so as to facilitate the participation of DBEs except that, with respect to construction projects with an estimated cost in excess of \$100,000, the Department of Public Works, Engineering Bureau is designated to compile specifications, advertise and open bids in accordance with City of Long Beach Administration Regulation 23-5. Where changes are found necessary to increase DBE utilization, they will be made in consultation and cooperation with the operating department involved.
- Provides guidance to DBEs in overcoming barriers, such as inability to obtain bonding or financing.
- Carries out information and communication programs on contracting opportunities in a timely manner including bilingual programs where appropriate.
- Coordinates with the City Treasurer the investigation of services offered by banks owned and controlled by Disadvantaged Business Enterprises.
- Makes available the listing of DBEs certified by Caltrans in the office of the City Engineer and in the offices of the Purchasing Division. Said listing includes the following information: Name, address, telephone number, ethnic background and/or gender of ownership, and type of work performed by firm.
- Ensures that prior to approval of the substitution of any DBE sub-contractor, prime contractors will be required to prove performance of good faith efforts to replace the DBE with another eligible DBE.
- Establishes a DBE overall annual goal. The goal is evaluated annually and adjusted as necessary.
- Ensures that an appropriate individual project DBE goal is established for each Federal-aid project advertised consistent with the City of Long Beach goals for construction projects and the Caltrans DBE Goal Guide.
- Ensures that good faith analysis is performed by the Department of Public Works, Engineering Bureau when the project goal is not achieved.
- Ensures the maintenance of such documentation as is necessary to verify performance of all activities included in this program.

Federal Financial Assistance Agreement Assurance (§26.13)

The City will sign the following assurance, applicable to all DOT-assisted contracts and their administration:

The City 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, or its designee, 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 City of its failure to carry out its approved program, the DOT 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.).

DBE Financial Institutions

It is the policy of the City 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 DBE Liaison Officer.

DBE Directory (§26.31)

The City will refer interested persons to the DBE directory available from Caltrans' Business Enterprise Program website at <http://www.dot.ca.gov/hq/bep/>. On projects funded by Federal Aviation Administration (FAA) grants, contractors may use DBEs certified by other agencies that have been authorized by the DOT or the FAA.

Required Contract Clauses (§§26.13, 26.29)

Contract Assurance

The City will ensure that the following clause is placed in every DOT-assisted contract and subcontract:

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 the recipient deems appropriate.

Prompt Payment

The City will include the following clause in each DOT-assisted prime contract:

Contractor agrees to pay each subcontractor under this Contract for satisfactory performance of its contract no later than 10 days after the receipt of each payment the prime contractor receives from the City. The Contractor agrees further to return retainage payments to each subcontractor within 7 days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the City. This clause applies to both DBE and non-DBE subcontractors.

Monitoring and Enforcement Mechanisms

The City will assign a contract manager to monitor and track actual DBE participation through contractor and subcontractor reports of payments in accordance with the following:

A. After Contract Award

After the contract award the City will review the award documents for the portion of items each DBE and first tier subcontractor will be doing and the dollar value of the work. With these documents the contract manager will be able to determine the work to be performed by the DBEs or subcontractors listed.

B. Preconstruction Conference

1. A preconstruction conference will be scheduled between the contract manager and the contractor or its representatives to discuss the work each DBE subcontractor will perform.
2. Before work can be started on a subcontract, the City will require the contractor to submit a completed "Subcontracting Request," Exhibit 16-B of the Local Area Programs Manual (LAPM). When the contract manager receives the completed form, it will be checked for agreement of the first tier subcontractor and DBEs. The contract manager will not approve the request when it identifies someone other than the DBE or first tier subcontractor listed in the previously completed "Local Agency Bidder DBE Information," Exhibit 15-G of the LAPM. The "Subcontracting Request" will not be approved until any discrepancies are resolved. If an issue cannot be resolved at that time, or there is some other concern, the contract manager will require the contractor to eliminate the subcontractor in question before signing the subcontracting request. A change in the DBE or first tier subcontractor may be addressed during a substitution process at a later date.
3. Suppliers, vendors or manufactures listed on the "Local Agency Bidder DBE Information" will be compared to those listed in the completed Exhibit 16-I of the LAPM. Differences must be resolved by either making corrections or requesting a substitution.

Substitutions will be subject to the Subletting and Subcontracting Fair Practices Act (FPA). The City will require the contractor to adhere to the provisions within Subletting and Subcontracting Fair Practices Act, Public Contract Code Section 4100-4144. FPA requires the contractor to list all subcontractors in excess of ½ of one percent (0.5%) of the contractor's total bid or \$10,000, whichever is greater. The statute is designed to prevent bid shopping by contractors. The FPA explains that a contractor may not substitute a subcontractor listed in the original bid except the with approval of the City.

4. The contract manager will give the contractor a blank "Final Report Utilization of Disadvantaged Business Enterprises," Exhibit 17-F of the LAPM, and will explain to it that the document will be required at the end of the project, for which payment can be withheld, in conformance with the contract.

C. Construction Contract Monitoring

1. The City Engineer, or his designee, will ensure that staff knows what items of work each DBE is responsible for. Violations will be noted immediately.
2. When someone other than the listed DBE subcontractor is found performing the work (i.e., employees noted earlier as contractor's or non-DBE subcontractor's), the contract manager will notify the contractor of the apparent violation and potential loss of payment. Based on the contractor's response, the contract manager will take appropriate action:
 - a. If the contractor's response is that the employees will be on the listed DBE subcontractor payroll, payrolls will be checked when received, and if the employees in question are not on the listed DBE subcontractor payroll, payment for the work will be withheld. If the employee is on the payroll, the DBE Liaison Officer, or designee, will perform a preliminary investigation to identify any potential issues related to the DBE subcontractor performing a commercially useful function. Any substantive issues will be forwarded to Caltrans' Business Enterprise Program.
 - b. If the contractor's response to the contract manager is anything other than the response in subpart (a) above, payment for the work will be withheld and a letter will be sent to the contractor referencing the applicable specification violation and the required withhold of payment.
3. If the contract requires the submittal of a monthly truck document, the contractor will be required to submit documentation to the contract manager showing the Owner's name; California Highway Patrol CA number; and the DBE certification number of the Owner of the truck for each truck used during that month for which DBE participation will be claimed. The trucks will be listed by California Highway Patrol CA number in the daily diary or on a separate piece of paper for documentation. The numbers are checked regularly to confirm compliance.

The burden of proof of DBE payment is the responsibility of the contractor.

D. Substitution

1. When a DBE substitution is requested, the contract manager will request a letter from the contractor explaining why a substitution is needed. The contract manager will obtain a written concurrence from the DBE regarding this change. If the contractor is not meeting the contract goal with this substitution, the contractor must provide the required good faith effort to the contract manager for the City's consideration.
2. If there is any doubt in the contract manager's mind regarding the requested substitution, the contract manager may on FHWA contracts contact the Caltrans District Local Assistance Engineer (DLAE) or on FAA contracts contact the Western-Pacific Region Airport Program Engineer (PE) for assistance and direction.

E. Record Keeping and Final Report Utilization of Disadvantaged Business Enterprises

1. The contractor shall maintain records showing the name and address of each first-tier subcontractor. The records shall show:
 - a. The name and business address, regardless of tier, of every DBE subcontractor, DBE vendor of materials and DBE trucking company.
 - b. The date of payment and the total dollar figure paid to each of the firms.
 - c. The DBE prime contractor shall also show the date of work performed by its own forces along with the corresponding dollar value of the work claimed towards DBE goals.

2. When a construction contract has been completed, the contractor will provide a summary of the records stated above. The DBE utilization information will be documented on Exhibit 17-F and will be submitted to the DLAE or PE attached to the Report of Expenditures.
 - a. The contract manager will compare the completed Exhibit 17-F to the contractor's completed Exhibit 15-G and, if applicable, Exhibit 16-B.
 - b. The DBEs shown on the completed Exhibit 17-F should be the same as those originally listed unless an authorized substitution was allowed, or the contractor used more DBEs and they were added.
 - c. The dollar amount should reflect any changes made in the planned work done by the DBE.
 - d. The contractor will be required to explain in writing why the names of the subcontractors, the work items or dollar figures are different from what was originally shown on the completed Exhibit 15-G when:
 - (1) There have been no changes made by the contract manager.
 - (2) The contractor has not provided a sufficient explanation in the comments section of the completed Exhibit 17-F.

The explanation will be attached to the completed Exhibit 17-F for submittal. The contract manager will file said exhibit and explanation in the project records.

The DBE Liaison Officer, or designee, will keep track of the DBE certification status and keep the contract manager informed of changes that affect the contract. The contract manager will require the contractor to act in accordance with existing contractual commitments regardless of decertification.

The City will bring to the attention of the DOT, or designee, any false, fraudulent, or dishonest conduct in connection with the program, so that DOT, or designee, can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, take action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in §26.109. The City also will consider similar action under its own legal authorities, including determinations of contractor's responsibility with respect to future contracts.

Overall Goals (§26.45)

Amount of Goal

The City's goal for street/runway/taxiway projects for FY 2000-2001 is 11.5% of the Federal funds received from DOT. This overall goal is broken down into 4.7% race-conscious and 6.8% race-neutral components.

The City's goal for airport building projects for FY 2000-2001 is 3.5% of the Federal funds received from DOT. This overall goal is broken down into 3.5% race-conscious and 0% race-neutral components.

Methodology

STEP 1: Establishing a Base Figure

Once the City of Long Beach defines its contracting program where DOT funds are used and relevant market areas for the fiscal year, the City of Long Beach will establish a Base Figure following one of the methodologies outlined in Title 49 CFR Part 26 and Caltrans' Local Assistance Procedures Manual.

For Federal fiscal year 2000/01, the City of Long Beach elected to utilize Caltrans' DBE Directory of Certified DBE firms (filtered to include DBE firms expressing an interest in doing business within the City of Long Beach's geographic market area), divided by all comparable firms available within the County Census Bureau Database to derive the relative availability of DBEs within the following work industries:

Categories: Highway & Street Construction, Trucking, and certain Special Trade Contractors

STEP 2: Adjusting the Base Figure

As a mandatory second step, the City of Long Beach will survey other relevant market data to consider adjusting the base figure established. Indicators that the City of Long Beach may determine to be relevant to its market, may include, but not be limited to:

1. Demonstrated evidence of DBE capacity to perform work in the City of Long Beach's federally assisted and non-federally assisted contracting program.
2. The number, types and dollar value of contracting opportunities projected to be financed with Federal funds and to be awarded during the Federal fiscal year.
3. The City of Long Beach's Bidders List.
4. Other recipients' goal results in similar contracting opportunities and markets, and the reasons for the level of those results.
5. The outreach methods used by the City of Long Beach to increase DBE participation in federally assisted contracts.
6. The demographics and business activity of the geographical area in which the City of Long Beach will solicit bids or proposals.
7. The data from statistical disparities of DBEs to obtain financing, bonding and insurance requirements.
8. The data on employment and self-employment, education and training programs, to the extent the City of Long Beach can relate it to the opportunities for DBEs to perform in the City of Long Beach's DBE Program.

Overconcentration

At this time, the City of Long Beach has not identified any types of work in DOT-assisted contracts that have an overconcentration of DBEs. If, in the future, a need is identified, measures to address DBE overconcentration will be submitted to Caltrans for approval.

Breakout of Estimated Race-Neutral and Race-Conscious Participation

The City of Long Beach will achieve the overall annual goals for DBE participation through a combination of race-neutral and race-conscious measures including the use of contract-specific goals as needed to meet its overall annual DBE goal.

Race-Neutral Measures

The City of Long Beach intends to use race-neutral measures to meet the maximum feasible portion of its overall annual goal. The City of Long Beach will use the following measures, as appropriate, to facilitate DBE and other small business participation in the City of Long Beach's contracting program:

- (a) Configuring large contracts into smaller contracts when feasible, which would make contracts more accessible to small businesses, and would not impose significant additional cost, delay or risk to the City of Long Beach;
- (b) Encouraging contractors to consider subcontractors for components of the work for which there is a known supply of ready, willing, and able subcontractors, including DBE subcontractors, in preparing their bids;
- (c) Assisting in overcoming limitations in bonding and financing;
- (d) Providing technical assistance in orienting small businesses to public contracting procedures, using the Internet, and facilitating introductions to the City of Long Beach's and other U.S. DOT recipients' contracting activities; and,
- (e) Providing outreach and communications programs on contract procedures and contract opportunities to ensure the inclusion of DBEs and other small businesses.

Race-Conscious Measures Goals

The City of Long Beach will annually consider various factors to project levels of DBE participation to be met through race-conscious measures and will use race-conscious measures such as contract specific goals to meet that portion of the overall goal which is not likely to be met utilizing race-neutral measures. The City of Long Beach shall monitor and adjust the estimated utilization of race-neutral and race-conscious measures as required in accordance with regulatory guidelines.

Process

For subsequent years, the following procedures will be followed:

The City of Long Beach will submit its overall annual DBE goal to Caltrans by June 1 of each year. The goal submission includes the overall goal, the method utilized to calculate that goal and estimated race-neutral and race-conscious participation.

Once the DLAE has responded with preliminary comments and the comments have been incorporated into the draft goal analysis, the City of Long Beach will publish a notice of the proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at the City of Long Beach's principal office for 30 days after the date of the notice, and informing the public that the City of Long Beach will accept comments relating to the goal analysis for 45 days following the date of the notice. Advertisements in newspapers, minority focus media, trade publications, and websites will be the normal means to accomplish this effort. The notice will include addresses to which comments may be sent and addresses (including offices and websites) where the proposed goal and rationale may be reviewed.

The resubmission of the overall goal to Caltrans will include a summary of information and comments received during this public participation process, including the City of Long Beach's responses and a determination on the impact the public comments had on the overall goal, if any. Resubmission will be made by September 1. Caltrans will have a month to perform a final review enabling the City of Long Beach to implement the new overall annual goal by October 1 of each year.

Contract Goals (§26.51)

The City of Long Beach will use specific contract goals to meet any portion of the overall goal that the City of Long Beach may not be able to meet by the use of race-neutral means. Specific contract goals are established so that, over the period to which the overall goal applies, they will cumulatively result in meeting any portion of the overall goal that may not be met through the use of race-neutral means.

The City will establish contract goals on only those DOT-assisted contracts that have subcontracting possibilities. The City need not establish a contract goal on every such contract, and the size of contract goals will be adapted to the circumstances of each contract (e.g., type and location of work, availability of DBEs to perform the particular type of work). The City will compare the contract work items with eligible DBE contractors willing to work on the project. A determination will also be made to decide which items are likely to be performed by the prime contractor and which ones are likely to be performed by the subcontractor(s). The goal will then be incorporated into the contract documents. The City will express its contract goals as a percentage of the total amount of each DOT-assisted contract.

Good Faith Efforts (§26.53)

Information to be Submitted

The City treats bidder's and proposer's compliance with "good faith efforts" requirements as a matter of responsiveness. A responsive bid is meeting all the requirements of the bid advertisement and proposal.

Each solicitation for which a construction goal has been established will require that the bidder submit the following information with the bid:

1. The names and addresses of DBE companies that will be subcontractors.
2. A description of the work that each DBE will perform.
3. The dollar amount that each DBE company will receive.

The following information may be submitted with the bid or within 5 working days after the bid opening:

1. Written and signed documentation of commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
2. Written and signed confirmation from the DBE that it is a subcontractor as provided in the prime contractor's commitment; and
3. If the contract goal is not met, evidence of good faith efforts.

Demonstration of Good Faith Efforts

The obligation of the bidder or proposer is to make good faith efforts. The bidder or proposer can demonstrate that it has done so by either meeting the contract goal or documenting good faith efforts. Examples of good faith efforts are found in Appendix A to part 26 (attached).

The DBE Liaison Officer, or designee, is responsible for determining whether a bidder or proposer who has not met the contract goal has documented sufficient good faith efforts to be regarded as responsive.

The City will ensure that all information is complete and accurate and adequately documents the bidder's or proposer's good faith efforts before awarding the contract.

Administrative Reconsideration

Within 5 days after being informed by the City that it is not responsive because it has not documented sufficient good faith efforts, a bidder or proposer may request administrative reconsideration. A bidder or proposer should make this request in writing to the DBE Liaison Officer, or designee. The DBE Liaison Officer, or designee, will not have played any roll in the original determination that the bidder or proposer did not document sufficient good faith efforts.

As part of this reconsideration, the bidder or proposer will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The bidder or proposer will have the opportunity to meet in person with the DBE Liaison Officer, or designee, to discuss the issue of whether it met the goal or made adequate good faith efforts to do. The City will send the bidder or proposer a written decision on reconsideration, explaining the basis for finding that the bidder or proposer did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the DOT, or designee.

Good Faith Efforts When a DBE is Replaced on a Contract

The City will require a contractor to make good faith efforts to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal. The City will require the contractor to notify the contract manager immediately of the DBE's inability or unwillingness to perform and provide reasonable documentation.

In this situation, the City will require the contractor to obtain the City's prior approval of the substitute DBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts. If the contractor fails or refuses to comply in the time specified, the City will issue an order stopping all or part of payment or work until satisfactory action has been taken. If the contractor still fails to comply, the City may terminate for default.

Counting DBE Participation (§26.55)

The City will count DBE participation toward overall and contract goals as provided in the contract documents for the contractor, subcontractor, joint venture partner with prime or subcontractor, or vendor of materials or supplies.

Certification (§26.61 – 26.91)

The City ensures that only DBEs certified by Caltrans and its affiliated participating certifying agencies or, on FAA projects only, agencies certified by the FAA will participate as DBEs in the City's program.

Information Collection and Reporting

Bidders List

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

Monitoring Payments to DBEs

The City will require prime contractors to maintain records and documents of payments to DBEs for three years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of the City or DOT, or designee. This reporting requirement also extends to any certified DBE subcontractor.

The City will review payments to DBE subcontractors to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the schedule of DBE participation.

Reporting to DOT

The City will report DBE participation to DOT, or designees, as follows:

FAA The City will report final utilization of DBE participation on an annual basis, using DOT Form 4630, as modified for use by FAA recipients.

FHWA The City will report final utilization of DBE participation to the DLAE using Exhibit 17-F of the Caltrans' LAPM.

Confidentiality

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

Attachment - Appendix A to Part 26, Guidance Concerning Good Faith Efforts

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APPENDIX A - GUIDANCE CONCERNING GOOD FAITH EFFORTS

- I. When, as a recipient, you establish a contract goal on a DOT-assisted contract, a bidder must, in order to be responsible and/or responsive, make 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, it is up to you 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. 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: meeting quantitative formulas is not required.
- 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. Soliciting through all reasonable and available means (e.g. attendance at prebid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must 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 to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.
 - 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.
 - 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

APPENDIX A - GUIDANCE CONCERNING GOOD FAITH EFFORTS

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. 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 employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.
 - 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, you may take into account 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 reasonable 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.