

**CITY OF EL PASO, TEXAS
AGENDA ITEM
DEPARTMENT HEAD'S SUMMARY FORM**

DEPARTMENT: Engineering and Construction Management
AGENDA DATE: November 9, 2010
CONTACT PERSON NAME AND PHONE NUMBER: R. Alan Shubert, P.E., City Engineer (X4423)
DISTRICT(S) AFFECTED: All

SUBJECT:

That the Mayor be authorized to sign a Memorandum of Understanding (MOU) Regarding the Adoption of the Texas Department of Transportation's (TxDOT) Federally-Approved Disadvantaged Business Enterprise Program (DBE) by the City between the City of El Paso and the Texas Department of Transportation. TxDOT requires the City to enter into this MOU in order for the City to receive Federal Highway Administration funding through TxDOT for City construction projects. TxDOT provides the certification of DBE participants and the City provides TxDOT with data showing compliance with the TxDOT DBE program under this MOU.

BACKGROUND / DISCUSSION:

TxDOT's program was established to support the U.S. Department of Transportation's policy of ensuring nondiscrimination in the award and administration of Federal DOT-assisted contracts and creating a level playing field on which firms owned and controlled by individuals who are determined to be socially or economically disadvantaged can compete fairly for DOT-assisted contracts.

The main objectives of the program are to ensure small DBEs can compete fairly for federally funded transportation-related projects, meet current legal standards, and ensure that only eligible firms participate as DBEs.

PRIOR COUNCIL ACTION:

N/A

AMOUNT AND SOURCE OF FUNDING:

N/A

BOARD / COMMISSION ACTION:

N/A

*****REQUIRED AUTHORIZATION*****

DEPARTMENT HEAD:



(If Department Head Summary Form is initiated by Purchasing, client department should sign also)

Information copy to appropriate Deputy City Manager

RESOLUTION

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That the Mayor be authorized to sign a Memorandum of Understanding (MOU) Regarding the Adoption of the Texas Department of Transportation's (TxDOT) Federally-Approved Disadvantaged Business Enterprise Program (DBE) by the City between the City of El Paso and the Texas Department of Transportation. TxDOT requires the City to enter into this MOU in order for the City to receive Federal Highway Administration funding through TxDOT for City construction projects. TxDOT provides the certification of DBE participants and the City provides TxDOT with data showing compliance with the TxDOT DBE program under this MOU.

ADOPTED this ____ day of _____, 2010.

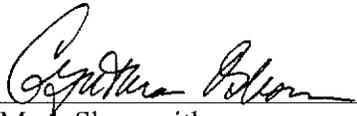
THE CITY OF EL PASO

John Cook
Mayor

ATTEST:

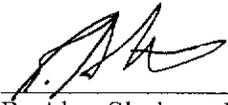
Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:

for 

Mark Shoesmith
Assistant City Attorney

APPROVED AS TO CONTENT:



R. Alan Shubert, P.E.
City Engineer

**MEMORANDUM OF UNDERSTANDING
REGARDING THE ADOPTION OF THE TEXAS DEPARTMENT OF
TRANSPORTATION'S FEDERALLY-APPROVED DISADVANTAGED BUSINESS
ENTERPRISE PROGRAM BY THE CITY OF EL PASO**

This Memorandum of Understanding is by and between the **TEXAS DEPARTMENT OF TRANSPORTATION ("TxDOT")**, an agency of the State of Texas; and the **CITY OF EL PASO**, a political subdivision of the State of Texas.

Whereas, from time to time the City of El Paso receives federal funds from the Federal Highway Administration ("FHWA") through TxDOT to assist the City of El Paso with the construction and design of projects partially or wholly funded through FHWA; and

Whereas, the City of El Paso, as a sub-recipient of federal funds, is required by 49 CFR 26, to implement a program for disadvantaged business enterprises ("DBEs"), as defined by 49 CFR 26 ("DBE Program"); and

Whereas, TxDOT has implemented a Disadvantaged Business Enterprise Program (DBE Program) that is approved by the FHWA pursuant to 49 CFR part 26; and

Whereas, certain aspects of the City of El Paso's procurement of construction and design services are subject to review and/or concurrence by TxDOT as a condition of receiving federal funds from FHWA through TxDOT; and

Whereas, the City of El Paso and TxDOT undertake substantially similar roadway construction projects and design projects and construct and design their respective projects using substantially the same pool of contractors; and

Whereas, the City of El Paso desires to implement a federally compliant DBE Program by adopting the TxDOT approved program, as recommended by FHWA; and

Whereas, TxDOT and the City of El Paso find it appropriate to enter into this Memorandum of Understanding to memorialize the obligations, expectations and rights each has as related to the City of El Paso's adoption of the TxDOT DBE Program to meet the federal requirements;

Now, therefore, TxDOT and the City of El Paso in consideration of the mutual promises, covenants and conditions made herein, agree to and acknowledge the following:

(1) TxDOT has developed a DBE Program and annually establishes a DBE goal for Texas that is federally approved and compliant with 49 CFR 26 and other applicable laws and regulations.

(2) The City of El Paso is a sub-recipient of federal assistance for construction projects and design projects and, in accordance with 49 CFR § 26.21, must comply with a federally approved DBE Program. The City of El Paso receives its federal assistance through TxDOT. As a sub-recipient, the City of El Paso has the option of developing its own program or adopting and operating under TxDOT's federally approved DBE Program. The FHWA recommends that sub-recipients, such as the City of El Paso, adopt the DBE program, administered through TxDOT, and the City of El Paso by its prescribed protocol adopted the TxDOT DBE Program on November 9, 2010.

(3) This Memorandum of Understanding evidences FHWA's and TxDOT's consent to the adoption of the TxDOT DBE Program by the City of El Paso to achieve its DBE participation in federally assisted Construction and Design Projects.

(4) The parties will work together in good faith to assure effective and efficient implementation of the DBE Program for the City of El Paso and for TxDOT.

(5) The City of El Paso and TxDOT have agreed upon the following delegation of responsibilities and obligations in the administration of the DBE Program adopted by the City of El Paso:

(a) The City of El Paso will be responsible for project monitoring and data reporting to TxDOT. The City of El Paso will furnish to TxDOT any required DBE contractor compliance reports, documents or other information as may be required from time to time to comply with federal regulations. TxDOT will provide the necessary and appropriate reporting forms, to the City of El Paso.

(b) The City of El Paso will recommend contract-specific DBE goals consistent with TxDOT's DBE guidelines and in consideration of the local market, project size, and nature of the good(s) or service(s) to be acquired. The City of El Paso's recommendation may be that no DBE goals are set on any particular project or portion of a project or that proposed DBE goals be modified. The City of El Paso and TxDOT will work together to achieve a mutually acceptable goal, however, TxDOT will retain final decision-making authority regarding DBE goals.

(c) TxDOT will cooperate with the City of El Paso in an effort to meet the timing and other requirements of the City of El Paso projects.

(d) The City of El Paso will be solely responsible for the solicitation and structuring of bids and bid documents to procure goods and services for its projects that use federal funds and will be responsible for all costs and expenses incurred in its procurements.

(e) The DBEs eligible to participate on TxDOT construction projects or design projects also will be eligible to participate on the City of El Paso construction projects or design projects subject to the DBE Program. The DBEs will be listed on TxDOT's website under the Texas Unified Certification Program (TUCP).

(f) The City of El Paso will conduct reviews and provide reports with recommendations to TxDOT concerning any DBE Program compliance issues that may arise due to project specific requirements such as Good Faith Effort (GFE), Commercially Useful Function (CUF), etc. The City of El Paso and TxDOT will work together to achieve a mutually acceptable goal, however, TxDOT will retain final decision-making authority on those issues and reserves the right to perform compliance reviews. The City of El Paso shall provide TxDOT with a listing of sanctions that will be assessed against contractors for violation of federal DBE regulations and its procedures for investigation of violations and assessment of sanctions for documented violations. The City of El Paso will require contractors for its FHWA federally assisted projects to use the attached forms as follows:

Attachment 1 – Disadvantaged Business Enterprise (DBE) Program Commitment Agreement
Form SMS 4901

Attachment 2 – DBE Monthly Progress Report Form SMS 4903

Attachment 3 – DBE Final Report Form SMS 4904

Attachment 4 – Prompt Payment Certification Form (Federal-air Projects) 2177

(g) The City of El Paso will designate a liaison officer to coordinate efforts with TxDOT's DBE Program administrators and to respond to questions from the public and private sector regarding the City of El Paso's administration of the DBE Program through TxDOT.

(h) The City of El Paso will be responsible for providing TxDOT with DBE project awards and DBE Commitments, monthly DBE reports, DBE Final Reports, DBE shortfall reports, and annual and updated goal analysis and reports.

(i) TxDOT will be responsible for maintaining a directory of firms eligible to participate in the DBE Program, and providing business development and outreach programs. The City of El Paso and TxDOT will work cooperatively to provide supportive services and outreach to DBE firms in the City of El Paso area.

(j) The City of El Paso will submit DBE semi-annual progress reports to TxDOT.

(k) The City of El Paso will participate in TxDOT sponsored training classes to include topics on Title VI of the Civil Rights Act of 1964, DBE Annual Goals, DBE Goal Setting for Construction Projects and Design Projects, DBE Contract Provisions, and DBE Contract Compliance, which may include issues such as DBE Commitments, DBE Substitution, and Final DBE Clearance. TxDOT will include DBE contractors performing work on the City of El Paso projects in the DBE Education and Outreach Programs.

(l) The Executive Director of the City of El Paso will implement all federal requirements , including those stated in Attachments A through F, which are incorporated as though fully set out herein for all purposes.

(m) In accordance with 23 CFR 200.1, the City of El Paso shall develop procedures for the collection of statistical data (race, color, religion, sex, and national origin) of participants in , and beneficiaries of State highway programs, i.e., relocatees, impacted citizens and affected communities; develop a program to conduct Title VI review of program areas; and conduct annual reviews of special emphasis program areas to determine the effectiveness of program area activities at all levels. TxDOT, in accordance with federal law, may conduct compliance reviews by TxDOT's OCR.

(n) The City of El Paso will comply with 49 CFR 26.29 as stated in Attachment F.

(6) In the event there is a disagreement between TxDOT and the City of El Paso about the implementation of the TxDOT DBE Program by the City of El Paso the parties agree to meet within ten (10) days of receiving a written request from the other party of a desire to meet to resolve any disagreement. The parties will make good faith efforts to resolve any disagreement as efficiently as is reasonably possible in consultation with FHWA. Non-compliance by the City of El Paso can result in restitution of federal funds to TxDOT and withholding of further federal funds upon consultation with FHWA.

(7) This Memorandum of Understanding becomes effective upon execution by all parties and automatically renews each year unless a party notifies the other parties of its intent to terminate the agreement.

(8) If this Memorandum of Understanding is terminated for any reason, the City of El Paso will be allowed reasonable time in which to seek approval from FHWA for an alternative DBE Program, without being deemed non-compliant with 49 CFR Part 26.

(9) This Memorandum of Understanding applies only to projects for which the City of El Paso is a sub-recipient of federal funds through TxDOT. The City of El Paso may also implement a Minority and Women-Owned Small Business Enterprise (M/W/SBE) policy and program that applies to projects for which it is not a sub-recipient of federal funds through TxDOT and which are not subject to the TxDOT DBE Program. The City of El Paso may, at its option, use some aspects of the TxDOT DBE Program and other similar programs in implementing its other policies and programs for its non-federally funded projects.

(10) The following attachments to this Memorandum of Understanding are also incorporated as if fully set out herein for all purposes:

Attachment A - FHWA Memorandum HCR-1/HIF-1 (relating to access required by the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973);

Attachment B - SPECIAL PROVISION – 000-1966

Attachment C – 49 CFR §26.13 (contractual assurances)

Attachment D – DBE Program Compliance Guidance for Local Government Agencies

Attachment E – FHWA Form 1273

Attachment F – Texas Department of Transportation (TxDOT) Disadvantaged Business Enterprise (DBE) Program with attachments as follows:

Attachment F 1 – DBE Regulations: 49 CFR Part 26

Attachment F 2 – DBE Special Provisions 000-1966

Attachment F 3 – TxDOT's Organizational Chart

Attachment F 4 – Measurement and Payment Special Provision 009-007

Attachment F 5 – Texas Unified Certification Program (TUCP) DBE directory example and website address to the directory

Attachment F 6 – DBE Goal Methodology

Attachment F 7 – DBE Bidder Certification

Attachment F 8 – DBE Joint Check Approval Form

Attachment F 9 – TUCP Standard Operating Procedures (SOP)

Attachment F 10 – TUCP Memorandum of Agreement (MOA)

Attachment F 11 – Forms list

(11) The following procedure shall be observed by the parties in regard to any notifications:

(a) Any notice required or permitted to be given under this Memorandum of Understanding shall be in writing and may be effected by personal delivery, by hand delivery through a courier or a delivery service, or by registered or certified mail, postage prepaid, return receipt requested, addressed to the proper party, at the following address:

CITY OF EL PASO

R. Alan Shubert, P.E.
City Engineer

Hand Delivery:

2 Civic Center Plaza, 4th Floor
El Paso, TX 79901

Registered or Certified Mail (Return receipt requested):

City of El Paso
2 Civic Center Plaza, 4th Floor
El Paso, TX 79901

TEXAS DEPARTMENT OF TRANSPORTATION
DBE Liaison
Office of Civil Rights
Address: 125 E. 11th Street
Austin, Texas 78701

(b) Notice by personal delivery or hand delivery shall be deemed effective immediately upon delivery, provided notice is given as required by Paragraph (a) hereof. Notice by registered or certified mail shall be deemed effective three (3) days after deposit in a U.S. mailbox or U.S. Post Office, provided notice is given as required by Paragraph (a) hereof.

(c) Either party hereto may change its address by giving notice as provided herein.

(12) This Memorandum of Understanding may be modified or amended only by written instrument, signed by both the City of El Paso and the Texas Department of Transportation and dated subsequent to the effective date(s) of this MOU. Except as authorized by the respective parties, no official, employee, agent, or representative of the parties has any authority, either express or implied, to modify or amend this MOU.

(13) The provisions of this MOU are severable. If any clause, sentence, provision, paragraph, or article of this MOU, or the application of this MOU to any person or circumstance is held by any court of competent jurisdiction to be invalid, illegal, or unenforceable for any reason, such invalidity, illegality, or unenforceability shall not impair, invalidate, nullify, or otherwise affect the remainder of this MOU, but the effect thereof shall be limited to the clause, sentence, provision, paragraph, or article so held to be invalid, illegal, or unenforceable, and the application of such clause, sentence, provision, paragraph, or article to other persons or circumstances shall not be affected; provided, however, the City of El Paso and TxDOT may mutually agree to terminate this Memorandum of Understanding.

(14) The following provisions apply in regard to construction of this MOU:

(a) Words of any gender in this MOU shall be construed to include the other, and words in either number shall be construed to include the other, unless the context in this MOU clearly requires otherwise.

(b) When any period of time is stated in this MOU, the time shall be computed to exclude the first day and include the last day of the period. If the last day of any period falls on a Saturday, Sunday, or national holiday, or state or county holiday, these days shall be omitted from the computation. All hours stated in this MOU are stated in Central Standard Time or in Central Daylight Savings Time, as applicable.

(15) This Memorandum of Understanding shall not be construed in any way as a waiver by the parties of any immunity from suit or liability that parties may have by operation of law, and the parties hereby retain all of their respective affirmative defenses.

EXECUTED in triplicate originals by TxDOT and the City of El Paso, acting through each duly authorized official and effective on the latest date signed.

The signatories below confirm that they have the authority to execute this MOU and bind their principles.

TEXAS DEPARTMENT OF TRANSPORTATION

CITY OF EL PASO

By: _____
Amadeo Saenz, Jr. P.E.
Executive Director

By: _____
John F. Cook
Mayor

Date: _____

Date: _____