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**City of Las Cruces**<sup>®</sup>  
 PEOPLE HELPING PEOPLE

**Council Action and Executive Summary**

Item # 6      Ordinance/Resolution# 13-014

For Meeting of \_\_\_\_\_  
 (Ordinance First Reading Date)

For Meeting of August 6, 2012  
 (Adoption Date)

Please check box that applies to this item:

QUASI JUDICIAL       LEGISLATIVE       ADMINISTRATIVE

**TITLE:** A RESOLUTION AMENDING THE CITY OF LAS CRUCES DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM TO FURTHER CLARIFY SMALL BUSINESS PARTICIPATION EFFORTS IN ACCORDANCE WITH FEDERAL REGULATIONS.

**PURPOSE(S) OF ACTION:**

To amend the City's DBE Program to conform to federal regulations.

<b>COUNCIL DISTRICT:</b> ALL		
<b><u>Drafter/Staff Contact:</u></b> Lisa Murphy	<b><u>Department/Section:</u></b> Transportation/Admin	<b><u>Phone:</u></b> 541-2048
<b><u>City Manager Signature:</u></b>		

**BACKGROUND / KEY ISSUES / CONTRIBUTING FACTORS:**

The City of Las Cruces is a recipient of Federal Department of Transportation (DOT) funds, primarily Federal Transit Administration (FTA) funds for the Road RUNNER Transit and Federal Aviation Administration (FAA) funds for the Las Cruces International Airport, as well as indirect funding for highway construction and Metropolitan Planning Organization (MPO) planning activities from the Federal Highway Administration (FHWA). In order to continue to receive and utilize these funds, the City is required to implement and maintain a Disadvantaged Business Enterprise (DBE) Program. The City's DBE Program was last updated pursuant to Resolution 12-143 on February 21, 2012.

Recent changes to federal regulations (effective February 2012) require that all DBE programs be amended to include provisions to eliminate obstacles and foster small business participation in DOT-assisted contracts. The FTA has requested that the City further expand these efforts beyond what was previously developed under Resolution 12-143. As such, the following items are some of those proposed for addition to the City's DBE Program:

1. Procedures for verification and documentation of small businesses.
2. Use of Job Order Contracts for awarding minor construction projects to small contractors.

(Continue on additional sheets as required)

3. Waiver of payment/performance bonds for subcontractors.
4. Waiver of payment/performance bonds of contracts of amounts less than \$25,000.
5. Reduced insurance requirements for small, non-construction contracts to small businesses.
6. Adding a contract condition requiring proof of release of lien by all subcontractors and suppliers to ensure that they have been paid before final payment is made to the primary contractor.

As required, the amended DBE Program will create a level playing field on which small businesses can compete for DOT-assisted projects and thus increase small business participation in City contracting opportunities. The proposed amendments to the City's DBE Program are attached to the proposed Resolution.

**SUPPORT INFORMATION:**

1. Resolution.
2. Exhibit "A", Amended DBE Program for the City of Las Cruces (excerpts of the only affected sections).
3. Attachment "A", Amended DBE Program shown in Legislative format.

**SOURCE OF FUNDING:**

<b>Is this action already budgeted?</b>  N/A	Yes	<input type="checkbox"/>	See fund summary below
	No	<input type="checkbox"/>	If No, then check one below:
	<i>Budget Adjustment Attached</i>	<input type="checkbox"/>	Expense reallocated from: _____
		<input type="checkbox"/>	Proposed funding is from a new revenue source (i.e. grant; see details below)
		<input type="checkbox"/>	Proposed funding is from fund balance in the _____ Fund.
<b>Does this action create any revenue?</b>  N/A	Yes	<input type="checkbox"/>	Funds will be deposited into this fund: _____ in the amount of \$ _____ for FY ____.
	No	<input type="checkbox"/>	There is no new revenue generated by this action.

**BUDGET NARRATIVE**

N/A
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**FUND EXPENDITURE SUMMARY:**

<b>Fund Name(s)</b>	<b>Account Number(s)</b>	<b>Expenditure Proposed</b>	<b>Available Budgeted Funds in Current FY</b>	<b>Remaining Funds</b>	<b>Purpose for Remaining Funds</b>
N/A	N/A	N/A	N/A	N/A	N/A

**OPTIONS / ALTERNATIVES:**

1. Vote "Yes"; this will approve the adoption of the amendments to the City's Disadvantaged Business Enterprise Program and allow the City to continue to receive and utilize funding from the US Department of Transportation.
2. Vote "No"; this will not approve the adoption of the amendments to the City's DBE Program, which may jeopardize the City's funding from the US Department of Transportation.
3. Vote to "Amend" the Resolution as deemed appropriate.
4. Vote to "Table" and direct staff accordingly.

**REFERENCE INFORMATION:**

The resolution(s) and/or ordinance(s) listed below are only for reference and are not included as attachments or exhibits.

1. Resolution No. 12-143.

(Continue on additional sheets as required)

**RESOLUTION NO. 13-014****A RESOLUTION AMENDING THE CITY OF LAS CRUCES DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM TO FURTHER CLARIFY SMALL BUSINESS PARTICIPATION EFFORTS IN ACCORDANCE WITH FEDERAL REGULATIONS.**

The City Council is informed that:

**WHEREAS**, the City of Las Cruces is the recipient of grants from the U.S. Department of Transportation (USDOT), either directly or indirectly; and

**WHEREAS**, the UDSOT has established the Disadvantaged Business Enterprise (DBE) regulations to ensure a level playing field in the procurement of goods and services purchased using DOT funds for those small, minority-owned and women-owned businesses that are formally recognized as disadvantaged businesses; and

**WHEREAS**, the City of Las Cruces is obligated under the DBE regulations to maintain and implement a formal DBE Program; and

**WHEREAS**, recent changes in federal DBE regulations intended to foster participation by small businesses in USDOT-assisted contracts have necessitated that the City's DBE Program be amended to conform to these changes.

**NOW, THEREFORE**, Be it resolved by the governing body of the City of Las Cruces:

(I)

**THAT** the amendments to the Disadvantaged Business Enterprise Program for the City of Las Cruces as shown in Exhibit "A", attached hereto and made a part of this Resolution, are hereby adopted.

(II)

THAT City staff is hereby authorized to do all deeds necessary in the accomplishment of the herein above.

DONE AND APPROVED this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

APPROVED:

\_\_\_\_\_  
Mayor

ATTEST:

\_\_\_\_\_  
City Clerk

(SEAL)

Moved by: \_\_\_\_\_

Seconded by: \_\_\_\_\_

APPROVED AS TO FORM:

  
\_\_\_\_\_  
City Attorney

VOTE:

Mayor Miyagishima:	_____
Councillor Silva:	_____
Councillor Smith:	_____
Councillor Pedroza:	_____
Councillor Small:	_____
Councillor Sorg:	_____
Councillor Thomas:	_____

the subcontractors, including DBE's have been paid from the 1<sup>st</sup> pay request). Additionally, the contractors will be required to submit the DBE reporting form with each pay request (See Attachment 4).

### **Section 26.31 Directory**

A directory will be maintained listing all firms who have identified themselves as eligible to participate as DBEs. In accordance with the New Mexico Unified Certification Program Letter of Agreement with the New Mexico Department of Transportation (NMDOT), approved by a City Council Resolution, the NMDOT certifies and maintains the DBE directory for the State of New Mexico. The directory lists the firm's name, address, phone number, e-mail address, fax number, and type of work performed using the most specific North American Industrial Classification System (NAICS) Code. The directory is revised on a continuous basis and is maintained by the NMDOT.

The City of Las Cruces will utilize the directory of certified firms capable of bidding on the City's USDOT funded projects. This action will enable the City to take advantage of a larger pool of available certified DBE's in various specialties from throughout the state in meeting and/or exceeding the established annual DBE goal.

The most current directory will be available through the NMDOT website:

<http://dot.state.nm.us/OEOP.html>.

### **Section 26.33 Over-concentration**

The City of Las Cruces has not identified that over-concentration exists in the types of work that DBEs perform. The City of Las Cruces has not identified any fields in which non-DBEs are unduly burdened that could be assisted by additional measures or requirements to assist DBEs to expand their efforts to assist any unduly burdensome work. The City of Las Cruces will vary our contract goals, to the extent consistent with 26.51, to ensure that non-DBEs are not unfairly prevented from competing for subcontracts.

Should, in the future that an overconcentration of DBEs by type of work is determined to exist the City will amend this Plan and obtain approval from the concerned DOT operating agency, and implement such efforts as part of this Program.

### **Section 26.35 Business Development Programs**

The City of Las Cruces has not been directed by any DOT operating administration to nor has the City established a business development program.

### **Section 26.37 Monitoring and Enforcement Mechanisms**

The City of Las Cruces will take the following monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 26.

1. The City of Las Cruces will bring to the attention of the relevant Department of Transportation agency (either FAA, FHWA, or FTA) any false, fraudulent, or dishonest conduct in connection with the program, so that the DOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT

Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 26.107.

2. The City of Las Cruces will consider similar action under our own legal authority, including responsibility determinations in future contracts. Attachment 4 lists the regulation, provisions, and contract remedies available to us in the event of non-compliance with the DBE regulation by a participant in our procurement activities.
3. The City of Las Cruces will provide a monitoring and enforcement mechanism to verify that work committed to DBEs at contract award or subsequently (i.e. as the result of modification to the contract) is actually performed by the DBEs to which the work was committed. This will, include at a minimum, a written certification by the City, that the City has reviewed contracting records and monitored work sites for this purpose (see Attachment 4). This monitoring may be conducted in conjunction with monitoring of contract performance for other purposes (e.g. close-out reviews for a contract, verification of certified payrolls, wage interviews for Davis-Bacon compliance).
4. The City of Las Cruces will keep a running tally of actual payments to DBE firms for work committed to them at the time of contract award. The contractor will complete a monthly monitoring form (See Attachment 4).

As part of our enforcement efforts, the City of Las Cruces shall undertake the following:

- a) Provide notice to the contractors that they have been awarded a contract, along with an acknowledgment that their listed subcontractors were to be used, including both DBE and non-DBE subcontractors.
- b) Subcontractors will be provided notice that the contract has been awarded to the prime contractor and that they should anticipate communication from the prime contractor and the City will indicate an anticipated Notice to Proceed date for the contract.
- c) In accordance with New Mexico statutes (NMSA 13-4, 1978 as annotated) in which the property owner, i.e. the City of Las Cruces, substitution of subcontractor cannot be done without owner approval. The City shall strongly encourage all major subcontractors and/or DBE's, either in person or via teleconference, have at least one representative at any pre-construction or pre-work meetings between the City and the prime contractor, including requiring that all present sign-in at the meeting.
- d) Develop and utilize a check list for all construction related contracts that ensure proper Davis-Bacon reports are submitted by all contractors, and verify those weekly payroll reports submitted confirm to the list of provided subcontractors.
- e) Require a certification by the prime contractor and verification by the subcontractor that work performed was performed by the respective firm.
- f) Develop and utilize a performance log and certification form that the City has reviewed the contracting records and monitored the applicable work sites to ensure that both contracts were provided to any DBE-subcontracting firm and that work was actually performed by those listed subcontractors. (See Attachment 4).

## Section 26.39 Fostering Small Business Participation

### Small Business Provision

It is the policy of the City of Las Cruces to ensure that Small Business as defined in part 26, have an equal opportunity to receive and participate in DOT-assisted contracts.

### Small Business Provision Implementation Plan

Without compromising mandated measures to maximize competition pursuant to federal regulations, the City will make every effort, as part of our DBE program, to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.

As part of this program element, the City has identified the following strategies:

- a) Ensure nondiscrimination in the award and administration of DOT-assisted projects.
- b) Create a level playing field on which small businesses can compete fairly for DOT assisted projects.
- c) Ensure that the Small Business Program is narrowly tailored in accordance with applicable law.
- d) Ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are qualified to participate, by verifying Small Business Administration Certification numbers on City Vendor Registration forms and formal definitions of Small Business in accordance with the Small Business Act.
- e) In multi-year design-build contracts or other large contracts (e.g., for "megaprojects") requiring bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform.
- f) Without compromising the prime contractors right to establish project means and methods, on prime contracts not having DBE contract goals, encouraging the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved.
- g) Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts. Efforts such as procuring and using pricing agreements for construction trades for use in contracts not to exceed \$25,000 will be performed.
- h) To meet the portion of your overall goal you project to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform.

- i) Whenever practical and to the extent allowed by law, award contracts for tangible goods based on lowest unit price received from multiple small businesses instead of a lump sum award to one large business.
- j) Utilize Job Order Contract for awarding minor construction projects to small contractors.
- k) Waive payment/performance bonds for subcontractors.
- l) Waive payment/performance bonds on contracts less than \$25,000.
- m) Reduce insurance requirements for small, non-construction contracts, costing less than \$10,000, including those to be performed by small businesses.
- n) Ensure the application of the Prompt Payment mechanisms for all business interests, not just DBE, as contained elsewhere within this Plan.
- o) Add a contract condition requiring proof of release of lien by all subcontractors and suppliers, including small businesses, from prime contractors prior to final payment on a contract, thus ensuring that the subcontractors and suppliers have been paid before final payment is made to the prime contractor.

#### Small Business Outreach

- a) The City's procurement office will provide regular and on-going sessions available to all businesses about the local public procurement processes.
- b) Provide bids to various local sources so that small businesses have greater access to procurement opportunities, including but not limited to the local SBA office, union houses and shops, local chambers of commerce, and local builder associations.

#### Small Business Verification

Verification of business size will be accomplished primarily through the City's vendor registration system and form. Other information may be used to assist in verification procedures, including, DBE certification records, DBE Bid forms, Subcontractor listing forms, City Business Registration records, SBA Registration Records, Contractor Bonding Capacity from the NM Contractor License website, and other readily available public records.

#### Small Business Implementation Schedule

For all elements not already in existence, the City of Las Cruces will implement the Small Business provision no later than nine (9) months after the FTA approval date.

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