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Contracting Mandates, Dos and Don'ts, Including PLAs, DBEs, LWOs and Requirements for Federally Funded Contracts

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CONTRACTING MANDATES, DOS AND DON'TS, INCLUDING PLAS, DBES, LWOS AND REQUIREMENTS FOR FEDERALLY FUNDED CONTRACTS

by
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I. Project Labor Agreements (PLAs)

1. What is a Project Labor Agreement?

What a PLA is may depend on the speaker's perspective:

> "Anti-competitive project labor agreements (PLAs) are special interest schemes that end open, fair and competitive bidding on public works projects. PLAs drive up the cost of construction by reducing competition and effectively excluding merit shop contractors and their skilled employees from building projects paid for by their own tax dollars." Associated Builders and Contractors, Inc. http://www.abc.org/en-us/politicspolicy/issues/projectlaboragreements.aspx

> "Family-supporting Project Labor Agreements, otherwise known as Community Workforce Agreements or PLAs, are a tried and true way of building the basics of America from the Hoover Dam to the Washington Nationals baseball stadium. These agreements benefit working men and women, contractors, communities and taxpayers by ensuring projects are completed on time and on budget, requiring employee training, and encouraging that public investment benefits local communities." Laborers' International Union of North America http://www.liuna.org/project-labor-agreements

A PLA is an agreement entered into between a private or public entity and an organization of construction or building trade labor unions, typically a regional or state "Building and Construction Trades Council," a regional or state "Skilled Building Trades Council," or similar organization,[2] in which the entity agrees to require all contractors and subcontractors on a construction project or projects to agree to its terms. Typically it would require the contractors and subcontractors on construction projects to agree to be governed by (i.e., sign) the current collective bargaining agreements of relevant unions, regardless of whether the contractor or

[1] Co-authored by Megan Lord, University of Michigan Law School, J.D. 2011. This paper is not a publication of the City of Ann Arbor and should not be cited or construed as the official policy or position of either the City of Ann Arbor, Michigan, or the Office of the Ann Arbor City Attorney.

[2] If the regional organization has a Construction Unity Board (CUB) that handles the agreements, the agreement between the owner and the organization may be referred to as a CUB agreement. PLA will be the term used in this paper.

subcontractor is or is not itself a union shop.[3] The contractor or subcontractor can choose to agree to the collective bargaining agreement terms on a "one project" basis. A general contractor can enter into a PLA with a labor organization on its own, even if not required to do so by a project owner. Private parties may enter into PLAs and impose those requirements on contractors on a project. See, e.g., *Eisenmann Corp. v. Sheet Metal Workers Int'l Ass'n Local No. 24, AFL-CIO*, 323 F.3d 375 (6th Cir. 2003). (General Motors entered into PLA for a plant reconstruction project that required contractors and subcontractors who participated in construction activities on the project to abide by union standards for all workers connected to the project, both on and off the job site).[4]

For municipalities, the decision to enter into a PLA and to impose its requirements on its construction contractors and subcontractors likely will arise or have arisen if the local labor organization for building or construction trade unions has approached the governing body or sympathetic members of the governing body asking the municipality to enter into a PLA for its construction projects.

In exchange for the agreements to require contactors to agree to the terms of relevant collective bargaining agreements and for prompt resolution of disputes regarding payments of wages and fringes, the parties also agree that there will be "no strike, work stoppage or lock-out" on covered projects.

2. May a Municipality Enter into a PLA and Impose its Requirements on Contractors?

Yes, unless PLAs are prohibited by statute in the state in which the municipality sits or by regulations governing a particular source of funding for the

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[3] Those agreements also may be referred to as PLAs. For purposes of this paper, PLA will refer only to the agreement between the entity that owns a construction project and the labor union organization.

[4] Subsections (e) and (f) of Section 8 of the National Labor Relations Act (NLRA) explicitly permits employers in the construction industry, and only in the construction industry, to enter into pre-hire agreements, i.e., collective-bargaining agreements providing for union recognition, compulsory union dues or equivalents, and mandatory use of union hiring halls, prior to the hiring of any employees. The pre-hire agreement can require the employer not to hire other contractors to work on a project site unless they agree to be bound by the terms of the labor agreement. Valid PLAs for construction projects are covered by this pre-hire exception in Section 8.

project.

Courts that have addressed the validity of PLAs have upheld the right of both private and public entities, acting in their roles as proprietors and market place participants (and not in a regulatory role), to enter into PLAs and to impose those requirements on contractors and subcontractors on their construction projects. A city may enter into a PLA and impose its requirements so long as the purpose is to further the city's proprietary interests and the requirements are properly limited to achieve that purpose.

Illustrative of the reasoning of the courts is *Michigan Building and Construction Trades Council v. Snyder,* 729 F.3d 572 (6th Cir. 2013), which addressed the validity of a Michigan decision, by statute, not to require its contractors to enter into PLAs. In 2011 the Michigan legislature passed the first version of a Fair and Open Competition Governmental Construction Act, which had prohibited PLAs in government contracts and subcontracts. In early 2012, the plaintiffs in the case had gotten a preliminary injunction against the Act on the grounds it was preempted by the NLRA, which allows the use of PLAs for construction projects. The court concluded the act was regulatory and not action by the state in its proprietary capacity. The Michigan act was then amended and the district court again enjoined the act on the grounds of preemption by the NLRA. On appeal, the Court of Appeals for the Sixth Circuit reversed, holding that the Michigan statute, as amended, "furthers Michigan's proprietary goal of improving efficiency in public construction projects," was not overly broad to effectuate that purpose, so was not preempted by the NLRA. The amended act barred governmental units from entering into PLAs, but no longer barred a governmental unit from spending funds on a project, awarding a contract, grant, tax abatement, or tax credit to a private owner, bidder, contactor or subcontractor that had entered into a PLA, as long as the governmental unit had not made entry into a PLA a condition of the award or grant.

Addressing the issue of whether the act was proprietary or regulatory, the court looked to the legislative history and accepted the purposes stated in the

legislative history - that the act was passed "in an effort to improve efficiency in government projects" and with an intent "to save resources" through the use of cheaper labor. Critical for the court was that the act did not apply to or regulate privately owned and funded projects, did not prohibit a governmental unit from entering into a contract with a contractor that had entered into a PLA, and governmental units could not discriminate against a contractor because it had or had not entered into a PLA.

The decision in *Snyder* followed and is consistent with *Building & Construction Trades Council v. Associated Builders and Contractors*, 517 U.S. 218 (1993) (*Boston Harbor*), in which the Court had held that a government-mandated PLA for the Boston Harbor construction project was proprietary. The Court considered the state's role owning and managing a project to be the same as a private owner would have, with both involving the same interactions with private participants in the marketplace and both owners being free to make the same decisions when choosing contractors for their projects. That the Massachusetts Water Resources Authority had determined that the PLA requirement would result in an efficient and low cost project, and the Michigan legislature had determined that a prohibition on PLA requirements would result in lower cost projects, notwithstanding objections that projects might be less speedy and efficient, did not matter. That determination was a determination properly left to the state to make in its proprietary capacity relative to its own projects, including those of governmental units within the state.

With respect to federally funded projects, President Obama's Executive Order 13502[5] allows federal agencies to use PLAs on construction projects of $25 million or more, if the agency determines that the use of a PLA will serve the agency's interests, including its interest in economy and efficiency, labor-management stability, and compliance with laws and regulations governing labor and employment on the project. Although Executive Order 13502 appears to apply only to federal construction projects and not contracts of a similar size funded with

[5] 74 Fed. Reg. 6985 (February 6, 2009).

federal funds, Executive Order 13502 also revoked Executive Order 13302,[6] issued by President George W. Bush, which had provided that a federal agency could not award a construction contract or issue grants or financial assistance for construction projects if the bid specifications, project agreements or other controlling documents either required or prohibited PLAs or discriminated against bidders, contractors, etc., for becoming or refusing to become signatories to agreements with labor organizations for the project. Under Executive Order 13302, municipalities that had entered into PLAs could not apply the requirements of those PLAs to projects for which they received federal funding.[7] With the revocation of this prohibition by Executive Order 13502, a municipality could impose the requirements of a PLA to a federally funded project.[8]

Absent a state prohibition on any local government mandate of PLA requirements in its contracts, a local government could enter into a PLA and require compliance, provided it is done to promote the local government's proprietary interests and is tailored to achieve that purpose. In *Metro. Milwaukee Ass'n of Commerce v. Milwaukee Cnty.*, 431 F.3d 277 (7th Cir. 2005), the Court of Appeals for the Seventh Circuit held that an ordinance requiring city contractors to enter into "labor peace agreements" with unions was regulatory, not proprietary, because it was not tailored to further the city's proprietary goal and had a "spillover" impact on private contracts as well. Because of its regulatory nature, it was preempted by the NLRA. See, also, *Idaho Bldg. & Const. Trades Council, AFL-CIO v. Wasden*, 836 F. Supp. 2d 1146 (D. Idaho 2011) (Idaho's Open Access to Work Act held to be regulatory and preempted because its purpose was not to further the state's interest in the efficient procurement of goods and services but rather to further Idaho's Right-to-Work Act).

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[6] 66 Fed. Reg. 11225 (February 17, 2001).
[7] *Building and Construction Trades Dep't v. Albaugh*, 295 F.3d 28 (D.C. Cir. 2002), upheld Executive Order 13302 as proprietary.
[8] President George H.W. Bush had prohibited PLAs on federally funded projects. President Clinton had revoked that order and allowed use of PLAs on federal construction projects of $5 million or more. This federal back and forth on prohibiting and allowing PLAs likely will continue with each new President.

In contrast, in *Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206 (3d Cir. 2004), the Court of Appeals for the Third Circuit held that the Pittsburgh ordinance that required the employer to accept a labor neutrality agreement and found it to be proprietary. The Court based its conclusion on Pittsburgh's partnership with the Urban Redevelopment Authority ("URA") and its proprietary financial interest in the success of the project, which was financed by the URA with tax increment financing, and found, in those circumstances, that Pittsburgh's ordinance furthered its proprietary interests by requiring an agreement that would eliminate picketing, work stoppages and other economic disruptions. See, also, B*ldg. Indus. Elec. Contractors Ass'n v. City of New York*, 678 F.3d 184 (2d Cir. 2012) (City of New York entered into PLAs for certain City construction projects, which were held not to be preempted because the City acted not as a regulator but as a market participant like any other landowner or developer). In *Sheet Metal Workers Int'l Ass'n Local Union No. 27, AFL-CIO v. E.P. Donnelly, Inc.*, 673 F. Supp. 2d 313 (D.N.J. 2009), the court upheld a PLA that complied with the New Jersey statute (N.J. Stat. Ann. § 52:38–3), which provided, in relevant part:

> "A public entity may include a project labor agreement in a public works project on a project-by-project basis, if the public entity determines, taking into consideration the size, complexity and cost of the public works project, that, with respect to that project the project labor agreement will meet the requirements of section 5 of this act, including promoting labor stability and advancing the interests of the public entity in cost, efficiency, skilled labor force, quality, safety and timeliness."

Section 5 required, in part, that the PLA, "Advance the interests of the public entity, including the interests in cost, efficiency, quality, timeliness, skilled labor force, and safety."

3. Are there Circumstances under Which a Municipality Cannot Impose the Requirements of a PLA on its Contractors?

Currently it appears there is no federal Executive Order that would prohibit a municipality from entering into a PLA or imposing its requirements on is contractors for a project that receives federal funding. However, because federal

prohibitions against PLAs have come and gone in the past, the current scope of any mandate, permission or prohibition should be monitored with every change in the office of President.

If an Executive Order or regulations prohibit PLAs for projects funded with federal funds, or with certain federal funds, the municipality can simply exclude construction projects funded with those funds from any PLA obligations it has agreed to.

Similarly, if a state has prohibited local units of government from entering into and mandating that contractors and subcontractors agree to comply with PLA requirements, municipalities in that state will not be able to enter into or impose the requirements of a PLA. A municipality cannot, however, discriminate for or against a contractor or subcontractor that chooses to enter into a PLA either generally or for a specific project of the municipality.

II. U.S. Department of Transportation's Disadvantaged Business Enterprise Program

Every year, the U.S. Department of Transportation (U.S. DOT), through its respective agencies,[9] allocates funds to state departments of transportation (state-DOTs) for use in transportation projects, including the construction and repair of roads. State-DOT recipients of such federal funding then allocate these funds, in the form of contractual project agreements, to municipalities for use in qualified projects.[10] In this arrangement, the state is the recipient of the federal funds, and the municipality is the sub-recipient.[11] As a condition of this federal funding, U.S. DOT requires both recipients and sub-recipients to comply with all applicable federal regulations, including the Disadvantaged Business Enterprise (DBE)

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[9] The Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA).

[10] *E.g.*, Federal-aid Program Overview: Funding Basics and Eligibility, http://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?id=44 (last visited Jul. 7, 2014).

[11] 49 C.F.R. §26.5 - A "recipient" is "any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance."

Program at 49 C.F.R. Part 26.[12]

The responsibilities of the federal government, of state-DOTs, and of municipalities in administering U.S. DOT-assisted contracts are addressed, with an up-to-date framework for compliance with federal DBE regulations.

1. **Federal DBE Program Requirements - Overview**

To encourage DBE participation and "create a level playing field on which DBEs can compete fairly for DOT-assisted contracts,"[13] U.S. DOT requires fund recipients to establish DBE programs in accordance with 49 C.F.R. Part 26.[14] These DBE programs must comply with federal regulations and receive approval from U.S. DOT. A DBE is defined as,

> "a for-profit small business concern - - (1) that is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and (2) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it."[15]

Women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the U.S. Small Business Administration (SBA) are presumed to be socially and economic disadvantaged for purposes of the DBE Program

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[12] *See* 49 C.F.R. §26.3(a) – "If you are a recipient of any of the following types of funds, this part applies to you:
(1) Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107.
(2) Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, Pub. L. 105-178.
(3) Airport funds authorized by 49 U.S.C. §47101 *et seq.*"

[13] 49 C.F.R. §26.1(b).

[14] U.S. DOT relied on the principles of Title VI of the Civil Rights Act of 1964 to create the DBE program. *See*, *e.g.*, Civil Rights Disadvantaged Business Enterprise: Program Overview, http://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?id=73 (last visited Jul. 7, 2014).

[15] 49 C.F.R. §26.5.

regulations.[16] If the personal net worth of an individual DBE owner exceeds $1.32 million, "the individual's presumption of economic disadvantage is rebutted."[17]

As direct recipients, state-DOTs bear the responsibility for establishing DBE programs. Sub-recipients of U.S. DOT funds, such as municipalities, need not develop independent programs.[18] Instead, municipalities that advertise and award federal-aid contracts must assure compliance with the federally-approved DBE programs established by their state-DOTs.[19]

Among other requirements, a state DBE programs must: (1) establish an overall goal for DBE participation in U.S. DOT-assisted contracts, and (2) develop a Unified Certification Program (UCP) to certify contractors and subcontractors as DBEs.[20] Municipalities should have a general understanding of both requirements to best carry out their own DBE program responsibilities.

2. Setting Overall DBE Participation Goals

As part of their DBE program, state-DOTs must establish overall DBE participation goals for DOT-assisted contracts. Overall goals must be based "on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on your DOT-assisted

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[16]Companies owned by members outside of these groups may apply for DBE certification, but have the burden of proving by a preponderance of evidence that the owner is socially and economically disadvantaged. 49 C.F.R. §26.67(d)).
[17]49 C.F.R. §26.67(b)(1).
[18] *See, e.g.*, Official Questions and Answers (Q&A's) Disadvantaged Business Enterprise Program Regulation (49 CFR 26), http://www.dot.gov/osdbu/disadvantaged-business-enterprise/official-questions-and-answers-26 (last visited Jul. 7, 2014).
[19] *See, e.g.*, Civil Rights Disadvantaged Business Enterprise: Program Overview, http://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?id=73 (last visited Jul. 7, 2014).
[20] *See* 49 C.F.R. §26.45; *But see* 49 C.F.R. §26.45 (a)(1) – "Except as provided in paragraph (a)(2) of this section, you must set an overall goal for DBE participation in your DOT-assisted contracts. (2) If you are a FTA or FAA recipient who reasonably anticipates awarding (excluding transit vehicle purchases) $250,000 or less in FTA or FAA funds in prime contracts in a Federal fiscal year, you are not required to develop overall goals for FTA or FAA respectively for that fiscal year. However, if you have an existing DBE program, it must remain in effect and you must seek to fulfill the objectives outlined in 26.1."

contracts…"[21] The overall goal may be met using both race-neutral and race-conscious means, and the percentage to be obtained by each should be included in the state's overall goal proposal. Race-neutral participation occurs when DBEs win prime contracts that specify no DBE goal, or when DBEs receive subcontracts with no consideration given to DBE status.[22] The portion of the goal which cannot be met through race-neutral means should be reached through race-conscious measures by setting DBE contract goals for specific projects.[23] Quotas cannot be used for DBE participation in DOT-assisted contracts and set-asides may not be used unless no other method exists to redress egregious discrimination.[24] If the entire overall goal can be reached using race-neutral means, specific contract goals should not be set unless circumstances change.[25] State DBE plans must be approval by U.S. DOT. [26]

3. Unified Certification Programs

To satisfy Federal requirements, U.S. DOT-assisted contract recipients must also establish Unified Certification Programs (UCPs) to certify firms as DBEs.[27] Under a UCP, an applicant need only apply once for DBE certification. If granted, the certification must be recognized by all FAA, FTA, and FHWA recipients in the state.[28] In other words, the UCP provides "one stop shopping" for firms looking to obtain DBE status for the purpose of participating in U.S. DOT-assisted contracts.[29] Federal regulations do not require municipalities to operate certification programs. If a municipality provides a DBE certification service, it must do so in accordance

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[21] 49 C.F.R. §26.45(b); A more detailed description of the overall goal-setting process is available at 49 C.F.R. §26.45.
[22] *See* 49 C.F.R. §26.51(a).
[23] *See* 49 C.F.R. §26.51(d).
[24] *See* 49 C.F.R. §26.43(a) and (b).
[25] *See* 49 C.F.R. §26.51(f)(1).
[26] *See* 49 C.F.R. §26.45(f)(1)(i); *See also* Disadvantaged Business Enterprise Program Procedures (2013), 26, *available at*, http://www.michigan.gov/mdot/0,1607,7-151-9625_21539_23108---,00.html.
[27] *See* 49 C.F.R. §26.81(a).
[28] *See* 49 C.F.R. §26.81(b).
[29] *See, e.g.*, Civil Rights Disadvantaged Business Enterprise: Program Overview, http://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?id=73 (last visited Jul. 7, 2014).

with established UCP procedures.[30] State-DOTs maintain directories of all certified firms, to which municipalities can refer when letting U.S. DOT-assisted contracts.[31]

A municipality that advertises and awards federal-aid contracts must follow their state-DOT's federally-approved DBE program to avoid the suspension of federal funds.[32] To assist with compliance with federal DBE Program requirements, a municipality should be familiar with and understand both the overall DBE participation goal and the UCP of their state-DOT.

4. Specific Municipal Responsibilities

The U.S. DOT, state-DOTs, and local governments share responsibility for complying with Federal DBE Program requirements. If a contract between the state-DOT and a municipal sub-recipient requires municipal advertisement and award of the Federal-aid contract, the municipality has the responsibility to provide contract administration throughout the entire project. The federally-approved state DBE program serves as the municipality's guide and must be followed unless the state mandates otherwise.[33]

A. Pre-Award Requirements

(1) Setting Specific Contract Goals

Specific contract goals may be set to meet that portion of the overall goal that

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[30] The City of Los Angeles continues to provide DBE certification services. Once certified by the City, DBEs become part of the UCP database of DBE firms. *See* California Department of Transportation Frequently Asked Questions: Disadvantaged Business Enterprise Program, http://www.dot.ca.gov/hq/bep/files/Disadvantaged_Business_Enterprise_DBE_Program_FAQs.pdf (last visited Jul. 7, 2014). In Illinois, five agencies, including the City of Chicago, certify firms under the Illinois UCP. Each agency uses the same certification application, and makes certification decisions binding on the other agencies. *See* Illinois Unified Certification Program, http://www.dot.state.il.us/ucp/ucp.html (last visited Jul. 7, 2014).

[31] *See* 49 C.F.R. §26.81(g);For a more detailed description of UCP requirements and the rules governing certification, refer to 49 C.F.R. §§26.65-26.83.

[32] *See* Civil Rights Disadvantaged Business Enterprise: Project Contract Administration, http://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?id=1 (last visited Jul. 7, 2014).

[33] *See* Civil Rights Disadvantaged Business Enterprise: Program Overview, http://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?id=73 (last visited Jul. 7, 2014).

cannot be reached by race-neutral means alone,[34] although specific contract goals need not be set for every U.S. DOT-assisted project.[35] Some state DBE plans may delegate responsibility for setting specific contract goals to municipality sub-recipients, but some states conduct the process without municipality input.[36] If a specific project goal has been set, the municipality letting the contract must know and follow the goal when accepting contractor bids.

The recipient or sub-recipient tasked with setting contract goals must consider a number of factors including: (1) the location of the particular project, (2) the type of work the project requires, and (3) the availability of DBEs that actually perform the type of work needed for the project.[37] Further, contract goals should only be set for U.S. DOT-assisted contracts with subcontracting possibilities.[38]

Once established, the specific contract goal must be included in the advertisement to contractors.[39] The contract should only be awarded to bidders who have made an adequate good faith effort to meet the contract goal.[40] If the municipality determines the prime contractor has obtained enough prospective DBE participation to meet the goal, that prime contractor has met the good faith requirement and may be selected for the project. If a potential prime contractor does not meet the goal, the municipality must evaluate the firm's good faith efforts to do so. 49 C.F.R. Pt.26, App. A provides guidance for evaluating good faith efforts.[41]

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[34] *See* 49 C.F.R. §26.51(d).
[35] *See* 49 C.F.R. §26.51(e)(2).
[36] *See* Civil Rights Disadvantaged Business Enterprise: Contract Goals, http://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?id=84 (last visited Jul. 7, 2014).
[37] *See* Civil Rights Disadvantaged Business Enterprise: Contract Goals, http://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?id=84 (last visited Jul. 7, 2014).
[38] *See* 49 C.F.R. §26.51(e)(1).
[39] *See* Civil Rights Disadvantaged Business Enterprise: Contract Goals, http://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?id=84 (last visited Jul. 7, 2014). If the municipality is letting the contract according to the state-DOT/City contract terms, the municipality advertises and awards the work.
[40] *See* 49 C.F.R. §26.53(a).
[41] Appendix A does not provide a mandatory checklist, so recipients and sub-recipients should have good criteria established for this determination. *See* Civil Rights Disadvantaged Business Enterprise: Evaluating Good Faith Efforts,

Bidders may request administrative reconsideration if the recipient makes a negative good faith determination.[42] To ensure the accuracy of all information supplied by a contractor, the municipality must obtain lists from each bidder with the names and addresses of the participating DBE firms, the type of work each will perform and the dollar amount, and written confirmation from the DBE subcontractors listed that they are in fact participating in the contract.[43] Municipalities should also confirm the DBEs listed are actually certified and included in the state's DBE directory.

(2) Contract Assurances

To comply with Federal DBE Program requirements when letting DOT-assisted contracts, municipalities must also require the inclusion of certain assurances in all project contracts. First, every contract entered into by the recipient, sub-recipient, prime contractor, and subcontractors must include non-discrimination assurances as well as the assurance that all parties follow the state DBE program guidelines.[44] Second, every contract must include a prompt payment

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http://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?id=85 (last visited Jul. 7, 2014).

[42] *See* 49 C.F.R. §26.53(d).

[43] *See* 49 C.F.R. §§26.53(b)(2) and 26.53(b)(3).

[44] *See* 49 C.F.R. §26.13(a) – "Each financial assistance agreement you sign with a DOT operating administration (or a primary recipient) must include the following assurance: The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of 49 CFR Part 26. The recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR Part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.). 49 C.F.R. §26.13(b) – Each contract you sign with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance: The contractor, sub recipient 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

clause, which requires "prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment you make to the prime contractor."[45] A subcontractor's work may be considered completed for purposes of this requirement when all tasks in the subcontract have been accomplished and documented, or when a recipient has made an incremental acceptance of a portion of the prime contract completed by a subcontractor.[46] Third, a sub-recipient may need to include a retainage provision in the contracts if required by the respective state DBE program.[47] Federal regulations require recipients to ensure payment of retainage from the prime contractor to the subcontractor.

B. Post-Award Requirements

After award of the contract, a municipality administering the contract maintains responsibility for monitoring the project and ensuring DBE program compliance by all participants. To do this, a municipality must refer to and follow completely the state DBE plan.

Oversight includes visiting the project site and confirming DBE performance of the work specified in the contract. Only DBE work considered "commercially useful" and actually performed by the DBE may be counted toward the DBE contract goal.[48] According to 49 C.F.R. §26.55(c)(1),

> "A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, order the material, and installing (where applicable) and

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this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate."

[45] 49 C.F.R. §26.29(a).

[46] *See* 49 C.F.R. §26.29(c).

[47] *See* Civil Rights Disadvantaged Business Enterprise: Project Contract Administration, http://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?id=1 (last visited Jul. 7, 2014).

[48] *See* 49 C.F.R. §26.55(a), (c).

paying for the material itself…"[49]

If a DBE subcontractor fails to perform the work allocated to it for any reason, the recipient or sub-recipient responsible must require the prime contractor to make good faith efforts to replace the DBE.[50] The municipality should provide written consent before a prime contractor may terminate a DBE subcontractor listed in its bid.[51] Further, the municipality maintains responsibility for making sure the prime contractor and subcontractors follow all contract assurances related to the DBE program.

Any record keeping required by the state DBE plan should be carried out by the municipality administering the contract.[52] By the end of the contract, payments made to DBE subcontractors should equal the DBE goal commitment and award amounts.[53]

5. Current Case Law and its Effect on Particular States

A number of Federal Circuit Courts have considered the constitutionality of the Federal DBE Program, both on its face and as implemented by state and local governments through state DBE plans. These decisions may have implications for states and municipalities in certain areas of the country both in developing state DBE plans and in administering those plans.

In *Adarand Constructors, Inc. v. Pena* (*Adarand III*), 515 U.S. 200, 227 (1995), the Supreme Court held that "all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny." Following *Adarand*, courts have applied strict scrutiny to DBE regulations and plans.

To satisfy strict scrutiny, the DBE program and individual DBE plans must

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[49] Specific instructions for an analysis of commercial usefulness and calculating amount of DBE participation to count toward goals are contained throughout 49 C.F.R. §26.55.
[50] *See* 49 C.F.R. §26.53(g).
[51] *See* 49 C.F.R. §26.53(f)(1).
[52] *See* Civil Rights Disadvantaged Business Enterprise: Project Contract Administration, http://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?id=1 (last visited Jul. 7, 2014).
[53] *Id.*

be narrowly tailored to serve a compelling state interest.[54] Further, there must be a "strong basis in evidence" that the program is necessary to combat discrimination.[55] On remand from the Supreme Court's decision in *Adarand III*, the Court of Appeals for the Tenth Circuit in *Adarand Constructors, Inc. v. Slater (Adarand VII)*, 228 F.3d 1147, 1165 (10th Cir. 2000), considered a facial challenge to the federal Small Business Program (SBP) (similar to the DBE program), and concluded that "the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements." The Court considered a number of factors, including the necessity for relief, the availability of alternative remedies, and a limit on the duration of race-conscious measures, and concluded the SBP to be narrowly tailored.[56]

The Courts of Appeal for the Seventh, Eighth, and Ninth Circuits have considered challenges to the federal DBE program specifically, both on its face and as applied. Where the federal DBE program has been challenged, it has been upheld as constitutional. Further, the Courts of Appeal in all three Circuits have concluded that a state, in an as applied challenged, may defend state DBE plans by relying on the federal government's compelling interest in not perpetuating discrimination in the distribution of federal funds.[57] The Courts have differed, however, as to whether or not state DBE plans must be analyzed separately for narrow tailoring. In *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.*, 345 F.3d 964 (8th Cir. 2003), the Court of Appeals for the Eighth Circuit considered a challenge to the Minnesota and Nebraska DBE plans. Addressing the requirement of narrow tailoring, the Court stated,

> "A valid race-based program must be narrowly tailored, and to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed.

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[54] *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.*, 345 F.3d 964, 969 (8th Cir. 2003), cert. denied, 541 U.S. 1041, 124 S.Ct. 2158, 158 L.Ed.2d 729 (2004).
[55] *Sherbrooke,* 345 F.3d at 969.
[56] *Adarand Constructors, Inc. v. Slater (Adarand VII)*, 228 F.3d 1147, 1176-1188 (10th Cir. 2000).
[57] *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 720 (7th Cir. 2007).

> To the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny." 345 F.3d at 971 (Emphasis in original).

The Court held each state program to be narrowly tailored because the state-DOTs undertook a thorough analysis in setting overall DBE participation goals.[58]

In *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 (7th Cir. 2007), the Court of Appeals for the Seventh Circuit refused to undertake a separate narrow tailoring analysis for the Illinois DBE program at issue. Instead, the Court reasoned that the state DBE program would fail a narrow tailoring analysis only if the state exceeded its federal authority under the federal DBE regulations.[59]

In *Western States Paving Co., Inc. v. Washington State Dept. of Transp.*, 407 F.3d 983 (9th Cir. 2005), the Court of Appeals for the Ninth Circuit applied a much more stringent test to analyze whether or not the Washington DBE program at issue could be considered narrowly tailored. Specifically, the Court reasoned that discrimination must be present in the state's transportation contracting industry, and its application must be confined to those groups that have actually faced this discrimination.[60] Because the State of Washington did not present sufficient evidence of discrimination in its own transportation contracting market, the Court concluded the state's program was not narrowly tailored.[61]

As a result of the decision in *Western States Paving Co.,* the U.S. DOT has provided some guidance as to how to conduct the overall goal setting process for states in the Ninth Circuit.[62] First, recipients should review all currently available evidence of discrimination to determine if its DBE plan complies with the narrow tailoring conditions expressed in *Western States Paving Co.*[63] Second, if the

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[58] *Sherbrooke,* 345 F.3d at 973-974.
[59] *Northern Contracting, Inc.*, 473 F.3d at 721-722.
[60] *Western States Paving Co., Inc. v. Washington State Dept. of Transp.*, 407 F.3d 983, 997-998 (9th Cir. 2005).
[61] Id. at 1003.
[62] The Ninth Circuit includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, as well as Guam and the Northern Mariana Islands.
[63] *See* U.S. Department of Transportation: Western States Paving Company Case Q&A, http://www.dot.gov/osdbu/disadvantaged-business-enterprise/western-states-paving-company-case-q-and-a (last visited Jul. 8, 2014).

recipient has sufficient evidence of discrimination and its effects, the recipient can establish race-conscious goals, as appropriate, based on that evidence.[64] Third, the recipient should apply its overall goal to only those socially and economically disadvantaged groups its evidence shows to be actually disadvantaged in the state's transportation contracting market.[65] States should be mindful of the need for thorough evidence of actual discrimination when setting overall contract goals.

6. Conclusion

States and municipalities must follow a number of requirements to properly administer U.S. DOT-assisted contracts and adhere to Federal DBE Program regulations. Most importantly, municipalities should closely follow federally-approved state DBE programs when letting and administering federally-funded transportation contracts. Adequate implementation of the Federal DBE Program will allow municipalities to successfully complete transportation projects while preventing project delays or loss of funding.

III. Living Wage or Other Minimum Wage Requirements

1. Does Executive Order 13658 (February 12, 2014) Impact Federally Funded Contracts?

The living wage requirements of Executive Order 13658 ($10.10 starting January 1, 2015), apply to federal contractors but not federal grants. Although regulations will be forthcoming, it appears these requirements will not apply to federally assisted contracts entered into by municipalities.

2. Can a Municipality Impose Living Wage or Other Minimum Wage Requirements on its Contractors?

The Michigan Court of Appeals recently upheld an ordinance adopted by the City of Lansing that imposed "prevailing wage" requirements on the city's construction contractors.[66] The ordinance provided in relevant part:

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[64] *Id.*
[65] *Id.*
[66] "Prevailing" and "living" wages are different, but the analysis is similar for both. As a general rule, prevailing wages are the level of compensation paid to workers in a particular industry in a defined (local) market area and are usually based on the pay scales of the unions relevant to the industry. A living wage is set as the minimum wage necessary to provide a worker and his/her family a decent living.

> "No contract, agreement or other arrangement for construction on behalf of the City and involving mechanics and laborers, including truck drivers of the contractor and/or subcontractors, employed directly upon the site of the work, shall be approved or executed by the City unless the contractor and his or her subcontractors furnish proof and agree that such mechanics and laborers so employed shall receive at least the prevailing wages and fringe benefits for corresponding classes of mechanics and laborers, as determined by statistics compiled by the United States Department of Labor and related to the Greater Lansing area by such Department."

Associated Builders and Contractors v. City of Lansing, Docket No. 313684, ___ N.W.2d ___, 2014 WL 2197850 (May 27, 2014).

The decision was a departure from an earlier decision, *Attorney General, ex re Lennane v. City of Detroit*, 225 Mich. 631, 196 NW 391 (1923), in which the Michigan Supreme Court had struck down a similar ordinance. In *Lennane*, the court had held that the city did not have authority to set wages because the state had not granted that authority to cities and that setting wages was a matter of state concern. In *City of Lansing*, the court looked to changes in the Michigan Constitution since *Lennane* and based its decision on the recognition that cities had broader police powers than when *Lennane* was decided and were not limited to powers explicitly granted to them by the state. The court also found that the City of Lansing ordinance was not preempted by the state's minimum wage or prevailing wage statutes.

In *Metro. Milwaukee Ass'n of Commerce, Inc. v. City of Milwaukee*, 2011 WI App 45, 332 Wis. 2d 459, 798 N.W.2d 287 (2011), the court upheld a voter initiated ordinance that required employers within the city of Milwaukee to provide their employees with paid sick leave, as specified in the ordinance. The court recognized that the city had the power to legislate for the purposes of the health, safety, and welfare of the public, but examined the ordinance as to whether it was written to rationally further that purpose. Relying in part on reports that supported the various ordinance provisions, the court concluded the ordinance provisions were not unreasonable.

Different wages may be set depending on whether or not the employee receives health benefits.

The court then looked at whether the ordinance was preempted by the state's minimum wage law, which provides that a city "may not enact and administer an ordinance establishing a living wage." By statute, a state department was identified as responsible for "determining the living wage" and carrying out its obligation by establishing "minimum wage rates." Because the court viewed paid sick leave as a benefit and not an hourly wage rate, the court held it was not preempted by the state minimum wage statute. The court also rejected claims that the ordinance conflicted with or was preempted by other state statutes. The court did not have to address whether an ordinance imposing a minimum wage or living wage requirement on employers in the city would have withstood a preemption challenge.

The court in *New Orleans Campaign for a Living Wage v. City of New Orleans*, 825 So. 2d 1098 (La. 2002), did have to address that issue. The court both upheld a Louisiana statute that prohibited local governments from establishing minimum wages and held that the New Orleans ordinance, which set a minimum wage for employees who performed work within the city was unconstitutional because it abridged the state's police powers. The court did not address whether it might have reached a different result if the ordinance applied only to employers who had entered into contacts with the city. In an opinion that foreshadowed the *City of Lansing* court's discussion of the change in law and broadening of municipal powers since *Lennane*, the dissenting judge in *New Orleans Campaign* criticized the majority for not recognizing a change in Louisiana's home rule city act, arguing it should have been construed to allow the ordinance. The dissenting judge also briefly recounted in a footnote the history of the living wage movement, which the judge said started in Baltimore, Maryland, in 1994,[67] but noted that most living wage ordinances applied to contractors with contracts to perform work for the municipality.

In contrast, in *New Mexicans for Free Enter. v. The City of Santa Fe*, 138 N.M. 785, 126 P.3d 1149 (2005), the court upheld the city's minimum wage

[67] Baltimore enacted a minimum wage ordinance many years before and it was upheld in *Mayor of Baltimore v. Sitnick*, 255 A.2d 376 (Md. 1969).

ordinance as not prohibited by state law. In *Visiting Homemaker Service v. Bd. of Chosen Freeholders*, 883 A.2d 1074 (N.J. Super. Ct. App. Div. 2005), the court upheld a county ordinance that directed contractors providing certain services to the county to provide an increased minimum wage and mandatory health benefits to the employees providing those services. The court rejected arguments that the ordinance was preempted by the state minimum wage law and was contrary to state law competitive bid requirements, as well as constitutional equal protection and due process challenges. In *City of Atlanta v. Associated Builders & Contractors*, 242 S.E.2d 139 (Ga. 1978), the court upheld the city's prevailing wage ordinance, which applied to construction contracts above $10,000 and required use of Davis-Bacon wages. The court held that the ordinance did not conflict with but rather "enhanced" state law governing wages.

3. Regulations Implementing a Living Wage Ordinance

A caution on implementation of a living wage requirement comes from *Agular v. Superior Court*, 170 Cal. App. 4th 313, 87 Cal. Rptr. 3d 813 (2009), regulations that had the effect of limiting the application of the City of Los Angeles' Living Wage Ordinance were challenged. The court relied on the plain language of the ordinance and its legislative history to discern the intent. Finding that the intent was to provide a living wage to employees of city service contractors who spent any of their time on those contracts, regulations that (1) applied the living wage requirement only to employees who worked more than 20 hours per month on a city service contact, and (2) applied the living wage requirement only to the hours spent working on a city service contact by the employee were held invalid because they were in conflict with the ordinance. Although the City of Los Angeles was not a party to the *Agular* case, a valuable lesson is to be sure the intent of a living wage ordinance and how it is to be applied is clear in the ordinance. If a city official or agency is empowered to promulgate regulations to implement the ordinance, care should be taken that the authority granted is defined, and that any regulations promulgated do not conflict with the ordinance. If the agency promulgating the regulations is authorized to limit application or create exceptions, that should be

clear.

4. Living Wage Ordinance Have Prevailed Against Claims of Federal Preemption and Unconstitutionality

Since *Agular*, in *Calop Business Systems, Inc. v. City of Los Angeles*, 984 F. Supp. 2d 981 (C.D. Cal. 2013), the Los Angeles ordinance requiring city contactors to pay a living wage to employees working on the contract was been upheld against challenges, including unconstitutional vagueness, that it violated ERISA, and that it was preempted by both the federal Railway Labor and Airline Deregulation Acts.

Fortuna Enterprises, L.P. v. City of Los Angeles, 673 F. Supp. 2d 1000 (C.D. Cal. 2008), addresses a living wage requirement, but with a PLA-like twist. By ordinance intended to "promote the economic vitality of [a Corridor] near the Los Angeles Airport," the city created an "airport Hospitality Enhancement Zone" in which the city would "target new City resources, investments and benefits." 673 F. Supp. 2d 1002. The city required hotels within the Zone to pay their employees a living wage set by the ordinance and subject to adjustment based on the Consumer Price Index, and also required to hotels to grant a certain number of days to their employees as paid and unpaid leave time. An exception to the wage and leave time requirements was allowed if a hotel "enters into a 'bona fide collective bargaining agreement' that includes a clear and unambiguous waiver of the terms of the Ordinance." 673 F. Supp. 2d 1002-1003. An exemption also was allowed if a hotel could demonstrate that compliance would require a significant reduction in workforce, curtailment of hours or require it to shut down or go into bankruptcy.

The court upheld the ordinance against challenges that it was preempted by the NLRA and that it violated equal protection requirements because of the exemption for hotels with collective bargaining agreements, because smaller hotels did not have to comply, and because it did not apply to other businesses within the Zone or to other hotels outside the Zone, finding that there was a rational basis for the ordinance. The court's decision followed an earlier decision, *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137 (9th Cir. 2004), in which the Court of Appeals had upheld a living wage ordinance that applied to only certain employers in a certain

area against similar challenges.

Last but not least, a very recent case, *Amerijet Internat'l, Inc. v. Miami-Dade County*, ___ F. Supp. 2d ___ (Case No. 12-22304-Civ.; S.D. Fla. March 5, 2014), addressed whether the County's living wage ordinance was unconstitutional either on its face or as applied to Amerijet. The ordinance required employees of County service contactors and County employees to be paid a living wage. By its terms, it also covered employers who transacted business at Miami International Airport via permit or lease. Services that an airline contracted to provide to another airline were included as covered services that triggered the living wage requirement. Because Amerijet provided cargo handling services to British Airways, the County took the position it was required to comply and several of its employees sued for back pay and penalties. The court rejected Amerijet's challenges of preemption under the Airline Deregulation Act, the Federal Aviation Administration Authorization Act, and various Open Skies Agreements between the United States and "some 100 foreign nations." The court also rejected Amerijet's claims that the ordinance violated the Commerce Clause and the Equal Protection Clause of the Fourteenth Amendment, as well as a couple of other arguments.

IV. July 21, 2014, Executive Order - Addition of "Sexual Orientation" and "Gender Identity" to the Provisions of Executive Order 11246 (September 25, 1965, as previously amended)

This new Executive Order adds "sexual orientation, gender identity" after "sex" in Paragraphs 1 and 2 of Section 202 of Executive Order 11246, which require government contracts to include a requirement for the contactor to agree not to discriminate on the basis of "race, color, religion, sex, or national origin," and now also "sexual orientation or gender identity," and to take affirmative action to ensure that employees are treated without regard to those characteristics during the hiring process and during employment. The equal opportunity/non-discrimination statement on hiring notices will include these additional categories as well. All practices and requirements, e.g., for compliance reports, will need to cover these additional categories of employees.

The requirements of Part II of Executive Order 11246 apply to contracts

entered into with the United States or one of its agencies. However, Part III of Executive Order 11246, requiring "Nondiscrimination Provisions in Federally Assisted Construction Contracts," applies by reference the requirements of Part II to construction contracts funded in whole or in part by federal "grant, contract, loan, insurance, or guarantee." Municipalities and their construction contractors have been complying for many years with the "race, color, religion, sex or national origin" employment requirements of Part III for federally assisted construction contracts. We can anticipate that the requirements for sexual orientation and gender identity likely will be the same.

The new Executive Order took effect immediately, requiring the Secretary of Labor to prepare regulations to implement the Order's requirements within 90 days. Contracts entered into on or after the effective date of the regulations promulgated by the Department of Labor will need to comply with those requirements.

V. Written and Enforceable Anti-Conflicts Policy Required for Federally Funded Contracts

Most municipal attorneys can recite all or most of the categories of prohibited relationships when a federally funded or assisted contract is awarded by a municipality. How many have helped their client write and implement an enforceable anti-conflicts ordinance, rule or policy is another matter. In states where the prohibitions on conflicts of interest are the same or similar to the federal prohibitions, the municipality may well have a policy or ordinance in place that will satisfy the federal requirement, although it may need to be checked for enforceability against elected officials who are participate in the decision to award a contract to a particular vendor. But for municipalities in states that have different or less robust prohibitions on conflicts in the award of contracts, a policy or ordinance that covers federally funded contacts needs to be adopted and, if needed, enforced.

For contracts funded with USDOT funds, 49 C.F.R. § 18.36 requires a recipient of federal funding to comply with its prohibitions against conflicts when

awarding contracts or sub-contracts. Subparagraph (b)(3) provides:

> "(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:
>
> > "(i) The employee, officer or agent,
> > "(ii) Any member of his immediate family,
> > "(iii) His or her partner, or
> > "(iv) An organization which employs, or is about to employ, any of the above,
>
> "has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest." (Emphasis added.)

A draft of a conflicts policy, including a provision for addressing with a violation of the conflict prohibition by an employee or by an elected or appointed official, is attached as Attachment 1.

A municipality may want to implement a practice of collecting information from prospective contractors that would disclose whether any of the foregoing relationships exist between the contractor and municipal employees or officials or members of their families/households. The information can be collected using a form submitted as part of the bid or proposal process and will be a way to spot prohibited conflicts for that contract.

If a state's statutory prohibitions against conflicts of interest in contracts are the same or very similar to those of the federal government, guarding against federally prohibited conflicts will not pose much of an additional burden, other than to be sure the policy is written and enforceable. If the state conflict provisions do not

preclude imposition of other, more stringent prohibitions, a single policy that complies with the federal requirements and also satisfies the state requirements would be easiest. If, however, state law is less stringent or different, and either preemptive of local regulation or in conflict with the federal requirements, care will need to be taken to make sure the correct conflict of interest policies and practices and applied to contracts that are and contacts that are not federally funded.

VI. Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.)

A municipality that receives federal funds for any program is obligated not to discriminate on the basis of race, color, or national origin in the provision of services or with respect to access to the municipality's programs.

Municipalities are required to assure compliance Title VI program. A copy of a written Title VI program modeled on the Michigan Department of Transportation's program and satisfactory to the US Department of Transportation is attached as Attachment 2.

VII. Limited English Proficiency (LEP) Requirements

With Executive Order 13166 (August 11, 2000), President Clinton added to the non-discrimination requirements of Title VI the explicit requirement that services and programs be made available to persons who are limited in their English proficiency (LEP). On the same date, USDOJ issued its LEP Guidance - a general guidance document.[68] Each federal agency was required to draft its own Title VI guidance, consistent with the USDOJ LEP Guidance.

Therefore as part of a municipality's Title VI obligations (non-discrimination in access to City programs, the provision of services, etc.), a municipality must include a program for access to services and programs by persons with limited English proficiency. www.LEP.gov provides a great deal of useful information, including a page entitled "Federal Agency Links to LEP Guidance for Recipients" that has links to the LEP Policy or Guidance document issued by each of the many

[68] The Court of Appeals for the Tenth Circuit has noted that, "The document makes clear, however, that it 'is not a regulation but rather a guide.' *United States v. Silva-Arzeta*, 602 F.3d 1208, 1216 (10th Cir. 2010) (concluding that "use of certified interpreters and recording devices during [police] interrogation could improve the accuracy of evidence at trial . . . [but are not] constitutionally required.")

agencies listed, including Department of Agriculture, Environmental Protection Agency, Health and Human Services, Department of Transportation and the Nuclear Regulatory Agency.[69]

USDOJ's June 17, 2002, LEP Guidance is available at 67 Fed. Reg. 41455 - 41472 (June 18, 2002). A copy of an LEP program modeled on the Michigan Department of Transportation's program and satisfactory to the US Department of Transportation is attached as Attachment 3.

Also of interest, particularly if a municipality is considering adoption of any sort of "English only" requirements, is the letter dated April 14, 2009, from Loretta King, Acting Assistant Attorney General of the Civil Rights Division of USDOJ, to Drew Edmondson, Attorney General of Oklahoma, regarding the conflict between a proposed "English-only" amendment to the Oklahoma constitution and the state's Title VI obligations. A copy of the letter is attached as Attachment 4.

[69] See http://www.lep.gov/guidance/guidance_Fed_Guidance.html#USDA.

ATTACHMENT 1

Conflict of Interest Policy When Federal Funds Are Involved

In addition to compliance with all other applicable requirements of federal and [State] law, the City Charter, City Code and City policies and procedures, the following requirements apply when the City awards a contract supported by Federal funds:

No employee, officer or agent of the City shall participate in the selection of, or in the award or administration of, a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved.

Such a conflict would arise when: (i) the employee, officer or agent, (ii) any member of his or her immediate family, (iii) his or her partner, or (iv) an organization that employs, or is about to employ, any of the foregoing, has a financial or other interest in the firm selected for award of the contract. Provided, that if the direct benefit to any of the foregoing is an amount that is both less than $250.00 and less than 5% of the public cost of the contract, the contract shall not be precluded.

No officer, employee or agent of the City will solicit or accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to contracts with the City. This prohibition does not include the receipt of a gift of an unsolicited item for which the intrinsic value does not exceed $50.00.

A City employee who willfully violates any of the provisions of this policy may be subject to appropriate discipline. If the Mayor, a Councilmember, the City Administrator or the City Attorney willfully violates any of the provisions of this policy, he or she shall be referred to the Council Administrative Committee for appropriate discipline or other action. A willful violation of any of the provisions of this policy by a contractor or an agent of a contractor may be cause for disqualification of the contractor, termination of contracts with the contactor or other action.

ATTACHMENT 2

Title VI Plan

For the City of Ann Arbor, Michigan

301 E. Huron St.

Ann Arbor, Michigan

Policy Statement

The City of Ann Arbor reaffirms its policy to afford all individuals the opportunity to participate in federal financially assisted services and that no person in the United States shall, on the grounds of race, color, age, sex, disability, limited English proficiency, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

This policy statement will be posted on the City of Ann Arbor's website.

_____

Steven D. Powers
City Administrator

AUTHORITIES

Title VI of the Civil Rights Act of 1964, 42 USC 2000d to 2000-4; 42 USC 4601 to 4655; 23 USC 109(h);

Title VI of the 1964 Civil Rights Act provides that no person in the United States shall, on the grounds of race, sex, color, or national origin (including Limited English Proficiency), be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving federal financial assistance (please refer to 23 CFR 200.9 and 49 CFR 21). Related statutes have broadened the grounds to include age, low income, and disability.

The Civil Rights Restoration Act of 1987 also broadened the scope of Title VI coverage by expanding the definition of terms "programs or activities" to include all programs or activities of Federal Aid recipients, sub-recipients, and contractors, whether such programs and activities are federally assisted or not (Public Law 100-259 March 22, 1988).

Federal Aid Highway Act of 1973, 23 USC 324: No person shall on the ground of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance under this title or carried on under this title.

Age Discrimination Act of 1975, 42 USC 6101: No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving federal financial assistance.

Americans With Disabilities Act of 1990 PL 101-336: No qualified individual with a disability shall, by reason of his/her handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination by a department, agency, special purpose district, or other instrumentality of a state or a local government.

Section 504 of the Rehabilitation Act of 1973: No qualified handicapped person shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity that receives or benefits from federal financial assistance.

USDOT Order 1050.2: Standard Title VI Assurances.

EO 12250: Department of Justice Leadership and coordination of Non-discrimination Laws.

EO 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; and

28 CFR 50.3: Guidelines for the enforcement of Title VI, Civil Rights Act of 1964.

EO 13166: Improving Access to Services for Persons with Limited English Proficiency.

Introduction

The purpose of Title VI of the Civil Rights Act of 1964 is to prohibit programs that receive federal funds from discriminating against participants or clients on the basis of race, color, sex, age, disability or national origin. The intent of the law is to insure that all persons, regardless of their race, color, sex, age, disability or national original, are allowed to participate in these federally funded programs. To insure that the City of Ann Arbor meets it compliance responsibility, the Title VI Plan has been established to provide for monitoring of Title VI compliance activities and complaint processing in all operations and programs which receive federal or state funding.

Staff Responsible for Title VI Compliance

The following City of Ann Arbor employee is assigned to Title VI Compliance:

Coordinator: Robyn Wilkerson
Director of Human Resources and Labor Relations
301 E. Huron St.
P.O. Box 8647
Ann Arbor, MI 48107-8647
Phone: (734) 794-6120
Fax: (734) 994-5961
Email: rwilkerson@a2gov.org

Coordinator Responsibilities

The Director of Human Resources and Labor Relations of the City of Ann Arbor is responsible for ensuring the implementation of the City of Ann Arbor's Title VI Plan. The City of Ann Arbor Director of Human Resources and Labor Relations is responsible for the overall management of the day to day administration of the Title VI Plan.

The Director of Human Resources and Labor Relations is assigned the responsibility for implementing, monitoring, and ensuring the City of Ann Arbor's compliance with the Title VI regulations. Title VI responsibilities are as follows:

1. Process the disposition of Title VI complaints received by the City of Ann Arbor.
2. Conduct an annual review of the City of Ann Arbor's Title VI program.
3. Review internal policies and, where applicable, include Title VI language and related requirements.
4. Certify annually before October 1 to the Michigan Department of Transportation that the City of Ann Arbor's Title VI plan is still in effect and/or advise the Michigan Department of Transportation of changes to the plan.
5. Implement informational training for employees through periodic updates and on line notices.
6. Include information regarding Title VI on Ann Arbor's website for the public

Assurances

Any federal financial assistance provided to the City of Ann Arbor is condition on providing assurances that the City of Ann Arbor services to be benefited by the funds will operate without discrimination. Such an assurance is a contractual obligation through which the City of Ann Arbor promises to comply with Title VI regulations and promises that it will take immediate and continuing steps to effectuate this compliance. As part of the Title VI compliance documentation, the City of Ann Arbor's assurances appear at **Appendix B.** Such assurances will also be a part of all contracts extending federal financial assistance through the City of Ann Arbor to City of Ann Arbor sub-recipients. A review of the sub-recipients' operations will be made within one (1) year of the sub-recipients initial receipt of federal funds to determine compliance with the assurances.

Administration

Complaints

If any individual believes that they or any other program beneficiaries have been subjected to unequal treatment or discrimination as a recipient of benefits and/or services, on the grounds of race, color, sex, age, disability or national origin, they may exercise the right to file a complaint with the City of Ann Arbor. Every effort will be made to resolve complaints informally at the agency, recipient, and contractor's level (see **Appendix A**).

Data Collection

Statistical data on race, color, national origin, age, disability and sex of participants in, and beneficiaries of, the City of Ann Arbor federally funded programs will be gathered as appropriate and maintained by the City of Ann Arbor Title VI Coordinator. The gathering procedures will be reviewed annually to ensure sufficiency of the data in meeting the requirements of the Title VI program.

Annual Reviews

All federally funded programs will be reviewed annually to assess effectiveness in the compliance of Title VI provisions. This is in addition to the day-to-day monitoring. The City of Ann Arbor Title VI Coordinator will coordinate efforts to ensure the equal participation in all their activities and programs at all levels.

Annual Reports

The City of Ann Arbor will certify annually before October 1 of each year to the Michigan Department of Transportation that the City of Ann Arbor Title VI Plan is still in effect and/or advise the Michigan Department of Transportation of changes to the plan. The Title VI Coordinator will be responsible for coordination and preparation of the report.

Public Notification

The City of Ann Arbor will provide Title VI Program information to City of Ann Arbor contractors. Public notification will include the posting of statements of Title VI language in contracts and announcements in minority newspapers when determined necessary and funding is available.

Remedial Action

The City of Ann Arbor will actively pursue the prevention of Title VI deficiencies and violations and will take the necessary steps to ensure compliance with all program administrative requirements. When deficiencies are found, procedures will be implemented in a timely fashion to correct the deficiencies, and the corrective actions will be documented. The period to determine corrective action(s) and document it (them) may not exceed 90 days from the date the deficiencies are found.

Limited English Proficiency

Compliance with Title VI includes Limited English Proficient (LEP) persons. Language barriers prohibit people who are LEP from obtaining services and information relating to transportation services and programs. Because people who are LEP are not able to read instructions or correspondence written in English, and may not understand verbal information, they often are not aware of regulatory requirements and legal implications of the services they seek.

It is essential that City of Ann Arbor personnel, professionals, and other sub-recipients of federal funds become informed about diverse clientele in the service area from a linguistic, cultural and social perspective. These individuals should become culturally competent so they can encourage vulnerable LEP populations to access and receive appropriate services with more knowledge and confidence.

U.S. DOT guidelines require that recipients of federal financial assistance provide “meaning full access to programs and activities” by giving LEP persons adequate and understandable information and allowing them to participate in programs and activities where appropriate. The recipient has to take “reasonable steps” to remove barriers for LEP individuals.

Reasonable steps will depend on:

- The number and proportion of LEP persons potentially served by the recipients' programs or activities and the variety of languages spoke in the recipient's service area
- The frequency with which LEP individuals are affected by the programs or activity
- The importance of the effect of the recipient's program on LEP individuals
- The resources available to the recipient and whether the recipient has budgeted for provision of special language services
- The level of services provided to fully English proficient people
- Whether LEP persons are being excluded from services or provided a lower level of services
- Whether the recipient has adequate justification for restrictions, if any, on special language services, or on speaking languages other than English

Appendix A

Nondiscrimination Complaint Procedures for Federally Assisted Programs or Activities

These procedures cover all complaints filed under Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, Civil Rights Restoration Act of 1987, and the Americans with Disabilities Act of 1990, relating to any plan or activity administered by the City of Ann Arbor as to sub-recipients, consultants, and contractors.

Intimidation or retaliation of any kind is prohibited by law. Every effort will be made to obtain early resolution of complaints at the lowest level possible. The option of informal mediation meeting(s) between the affected parties and the Title VI Coordinator may be utilized for resolution. Further, these procedures do not deny the rights of the complainant to file a formal complaint with other state or federal agencies or to seek private counsel for complaints alleging discrimination.

1. Any individual, group of individuals or entity that believes it has been subjected to discrimination prohibited by Title VI nondiscrimination provisions may file a written complaint with the City of Ann Arbor. A signed, written complaint should be filed within 180 days of the alleged discrimination. If you could not reasonably be expected to know the act was discriminatory within the 180 day period, you have 60 days after you became aware to file your complaint.

2. Upon receipt of the complaint, the City of Ann Arbor, specifically the Title VI Compliance Coordinator will determine its jurisdiction, acceptability, need for additional information, and will investigate the merit of the complaint. In cases where the complaint is against the City of Ann Arbor or one of the City of Ann Arbor's sub-recipients of federal funds, the City of Ann Arbor will forward the complaint to the Michigan Department of Transportation Office of Equal Opportunity. Additionally, a copy of the complaint will be forwarded to the City of Ann Arbor's City Attorney for review.

3. When the complaint is forwarded to Michigan Department of Transportation Office of Equal Opportunity, the Title VI Coordinator will notify the individual, group of individuals or entity that believes it has been subject to discrimination within five calendar days.

4. Upon receipt of any complaint, the Title VI Coordinator will keep record of all correspondence received regarding that complaint.

5. Any comments or recommendations from legal counsel will be reviewed by the Title VI Coordinator.

6. Once the City of Ann Arbor is notified of Michigan Department of Transportation office of Equal Opportunity investigative report findings, the City of Ann Arbor will adopt a final resolution.

7. All parties will be properly notified of the outcome of the Michigan Department of Transportation Office of Equal Opportunity report.

8. If the complainant is not satisfied with the results of the investigation of the alleged discriminatory practice(s), they shall be advised of their rights to appeal the Michigan Department of Transportation Office of Equal Opportunity decision. Appeals must be filed within 180 days after the City of Ann Arbor's final resolution. Unless new facts not previously considered come to light, reconsideration of the City of Ann Arbor's determination will not be available.

9. In cases where the complaint is against a consultant and/or contractor who has contracted with The City of Ann Arbor, the Title VI Coordinator shall investigate the merit of the complaint and send a written report of his/her findings and recommendations to the Director of City of Ann Arbor Division of Purchasing. The report shall be submitted within thirty (30) calendar days of receiving the initial complaint and shall include, but not be limited to a narrative description of the incident, and identification of persons involved.

10. The Title VI coordinator may consult with the Ann Arbor City Attorney when preparing the report for the Purchasing Director.

11. The City of Ann Arbor Purchasing Director shall review the report and after consulting with the Ann Arbor City Attorney make a final determination whether to give a violator a warning, and/or seek an injunction, liquidated damages, or other remedies as may be provided under contract or law.

12. The City of Ann Arbor Purchasing Director shall notify all parties of the outcome and their right to appeal within 180 days of the Purchasing director's decision to the Michigan Department of Transportation Office of Equal Opportunity.

The foregoing complaint resolution procedures will be implemented in accordance with the Department of Justice guidance manual entitled "Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes," available on line at:

http://www.usdoj.gov/crt/cor/pubs/manuals/complain.html

Appendix B

Title VI Assurances

The City of Ann Arbor (hereinafter referred to as "Recipient"), HEREBY AGREES THAT as a condition to receiving any federal financial assistance from the United States Department of Transportation, it will comply with Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 USC 2000d to 42 USC 2000d-4 (hereinafter referred to as the "Act"), and all requirements imposed by or pursuant to title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, Office of the Secretary, Part 21, Nondiscrimination in Federally Assisted Programs of the Department of Transportation-Effectuation of the Title VI of the Civil Rights Act of 1954 (hereinafter referred to as the "Regulations"), and other pertinent directives, to the end that in accordance with the Act, Regulations, and other pertinent directives, no person in the United States shall, on the grounds of race, color, sex, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Recipient receives federal financial assistance, and

HEREBY GIVES ASSURANCE THAT it will promptly take any measures necessary to effectuate this agreement. This Assurance is required by Subsection 21.7(a)(1) of the Regulations. More specifically and without limiting the above general assurance, the Recipient hereby gives the following specific assurances to its federally funded programs:

1. That the Recipient agrees that each "program" and each "facility", as defined in Subsections 21.23(3) and 21.23(b) of the Regulations, will be conducted (with regard to a "program"), or will be operated (with regard to a "facility") in compliance with all requirements imposed by, or pursuant to, the Regulations.

2. That the Recipient shall insert the following notification in all solicitations for bids for work or material subject to the regulations made in connection with the Federal Aid Program, and in adapted form in all proposals for negotiated agreements:

   The City of Ann Arbor in accordance with Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 USC 2000d-d4 and Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, Office of the Secretary, Part 21, Nondiscrimination in Federally Assisted programs of Department of Transportation, and all requirements issued pursuant to such Act, hereby notifies all bidders that minority disadvantaged business enterprises will be afforded full opportunity to submit bids in response to this invitation and will not be discriminated against on the grounds of gender, disability, race color, sex or national origin in consideration for an award.

3. That the Recipient shall insert clauses of Appendix C in every contract subject to the Act and the Regulations.

4. That where the Recipient receives federal financial assistance to construct a facility, or part of a facility, the Assurance shall extend to the entire facility and facilities operated in connection therewith.

5. The Recipient shall provide for such methods of administration for the plan as are found by the Secretary of Transportation, or the official to whom they delegate specific authority to give reasonable guarantee that it, other recipients, sub-grantees, contractors, subcontractors, transferees, successors in interest, and other participants of federal financial assistance under such plan will comply with all requirements imposed or pursuant to the Act, the Regulations and this Assurance.

6. The Recipient agrees that the United States has the right to seek judicial endorsement with regard to any matter arising under the Act, the Regulations, and this Assurance.

THIS ASSURANCE is given in consideration of and for the purpose of obtaining, any and all federal grants, loans, contracts, property, discounts, or other federal financial assistance extended after the date hereof to the Recipient by the Department of Transportation under the Federal Aid Highway Program, and is binding on it, other recipients, sub-grantees, contractors, subcontractors, transferees, successors in interest, and other participants in the Federal Aid Highway Program. The person or persons whose signatures appear below are authorized to sign this Assurance on behalf of the Recipient.

_____ _____

Steven D. Powers, City Administrator Date

_____ _____

Robyn Wilkerson Date
Title VI Compliance Coordinator

Appendix C

Title VI Contract Language

During the performance of this contract, the contractor, for itself, its assignees, and successors in interest, (hereinafter referred to as the “contractor”) agrees as follows:

1. Compliance with Regulations

   The contractor shall comply with the regulations relative to nondiscrimination in federally assisted programs of the Department of Transportation (hereinafter referred to as DOT), Title 49, Code of Federal Regulations, part 21 (hereinafter referred to as the Regulations), as they may be amended from time to time, herein incorporated by reference and made a part of this contract.

2. Nondiscrimination

   The contractor, with regard to the work performed during the contract, shall not discriminate on the grounds of race, color, sex, or national origin in the selection and retention of subcontractors, including procurement of materials and leases of equipment. The contractor shall not participate either directly or indirectly in discrimination prohibited by Section 21.5 of the Regulations, including employment practices when the contract covers a program set forth in Appendix B of the Regulations.

3. Solicitations for Subcontracts, including Procurement of Materials and Equipment

   In all solicitations either by competitive bidding or negotiations made by the contractor for work to be performed under a subcontract, including procurement of material for leases of equipment, each potential subcontractor or supplier shall be notified by the contractor of the contractor’s obligations under this contract and the Regulations relative to nondiscrimination on the ground of race, color, sex, or national origin.

4. Information and Reports

   The contractor shall provide all information and reports required by the Regulation or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information and its facilities as may be determined by the City of Ann Arbor, Michigan Department of Transportation, or appropriate Federal Agency to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of a contractor is in exclusive possession of another who fails or refuses to furnish this information, the contractor shall so certify to the Michigan Department of Transportation or the appropriate Federal Agency as needed, and shall set forth what efforts it has made to obtain the information.

5. Sanctions for Noncompliance

   In the event of the contractor's noncompliance with the nondiscrimination provisions of this contract, the City of Ann Arbor shall impost such contract sanctions as the Michigan Department of Transportation may determine to be appropriate, including, but not limited to:

   A. Withholding of payments to the contractor under contract until the contractor complies, and/or
   B. Cancellation, termination, or suspension of the contract, in whole or in part.

6. Incorporations and Provisions

   The contractor shall include the provisions of paragraphs (1) through (5) in every subcontract, including procurement of materials and leases of equipment, unless exempt by Regulations or directives issued pursuant thereto. The contractor shall take such action with respect to any subcontractor or procurement as the City of Ann Arbor, Michigan Department of Transportation, or appropriate Federal Agency may direct as a means of enforcing such provisions, including sanctions for noncompliance.

Appendix D
TITLE VI COMPLAINT FORM

This form may be used to file a complaint with the City of Ann Arbor based on purported violations of Title VI of the Civil Rights Act of 1964. You are not required to use this form; a letter that provides the same information is sufficient to file your complaint. If you need assistance completing this form due to a physical impairment please contact us by phone at (734) 794-6120 or FAX (734) 994-5961.

Only the complainant or the complainant's designated representative should complete this form.

Name: _____

Address: _____

City:_____State:_____Zip:_____

Telephone:

Home:_____Work:_____Fax:_____

Please explain your relationship to the individual(s) indicated above: _____
_____

Name of agency, department or program that allegedly discriminated:
_____

_____

Agency or Department Name: _____

Name of Individual if Known:_____

Date(s) of alleged discrimination:_____

Waiver Request:
Generally, complaints of discrimination must be filed within 180 days of the alleged discrimination. If the most recent date of discrimination listed was more than 180 days ago, you may request a waiver of the filing requirement. If you wish to request a waiver, please explain why you waited until now to file your complaint:

Alleged discrimination:

Race/Color

National origin

Sex

Religion

Age

Disability

Explain: Please explain as clearly as possible what happened. Provide the name(s) of witnesses and others involved in the alleged discrimination. (Attach additional sheets if necessary and provide a copy of written materials pertaining to your case)

Note: The laws enforced by this department prohibit retaliation or intimidation against anyone because that individual has either taken action or participated in action to secure rights protected by these laws. If you experience retaliation or intimidation separate from the discrimination alleged in this complaint or if you have questions regarding the completion of this form, please contact

City of Ann Arbor
Human Resources Department
Attn: Robyn Wilkerson
301 E. Huron St., P.O. Box 8647
Ann Arbor, MI 48107-8647
Phone: (734) 794-6120
Email: rwilkerson@a2gov.org

Appendix E
Program Compliance/Program Review Goals for Current Plan Year

1. The City Title VI Policy will be communicated to each City Service Area Administrator who will review the Policy with appropriate employees.

2. The City Title VI Policy will be published on the City of Ann Arbor Internet Web Site.

3. Appendix C will be included in all City contracts as outlined in the Title VI Plan.

4. The language in number 2 of the City of Ann Arbor Title VI Assurances will be included in all solicitations for bids for work or material subject to the Regulations and in all proposals for negotiated agreements.

5. A procedure for responding to individuals with Limited English Proficiency will be developed.

6. Appropriate City employees will be trained on the LEP procedure and the Title VI complaint procedure.

7. The following data will be collected and reviewed by the City Administrator and included, where appropriate, in the annual report submitted to MDOT.

    a. Construction Projects: The number of construction projects, number of minority contractors bidding and the number selected; verification that Title VI language was included in bids and contracts for each project.
    b LEP Needs: How many requests for language assistance were requested or required and the outcome of these requests.
    c. Complaints: The number of Title VI complaints received; nature of the complaints; resolution of the complaints. -
    d. Timeliness of services: Number of requests for services; Amount of time from request to when service was delivered; Number of requests denied.
    e. Program Participants: Racial data of program participants where possible.

ATTACHMENT 3

CITY OF ANN ARBOR

LIMITED ENGLISH PROFICIENCY (LEP) PLAN

Guidelines and Procedures

INTRODUCTION

The City is committed to making its services, programs and activities available to everyone, regardless of language barriers. As residents, workers or visitors who contribute to the quality of life in the City, LEP individuals are entitled to meaningful access to City services. As a recipient of federal funds, the City is required by federal law to plan for, and provide LEP individuals with meaningful access to City services, programs and activities. The City's LEP Plan has been prepared in accordance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d et seq., and its implementing regulations, which state that no individual shall be subjected to discrimination on the basis of race, color, or national origin. Executive Order 13166, titled *Improving Access to Services for Individuals with Limited English Proficiency* indicates that differing treatment based upon an individual's inability to speak, read, write or understand English is a type of national origin discrimination. It directs Federal agencies to publish guidance for its respective recipients clarifying their obligation to ensure that such discrimination does not take place. This Executive Order applies to all state and local agencies that receive federal funds, including all City service areas receiving federal funds.

LEP community members and advocates can refer to the City's LEP Plan to learn about the City's commitment to ensure LEP individuals have meaningful access to City services, programs and activities. The guidelines and procedures contained in this document apply to all City service areas and all City employees who interact directly or indirectly with LEP individuals.

The Director of Human Resources is responsible for developing and maintaining the City's LEP Plan. For questions about the City's LEP plan, contact (734) 794-6120 or send an email to rwilkerson@a2gov.org.

LEP SERVICES

The City's LEP Plan governs City and City employee functions and actions, along with sub-recipients of federal funds through the City. This plan does not govern organizations that make use of City space for non-City events.

The City's LEP Plan addresses how services will be provided through general guidelines and specific procedures.

- Notification: Providing notice to LEP individuals about their right to service
- Identification: Identifying LEP populations and LEP services in City service areas
- Interpretation: Offering free and timely interpretation to LEP individuals upon request
- Translation: Providing free and timely translation of vital City documents upon request
- Training: Delivering training on LEP service to City employees

General Guidelines and Procedures for LEP Services

The City's LEP Plan will be updated as necessary by Human Resources.

Human Resources will evaluate the City's LEP Plan on a regular basis to determine its effectiveness. The evaluation will include:

- Identification of the LEP population in the City of Ann Arbor and recalculation of the City's primary language groups
- Assessment of the current level of services delivered to LEP individuals by each City service area
- Reporting on the LEP training received by City employees
- Reporting of activities by each City service area
- Feedback and comments from LEP communities, including organizations and advocacy groups serving LEP individuals, on the effectiveness of the City's LEP services.
- Evaluation of complaints

A. Notification

Guidelines

The City must proactively notify LEP individuals of their right to services, programs and activities.

City service areas and their employees must ensure that LEP individuals know they have the right to free and timely language services as it relates to the City's services, programs and activities.

Notification should be provided in a variety of ways, including, but not limited to:

- Posting signs in appropriate areas, such as waiting rooms, reception areas and other points of entry
- Standard translated content in outreach documents, such as posters or brochures, stating that services are available
- Working with LEP organizations and other stakeholders to inform City of Ann Arbor residents of their right to LEP services

Notification includes (at minimum):

- Information about available LEP services;
- Instructions on accessing services, programs and activities, including directions to City offices; and
- Assurance of free and timely service.

Notice should be provided based on a calculation of relative importance of the information or City services, programs and activities as it relates to the LEP individual.

Decisions on which signs, documents or other means of providing notice should be based on criteria such as:

- Importance or urgency of service
- Volume of contact

Procedures

City service areas should post standard signs informing LEP individuals of their right to free and timely interpretation and translation services.

Catalog current signs that are posted in public areas and decide which signs (e.g. directional, instructional, etc.) are the most important for accessing City services, programs and activities. Translate the most important signs first.

Questions about other signs should be referred to Human Resources.

Vital documents used for City services, programs and activities should include a version of the following message, translated into the City's primary languages: "Attention. If you want help translating this information, call 734 xxx-xxxx" .

B. Identification

Guidelines

The City should identify the number or percentage of City of Ann Arbor residents who primarily speak a language other than English, and which languages they speak. The primary languages should be reviewed at least once a year and revised as necessary.

Immigration status is not relevant in determining whether an individual is eligible for the LEP services outlined in the City's LEP Plan. Except under special circumstances, City employees are not permitted to ask an LEP individual about their immigration status. All LEP individuals are eligible for City services, programs and activities.

City service areas will be responsible to keep detailed records of the LEP services they provide. Guidance on keeping records and the ensuing reporting will be provided by Human Resources These records will be requested by Human Resources on a predetermined schedule. Records may also be requested on a need-to-know basis. The records may be used to determine the level of LEP services, evaluate changes and make appropriate LEP budget decisions.

Procedures

EP individuals can be identified in a variety of ways, including:

- Analyzing existing data sets, such as United States Census data or information from public agencies; or

- Asking LEP individuals to indicate their preferred language using "I Speak" cards or other mechanisms.

General population statistics are accessible on the United States Census Bureau website at www.census.gov.

Ways to collect information about LEP individuals served may include:

- Adapting databases used by the City to track languages spoken by clients
- Incorporating 'language spoken' fields in client intake forms and tracking responses
- Tracking telephone interpreting service usage
- Counting website 'hits' directed to translated content
- Conducting resident or customer satisfaction surveys
- Tallying the number of translated materials requested or distributed

C. Interpretation and Translation

Guidelines

The City must provide an interpreter, free of charge, to LEP individuals if needed to receive meaningful access to City services, programs and activities. The City must provide a translation of vital documents, free of charge, to LEP individuals if needed to receive meaningful access to City services, programs and activities.

Public meeting notices should include notification language that states interpreters will be provided upon request, if requested at least 5 business days prior to the meeting.

Vital documents must be available in the City's primary languages or readily translated by an interpreter, upon request. Not all documents can be translated and available in every language. City service areas must have the capacity to translate documents upon request and in a timely fashion.

Interpretation is more than the ability to speak two or more languages. Interpretation is the conversion of a spoken message from one language to another, while preserving the intent and meaning of the original message. Interpreters must be skilled and competent. Translation is more than the ability to read and write in two or more languages. Translation is the conversion of a written message from one language to another, while preserving the intent and meaning of the original message. Translators must be skilled and competent.

Competent interpreters should be able to demonstrate at least one of the following:

- Evidence of training that includes skills and ethics of interpreting;
- Ability to convey information· in both languages, accurately and completely, as demonstrated by a simulated interpreting encounter; or;
- Fundamental knowledge in both languages of any specialized terms or concepts related to a City service area's service, program or activity.
- The skill of translating is very different from the skill of interpreting. An individual who is a competent interpreter may or may not be competent to translate. A translator should understand the expected reading level of the audience and where appropriate, have fundamental knowledge about the target group's vocabulary and phraseology.

A competent translator should demonstrate one or more of the following:

- Evidence of training that includes skills and ethics of translation
- Proficiency in English and the other language, as documented in an objective language proficiency test
- Ability to convey information in both languages, accurately and completely, as demonstrated by a simulated translation request
- Fundamental knowledge in both languages of any specialized terms or concepts

Interpretation and translation services for the City will be carried out by competent interpreters or translators, whether they are City employees, contractors or telephone interpreters. City employees who work as interpreters or translators must demonstrate competence as defined above. With contract interpreters and translators and telephone interpreters, contracting agencies must demonstrate how competency is assessed.

Volunteers, friends or family members whose competence has not been assessed should not be relied upon to interpret or translate. The use of untrained volunteers exposes the City to liability related to its legal obligation to provide competent interpreter and translation services.

For reasons of accuracy, confidentiality and family dynamics, minor children (under 18) should not interpret or translate for family members or other LEP individuals. This guideline does not apply in serious emergency cases when a minor child is the only available potential interpreter or translator.

City employees should not urge or require those who speak little or no English to provide their own interpreter or translator. LEP individuals, however, may use their own interpreter or translator if they waive their right to an interpreter or translator provided by the City. If the effectiveness of service may be compromised or the LEP individual's privacy may be violated, a competent interpreter or translator should be used.

Individuals waiving the right to an interpreter or translator provided by the City will be asked to sign a waiver form.

Access to interpretation or translation services in all City service areas must be timely. No one may be denied access to services based on the lack of interpreter or translator availability.

Procedures

Interpretation or translation can be provided in a variety of ways:

- Bilingual City employee formally trained in interpreting or translating
- Approved City contract vendor providing interpretation or translation services
- Contract or freelance professional translators or contract interpreters providing oral, on-site translation
- Competent volunteer translators

The City maintains contracts with vendors to provide interpretation and translation services. City service areas that use these services will be charged for them. To access an interpreter or translator, City employees must contact Human Resources.

The City maintains contracts with vendors to provide telephonic interpretation services. City service areas that use these services will be charged for using them. To access a telephone interpreter, City employees must contact Human Resources.

Access to translated materials in all City service areas must be timely. No one may be denied access to services, programs and activities based on the lack of translated materials or documents.

If the City hires or contracts with an interpreter or translator, the City has the responsibility to ensure that all individuals should, at a minimum, demonstrate oral and written proficiency in each language and demonstrate familiarity with and comprehension of ethical standards for interpreters and translators.

D. Training

It is important to ensure that all City employees are given proper LEP training. City employees should know their obligations to provide LEP individuals with meaningful access to City services, programs and activities. The more frequent the contact with LEP individuals, the greater the need for in-depth training. City employees with little or no contact with LEP individuals must be aware of the City's LEP Plan. City employees in management positions, even if they do not interact regularly with LEP individuals, must be fully aware of and understand the City's LEP Plan so they can reinforce the importance and ensure the implementation of the City's LEP Plan.

LEP training on a city-wide level will be planned and carried out by Human Resources as needed.

At a minimum, the City will ensure:

- All City employees know about the City's LEP Plan;
- All City employees who are in public contact positions will be trained to work effectively with in-person and telephone interpreters and translators; and
- The City will provide training, including a copy of the City's LEP Plan, as part of the City's orientation for new City employees.

IMPLEMENTING, MONITORING AND UPDATING THE PLAN

The City's LEP Plan will be updated as necessary. Updating and maintaining the City's LEP Plan is the responsibility of Human Resources.

To ensure continuous improvement in providing LEP individuals with meaningful access to City services, programs and activities, the City will seek input from non-English or LEP communities, as well as community-based and advocacy organizations that work and interact with LEP populations.

Human Resources will work with Communications to maintain and update the City's LEP information page on the City's website.

Human Resources will evaluate the City's LEP plan on a regular basis to determine its effectiveness. The evaluation will include:

- Identification of the LEP population in the City of Ann Arbor and recalculation of the City's primary language groups
- Assessment of the current level of services delivered to LEP individuals by each City service area
- Reporting on the LEP training received by City employees
- Feedback and comments from LEP communities, including organizations and advocacy groups serving LEP individuals, on the effectiveness of the City's LEP services
- Evaluation of Human Resources responsibilities in handling complaints.

CONTRACTOR RESPONSIBILITIES

City contracted vendors and sub-recipients of federal funds through the City will be directed to read and follow the City's LEP Plan. Language to ensure compliance with language access and the City's LEP Plan should appear in City contracts. Contractors and vendors will be responsible for notifying and training their employees about LEP mandates. The City Attorney’s Office will be responsible for providing City service areas with the necessary LEP language requirements to include in City contracts.

COMPLAINT PROCESS

Complaints regarding LEP services (e.g. poor customer service, timeliness or quality of interpreter services) may be made in a number of ways to Human Resources:

- Face-to-face (Complainant will be asked to fill out a complaint form)
- Telephone (City employees will be asked to fill out a complaint form on behalf of the complainant)
- In writing via the U.S. mail
- In writing via electronic mail
- In writing via fax

The Complaint should contain the following information:

- Name, mailing address, and contact information (i.e. telephone number, email address, etc.)
- How, when, where, and why complainant believes he or she received unsatisfactory service. Include the location, names, and contact information of any witnesses.
- Other information that complainant deems significant

The complaint must be sent to Human Resources at Ann Arbor City Hall, 301 E. Huron, P.O. Box 8647, Ann Arbor, Michigan 48107-8647 or via email to rwilkerson@a2gov.org or fax to (734) 794-6120.

ATTACHMENT 4

U.S. Department of Justice

Civil Rights Division

Assistant Attorney General
950 Pennsylvania Avenue, NW - RFK
Washington, DC 20530

APR 14 2009

CERTIFIED, RETURN-RECEIPT REQUESTED

The Honorable W.A. Drew Edmondson
Attorney General of Oklahoma
313 NE 21st Street
Oklahoma City, OK 73105

Dear Mr. Edmondson:

Our office is aware that legislators in Oklahoma are seeking to send an English-only constitutional amendment to voters for ratification. If enacted, the amendment generally would seek to require that "[o]fficial actions of the state government be taken only in the English language." We are writing to advise you that implementation of this amendment may conflict with Oklahoma's obligations to protect the civil rights of limited English proficient (LEP) persons.

Many state, county, and local jurisdictions receive, either directly or indirectly, federal financial assistance from the Department of Justice (DOJ) or other federal agencies. As you know, recipients of federal financial assistance must comply with various civil rights statutes, including Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d *et seq*. (Title VI), which prohibits discrimination on the basis of race, color, and national origin. Specifically, Title VI states that no person shall "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Title VI further provides that each federal department and agency empowered to extend federal financial assistance must promulgate regulations that effectuate the purpose of Title VI and obtain assurances of nondiscrimination from the recipients of its financial assistance.

Under DOJ regulations implementing Title VI, recipients of federal financial assistance have a responsibility to ensure meaningful access to their programs and activities by LEP persons. *See* 28 C.F.R. § 42.104(b)(2). As the Department noted in our *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons,* 67 Fed. Reg. 41,455, 41,457 (June 18, 2002) (*LEP Guidance*):

> In certain circumstances, failure to ensure that LEP persons can effectively participate in or benefit from Federally assisted programs and activities may violate the prohibition under Title VI of the Civil Rights Act of 1964, 42 U.S.C.

> 2000d and Title VI regulations against national origin discrimination. The purpose of this policy guidance is to assist recipients in fulfilling their responsibilities to provide meaningful access to LEP persons under existing law.

The proposed amendment that passed the Oklahoma House in mid-March (HJR 1042) acknowledges that government use of languages other than English may be required by federal law and would permit use of other languages in such situations. The House proposal further defines "federal law" to exclude, among other things, Executive Order 13166, "unless and until federal or state courts have held [it] to be mandatory and binding on the state." *Id.* As the *LEP Guidance* noted, the Executive Order, reprinted at 65 Fed. Reg. 50,121 (August 16, 2000), did not create new obligations on recipients of federal financial assistance to ensure meaningful access to their programs or activities; that is, the state's obligation to abide by Title VI's bar to discrimination on the basis of national origin against LEP individuals is not dependent on the Executive Order. This Title VI obligation to LEP individuals is long-standing. In *Lau v. Nichols*, 414 U.S. 563 (1974), which addressed the obligation of a school system receiving federal financial assistance to provide language-based assistance to an LEP community, the U.S. Supreme Court held that Title VI prohibits conduct that has a disproportionate effect on LEP persons because such conduct constitutes national origin discrimination. For this reason, the proposed exclusion of the Executive Order from the definition of "federal law" has no practical effect. As *Lau* makes clear, the obligation to provide meaningful access to LEP individuals is mandatory and binding on the state.

The bill, which is now pending in the state Senate, includes a definition of "federal law" that includes only the "express language of the Constitution of the United States, federal laws, or binding and statutorily authorized federal regulations requires the use of a language other than the American dialect of English." OK HJR 1042 § 1.B.3 (Floor Substitute, Mar. 11, 2009). As discussed above, Title VI, federal regulations implementing Title VI, and the *LEP Guidance* require Oklahoma agencies and other recipients of federal financial assistance to take reasonable steps to provide meaningful access to the LEP individuals they encounter or who are in the eligible service area (including LEP parents and guardians of any minor, whether the minor is LEP or not).

Moreover, the President issued the Executive Order in large part to underscore and provide renewed emphasis on the importance of providing "access to federally conducted and federally assisted programs and activities for persons who, as a result of national origin, are limited in their English proficiency." The Executive Order further sets forth an obligation that federal agencies "draft title VI guidance" describing how each will make certain that their recipients provide for such access to LEP individuals. The *LEP Guidance* makes clear that the criteria for use in determining when to provide LEP individuals with meaningful access to federally-supported programs and services "are the same criteria DOJ will use in evaluating whether recipients are in compliance with Title VI and Title VI regulations." 67 Fed. Reg. at 41,457.

In order to assist agencies in determining the extent and type of language services needed to meet the legal standard of providing meaningful access to LEP individuals, the *LEP Guidance* recommends considering four factors. These factors take into account that recipients are asked to make increasingly difficult decisions on how to allocate scarce resources. The factors are:

(1) The number or proportion of LEP persons in the eligible service population;

(2) The frequency with which LEP individuals come into contact with the program;

(3) The importance of the program or activity to the LEP person (including the consequences of lack of language services or inadequate interpretation and/or translation); and

(4) The resources available to the recipient and the costs.

Moreover, this nondiscrimination requirement – including rules applicable to the provision of services to the LEP population – applies notwithstanding state adoption of English-only constitutional amendments or English-only laws or ordinances. The *LEP Guidance* addresses this issue specifically, noting that "some recipients operate in jurisdictions in which English has been declared the official language. Nonetheless, these recipients continue to be subject to Federal nondiscrimination requirements, including those applicable to the provision of Federally assisted services to persons with limited English proficiency." *Id.* at 41,459. State agencies and other entities in Oklahoma that receive federal financial assistance thus would be precluded by federal law from abiding by an English-only requirement where it conflicts with their obligations under Title VI.

For your convenience, we have enclosed the *LEP Guidance*. We also direct your attention to the Federal Interagency website on limited English proficiency, www.lep.gov, to find useful information on language access issues.

The Justice Department has an abiding interest in securing full compliance with the language access requirements of Title VI. The Civil Rights Division welcomes requests for technical assistance from its recipients of federal financial assistance, and works with recipients to create language assistance plans and cost-effective strategies to ensure meaningful access for LEP individuals. Please feel free to contact Merrily A. Friedlander, Chief, Coordination and Review Section, Civil Rights Division, at (202) 307-2222 for more information or assistance on this matter.

Sincerely,

Loretta King

Loretta King
Acting Assistant Attorney General

Enclosure