

**STAFF REPORT FOR CALENDAR ITEM NO.: 10
FOR THE MEETING OF: September 13, 2012**

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION:

Approval of changes to the TJPA Small Business Enterprise (SBE) Program and the TJPA Disadvantaged Business Enterprise (DBE) Program, including the Anticipated Disadvantaged Business Enterprise (DBE) Participation Level (ADPL) for the remainder of the triennial period of federal fiscal years 2011 through 2013 and authorization of the release of the revised draft ADPL for a 30-day public review/45-day public comment process.

SUMMARY:

In accordance with Title 49 of the Code of Federal Regulations, Part 26 (49 CFR Part 26), the TJPA implements a DBE Program to ensure nondiscrimination in the award of contracts. TJPA operates a race-neutral DBE Program, which means that enforceable DBE goals cannot be placed on contracts. In 2009, TJPA established an SBE Program which allows it to place enforceable SBE goals on contracts.

In April 2012, the FTA Office of Civil Rights (OCR) conducted a review of TJPA's DBE Program and has subsequently requested several changes to the Program. Those changes are described in further detail below.

EXPLANATION:

Changes to the TJPA DBE Program Plan

OCR requested several changes to the TJPA DBE Program Plan. TJPA has been following established practices in accordance with the intent of 49 CFR Part 26, but had not documented these practices in the written Program Plan. These changes are thus simply clarification of actual current practice.

- Section I, Objectives/Policy Statement, now includes a description of how, when and where the Program Plan will be distributed within and outside of the organization, and this description has been inserted into the SBE Program Plan as well. Specifically:
 - The Disadvantaged Business Enterprise Liaison Officer (DBELO) disseminates the Plan to the Transbay Joint Powers Authority Board of Directors whenever there are significant revisions for review and approval.
 - The TJPA also disseminates the Program Plan upon revision to members of TJPA's organization (staff and management consultants) at a regular staff meeting and via email.
 - The TJPA makes the Program Plan available to DBE and non-DBE business communities that perform work for it on DOT-assisted contracts by publishing an announcement of availability of revisions to the Plan in general circulation, minority-focused, and trade association publications such as the San Francisco Chronicle, San Francisco Examiner, El Mensajero, Small Business Exchange, San Francisco Bay View, La Oferta Review, Thoi Bao, Philippine News, and China Press.

- The Program Plan is available on the TJPA website, www.transbaycenter.org > Doing Business with the TJPA, and notice of its availability is sent to over 100 Bay Area chambers of commerce. A list of the chambers is maintained by the DBELO.
- Section V of the Program Plan, Required Contract Clauses, now specifically states that TJPA contractors must include the USDOT non-discrimination clause in every subcontract and provide a copy of every subcontract to TJPA.
- Section IX of the Program Plan, DBE Financial Institutions, now specifically states how TJPA will encourage the use of financial institutions owned and controlled by minorities: the website location for the Federal Reserve's list of minority-owned banks is now included in the Program Plan; TJPA will consult this list whenever seeking proposals for its own banking needs, and will encourage TJPA contractors and vendors to consider these institutions for their own banking via the annual fiscal year billing reminder letter sent to all TJPA vendors.
- Section XI of the Program Plan, Overconcentration, now includes a description of how and when it will analyze "overconcentration", which arises if DBE firms are so frequently used in certain types of work as to unduly burden the opportunity of non-DBE firms to participate. This is often raised in the context of highway construction work such as guardrail and fencing installation, landscaping, traffic control, etc. TJPA is not aware of any areas of overconcentration of DBEs in our marketplace, but will conduct an analysis triennially when setting our FTA DBE target by comparing the number of DBE firms in a given work code to the number of non-DBE firms. If overconcentration is identified in any field, TJPA will notify USDOT and request concurrence. Upon concurrence, TJPA will propose specific measures to address the concentration for USDOT approval before implementing, per 49 CFR Part 26.
- Section XVIII of the Program Plan, Counting DBE Participation, has a new sub-section entitled Legal Remedies. This sub-section calls out the fact that TJPA may deal with violations of the DBE Program requirements by terminating the contract, and/or determining that the contractor is in default or non-responsible. The standard default language from TJPA agreements has also been inserted into the sub-section.
- TJPA has previously calculated and published "DBE Availability Advisory Percentages" in Requests for Proposals and Invitations for Bid as appropriate given the scope of work, the subcontracting opportunities, and the availability of DBEs in the marketplace. OCR has directed TJPA to cease using these availability advisories. OCR believes that this may be interpreted to be an enforceable goal or quota in the eyes of the contracting community, despite clear language in TJPA procurement documents that an availability advisory is not a goal. OCR has also directed that reference to good faith efforts be deleted from the TJPA Program Plan as we operate a race-neutral program. We have complied with these directives in the attached revised DBE Program Plan, but note that good faith efforts will still be required to meet SBE contract goals.

- Changes to the methodology for calculating the triennial DBE target, and a minor change to the SBE Program Plan, are also proposed for TJPA Board approval and are described in further detail below.

Development of DBE Percentage

Since 2006, TJPA has been setting a DBE target (the Anticipated DBE Participation Level or ADPL) based on all contracts anticipated to be awarded in the relevant period (goal-setting used to be an annual process; in 2010 it was changed to a triennial process) because this is a federalized project. TJPA has submitted its DBE target to FTA as required and our targets have always been approved.

However, immediately following the OCR review, the FTA Region IX Civil Rights Officer directed TJPA to calculate its DBE target based upon only federally-funded contracts.

TJPA will continue to seek small and disadvantaged business participation to the maximum extent possible on contracts, regardless of funding source. Nonetheless, to comply with the FTA request, staff has calculated a new DBE target of 8.3 percent for only those contracts planned to be funded all or in part with FTA funds for the remainder of this triennial period. Staff proposes to retain the previously calculated 18.5 percent goal for the overall Program as a programwide SBE goal.

OCR also requested that TJPA include additional detail in the description of our methodology for goal-setting. We have done so, and the new methodology description is an appendix to the attached revised DBE Program Plan. The methodology to calculate the DBE participation target is a two-step process described in the federal DBE regulation. Step One of the methodology establishes a base figure for the anticipated new contracts to be awarded in the upcoming triennial period. The base figure is derived from the relative availability of DBEs that are ready, willing, and able to participate on the anticipated contracts. Step Two relies on the TJPA's knowledge of its contracting markets and previous history of DBE participation to determine if an adjustment to the base figure is needed. The 8.3 percent DBE target is a result of following these two steps, and the detail is shown in the attachments to the methodology.

In accordance with the public participation requirements of 49 CFR Part 26.45, the proposed revised ADPL of 8.3% must be released for a 30-day review/45-day comment period. A public notice will be published in general circulation media and available minority-focused media and trade association publications, including the following: San Francisco Chronicle, San Francisco Examiner, El Mensajero, Small Business Exchange, San Francisco Bay View, La Oferta Review, Thoi Bao, Philippine News, and China Press. The revised ADPL will also be sent to TJPA's local partner agencies (SFMTA, Caltrain/SamTrans, AC Transit, SFCTA, MTC) and the various Bay Area chambers of commerce with an invitation to comment.

Comments received during the public participation process will be addressed and included as part of the final ADPL. The ADPL for FY11-13 will be brought back to the TJPA Board in November for final adoption following the close of the public review/comment process. Following Board approval, the revised ADPL will be sent to FTA.

Changes to the SBE Program Plan

Two minor changes have been made to the SBE Program Plan to document current practice. One, the Program Plan now specifically states that contracts shall be analyzed for opportunities to unbundle work, in order to break large contracts into elements small enough for small businesses to reasonably perform, where this would not cause an undue burden to TJPA. Additionally, DBEs certified in other states' Unified Certification Programs count as SBEs in TJPA's Program. To allow participation by only California-certified DBEs would be contrary to federal guidelines.

RECOMMENDATION:

1. Approve the proposed changes to the Disadvantaged Business Enterprise (DBE) Program Plan and the Small Business Enterprise (SBE) Program Plan.
2. Approve the draft revised Anticipated DBE Participation Level (ADPL) of 8.3% for FY 2011-13.
3. Authorize the release of the draft revised ADPL for a 30-day public review/45-day public comment process.

ATTACHMENTS:

1. Resolution
2. Revised DBE Program Plan, with revised ADPL Methodology attached
3. Revised SBE Program Plan

**TRANSBAY JOINT POWERS AUTHORITY
BOARD OF DIRECTORS**

Resolution No. _____

WHEREAS, The Transbay Joint Powers Authority (TJPA) is a joint powers agency organized and existing under the laws of the State of California; and

WHEREAS, The Federal Transit Administration (FTA) authorized TJPA to become an eligible grantee for Federal financial assistance in January 2006; and

WHEREAS, In order to obtain federal funds for transportation projects from either the FTA or the Federal Highway Administration (FHWA), both operating administrations within the United States Department of Transportation (U.S. DOT), TJPA must implement an approved Disadvantaged Business Enterprise (DBE) Program in compliance with federal requirements (Title 49 Code of Federal Regulations Part 26) and update its DBE participation target on an triennial basis; and

WHEREAS, The TJPA originally adopted a DBE Program in July 2006, and supplemented its DBE Program by adopting a Small Business Enterprise (SBE) Program in June 2009; and

WHEREAS, Staff has updated both the DBE Program and the SBE Program to document established practices, and removed the use of DBE Availability Advisories from the DBE Program; and

WHEREAS, The Anticipated DBE Participation Level (ADPL) established for federal Fiscal Years 2010-11 through 2012-13 for DBE participation in the performance of contracts financed with U.S. DOT funds has been recalculated at the request of FTA and is proposed to be revised to be 8.3% and shall be Race-Neutral; and

WHEREAS, A notice of the proposed overall participation percentage level must be published, informing the public that the proposed goal and its rationale are available for inspection for thirty days following the date of the notice and comments accepted on the proposed goal for forty-five days following the date of the notice; now, therefore, be it

RESOLVED, That the TJPA Board approves the updates to the DBE Program and SBE Program; and be it

FURTHER RESOLVED, That the TJPA Board approves the draft FY 2011-13 ADPL and authorizes the release of the draft FY 2011-13 ADPL for a period of 30 days for public review and 45 days for public comments.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of September 13, 2012.

Secretary, Transbay Joint Powers Authority

TRANSBAY JOINT POWERS AUTHORITY

Board Policy No. 010

Category: Financial Matters

DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM PLAN

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Transbay Joint Powers Authority Disadvantaged Business Enterprise (DBE) Program Plan

I. Objectives / Policy Statement (§§26.1, 26.23)

The Transbay Joint Powers Authority (TJPA) has established a Disadvantaged Business Enterprise (DBE) Program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26. Section numbers referenced in section titles refer to specific sections of 49 CFR Part 26 (e.g., this Section 1 of the TJPA DBE Program Plan addresses 49 CFR Part 26.1 and 26.23). The TJPA receives Federal financial assistance from the DOT, and as a condition of receiving this assistance, the TJPA annually certifies that it will comply with 49 CFR Part 26.

It is the policy of the TJPA to ensure that DBEs, as defined in 49 CFR Part 26, have an equal opportunity to receive and participate in DOT-assisted contracts. It is also the TJPA's policy:

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

The Chief Financial Officer (CFO) has been designated the DBE Liaison Officer (DBELO). In that capacity, the CFO is responsible for implementing all aspects of the DBE Program. Implementation of the DBE Program is accorded the same priority as compliance with all other legal obligations incurred by the TJPA in its financial assistance agreements with its funders including DOT.

At the time of Program adoption in 2006 and upon significant revisions in 2012, the DBELO disseminated this policy statement to the Transbay Joint Powers Authority Board of Directors for review and approval. The TJPA also disseminates the Program Plan upon revision to members of TJPA's organization (staff and management consultants) at a regular staff meeting and via email. The TJPA makes the Program Plan available to DBE and non-DBE business communities that perform work for it on DOT-assisted contracts by publishing an announcement of availability of revisions to the Plan in general circulation, minority-focused, and trade association publications such as the San Francisco Chronicle,

San Francisco Examiner, El Mensajero, Small Business Exchange, San Francisco Bay View, La Oferta Review, Thoi Bao, Philippine News, and China Press. The Program Plan is available on the TJPA website, www.transbaycenter.org > Doing Business with the TJPA, and notice of its availability is sent to over 100 Bay Area Chambers of Commerce. A list of the chambers is maintained by the DBELO.

II. Definitions of Terms (§26.5)

The following terms used in this Program have meanings as defined in 49 CFR Part 26:

A. Disadvantaged Business Enterprise (DBE) is 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.

B. Socially and Economically Disadvantaged Individual is any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is:

- (1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.
- (2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
 - (i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
 - (ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
 - (iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
 - (iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration (SBA), at such time as the SBA designation becomes effective.

III. Nondiscrimination (§26.7)

The TJPA will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex, or national origin. In administering its DBE Program, the TJPA will not, directly or through contractual or other arrangements, use criteria or methods of administration whose purpose is to defeat or substantially impair accomplishment of the objectives of the DBE Program with respect to individuals of a particular race, color, sex, or national origin.

IV. Federal Financial Assistance Agreement Assurance (§26.13)

The TJPA will sign the following assurance, applicable to all DOT-assisted contracts and their administration as part of the Program Supplement Agreement for each project:

The TJPA 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 TJPA 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 TJPA'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 TJPA 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.).

V. Required Contract Clauses (§§26.13, 26.29)

1. Contract Assurance

The TJPA ensures that the following clause is placed in every DOT-assisted contract and subcontract:

The contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this

contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the TJPA deems appropriate.

All TJPA contractors must place the above clause in any subcontract. Additionally, a copy of each subcontract must be provided to TJPA.

2. Prompt Payment

The TJPA ensures that the following clauses or equivalent will be included in each DOT-assisted prime contract:

Prompt Progress Payment to Subcontractors. A prime contractor or subcontractor shall pay a subcontractor not later than 10 days of receipt of each progress payment in accordance with the provision in Section 7108.5 of the California Business and Professions Code concerning prompt payment to subcontractors. The 10 days is applicable unless, a longer period is agreed to in writing. Any violation of Section 7108.5 shall subject the violating contractor or subcontractor to the penalties, sanction and other remedies of that section. Federal regulation (49 CFR 26.29) requires that any delay or postponement of payment over 30 days of receipt of each payment may take place only for good cause and with the TJPA's prior written approval. These requirements shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise, available to the prime contractor or subcontractor in the event of a dispute involving late payment, or nonpayment by the prime contractor, deficient subcontract performance, or noncompliance by a subcontractor. This provision applies to both DBE and non-DBE prime contractors and subcontractors.

Prompt Payment of Withheld Funds to Subcontractors. If the TJPA requires retainage from the prime contractor and prompt and regular incremental acceptances of portions, as determined by the TJPA of the contract work and retainage is paid to the prime contractor based on these acceptances, then the prime contractor or subcontractor shall return all monies withheld in retention from all subcontractors within 30 days after receiving payment for work satisfactorily completed and accepted including incremental acceptances of portions of the contract work by the TJPA. Any delay or postponement of payment may take place only for good cause and with the TJPA's prior written approval. Any violation of these

provisions shall subject the violating prime contractor to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise, available to the prime contractor or subcontractor in the event of a dispute involving late payment, or nonpayment by the contractor, or deficient subcontractor's performance, or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

VI. DBE Program Updates (§26.21)

The TJPA will continue to carry out this Program until the TJPA has established a new goal setting methodology or until significant changes to this DBE Program are adopted. The TJPA will provide to FTA a proposed Anticipated DBE Participation Level (ADPL) and methodology and other Program updates by August 1 triennially, or as required by FTA.

VII. DBE Liaison Officer (DBELO) (§26.25)

The TJPA has designated the following individual as the DBE Liaison Officer (DBELO):

Chief Financial Officer
Transbay Joint Powers Authority
201 Mission Street, Suite 2100
San Francisco, CA 94105
(415) 597-4620

In this capacity, the CFO is responsible for implementing all aspects of the DBE Program and ensuring that the TJPA complies with all provisions of Title 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs". This is available on the Internet at the website <http://osdbuweb.dot.gov/DBEProgram/index.cfm>. The CFO has direct, independent access to the TJPA Executive Director concerning DBE Program matters.

The DBELO is responsible for developing, implementing, and monitoring the DBE Program, in coordination with other appropriate officials and staff. Duties and responsibilities include the following:

1. Gather and report statistical data and other information as required.
2. Review third-party contracts and purchase requisitions for compliance with this Program.
3. Ensure that bid notices and requests for proposals are available to DBEs in a timely manner.

4. Identify contracts and procurements so that DBE goals are included in solicitations (both race-neutral methods and contract-specific goals) and monitor results.
5. Analyze the TJPA's progress toward goal attainment and identify ways to improve progress.
6. Participate in pre-bid meetings.
7. Advise the TJPA Executive Director and Board of Directors on DBE matters and achievement.
8. Participate with legal counsel and project staff to determine contractor compliance with good faith efforts.
9. Provide DBEs with information and assistance in preparing bids and obtaining bonding and insurance.
10. Plan and participate in DBE training seminars.
11. Provide outreach to DBEs and community organizations to advise them of opportunities.

VIII. Information Collection and Reporting (§26.11)

1. Bidders List

The TJPA will create and maintain a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on its DOT-assisted contracts. The bidders list will include the name, address, DBE/non-DBE status, age, and annual gross receipts of firms. The TJPA has incorporated a "Bidders/Proposers Information Request Form" into its solicitation documents, requiring that bidders/proposers provide all requested information in their submissions.

2. Reporting to DOT

The TJPA will continue to report DBE participation and ADPL setting methods to FTA as directed. Statistical data will be maintained as prescribed on a semi-annual basis to provide reports to DOT agencies reflecting the DBE participation on the TJPA's federally-assisted procurement activities. These reports will provide DBE participation information on the TJPA's race-neutral contracts; race-conscious contracts; and the combined DBE participation on all federally-assisted procurement activities. The TJPA will report final DBE participation to DOT using data from "Final Expenditure Reports" collected from contractors at contract close.

3. Confidentiality

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

IX. DBE Financial Institutions (§26.27)

It is the policy of the TJPA to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions, and to encourage prime contractors on DOT-assisted contracts to make use of these institutions. Information on the availability of such institutions can be obtained on the Federal Reserve website at <http://www.federalreserve.gov/releases/mob/>. TJPA will consult the latest release of the list whenever it is seeking proposals for services from financial institutions, and will encourage TJPA vendors and contractors to do the same in its annual fiscal year billing deadline letter to vendors and contractors.

X. Directory (§26.31)

The TJPA will refer interested persons to the DBE directory available from the Caltrans Disadvantaged Business Enterprise Program website at www.dot.ca.gov/hq/bep.

XI. Over-concentration (§26.33)

TJPA will compare DBEs in certain types of work to non-DBEs in the same type of work on a regular basis when setting its Program DBE goal, in order to determine if an over-concentration is occurring. If an over-concentration is determined to exist, TJPA will submit this concern to DOT for concurrence. If concurrence is received, TJPA will further analyze the over-concentration and provide FTA with a proposal to address the over-concentration, which may include the use of incentives, technical assistance, business development programs, and/or other appropriate measures designed to assist DBEs in performing work outside of the specific field in which it has been determined that non-DBEs are unduly burdened.

XII. Business Development Programs (§26.35)

The TJPA does not have a business development or mentor-protégé program; however, see Section XIV regarding TJPA's Small Business Enterprise Program. If the TJPA identifies the need for a business development or mentor-protégé program in the future, the rationale for adopting such a program and a comprehensive description of it will be submitted to DOT.

XIII. Monitoring (§§26.37, 26.55)

1. Monitoring Actual DBE Participation (§§26.37, 26.55)

The DBELO shall monitor and track the actual DBE participation through contractor and subcontractor reports of payments. The DBELO will maintain a running tally of payments actually made to DBE firms and may require prime contractors and DBE subcontractors and suppliers to provide appropriate documentation to verify such payments.

The DBELO shall ensure that DBE participation is counted toward contract availability advisories on DOT-assisted contracts and the ADPL in accordance with the DBE Program. Credit toward overall or contract goals may only be given upon satisfactory evidence that payments were actually made to DBEs.

2. Monitoring Payments to DBEs (§26.37)

Prime contractors are required to maintain records and documents of payments to DBEs for three (3) years following the performance of the contract. These records shall be made available for inspection upon request by any authorized representative of the TJPA or DOT. This reporting requirement also extends to any certified DBE subcontractor.

Payments to DBE subcontractors will be reviewed by the TJPA to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the schedule of DBE participation.

XIV. Fostering Small Business Participation (§26.39)

In 2009, the TJPA Board adopted the TJPA Small Business Enterprise (SBE) Program to facilitate participation by small business concerns. Steps the TJPA takes to eliminate obstacles to SBE participation include, but are not limited to, unbundling contracts, establishing race-neutral small business set-asides for contracts as appropriate, and placing enforceable contract goals on prime contracts for SBE participation. TJPA accepts several types of small business certifications, and DBEs are counted as SBEs under the Program. See TJPA Board Policy No. 015 for more information.

XV. Quotas (§26.43)

The TJPA will not use quotas or set-asides in any way in the administration of this DBE Program.

XVI. Triennial Anticipated DBE Participation Level (§26.45)

1. Anticipated DBE Participation Level (ADPL)

The TJPA sets an overall target for DBE participation in all DOT-funded contracts by federal fiscal year. This Anticipated DBE Participation Level is submitted to FTA, and subsequently monitored and reported on, on a triennial basis beginning in federal fiscal year 2010-11. The next TJPA submission will be for federal fiscal year 2013-14 through 2015-16.

2. Methodology

See Appendix A.

3. Process

By June 1 triennially, the TJPA will submit to the TJPA Board its draft overall ADPL and methodology (the amount of the overall ADPL and the method to calculate the ADPL).

Once the TJPA Board has approved the draft overall ADPL for distribution, the TJPA will publish a notice of the proposed overall ADPL in newspapers such as the San Francisco Chronicle, San Francisco Examiner, El Mensajero, Small Business Exchange, San Francisco Bay View, La Oferta Review, Thoi Bao, Philippine News, and China Press, and on the TJPA website (www.transbaycenter.org > Documents > Items for Public Comment). The notice will inform the public that the proposed ADPL and its rationale are available for inspection during normal business hours at the TJPA's principal office for 30 days following the date of the notice, and that comments will be accepted on the ADPL for 45 days following the date of the notice. The notice will include addresses to which comments may be sent and addresses (including offices and websites) where the proposal may be reviewed.

The draft goal is additionally publicized to the business community for input by sending notice to the Bay Area Chambers of Commerce and at the DBE Public Participation meeting hosted by the Business Outreach Committee (BOC), a working group of Bay Area transportation agencies dedicated to assisting small disadvantaged and local firms in doing business with the agencies, a group of which TJPA is a member. The draft goal is also sent to the following TJPA project stakeholders and funders for comment: Alameda-Contra Costa Transit District, CalTrain/SamTrans, Metropolitan Transportation Commission, San Francisco Municipal Transportation Agency, and San Francisco County Transportation Authority.

The TJPA will, on or before August 1 triennially, resubmit the final overall ADPL information to the TJPA Board for approval, along with a summary of information and any comments received during the public participation process and the TJPA's responses.

Following approval of the final overall ADPL by the TJPA Board, the TJPA will, on or before August 1 triennially, submit the final overall ADPL to DOT. The TJPA may begin using the approved ADPL on October 1, the beginning of the next federal fiscal year.

XVII. Transit Vehicle Manufacturers (§26.49)

TJPA is not a transit operating agency and does not procure transit vehicles. If transit vehicles are procured in the future, the TJPA will require each transit vehicle manufacturer, as a condition of being authorized to bid or propose on transit vehicle procurements, to certify that it has complied with the requirements of 49 CFR Part 26, Section 49. The

TJPA will direct the transit vehicle manufacturer to the subject requirements located on the Internet at <http://osdbuweb.dot.gov/DBEProgram/index.cfm>.

XVIII. Counting DBE Participation (§26.55)

1. Contracting and Tracking DBE Participation (§ 26.55)

Only the work actually performed by a DBE will be counted towards contract availability advisories and the ADPL. The cost of supplies and materials obtained by the DBE or equipment leased (except from the prime contractor or its affiliate) may also be counted.

Work that a DBE subcontracts to a non-DBE firm does not count toward the ADPL. Expenditures may only be counted if the DBE is performing a commercially useful function. A DBE should perform at least thirty percent (30%) of the total cost of its contract with its own work force.

If materials or supplies are obtained from a DBE manufacturer, 100 percent (100%) of the cost will be counted. If the materials and supplies are purchased from a DBE regular dealer, 60 percent (60%) of the cost will be counted.

DBE achievement will not be counted toward the ADPL until the DBE has been paid. Additionally, the DBELO will not count that portion of a DBE's participation that is achieved after the certification of the DBE has been removed during the performance of a contract, unless the certification is removed solely because the DBE has exceeded the size standards (i.e., "graduated" from the DBE Program).

2. Construction Contract Monitoring

The TJPA will assign, or engage under a professional services contract, a Resident Engineer (RE) or Contract Manager to monitor and track actual DBE participation through contractor and subcontractor reports of payments in accordance with the following:

A. After Contract Award

After the contract award, the TJPA will review the award documents for the portion of items each DBE and first-tier subcontractor will be performing and the dollar value of that work. With these documents, the RE/Contract Manager will be able to determine the work to be performed by the DBEs or subcontractors listed.

B. Pre-construction Conference

A pre-construction conference will be scheduled between the RE/Contract Manager and the contractor or its representative to discuss the work each DBE subcontractor will perform.

Before work can begin on a subcontract, the TJPA will require the contractor, supplier, vendors, or manufacturers to submit a completed "Bidders/Proposers Information Request Form." The RE/Contract Manager will ensure that the RE/Contract Manager's staff (inspectors) knows what items of work each DBE is responsible for performing based on the "Bidders/Proposers Information Request Form." Inspectors will notify the RE/Contract Manager immediately of apparent violations.

When a firm other than the listed DBE subcontractor is found performing the work, the RE/Contract Manager will notify the contractor of the apparent discrepancy and potential loss of payment. Based on the contractor's response, the RE/Contract Manager will take appropriate action: The DBELO will perform a preliminary investigation to identify any potential issues related to the DBE subcontractor performing a commercially useful function. Any substantive issues will be forwarded to the FTA Civil Rights Office (CRO). If the contractor fails to adequately explain why there is a discrepancy, payment for the work will be withheld and a letter will be sent to the contractor referencing the applicable specification violation and the required withholding of payment.

Providing evidence of DBE payment is the responsibility of the contractor. The TJPA will require the contractor to submit a "Progress Payment Report" with every invoice, which summarized the actual amounts due to every DBE and non-DBE subcontractor for services performed in that period. The contractor will also be required to submit to the TJPA a "Subcontractor Payment Declaration" as proof of payment to DBE and non-DBE subcontractors.

3. Substitution

When a DBE substitution is requested, the RE/Contract Manager will request a letter from the contractor explaining why substitution is needed. The RE/Contract Manager must review the letter to be sure names and addresses are shown, dollar values are included, and the reason for the request is explained. If the RE/Contract Manager agrees to the substitution, the RE/Contract Manager will notify the DBE subcontractor in writing regarding the proposed substitution and procedure for written objection from the DBE subcontractor in accordance with the Subletting and Subcontracting Fair Practices Act. If the contractor is not meeting the contract goal with this substitution, the contractor must provide the required good faith effort to the RE/Contract Manager for local agency consideration.

If there is any doubt in the RE/Contract Manager's mind regarding the requested substitution, the RE/Contract Manager may contact the DBELO or the CRO for assistance and direction.

4. Record Keeping and Final Report

The contractor shall maintain records and prepare a "Final Expenditure Report" showing the name and address of each first-tier subcontractor. The "Final Expenditure Report" shall also show:

- a) The name and business address, regardless of tier, of every DBE subcontractor, DBE vendor of materials, and DBE trucking company; and
- b) The date of final payment and the total dollar figure paid to each of the firms.

The DBE prime contractor shall also show the date of work performed by its own forces, along with the corresponding dollar value of the work claimed toward DBE goals.

When a contract has been completed, the contractor will provide the "Final Expenditure Report" and a summary of the records stated above. The RE/Contract Manager will compare the completed "Bidders/Proposers Information Request Form" to the contractor's completed "Final Expenditure Report." The DBEs shown on the completed records should be the same as those originally listed unless an authorized substitution was made or the contractor used additional DBEs. The dollar amount should reflect any changes made in planned work done by the DBEs. The contractor will be required to explain in writing why the names of the subcontractors, the work items, or the dollar figures are different from what was originally shown on the completed "Bidders/Proposers Information Request Form" when:

- a) There have been no changes made by the RE/Contract Manager; or
- b) The contractor has not provided a sufficient explanation in the comments section of the completed "Final Expenditure Report."

The explanation will be attached to the completed "Final Expenditure Report" for submittal. The RE/Contract Manager will file this in the project records.

The DBELO will keep track of the DBE certification status on the Internet at <http://www.dot.ca.gov/hq/bep> and keep the RE/Contract Manager informed of changes that affect the contract. The RE/Contract Manager will require the contractor to act in accordance with existing contractual commitments regardless of decertification.

5. Legal Remedies

The TJPA will bring to the attention of the DOT through the CRO any false, fraudulent, or dishonest conduct in connection with the Program, so that the DOT can take the steps provided in §26.109 (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action

under suspension and debarment or Program Fraud and Civil Penalties rules). The TJPA also will consider similar action under its own legal authority, including:

- Termination of the contract for convenience
- Determination that the contractor is in default
- Determination of non-responsibility of the contractor.

On and after any event of default, the TJPA shall have the right to exercise its legal and equitable remedies, including, without limitation, the right to terminate the agreement or to seek specific performance of all or any part of the agreement. In addition, the TJPA shall have the right (but no obligation) to cure (or cause to be cured) on behalf of the Contractor any Event of Default; the Contractor shall pay to the TJPA on demand all costs and expenses incurred by the TJPA in effecting such cure, with interest thereon from the date of incurrence at the maximum rate then permitted by law. The TJPA shall have the right to offset from any amounts due to Contractor under the relevant agreement or any other agreement between the TJPA and the Contractor all damages, losses, costs or expenses incurred by the TJPA as a result of such Event of Default and any liquidated damages due from the Contractor pursuant to the terms of the relevant agreement or any other agreement.

All remedies provided for in the agreement may be exercised individually or in combination with any other remedy available hereunder or under applicable laws, rules and regulations. The exercise of any remedy shall not preclude or in any way be deemed to waive any other remedy.

XIX. Certification (§26.83(a))

The TJPA ensures that only DBE firms currently certified in the California Unified Certification Program (UCP) will participate as DBEs in the TJPA's DBE Program. The UCP directory can be found at the website: http://www.dot.ca.gov/hq/bep/dbe_query.htm.

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This Disadvantaged Business Enterprise Program Plan for the Transbay Joint Powers Authority is:

Recommended by:

Sara Gigliotti
Chief Financial Officer/DBELO

Date

Approved by:

Maria Ayerdi-Kaplan
Executive Director

Date

APPENDIX A
FY 2011-13
REVISED ANTICIPATED DBE PARTICIPATION LEVEL (ADPL)
METHODOLOGY

The methodology to calculate an agency's DBE participation target is a two-step process described in 49 CFR Part 26. Step One of the methodology establishes a base figure for the anticipated new federally-funded contracts to be awarded in the upcoming Federal Fiscal Year (October 1 – September 30). Per the new Rule issued in 2010, recipients of federal funding are now to submit overall goals for review every three years, so this calculation has been done for contracts expected to be awarded between October 1, 2010 and September 30, 2013. The calculation was originally performed in 2010 and resulted in an ADPL of 18.5%, but is being revised at the direction of FTA in the summer of 2012.

The base figure is derived from the relative availability of DBEs that are ready, willing, and able to participate on these anticipated contracts. Step Two relies on the agency's knowledge of its contracting markets and previous history of DBE participation to determine if an adjustment to the base figure is needed. The calculation using the two-step methodology results in a revised ADPL of 8.3% for FY 2011-13 for the TJPA. This methodology is outlined below.

Step One Process: Development of Base Figure

The initial step in developing an ADPL is to determine the market area for consultants who have demonstrated an interest or are anticipated to participate in TJPA contracts. The TJPA's market area consists of the nine Bay Area counties:

- Alameda
- Contra Costa
- Marin
- Napa
- San Francisco
- San Mateo
- Santa Clara
- Solano
- Sonoma

The Transbay Transit Center will be a visionary multi-modal transportation station serving the San Francisco Bay Area Region. It will be a hub for the transit systems from the surrounding counties that already bring thousands of workers into San Francisco daily. The San Francisco Bay Area Region is made up of the following nine Bay Area counties: Alameda, Contra Costa, Marin, Napa, San Mateo, San Francisco, Santa Clara, Solano and Sonoma. The Metropolitan Transportation Commission—the state designated regional transportation agency—defines its transportation planning and financing area as the nine-county Bay Area, and California Department of Transportation (Caltrans) District 4 is also made up of the nine-county Bay Area. MTC and Caltrans are funders of the Transbay Transit Center project, and the nine counties are represented in some fashion on the TJPA

Board, each with an expectation of project benefits including work on the project during the design and construction phases. The nine-county San Francisco Bay Area is the most appropriate market area for TJPA to use in its goal-setting methodology. 58 percent of past and current TJPA vendors are from the Bay Area.

Second, the work categories must be determined for the anticipated contracts, and each work category is weighted according to its percentage of the total amount of the contracts planned for award. TJPA awarded or plans to award six federally-funded contracts in FYs 2011-13: Public Relations & Outreach, Independent Auditing Services, Outside Legal Services (two contracts), Supplemental EIR/EIS Preparation, and Financial & Grant Management. These activities were matched with their respective North American Industry Classification System (NAICS) codes, which are used to identify firms in the California Unified Certification Program (CUCP) DBE and U.S. Census Bureau's County Business Patterns databases.

Both databases are searched for the number of firms in the relevant NAICS code in the TJPA market area (see Attachment 2.1). The ratio of DBE firms to non-DBE firms is then calculated, by dividing the number of certified DBE firms ready, willing and able to work in the TJPA's market area, according to the CUCP database, by the total number of firms found in the same market area according to the U.S. Census database (see Attachment 2.1). This is performed for each county and each type of activity.

Finally, the Step One Base Figure results from multiplying the DBE ratios for each work category by the corresponding weights for each work category, and summing the results for each activity. The calculation of the Step One Base Figure is shown in Attachment 2.1.

Step One Base Figure = SUM ((Weight * Ratio) for each activity) = 2.84%.

The Step One Base Figure, weighted by type of work to be performed, is 2.8%.

AWARDED OR PLANNED TO BE AWARDED – REVISED 2012 CALCULATION				
Award Date	FY 2011-13 Federally Funded Contracts	NAICS	Contract Amt.	% of Total
Feb 2013	Public Relations & Outreach	541820 - Public Relations Agencies	\$ 750,000	4.00%
Nov 2012	Supplemental EIR/EIS Preparation	541620 - Environmental Consulting Svcs	\$ 1,240,000	6.62%
Sep 2012	Outside Legal Services	541110 - Offices of Lawyers	\$ 8,000,000	42.69%
Jan 2011	Independent Auditing Services	541211 - Offices of CPAs	\$ 250,000	1.33%
Oct 2010	Outside Legal Services	541110 - Offices of Lawyers	\$ 5,000,000	26.68%
Oct 2010	Financial & Grant Management	541611 - Administrative Management & General Management Services	\$ 3,500,000	18.68%
		Total	\$ 18,740,000	100.0%

AWARDED OR PLANNED TO BE AWARDED – REVISED 2012 CALCULATION			
FY 2011-13 Federally Funded Contracts	No. DBE Firms / No. Total Firms	% of Total	Weighted Average
Public Relations & Outreach	32 / 264 = 12.12%	4.00%	0.49%
Supplemental EIR/EIS Preparation	60 / 341 = 17.6%	6.62%	1.16%
Outside Legal Services	6 / 4660 = 0.13%	42.69%	0.06%
Independent Auditing Services	7 / 1478 = .47%	1.33%	0.01%
Outside Legal Services	6 / 4660 = 0.13%	26.68%	0.03%
Financial & Grant Management	104 / 1775 = 5.86%	18.68%	1.09%
	Total	100%	2.84%

PLANNED TO BE AWARDED – ORIGINAL 2010 CALCULATION				
Award Date	FY 2011-13 Federally Funded Contracts	NAICS	Contract Amt.	% of Total
Feb 2013	Public Relations & Outreach	541820 - Public Relations Agencies	\$ 750,000	2.91%
2012-13	Bus Storage Construction	Various 23 series	\$ 17,300,000	67.05%
Sep 2012	Bus Storage Construction Mgmt	237990 - Other Heavy/Civil Engineering Construction	\$ 1,000,000	3.88%
Jan 2011	Independent Auditing Services	541211 - Offices of CPAs	\$ 250,000	0.97%
Oct 2010	Outside Legal Services	541110 - Offices of Lawyers	\$ 5,000,000	11.63%
Oct 2010	Financial & Grant Management	541611 - Administrative Management & General Management Services	\$ 3,500,000	13.57%
		Total	\$ 25,800,000	100.0%

PLANNED TO BE AWARDED – ORIGINAL 2010 CALCULATION			
FY 2011-13 Federally Funded Contracts	No. DBE Firms / No. Total Firms	% of Total	Weighted Average
Public Relations & Outreach	32 / 264 = 12.12%	2.91%	0.35%
Bus Storage Construction	Varying by NAICS	67.05%	18.93%
Bus Storage Construction Management	30 / 82 = 36.59%	3.88%	1.42%
Independent Auditing Services	7 / 1478 = .47%	0.97%	0.00%
Outside Legal Services	6 / 4660 = 0.13%	11.63%	0.01%
Financial & Grant Management	86 / 1775 = 4.85%	13.57%	0.66%
	Total	100.0%	21.38%

Step Two Process: Adjustment to the Base Figure

The purpose of the Step Two analysis is to determine if an upward or downward adjustment to the base ADPL is justified, based on relevant evidence available to TJPA. The TJPA's DBE participation history can assist in determining whether an adjustment to the Step One Base Figure is warranted.

Attachments 2.2 and 2.3 analyze those TJPA contracts that fall into the same NAICS work categories as those planned for award, and their DBE participation levels through March 2012.

The past participation levels can be applied to adjust the FY 2011-13 Base Figure by category, by calculating the average of the two figures. The DBE percentages for the legal and auditing contracts are adjusted slightly downward as TJPA has had no DBE participation in these categories in the past. The financial consulting and public relations contract percentages are revised upwards, on the other hand, given previous DBE participation of 61 percent and 18 percent respectively. The environmental services contract percentage was not adjusted as TJPA does not have a similar contract opportunity in the past. These adjustments result in a total adjusted percentage of 8.3 percent. Thus the revised DBE participation level is 8.3 percent.

The overall ADPL, or the Step Two Adjusted Figure, is 8.3%.

AWARDED OR PLANNED TO BE AWARDED – REVISED 2012 CALCULATION			
Contract	Historical DBE Participation	Weighted Average (from above)	Adjusted DBE %
Public Relations & Outreach	17.9%	0.49%	9.22%
Supplemental EIR/EIS Preparation	n/a	1.16%	1.16%
Outside Legal Services	0%	0.06%	0.03%
Independent Auditing Services	0%	0.01%	0.00%
Outside Legal Services	0%	0.03%	0.01%
Financial & Grant Management	60.6%	1.09%	30.87%
		2.84%	8.3%

PLANNED TO BE AWARDED – ORIGINAL 2010 CALCULATION			
Contract	Historical DBE Participation	Weighted Average (from above)	Adjusted DBE %
Public Relations & Outreach	20%	0.35%	10.18%
Bus Storage Construction	31%	18.93%	24.96%
Bus Storage Construction Mgmt	94%	1.42%	47.71%
Independent Auditing Services	0%	0.00%	0.00%
Outside Legal Services	0%	0.01%	0.01%
Financial & Grant Management	56%	0.66%	28.33%
		21.38%	18.5%

Conclusion

The Revised Anticipated Disadvantaged Business Enterprise (DBE) Participation Level (ADPL) for FY 2011-13 is 8.3%.

**ATTACHMENT 2.1
FY 2011-13 DBE Base Figure Calculation**

DBE Totals by County and Activity

Counties ^(1,2)	<u>541820</u>	<u>541211</u>	<u>541110</u>	<u>541611</u>	<u>541620</u>
	Public Relations Agencies	Offices of Certified Public Accountants	Offices of Lawyers	Administrative Management, General Management	Environmental Consulting Services
Alameda (510)	10	2	2	39	18
Contra Costa (925)	1	0	0	16	12
Napa, Solano, Sonoma (707)	0	0	0	12	9
San Francisco/Marin (415)	19	4	3	26	16
San Mateo (650)	0	0	0	1	2
Santa Clara (408)	2	1	1	10	3
Totals	32	7	6	104	60

NAICS Totals by County and Activity

Counties ^(1, 3)	<u>541820</u>	<u>541211</u>	<u>541110</u>	<u>541611</u>	<u>541620</u>
	Public Relations Agencies	Offices of Certified Public Accountants	Offices of Lawyers	Administrative Management, General Management	Environmental Consulting Services
Alameda (510)	20	224	752	289	85
Contra Costa (925)	17	226	520	240	74
Napa, Solano, Sonoma (707)	17	186	426	122	37
San Francisco/Marin (415)	130	156	1616	517	73
San Mateo (650)	26	325	341	210	12
Santa Clara (408)	54	361	1005	397	60
Totals	264	1478	4660	1775	341

Calculation of Step 1 Base Figure

NAICS Code and Description	<u>541820</u>	<u>541211</u>	<u>541110</u>	<u>541611</u>	<u>541620</u>
	Public Relations Agencies	Offices of Certified Public Accountants	Offices of Lawyers	Administrative Management, General Management	Environmental Consulting Services
DBE Totals for All Counties:	32	7	6	104	60
NAICS Totals for All Counties:	264	1478	4660	1775	341
DBE Totals/NAICS Totals:	12.12%	0.47%	0.13%	5.86%	17.60%
Weight Values:	4.00%	1.33%	69.37%	18.68%	6.62%
	0.49%	0.01%	0.09%	1.09%	1.16%

FY 2011-13 DBE Step One Base Figure 2.84%

(1) Nine Bay Area Counties are Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, Sonoma.

(2) Source of DBE Query Data: <http://www.dot.ca.gov/ucp/QuerySubmit.do>

(3) NAICS data is from the U.S. Census Bureau's 2010 County Business Patterns.

ATTACHMENT 2.2
FY 2011-13 DBE Base Figure Adjustment Calculation

DBE Past Participation for Contracts by NAICS: FY 2004-05 to FY 2011-12 (through March 2012)

Contract	NAICS	TJPA DBE %
Outside Legal Services	541110	0%
Independent Auditing Services	541211	0%
Financial Consulting Services	541611	60.6%
SEIS/EIR Preparation Services	541620	0%
Public Relations	541820	17.9%

Adjustment of DBE Base Figure for FY 2011-13 Contracts

NAICS	Base Goal	TJPA DBE %	Adjusted DBE %
541110 - Offices of Lawyers	0.09%	0.0%	0.04%
541211 - Offices of CPAs	0.01%	0.0%	0.00%
541611 - Administrative/Gen Mgmt	1.09%	60.6%	30.87%
541620 - Environmental Consulting Services	1.16%	n/a	1.16%
541820 - Public Relations Agencies	0.49%	17.9%	9.22%
Total	2.84%		8.3%

FY 2011-13 Anticipated DBE Participation Level	8.3%
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ATTACHMENT 2.3
Past DBE Participation on Similar TJPA Contracts

Financial Consultant (NAICS 541611) DBE Participation History

	Total	non-DBE	DBE
FY 2011-12	255,935.06	89,118.12	166,816.94
FY 2010-11	700,681.49	242,341.83	459,688.67
FY 2009-10	1,028,716.44	505,982.43	522,734.01
FY 2008-09	985,184.32	429,349.90	555,834.42
FY 2007-08	936,163.88	361,750.02	574,413.86
FY 2006-07	566,953.01	264,138.64	302,814.37
FY 2005-06	352,579.80	94,502.96	258,076.84
FY 2004-05	387,806.83	54,694.53	333,112.30
Total	4,958,085.77	1,952,760.31	3,006,674.47
		39.4%	60.6%

Public Relations (NAICS 541820) DBE Participation History

	Total	non-DBE	DBE
FY 2011-12	105,000.00	105,000.00	-
FY 2010-11	282,147.71	272,347.71	9,800.00
FY 2009-10	402,714.90	354,105.18	48,609.72
FY 2008-09	207,040.86	165,172.11	41,868.75
FY 2007-08	295,105.04	221,665.04	73,440.00
FY 2006-07	128,833.96	90,083.96	38,750.00
FY 2005-06	174,527.85	149,369.11	25,158.74
FY 2004-05	51,623.35	38,644.92	12,978.43
Total	1,646,993.67	1,396,388.03	250,605.64
		84.8%	17.9%

TRANSBAY JOINT POWERS AUTHORITY

Board Policy No. 015

Category: Financial Matters

SMALL BUSINESS ENTERPRISE (SBE) PROGRAM PLAN

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Transbay Joint Powers Authority Small Business Enterprise (SBE) Program Plan

I. Objectives / Policy Statement

The TJPA hereby establishes a Small Business Enterprise (SBE) Program. It is the policy of the TJPA to ensure that SBEs, as defined below, have an equal opportunity to receive and participate in TJPA contracts. It is also the TJPA's intention to:

- create a level playing field on which SBEs can compete fairly for TJPA contracts;
- remove barriers to SBE participation in the bidding, award and administration of TJPA contracts;
- assist SBEs to develop and compete successfully outside of the Program
- ensure that only SBEs meeting the eligibility requirements are allowed to participate as SBEs
- identify business enterprises that are qualified as SBEs and are qualified to provide TJPA with required materials, equipment, supplies and services; and to develop a good rapport with the owners, managers and sales representatives of those enterprises

The Chief Financial Officer (CFO) has been designated the SBE Liaison Officer (SBELO). In that capacity, the CFO is responsible for implementing all aspects of the SBE Program. Implementation of the SBE Program is accorded the same priority as compliance with the TJPA DBE Program.

At the time of Program adoption in 2009 and upon significant revisions in 2012, the SBELO disseminated this policy statement to the Transbay Joint Powers Authority Board of Directors for review and approval. The TJPA also disseminates the Program Plan upon revision to members of TJPA's organization (staff and management consultants) at a regular staff meeting and via email. The TJPA makes the Program Plan available to SBE and non-SBE business communities that perform work for it by publishing an announcement of availability of revisions to the Plan in general circulation, minority-focused, and trade association publications such as the San Francisco Chronicle, San Francisco Examiner, El Mensajero, Small Business Exchange, San Francisco Bay View, La Oferta Review, Thoi Bao, Philippine News, and China Press. The Program Plan is available on the TJPA website, www.transbaycenter.org > Doing Business with the TJPA, and notice of its availability is sent to over 100 Bay Area Chambers of Commerce. A list of the chambers is maintained by the SBELO.

II. Certification Definitions

Any business that is certified under any of the programs outlined below shall qualify to participate in the Transbay Joint Powers Authority (TJPA) Small Business Enterprise (SBE) Program.

- A. California Certified Small Business (SB) as certified by the California Department of General Services (DGS) – Procurement Division (PD) – Office of Small Business and Disabled Veteran Business Enterprise Services (OSDS)*

- Must be independently owned and operated; not dominant in its field of operation;

- With its principal office located in California; its owners (or officers in the case of a corporation) domiciled in California; and
- Together with its affiliates, be either:
 - A business with 100 or fewer employees, and an average annual gross receipts of \$12 million or less over the previous three tax years, or
 - A manufacturer with 100 or fewer employees. A *manufacturer* is a business that is both of the following:
 1. Primarily engaged in the chemical or mechanical transformation of raw materials or processed substances into new products.
 2. Classified between Codes 2000 to 3999, inclusive, of the Standard Industrial Classification (SIC) Manual published by the United States Office of Management and Budget, 1987 edition.

B. City and County of San Francisco Local/Minority/Woman-Owned Business Enterprise (L/M/WBE) as certified by the San Francisco Human Rights Commission (HRC)

- A Local Business Enterprise (LBE) is a Small or Micro business that has had its principal place of business in San Francisco for more than six months, has gross income that does not exceed the economic threshold set by San Francisco Administrative Code Chapter 14B for the applicable industry and has any necessary license.
- A Minority-Owned Business Enterprise (MBE) is any HRC-certified LBE that is owned and controlled by one or more people who belong to one or more of the following ethnic groups: (1) African Americans, defined as persons whose ancestry is from any of the Black racial groups of Africa or the Caribbean; (2) Arab Americans, defined as persons whose ancestry is from an Arabic speaking country that is a current or former member of the League of Arab States; (3) Asian Americans, defined as persons with Chinese, Japanese, Korean, Pacific Islander, Samoan, Filipino, Asian Indian, and Southeast Asian ancestry; (4) Iranian Americans, defined as persons whose ancestry is from the country of Iran; (5) Latino Americans, defined as persons with Mexican, Puerto Rican, Cuban, Central American or South American ancestry; and (6) Native Americans, defined as any person whose ancestry is from any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition. The minority-owner must be the license qualifier and own at least 51 percent of the business.
- A Woman-Owned Business Enterprise (WBE) is any HRC-certified LBE and is owned and controlled by one or more women. The woman-owner must be the license qualifier and own at least 51 percent of the business.

C. A Disadvantaged Business Enterprise (DBE), as certified by any state's Unified Certification Program (UCP); a for-profit small business concern:

- 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

- Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.
 - A Socially and Economically Disadvantaged Individual is any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is:
 - (1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.
 - (2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
 - (i) “Black Americans,” which includes persons having origins in any of the Black racial groups of Africa;
 - (ii) “Hispanic Americans,” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
 - (iii) “Native Americans,” which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
 - (iv) “Asian-Pacific Americans,” which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
 - (v) “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
 - (vi) Women;
 - (vii) Any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration (SBA), at such time as the SBA designation becomes effective.

Businesses interested in certification may obtain information at the following sites:

- California Department of General Services, OSDs:
<http://www.pd.dgs.ca.gov/smbus/certapps.htm>
- City & County of San Francisco HRC: <http://www.sfgov.org/sfhumanrights>
- California Unified Certification Program:
http://www.dot.ca.gov/hq/bep/business_forms.htm
- Other states’ Unified Certification Programs’ databases can be found online by conducting an internet search for the state name and Unified Certification Program.

III. Nondiscrimination

The TJPA will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract on the basis of race, color, sex, or national origin, nor on the fact or perception of a person's creed, religion, ancestry, age, sexual orientation, gender identity, domestic partner status, marital status, height, weight, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status). In administering its SBE Program, the TJPA will not, directly or through contractual or other arrangements, use criteria or methods of administration whose purpose is to defeat or substantially impair accomplishment of the objectives of the SBE Program with respect to individuals in the groups or categories or having the characteristics listed above.

IV. SBE Program Updates

The TJPA will continue to carry out this Program until significant changes to the Program are adopted.

V. SBE Liaison Officer (SBELO)

The TJPA has designated the following individual as the SBE Liaison Officer (SBELO):

Chief Financial Officer
Transbay Joint Powers Authority
201 Mission Street, Suite 2100
San Francisco, CA 94105
(415) 597-4620

In this capacity, the Chief Financial Officer is responsible for implementing all aspects of the SBE Program. The Chief Financial Officer has direct, independent access to the TJPA Executive Director concerning SBE Program matters. The SBELO is responsible for developing, implementing, and monitoring the SBE Program, in coordination with other appropriate officials. Duties and responsibilities include the following:

1. Gather and report statistical data and other information as required.
2. Review third-party contracts and purchase requisitions for compliance with this Program.
3. Ensure that bid notices and requests for proposals are available to SBEs in a timely manner.
4. Identify contracts and procurements so that SBE goals are included in solicitations and monitor results.
5. Analyze the TJPA's progress toward goal attainment and identify ways to improve progress.
6. Participate in pre-bid meetings.
7. Advise the TJPA Executive Director and Board of Directors on SBE matters and achievement.
8. Participate with legal counsel and project staff to determine contractor compliance with good faith efforts.
9. Provide SBEs with information and assistance in preparing bids.
10. Plan and participate in SBE training seminars.

11. Provide outreach to SBEs and community organizations to advise them of opportunities.

VI. Information Collection and Reporting

1. Bidders List

The TJPA will create and maintain a bidders list, consisting of information about all SBE and non-SBE firms that bid or quote on its contracts. The bidders list will include the name, address, SBE/non-SBE status, age, and annual gross receipts of firms. The TJPA has incorporated a "Bidders/Proposers Information Request Form" into its solicitation documents, requiring that bidders/proposers provide all requested information in their submissions.

2. Confidentiality

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

VII. Directories

The TJPA will refer interested persons to the SBE directories available from the following certification agencies:

- California Department of General Services Procurement Department website – <http://www.eprocure.dgs.ca.gov/default.htm>
- San Francisco Local Business Enterprise Directory website – http://sfgov.org/site/uploadedfiles/sfhumanrights/directory/vlistS_1.htm
- California Unified Certification Program (CUCP) website – <http://www.dot.ca.gov/hq/bep/ucp.htm>
- Other states' Unified Certification Programs' databases can be found online by conducting an internet search for the state name and Unified Certification Program.

VIII. Monitoring

1. Monitoring Actual SBE Participation

The SBELO shall monitor and track the actual SBE participation through contractor and subcontractor reports of payments. The SBELO will maintain a running tally of payments actually made to SBE firms and may require prime contractors and SBE subcontractors and suppliers to provide appropriate documentation to verify such payments.

The SBELO shall ensure that SBE participation is counted toward contract and overall goals on TJPA contracts in accordance with the SBE Program. Credit toward overall or contract goals may only be given upon satisfactory evidence that payments were actually made to SBEs.

2. Monitoring Payments to SBEs

Prime contractors are required to maintain records and documents of payments to SBEs for three (3) years following the performance of the contract. These records shall be made available for inspection upon request by any authorized representative

of the TJPA. This reporting requirement also extends to any certified SBE subcontractor.

Payments to SBE subcontractors will be reviewed by the TJPA to ensure that the actual amount paid to SBE subcontractors equals or exceeds the dollar amounts stated in the schedule of SBE participation.

IX. Program and Contract Goals

On the same triennial schedule that TJPA must submit a Disadvantaged Business Enterprise (DBE) goal to the Federal Transit Administration for FTA-funded contracts, an overall program SBE goal will be developed for all anticipated contracts, regardless of funding source. The methodology and process for setting the program SBE goal is identical to the methodology and process for calculating the DBE goal and is fully described in the TJPA DBE Program Plan.

The TJPA shall use contract goals for SBE participation on contracts that have subcontracting possibilities. Contract goals shall be enforceable and compliance with the goal or good faith efforts to do so shall be a condition of contract award. Contract goals need not be established on every such contract, and the size of contract goals will be adapted to the circumstances of each such contract (e.g., type and location of work and availability of SBEs to perform the particular type of work). The contract work items will be compared with eligible SBE contractors willing to work on the project. A determination will be made regarding which items are likely to be performed by the prime contractor and which ones are likely to be performed by the subcontractor(s). The goal will then be incorporated into the contract documents. Contract goals will be expressed as a percentage of the total amount of a contract. For contracts with no SBE goal, TJPA strongly encourages the prime contractor to include SBEs to perform meaningful work in all aspects of the project.

TJPA will not provide bid discounts or bid preferences for SBE participation.

X. Small Business Set-Asides and Unbundling

The TJPA shall use set-asides for small business enterprises as appropriate in the administration of this SBE Program. Contracts shall also be analyzed for opportunities to unbundle work, in order to break large contracts into elements small enough for small businesses to reasonably perform, where this would not cause an undue burden to TJPA or its funders.

XI. Good Faith Efforts

1. Information to be Submitted

The TJPA treats bidders'/proposers' compliance with good faith effort requirements as a matter of responsiveness. A responsive proposal meets all the requirements of the advertisement and solicitation. Each solicitation for bids/proposals will require the bidders/proposers to submit the "Bidders/Proposers Information Request Form" which should include:

- a) The names and addresses of known SBE firms that will participate in the contract;
- b) A description of the work that each SBE will perform;

- c) The dollar amount of each SBE firm's participation;
- d) Written and signed documentation of commitment to use a SBE subcontractor whose participation is submitted to meet a contract goal;
- e) Written and signed confirmation from the SBE that it is participating in the contract as provided in the prime contractor's commitment; and
- f) If the contract availability advisory is not met, evidence of good faith efforts.

2. Demonstration of Good Faith Efforts

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

The SBELO is responsible for determining whether a bidder/proposer who has not met the contract goal has documented sufficient good faith efforts to be regarded as responsive.

The TJPA will ensure that all information is complete and accurate and adequately documents the bidder's/proposer's good faith efforts before a commitment to the performance of the contract by the bidder/proposer is made.

3. Administrative Reconsideration

Within ten (10) days of being informed by the TJPA that it is not responsive because it has not documented sufficient good faith efforts, a bidder/proposer may request administrative reconsideration. Bidders/proposers should make this request in writing to the following reconsideration official:

Maria Ayerdi-Kaplan, Executive Director
Transbay Joint Powers Authority
201 Mission Street, Suite 2100
San Francisco, CA 94105
(415) 597-4620

The reconsideration official will not have played any role in the original determination that the bidder/proposer did not make or document sufficient good faith efforts.

As part of this reconsideration, the bidder/proposer will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The bidder/proposer will also have the opportunity to meet in person with the reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. The TJPA will send the bidder/proposer a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the State of California, City and County of San Francisco, or U.S. Department of Transportation.

4. Good Faith Efforts when a SBE is Replaced on a Contract

The TJPA will require a contractor to make good faith efforts to replace a SBE that is terminated or has otherwise failed to complete its work on a contract with another certified SBE, to the extent needed to meet the contract goal. The prime contractor is required to notify the RE/Contract Manager immediately of a SBE's inability or unwillingness to perform, and it must provide reasonable documentation.

In this situation, the prime contractor will be required to obtain the TJPA's prior approval of a substitute SBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts. If the contractor fails or refuses to comply in the time specified, the TJPA's contracting office will issue an order stopping all or part of the payment and/or work until satisfactory action has been taken. If the contractor still fails to comply, the contracting officer may issue a termination for default proceeding.

XI. Counting SBE Participation

To count towards an SBE contract goal, a business must be certified on the date bids or proposals are received.

1. Contracting and Tracking SBE Participation

Only the work actually performed by a SBE will be counted towards contract and overall goals. Count SBE participation according to the following guidelines:

- a. SBE Prime Contractor - Count the entire dollar amount of the work performed or services provided by the SBE's own forces, including the cost of materials and supplies obtained for the work and the reasonable fees and commissions charged for the services. Do not count any work subcontracted to another firm as SBE participation by the SBE Prime Contractor.
- b. SBE Subcontractor - Count the entire amount of the work performed or services provided by the SBE's own forces, including the cost of materials and supplies obtained for the work (except for materials and supplies purchased or leased from the Prime Contractor) and reasonable fees and commissions charged for the services. Do not count any work subcontracted by an SBE subcontractor to another firm as SBE participation by said SBE subcontractor. If the work has been subcontracted to another SBE, it will be counted as SBE participation by that other SBE.
- c. SBE Joint Venture Partner - Count the portion of the work that is performed solely by the SBE's forces or if the work is not clearly delineated between the SBE and the joint venture partner, count the portion of the work equal to the SBE's percentage of ownership interest in the joint venture.
- d. SBE Regular Dealer - Count 60 percent of the costs of materials and supplies obtained from an SBE regular dealer that owns, operates or maintains a store or warehouse in which the materials and supplies are regularly bought, kept in stock and sold or leased to the public in the usual course of business (except regular dealers of bulk items such as petroleum, cement and gravel who own and operate

distribution equipment in lieu of maintaining a place of business). This applies whether an SBE is a prime contractor or subcontractor.

- e. Other SBEs - Count the entire amount of fees or commissions charged for assistance in procuring or delivering materials and supplies when purchased from a SBE that is not a manufacturer or regular dealer. Do not count the cost of the materials and supplies.
- f. SBE Trucking Company - Count the entire amount of the transportation services provided by an SBE trucking company that performs the work using trucks it owns, insures and operates with its own employees.

Count the entire amount of the transportation services provided by an SBE trucking company that performs the work using trucks it leases from another SBE (including an owner-operator) provided that it is responsible for the overall management and supervision of the service and that it uses at least one truck that it owns, insures and operates with its own employees on the contract.

Count the entire amount of fees and commissions charged for providing the management and supervision of transportation services using trucks it leases from a non-SBE trucking company (including owner-operator) provided that it is responsible for the overall management and supervision of the service and that it uses at least one truck that it owns, insures and operates with its own employees on the contract.

SBE achievement will not be counted toward the goal until the SBE has been paid. Additionally, the SBELO will not count that portion of a SBE's participation that is achieved after the certification of the SBE has been removed during the performance of a contract.

2. Construction Contract Monitoring

The TJPA will assign, or engage under a professional services contract, a Resident Engineer (RE) or Contract Manager to monitor and track actual SBE participation through contractor and subcontractor reports of payments in accordance with the following:

a. After Contract Award

After the contract award, the TJPA will review the award documents for the portion of items each SBE and first-tier subcontractor will be performing and the dollar value of that work. With these documents, the RE/Contract Manager will be able to determine the work to be performed by the SBEs or subcontractors listed.

b. Pre-construction Conference

A pre-construction conference will be scheduled between the RE/Contract Manager and the contractor or its representative to discuss the work each SBE subcontractor will perform.

Before work can begin on a subcontract, the TJPA will require the contractor, supplier, vendors, or manufacturers to submit a completed "Bidders/Proposers

Information Request Form.” The RE/Contract Manager will ensure that the RE/Contract Manager’s staff (inspectors) knows what items of work each SBE is responsible for performing based on the “Bidders/Proposers Information Request Form.” Inspectors will notify the RE/Contract Manager immediately of apparent violations.

When a firm other than the listed SBE subcontractor is found performing the work, the RE/Contract Manager will notify the contractor of the apparent discrepancy and potential loss of payment. Based on the contractor’s response, the RE/Contract Manager will take appropriate action: The SBELO will perform a preliminary investigation to identify any potential issues related to the SBE subcontractor performing a commercially useful function. Any substantive issues will be forwarded to the relevant certification office. If the contractor fails to adequately explain why there is a discrepancy, payment for the work will be withheld and a letter will be sent to the contractor referencing the applicable specification violation and the required withholding of payment.

Providing evidence of SBE payment is the responsibility of the contractor. The TJPA will require the contractor to submit a “Progress Payment Report” (see Attachment C) with every invoice, which summarizes the actual amounts due to every SBE and non-SBE subcontractor for services performed in that period. The contractor will also be required to submit to the TJPA a “Subcontractor Payment Declaration” as proof of payment to SBE and non-SBE subcontractors.

3. Substitution

When a SBE substitution is requested, the RE/Contract Manager will request a letter from the contractor explaining why substitution is needed. The RE/Contract Manager must review the letter to be sure names and addresses are shown, dollar values are included, and the reason for the request is explained. If the RE/Contract Manager agrees to the substitution, the RE/Contract Manager will notify the SBE subcontractor in writing regarding the proposed substitution and procedure for written objection from the SBE subcontractor in accordance with the Subletting and Subcontracting Fair Practices Act. If the contractor is not meeting the contract goal with this substitution, the contractor must provide the required good faith effort to the RE/Contract Manager for consideration.

If there is any doubt in the RE/Contract Manager’s mind regarding the requested substitution, the RE/Contract Manager may contact the SBELO for assistance and direction.

4. Record Keeping and Final Report

The contractor shall maintain records and prepare a “Final Expenditure Report” showing the name and address of each first-tier subcontractor. The “Final Expenditure Report” shall also show:

- a) The name and business address, regardless of tier, of every SBE subcontractor, SBE vendor of materials, and SBE trucking company; and
- b) The date of final payment and the total dollar figure paid to each of the firms.

The SBE prime contractor shall also show the date of work performed by its own

forces, along with the corresponding dollar value of the work claimed toward SBE goals.

When a contract has been completed, the contractor will provide the "Final Expenditure Report" and a summary of the records stated above. The RE/Contract Manager will compare the completed "Bidders/Proposers Information Request Form" to the contractor's completed "Final Expenditure Report." The SBEs shown on the completed records should be the same as those originally listed unless an authorized substitution was made or the contractor used additional SBEs. The dollar amount should reflect any changes made in planned work done by the SBEs. The contractor will be required to explain in writing why the names of the subcontractors, the work items, or the dollar figures are different from what was originally shown on the completed "Bidders/Proposers Information Request Form". The explanation will be attached to the completed "Final Expenditure Report" for submittal. The RE/Contract Manager will file this in the project records.

The SBELO will keep track of the SBE certification status and keep the RE/Contract Manager informed of changes that affect the contract. The RE/Contract Manager will require the contractor to act in accordance with existing contractual commitments regardless of decertification.

5. Legal Remedies

The TJPA will bring to the attention of the relevant certification agency any false, fraudulent, or dishonest conduct in connection with the Program. The TJPA also will consider similar action under its own legal authority, including:

- Termination of the contract for convenience
- Determination that the contractor is in default
- Determination of non-responsibility of the contractor.

On and after any event of default, the TJPA shall have the right to exercise its legal and equitable remedies, including, without limitation, the right to terminate the agreement or to seek specific performance of all or any part of the agreement. In addition, the TJPA shall have the right (but no obligation) to cure (or cause to be cured) on behalf of the Contractor any Event of Default; the Contractor shall pay to the TJPA on demand all costs and expenses incurred by the TJPA in effecting such cure, with interest thereon from the date of incurrence at the maximum rate then permitted by law. The TJPA shall have the right to offset from any amounts due to Contractor under the relevant agreement or any other agreement between the TJPA and the Contractor all damages, losses, costs or expenses incurred by the TJPA as a result of such Event of Default and any liquidated damages due from the Contractor pursuant to the terms of the relevant agreement or any other agreement.

All remedies provided for in the agreement may be exercised individually or in combination with any other remedy available hereunder or under applicable laws, rules and regulations. The exercise of any remedy shall not preclude or in any way be deemed to waive any other remedy.

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This Small Business Enterprise Program Plan for the Transbay Joint Powers Authority is:

Recommended by:

Sara Gigliotti
Chief Financial Officer/SBELO

Date

Approved by:

Maria Ayerdi-Kaplan
Executive Director

Date

APPENDIX A
GUIDANCE CONCERNING GOOD FAITH EFFORTS

- I. When a goal has been established on a contract, a bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by SBE firms sufficient for this purpose. Second, even if it does not meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a SBE goal or other requirement of this Program that, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient SBE participation, even if they were not fully successful.

- II. In any situation in which a contract goal has been established, it is up to the TJPA to make a fair and reasonable judgment as to whether a bidder that did not meet the goal made adequate good faith efforts. TJPA shall consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain SBE participation sufficient to meet the SBE contract goal. Mere *pro forma* efforts are not good faith efforts to meet the SBE contract requirements; however, meeting quantitative formulas is not required.

- III. The TJPA shall not require that a bidder meet a contract goal (*i.e.*, obtain a specified amount of SBE participation) in order to be awarded a contract if the bidder makes an adequate good faith efforts showing. This rule specifically prohibits TJPA from ignoring *bona fide* good faith efforts.

- IV. The following is a list of types of actions that TJPA shall consider as part of the bidder's good faith efforts to obtain SBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases:
 - A. Soliciting through all reasonable and available means (*e.g.*, attendance at pre-bid meetings, advertising, and/or written notices) the interest of all certified SBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the SBEs to respond to the solicitation. The bidder must determine with certainty if the SBEs are interested by taking appropriate steps to follow up initial solicitations.

 - B. Selecting portions of the work to be performed by SBEs in order to increase the likelihood that the SBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate SBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.

 - C. Providing interested SBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.

- D. 1. Negotiating in good faith with interested SBEs. It is the bidder's responsibility to make a portion of the work available to SBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available SBE subcontractors and suppliers, so as to facilitate SBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of SBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for SBEs to perform the work.
 - 2. A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including SBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using SBEs is not in itself sufficient reason for a bidder's failure to meet the contract SBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from SBEs if the price difference is excessive or unreasonable.
 - E. Not rejecting SBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.
 - F. Making efforts to assist interested SBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.
 - G. Making efforts to assist interested SBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
 - H. Effectively using the services of available woman/minority community organizations, woman/minority contractors' groups, local, state, and Federal woman/minority business assistance offices, and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of SBEs.
- V. In determining whether a bidder has made good faith efforts, TJPA may take into account the performance of other bidders in meeting the contract goal. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average SBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.