

**THIS STAFF REPORT COVERS CALENDAR ITEM NO.: 10
FOR THE MEETING OF: June 11, 2009**

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION:

Approval of the Annual Anticipated Disadvantaged Business Enterprise (DBE) Participation Level (AADPL) Program for FY 2009-10.

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 federally funded contracts. As part of this program, the TJPA must establish an annual target for DBE participation in all new contracts that are eligible to be funded with federal funds. A DBE firm is defined as a for-profit “small business concern” that is at least 51 percent owned and controlled by one or more socially and economically disadvantaged individuals. DBE firms are certified as such through United Certification Programs established in each state.
- On April 9, 2009, the TJPA Board authorized the release of the draft AADPL of 25.4% for a 30-day review/45-day comment period. No comments were received.

ATTACHMENTS:

1. Resolution
2. FY 2009-10 AADPL Methodology

EXPLANATION:

Development of AADPL Percentage

As an eligible recipient of federal-aid funding, TJPA is required to comply with 49 CFR Part 26, which states that grantees must establish and implement a DBE program and annually set DBE participation targets. The TJPA establishes an Annual Anticipated Disadvantaged Business Enterprise (DBE) Participation Level (AADPL) percentage as part of its approved DBE Program.

The methodology to calculate the annual 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 contracts to be awarded in Federal Fiscal Year 2009-10 (October 1, 2009 – September 30, 2010). 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 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 calculation using the two-step methodology results in an AADPL of 25.4% for FY 2009-10. This methodology is outlined in Attachment 2.

The overall DBE goal is typically split into race-neutral and race-conscious components. Race-neutral participation occurs when a DBE obtains a contract or subcontract through customary

procurement procedures where there was no contract goal or its DBE status was not considered in making the award. Race-conscious DBE participation is the portion of the overall goal that focuses on assisting only DBEs, where a contract's DBE goal is explicitly stated to encourage DBE participation.

Race-Conscious vs. Race-Neutral Program

In light of the United States Ninth Circuit Court of Appeals opinion in the Western States Paving Co. vs. Washington State Department of Transportation (WSDOT), the TJPA has been following and enforcing a race-neutral program. In order to implement a race-conscious program and place binding goals on contracts, TJPA would need to be able to present evidence of past discrimination in contracting. This evidence would have to be the product of a rigorous and comprehensive disparity study to evaluate what, if any, discrimination exists for minority groups included in TJPA's DBE Program.

Disparity studies require significant resources. Estimates from experts in the field put the cost of conducting a thorough study in the hundreds of thousands of dollars, and over a time period of no less than one year. Consequently, TJPA has considered using data from another agency's disparity study once available. While the State of California Department of Transportation's disparity study has been completed, this study was developed using state-wide market and contracting data that is not truly applicable, nor useful in determining whether there is evidence of discrimination in the TJPA's market area. Studies conducted by Bay Area Rapid Transit (BART) and/or the San Francisco Municipal Transportation Agency would be much more relevant to TJPA contracting, and staff is reviewing the now completed BART study. Once the SFMTA study is finished and review of both studies is completed, TJPA may use the data produced by these studies to consider whether it would be proper to put a race-conscious program into place. FTA has indicated that using another agency's disparity study requires a waiver from U.S. DOT. Implementing a race-conscious DBE program without evidence of discrimination would expose the TJPA to significant risk of having the entire program struck down if challenged in court. For this reason, staff strongly recommends continuing to implement a race-neutral DBE program.

A discrete Small Business Enterprise (SBE) Program may be implemented to put contract goals for utilization of small business firms on all federally-eligible contracts. Adoption of an SBE Program for TJPA is the subject of a separate calendar item. It should be noted that federal procurement rules specifically prohibit the use of geographical preferences (e.g., local) in federally-eligible contracts.

Past Participation

TJPA has been very successful in awarding contracts to DBE firms:

Fiscal Year	DBE Target	Awarded to DBEs	Actual Payments to DBEs
2004-05	n/a	29%	26%
2005-06	n/a	No contracts were awarded	24%
2006-07	4%	25%	25%
2007-08	15%	12%	17%

As explained in the methodology attachment, the DBE target is calculated based on planned contract award. TJPA also tracks actual payments to DBEs. Because the majority of the contracts required for project completion have already been awarded, the DBE award target will likely be less in subsequent years. Actual payments made to DBEs, however, should remain near current levels, as contracts are multi-year and participation stretches out over time.

Outreach/Public Comment Period

In accordance with the public participation requirements of 49 CFR Part 26.45, the draft AADPL was released for a 30-day review/45-day comment period. A public notice was published in general circulation media and available minority-focused media and trade association publications, including the following:

- El Mensajero
- La Oferta Review
- San Francisco Bay View
- San Francisco Chronicle
- San Francisco Examiner
- Small Business Exchange

The TJPA's draft AADPL was also be sent to the TJPA's local partner agencies for review. The following local agencies received a letter announcing the release of the draft FY 2009-10 AADPL for review:

- San Francisco Municipal Transportation Agency (MTA)
- Caltrain/SamTrans
- AC Transit
- San Francisco County Transportation Authority (SFCTA)
- Metropolitan Transportation Commission (MTC)

There were no comments received from the general public or the TJPA partner agencies during the outreach period. Once approved by the TJPA Board, FTA will be notified of the TJPA AADPL for FY 2009-10.

RECOMMENDATION:

Approve the Annual Anticipated Disadvantaged Business Enterprise (DBE) Participation Level (AADPL) of 25.4% for FY 2009-10.

**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 annual basis; and

WHEREAS, The Annual Anticipated DBE Participation Level (AADPL) established for FY 2009-10 for DBE participation in the performance of contracts financed in whole or in part with U.S. DOT funds shall be 25.4% and shall be Race-Neutral; and

WHEREAS, Notice of the AADPL was published in several media outlets and on the TJPA website, informing the public that the AADPL and its methodology were available for inspection for thirty days following the date of the notice and that comments were accepted on the proposed AADPL for forty-five days following the date of the notice; and

WHEREAS, Letters were sent notifying the TJPA's local partner agencies of the proposed AADPL for review and comment; and

WHEREAS, No comments were received by the general public or the TJPA's local partner agencies during the public comment period; now, therefore, be it

RESOLVED, That the TJPA Board approves the FY 2009-10 AADPL of 25.4%.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of June 11, 2009.

Secretary, Transbay Joint Powers Authority

FY 2009-10
ANNUAL ANTICIPATED DBE PARTICIPATION LEVEL (AADPL)
METHODOLOGY

The methodology to calculate an agency's annual 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-eligible contracts to be awarded in the upcoming Federal Fiscal Year (October 1 – September 30). 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 an AADPL of 25.4% for FY 2009-10 for the TJPA. This methodology is outlined below.

Step One Process: Census Bureau Data and DBE Directory

The initial step in developing an AADPL is to determine the market area for consultants who have demonstrated an interest or are anticipated to participate in TJPA contracts. The counties in the TJPA's market area consist of the nine (9) Bay Area counties:

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

Second, the work categories must be determined for the anticipated contracts. TJPA may award four federally-eligible contracts in FY 2009-10: Construction Management Oversight, Construction Management – Utilities, Environmental Review for a DTX EIS/EIR Supplement, and Storage of Historical Materials from the Transbay Terminal during construction. These activities were matched with their respective North American Industry Classification System (NAICS) codes, which are used to identify firms in the California United Certification Program DBE and US Census Bureau's County Business Patterns databases.

The third step in calculating the Step One AADPL, or Base Figure, is to weight each work category as a percentage of the total amount of the contracts planned for award. Weighting each category provides a more accurate Step One Base Figure (see Attachment 2.1).

The ratio of DBE firms to non-DBE firms must then be calculated by dividing the number of certified DBE firms ready, willing and able to work in the TJPA's market area by the total number of firms found in the same market area according to the US Census database (see Attachment 2.2). 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 their corresponding weights, and summing the results for each activity. The calculation of the Step One Base Figure is shown in Attachment 2.2.

Step One Base Figure = SUM (Weight * Ratio) for each activity = 15.30%.

The Step One Base Figure, weighted by type of work to be performed, is 15.3%.

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 AADPL 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.

Attachment 2.3 analyzes those TJPA contracts fall into the same NAICS work categories as those planned for award. Through February of FY08-09, the TJPA has achieved an average DBE participation level of 20% for activities in these NAICS categories (Environmental Consulting).

The past participation level of 20% can be applied to adjust the FY 2009-10 Base Figure by category (see Attachment 2.3). The total calculated participation level is averaged with the past participation level by category, and results in a percentage of 25.4%. Thus the revised DBE participation level is 25.4%.

The overall AADPL, or the Step Two Adjusted Figure, is 25.4%.

Conclusion

The Annual Anticipated Disadvantaged Business Enterprise (DBE) Participation Level (AADPL) for FY 2009-10 is 25.4%.

ATTACHMENT 2.1
FY 2009-10 Anticipated Federally Funded Contracts

FY 2009-10 Project/Contract	NAICS	NAICS Description	Contract Amt.	Federally Eligible Portion of Contract (80%)	% of Total
CM Oversight	237990	Other Heavy Civil Engineering Construction	\$ 27,000,000	\$ 21,600,000	31.03%
CM for Utility Relocation/Demo	237110	Water and Sewer Line and Related Structures	\$ 58,600,000	\$ 46,880,000	67.36%
DTX Loop EIS/EIR Supplemental	541620	Environmental Consulting Services	\$ 1,300,000	\$ 1,040,000	1.49%
Storage for Materials for Museum	493110	General Warehousing & Storage	\$ 100,000	\$ 80,000	0.11%
			Total	\$ 69,600,000	100.0%

**ATTACHMENT 2.2
FY 2009-10 DBE Base Figure Calculation**

DBE Totals by County and Activity				
	<u>237990</u>	<u>237110</u>	<u>493110</u>	<u>541620</u>
Counties ^(1,2)	Other Heavy Civil Eng Construction	Water & Sewer Line	General Warehousing & Storage	Environmental Consulting Services
Alameda (510)	10	2	0	10
Contra Costa (925)	5	0	0	8
Napa, Solano, Sonoma (707)	4	1	0	6
San Francisco/Marin (415)	10	2	0	12
San Mateo (650)	2	2	0	1
Santa Clara (408)	1	2	0	1
Totals	32	9	0	38
NAICS Totals by County and Activity				
	<u>237990</u>	<u>237110</u>	<u>493110</u>	<u>541620</u>
Counties ^(1,3)	Other Heavy Civil Eng Construction	Water & Sewer Line	General Warehousing & Storage	Environmental Consulting Services
Alameda (510)	16	33	72	85
Contra Costa (925)	20	28	21	52
Napa, Solano, Sonoma (707)	24	57	33	37
San Francisco/Marin (415)	14	15	14	65
San Mateo (650)	3	14	16	13
Santa Clara (408)	8	30	39	44
Totals	85	177	195	296
Calculation of Step 1 Base Figure				
NAICS Code and Description	<u>237990</u>	<u>237110</u>	<u>493110</u>	<u>541620</u>
DBE Totals for All Counties:	32	9	0	38
NAICS Totals for All Counties:	85	177	195	296
DBE Totals/NAICS Totals:	37.65%	5.08%	0.00%	12.84%
Weight Values:	31.03%	67.36%	0.11%	1.49%
	11.68%	3.42%	0.00%	0.19%
FY 2009-10 DBE Step One Base Figure			15.30%	
<small>(1) Nine Bay Area Counties include Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, Sonoma.</small>				
<small>(2) Source of DBE Query Data: http://www.dot.ca.gov/ucp/GetLicenseForm.do</small>				
<small>(3) NAICS data is from the U.S. Census Bureau's 2006 County Business Patterns (most recent year available)</small>				

**ATTACHMENT 2.3
FY 2009-10 DBE Base Figure Adjustment Calculation**

DBE Past Participation of Relevant Active Contracts: FY 2004-05 to FY 2008-09 (through December)					
Contract	NAICS	NAICS Description	Non-DBE \$ Share	DBE \$ Share	DBE %
As-Needed Environmental Consulting (3)	541620	Environmental Consulting Services	\$372,494	\$95,925	20%
Adjustment of DBE Base Figure for FY08-09 Contracts					
NAICS	Base Goal	NAICS Past Participation Level	NAICS Adjustment		
237110	3.42%	n/a	3.42%		
237990	11.68%	n/a	11.68%		
493110	0.00%	n/a	0.00%		
541620	0.19%	20%	10.34%		
	15.30%	DBE % =	25.4%		
FY 2009-10 Annual Anticipated DBE Participation Level					25.4%