

THIS STAFF REPORT COVERS CALENDAR ITEM NO.: 12
FOR THE MEETING OF: April 22, 2010

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION:

Approval of the draft Anticipated Disadvantaged Business Enterprise (DBE) Participation Level (ADPL) Program for federal fiscal years 2010-11 through 2012-13 and authorization of the release of the 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 federally funded contracts. As part of this program, the TJPA established a 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 Unified Certification Programs established in each state.
- Under a new Final Rule issued February 3, 2010, recipients of federal transportation funds will now submit an overall goal every three years, rather than annually as has been done in the past. The Federal Transit Administration (FTA) released a submission schedule on April 6, 2010 that requires TJPA and most other Bay Area transit agencies to submit their three-year goals to FTA by August 1, 2010.
- In accordance with the public participation requirements of 49 CFR Part 26.45, the draft DBE target must be released for a 30-day review/45-day comment period.
- The draft FY 2010-13 Anticipated DBE Participation Level is 18.5%.
- TJPA will continue to implement its approved Small Business Enterprise (SBE) Program to supplement DBE participation, but does not set or report overall SBE goals to the FTA.

ATTACHMENTS:

1. Resolution
2. Draft FY 2010-13 ADPL Methodology

EXPLANATION:

Development of ADPL 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, until now, annually set DBE participation targets. Under the new Final Rule issued this spring, participation targets will now be set for three-year time periods. The TJPA establishes an Anticipated Disadvantaged Business Enterprise (DBE) Participation Level (ADPL) percentage as part of its approved DBE Program.

The methodology to calculate the 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 2010-11 through federal Fiscal Year 2012-13 (October 1, 2010 – September 30, 2013). 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 ADPL of 18.5% for FY 2010-13. 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. TJPA will continue to operate a race-neutral DBE 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), which stated that in order to implement a race-conscious program and place binding goals on contracts, an agency must be able to present evidence of past discrimination in contracting. 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.

Past Participation

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

Fiscal Year	DBE Target	Awarded to DBEs
2004-05	n/a	29%
2005-06	n/a	No contracts were awarded
2006-07	4%	25%
2007-08	15%	12%
2008-09	29%	28%

Public Outreach

In accordance with the public participation requirements of 49 CFR Part 26.45, the draft ADPL 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:

- Asian Week
- El Mensajero
- Hokubei Mainichi
- La Oferta Review
- San Francisco Bay View
- San Francisco Chronicle
- San Francisco Examiner
- Small Business Exchange

The notice will inform the public that the proposed percentage level and its rationale are available for inspection on the TJPA website and during normal business hours at the TJPA office for 30 days following the date of the notice, and that TJPA will accept comments on the goal for 45 days following the date of the notice. Comments received during the public participation process will be addressed and included as part of the final ADPL. The ADPL for FY10-13 will be brought back to the TJPA Board in July for final adoption following the close of the public review/comment process.

The TJPA's draft ADPL will also be sent to the TJPA's local partner agencies for review. The following local agencies will receive a copy for review:

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

The draft ADPL will also be presented to the public as part of the Business Outreach Committee's public participation process. The Business Outreach Committee is a working group of Bay Area transit agencies focused on supporting disadvantaged and small business participation on contracts.

RECOMMENDATION:

1. Approve the draft Anticipated Disadvantaged Business Enterprise (DBE) Participation Level (ADPL) for FY 2010-13.
2. Authorize the release of the draft ADPL for a 30-day public review/45-day public comment process.

**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 Anticipated DBE Participation Level (ADPL) established for federal Fiscal Years 2010-11 through 2012-13 for DBE participation in the performance of contracts financed in whole or in part with U.S. DOT funds is proposed to be 18.5% and shall be Race-Neutral; and

WHEREAS, The TJPA plans to continue to take affirmative steps to achieve DBE participation through implementation of its separate Small Business Enterprise (SBE) Program; 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 draft FY 2010-13 ADPL; and be it further

RESOLVED, That the TJPA Board authorizes the release of the draft FY 2010-13 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 April 22, 2010.

Secretary, Transbay Joint Powers Authority

ATTACHMENT 2.1
FY 2010-11 Through FY 2012-13
Anticipated Federally Funded Contracts

Award Date	FY 2010-13 Project/Contract	NAICS	NAICS Description	Contract Amt.	Federally Eligible Portion of Contract (80%)	% of Total
Sept 2012	Bus Storage CM	237990	Other Heavy & Civil Engineering Construction	\$ 1,000,000	\$ 800,000	3.88%
	Bus Storage Construction	236220	Commercial & Institution Building Construction	\$ 700,000	\$ 560,000	2.71%
	Bus Storage Construction	237110	Water and Sewer Line and Related Structures	\$ 300,000	\$ 240,000	1.16%
	Bus Storage Construction	237130	Power & Communication Lines/Related Structures	\$ 500,000	\$ 400,000	1.94%
	Bus Storage Construction	238110	Poured Concrete Foundation & Structure	\$ 1,100,000	\$ 880,000	4.26%
	Bus Storage Construction	238140	Masonry Contractors	\$ 300,000	\$ 240,000	1.16%
	Bus Storage Construction	238910	Site Preparation (including Demolition)	\$ 2,200,000	\$ 1,760,000	8.53%
	Bus Storage Construction	237710	Highway, Street & Bridge Construction	\$ 12,200,000	\$ 9,760,000	47.29%
Feb 2013	Public Relations & Outreach	541820	Public Relations Agencies	\$ 750,000	\$ 600,000	2.91%
Jan 2011	Independent Auditing Services	541211	Offices of Certified Public Accountants	\$ 250,000	\$ 200,000	0.97%
Oct 2010	Outside Legal Services	541110	Offices of Lawyers	\$ 3,000,000	\$ 2,400,000	11.63%
Oct 2010	Financial & Grant Management	541611	Administrative Mgmt & General Mgmt Svcs	\$ 3,500,000	\$ 2,800,000	13.57%
			Total	\$ 25,800,000	\$ 20,640,000	100.0%

ATTACHMENT 2.2
FY 2010-13 DBE Base Figure Calculation

DBE Totals by County and Activity												
	<u>236220</u>	<u>237310</u>	<u>237990</u>	<u>237110</u>	<u>237130</u>	<u>238110</u>	<u>238140</u>	<u>238910</u>	<u>541820</u>	<u>541211</u>	<u>541110</u>	<u>541611</u>
Counties ^(1,2)	Commercial & Institutional Building Construction	Highway, Bridge & Street Construction	Other Heavy Civil Eng Construction	Water & Sewer Line	Power & Communication Lines/Related	Poured Concrete Foundation	Masonry	Site Preparation / Demolition	Public Relations Agencies	Offices of Certified Public Accountants	Offices of Lawyers	Administrative Management, General Management
Alameda (510)	5	23	5	4	3	12	1	10	10	2	2	34
Contra Costa (925)	5	12	5	2	1	4	1	5	1	0	0	15
Napa, Solano, Sonoma (707)	3	7	3	1	0	5	1	4	0	0	0	6
San Francisco/Marin (415)	13	20	13	4	1	10	2	7	19	4	3	21
San Mateo (650)	2	6	2	2	0	3	1	3	0	0	0	2
Santa Clara (408)	2	4	2	2	3	2	0	1	2	1	1	8
Totals	30	72	30	15	8	36	6	30	32	7	6	86
NAICS Totals by County and Activity												
	<u>236220</u>	<u>237310</u>	<u>237990</u>	<u>237110</u>	<u>237130</u>	<u>238110</u>	<u>238140</u>	<u>238910</u>	<u>541820</u>	<u>541211</u>	<u>541110</u>	<u>541611</u>
Counties ^(1,3)	Commercial & Institutional Building Construction	Highway, Bridge & Street Construction	Other Heavy Civil Eng Construction	Water & Sewer Line	Power & Communication Lines/Related	Poured Concrete Foundation	Masonry	Site Preparation / Demolition	Public Relations Agencies	Offices of Certified Public Accountants	Offices of Lawyers	Administrative Management, General Management
Alameda (510)	171	41	16	34	14	57	52	84	20	224	752	289
Contra Costa (925)	144	31	18	25	17	71	53	87	17	226	520	240
Napa, Solano, Sonoma (707)	147	47	25	57	25	115	89	169	17	186	426	122
San Francisco/Marin (415)	177	13	11	18	3	32	31	41	130	156	1616	517
San Mateo (650)	93	19	4	15	3	42	29	39	26	325	341	210
Santa Clara (408)	176	42	8	30	18	104	69	71	54	361	1005	397
Totals	908	193	82	179	80	421	323	491	264	1478	4660	1775
Calculation of Step 1 Base Figure												
	<u>236220</u>	<u>237310</u>	<u>237990</u>	<u>237110</u>	<u>237130</u>	<u>238110</u>	<u>238140</u>	<u>238910</u>	<u>541820</u>	<u>541211</u>	<u>541110</u>	<u>541611</u>
NAICS Code and Description	Commercial & Institutional Building Construction	Highway, Bridge & Street Construction	Other Heavy Civil Eng Construction	Water & Sewer Line	Power & Communication Lines/Related	Poured Concrete Foundation	Masonry	Site Preparation / Demolition	Public Relations Agencies	Offices of Certified Public Accountants	Offices of Lawyers	Administrative Management, General Management
DBE Totals for All Counties:	30	72	30	15	8	36	6	30	32	7	6	86
NAICS Totals for All Counties:	908	193	82	179	80	421	323	491	264	1478	4660	1775
DBE Totals/NAICS Totals:	3.30%	37.31%	36.59%	8.38%	10.00%	8.55%	1.86%	6.11%	12.12%	0.47%	0.13%	4.85%
Weight Values:	2.71%	47.29%	3.88%	1.16%	1.94%	4.26%	1.16%	8.53%	2.91%	0.97%	11.63%	13.57%
	0.09%	17.64%	1.42%	0.10%	0.19%	0.36%	0.02%	0.52%	0.35%	0.00%	0.01%	0.66%
FY 2010-13 DBE Step One Base Figure			21.38%									
<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/QuerySubmit.do</small>												
<small>(3) NAICS data is from the U.S. Census Bureau's 2007 County Business Patterns.</small>												

**ATTACHMENT 2.3
FY 2010-13 DBE Base Figure Adjustment Calculation**

DBE Past Participation for Active Contracts by NAICS: FY 2004-05 to FY 2009-10 (through January 2010)				
Contract	NAICS	NAICS Description	TJPA DBE %	
Temp Terminal CM	237990	Heavy & Civil Engineering, including CM	94%	
Temp Terminal Construction	23---	Construction	31%	
Outside Legal Services	541110	Offices of Lawyers	0%	
Independent Auditing Services	541211	Offices of CPAs	0%	
Financial Consulting Services	541611	Administrative Mgmt and General Mgmt Services	56%	
Public Relations	541820	Public Relations Agencies	20%	
Adjustment of DBE Base Figure for FY10-13 Contracts				
NAICS	Base Goal	Base Goal (by work category)	NAICS Past DBE Participation Level	NAICS Adjustment
236220	0.09%	18.93%	31.00%	24.96%
237110	0.10%			
237130	0.19%			
237310	17.64%			
238110	0.36%			
238140	0.02%			
238910	0.52%			
237990	1.42%	1.42%	94.00%	47.71%
541110	0.01%	0.01%	0.0%	0.01%
541211	0.00%	0.00%	0.0%	0.00%
541611	0.66%	0.66%	56.0%	28.33%
541820	0.35%	0.35%	20.0%	10.18%
	21.38%	21.38%	DBE % =	18.5%
FY 2010-13 Anticipated DBE Participation Level				18.5%