

**THIS STAFF REPORT COVERS CALENDAR ITEM NO.: 10
FOR THE MEETING OF: September 20, 2007**

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION:

Approval of the Disadvantaged Business Enterprise (DBE) Program for FY 2007-08.

SUMMARY:

- Since its creation in 2001, TJPA has received Federal financial assistance from the Federal Transit Administration (FTA) through grants administered by the Municipal Transportation Agency (MTA).
- The passage of SAFETEA-LU in 2005 included more than \$56 million in federal earmarks for the Transbay project.
- In January 2006, TJPA became an official and legitimate FTA grantee, authorizing TJPA to file applications for federal assistance, file annual certifications and assurances, and execute grant agreements directly with FTA.
- In accordance with Title 49 of the Code of Federal Regulations, Part 26 (49 CFR Part 26), TJPA must establish an Annual Anticipated Disadvantaged Business Enterprise Participation Level (AADPL) for contracts awarded with federal funds. A DBE firm is defined as a for-profit "small business concern" that is at least 51% owned and controlled by one or more socially and economically disadvantaged individuals. A DBE Program is established to ensure nondiscrimination in the award of federally funded contracts.
- A DBE Program is a requirement to obligate federal funds.
- On June 21, 2007, the TJPA Board authorized the release of the draft DBE Program for a 30-day public review/45-day public comment process.
- The FY 2007-08 Annual Anticipated DBE Participation Level (AADPL) is 15.1%, the same rate as the draft FY 2007-08 DBE Program presented to the TJPA Board in June.

ENCLOSURES:

1. Resolution
2. FY 2007-08 Annual Anticipated DBE Participation Level (AADPL) Methodology

EXPLANATION:

The methodology to calculate the Annual Anticipated DBE Participation Level (AADPL) is a two-step process described in 49 CFR Part 26. Step One of the methodology establishes a base figure, which is derived from the anticipated new contracts to be awarded in FY 2007-08. The base figure is calculated from the relative availability of DBEs that are ready, willing, and able to participate in federally funded projects. Step Two relies on the TJPA's knowledge of its contracting markets to determine if an adjustment from the base figure is needed. The calculation using the two-step methodology results in an AADPL of 15.1% for FY 2007-08. The methodology and the determination of the DBE goal are outlined in Enclosure 2.

The AADPL is typically split into race-neutral and race-conscious components. Race-neutral participation is defined as any time a DBE obtains a contract through customary procurement procedures where its DBE status was not considered in making the award. Race-conscious DBE

participation focuses on assisting only DBEs, where a level of DBE participation serves as criteria for contract award.

On May 9, 2005, the United States Ninth Circuit Court of Appeals filed an opinion on the Western States Paving Co. vs. Washington State Department of Transportation (WSDOT). The opinion found that while the Federal DBE Program is constitutional, judgment was made against the State because WSDOT's DBE goal was not separately supported with controlled, statistical evidence of discrimination for the race-conscious portion of the goal. WSDOT was required to conduct a disparity study to determine the presence or effects of discrimination in its marketplace before being allowed to continue using race-conscious components to meet its DBE goal. This ruling applies to all states within the jurisdiction of the Ninth Circuit Court, including California.

In response to this ruling, the California Department of Transportation (Caltrans) implemented a race-neutral DBE program on May 1, 2006, which means local agencies may no longer advertise and award contracts with federal-aid funds containing race-conscious DBE goals. Caltrans completed a statewide disparity study in June 2007 to evaluate what, if any, discrimination exists for minority groups included in its DBE Program. Until such a time Caltrans receives concurrence from the Federal Highway Administration (FHWA) on the results from the disparity study, Caltrans will continue to administer a race-neutral DBE Program.

As advised by Caltrans and FTA, TJPA prepared its DBE Program under the race-neutral guidelines from the California Department of Transportation. In compliance with the Caltrans decision, the Annual Anticipated DBE Participation Level (AADPL) of 15.1% will be exclusively race-neutral. Should Caltrans or FTA notify TJPA of mandatory changes to the DBE Program, an amendment to this program, once approved, will likely be required.

TJPA has been very successful in awarding contracts to DBE firms. Over the past three years, five of the twelve prime contracts awarded by TJPA include DBE participation. Based on actual payments for all contracts, TJPA has maintained an average DBE participation level of 24.8% over the three-year period from FY 2004 to FY 2007, well beyond the 15.1% AADPL calculated for FY 2007-08.

Outreach/Public Comments Period

In conformance with the public participation requirements of 49 CFR Part 26.45, the draft DBE Program was released for a 30-day public review/45-day public comment period on June 25, 2007. A public notice was published in the following general circulation media, minority-focused media and trade association publications:

- Asian Week
- China Press
- El Mensajero
- La Oferta Review
- Phillipine News
- San Francisco Bay View
- San Francisco Examiner
- Small Business Exchange
- Thoi Bao Community Newspaper

The draft DBE Program was also sent to the TJPA's local partner agencies for review. The following local agencies received a letter announcing the release of the draft FY 2007-08 DBE Program 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, a memo and a copy of the DBE Program will be sent to FTA and Caltrans notifying them of the approval.

RECOMMENDATION:

Approve the FY 2007-08 Disadvantaged Business Enterprise (DBE) Program.

**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 comply with federal requirements to obtain federal funds for transportation projects, TJPA must approve and implement a Disadvantaged Business Enterprise ("DBE") Program (Title 49 Code of Federal Regulations Part 23) prior to approval by the Federal Transit Administration (FTA), the Federal Highway Administration (FHWA), and the United States Department of Transportation (U.S. DOT) of any request for Federal funds; and

WHEREAS, The overall Annual Anticipated DBE Participation Level (AADPL) established by the FY 2007-08 DBE Program for DBE participation in the performance of contracts financed in whole or in part with DOT funds shall be 15.1% and shall be Race-Neutral; and

WHEREAS, A notice of the AADPL was published on June 25, 2007, informing the public that the AADPL and its rationale were available for inspection for thirty days following the date of the notice and that comments were accepted on the proposed goal for forty-five days following the date of the notice; and

WHEREAS, Letters were sent notifying the TJPA's local partner agencies of the DBE Program 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 Transbay Joint Powers Authority Board approves the FY 2007-08 Disadvantaged Business Enterprise (DBE) Program.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of September 20, 2007.

Secretary, Transbay Joint Powers Authority

FY 2007-08
ANNUAL ANTICIPATED DBE PARTICIPATION LEVEL (AADPL)
METHODOLOGY

Introduction

The Transbay Joint Powers Authority (TJPA) was created in April 2001 to design, build, operate and maintain the new Transbay Transit Center and associated facilities in downtown San Francisco, including the construction of bus storage and staging facilities, the extension of the Caltrain commuter rail 1.3 miles into the new Transit Center, and accommodations for future California High Speed Rail.

The TJPA consists of a historic collaboration of Bay Area government and transportation agencies committed to replacing the current Transbay Terminal in San Francisco with the new Transbay Transit Center to improve the transportation needs for the entire Bay Area region and the State. The TJPA is managed by TJPA Staff and is overseen by a five member Board of Directors. The TJPA Board of Directors is comprised of representatives from the following agencies:

- City and County of San Francisco- one board member for each of the following departments:
 - Municipal Transportation Agency (MTA)
 - The Office of the Mayor
 - Board of Supervisors
- Alameda-Contra Costa Transit District (AC Transit)
- Peninsula Corridor Joint Powers Board – Caltrain; created by the City and County of San Francisco, San Mateo County Transit District, and Santa Clara Valley Transportation Authority.

Since its creation in 2001, TJPA has received Federal financial assistance from the Federal Transit Administration (FTA) through grants administered by MTA. This arrangement changed in January 2006, when the TJPA became an official and legitimate FTA grantee, authorizing TJPA to file applications for Federal assistance, file annual certifications and assurances, and execute grant agreements directly with the FTA.

In accordance with Title 49 of the Code of Federal Regulations, Part 26 (49 CFR Part 26), an Annual Anticipated Disadvantaged Business Enterprise (DBE) Participation Level (AADPL) must be established for contracts anticipating award with Federal funds. A two-step methodology process described in 49 CFR Part 26 must be used to determine the AADPL. Step One of the methodology establishes a base figure for the relative availability of DBEs that are ready, willing, and able to participate in Federally funded Department of Transportation (DOT) assisted projects. Step Two relies on the TJPA's

knowledge of its contracting markets to determine if an adjustment from the base figure is needed. Each methodology is discussed in detail below.

Step One Process: Census Bureau Data and DBE Directory

The first stage in developing an AADPL is to develop a market area for which consultants 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

The second stage is to determine the corresponding work categories for the anticipated FY 2007-08 Federal-award contracts. TJPA anticipates to award nine (9) contracts with Federal funds in FY 2007-08 (see Attachment 1.1). These activities were matched with their respective North American Industry Classification System (NAICS) codes, which are used to identify DBE firms in the Caltrans DBE and the US Census Bureau's databases.

The third step to calculating the Step One AADPL, or Base Figure, is to weight each work category as a percentage of the total amount of the contract award. Weighting each category will assist in providing a more accurate Step One Base Figure.

NAICS	NAICS Description	Weight
237990	Other Heavy Civil Engineering Construction	5.30%
238910	Site Preparation Contractors	1.12%
531312	Nonresidential Property Managers	0.06%
531390	Other Activities Related to Real Estate	0.19%
541219	Other Accounting Services	0.31%
541310	Architectural Services	44.10%
541330	Engineering Services	47.65%
541620	Environmental Consulting Services	0.62%
541820	Public Relations Agencies	0.84%

The next step to developing the Base Figure is to calculate the ratio of DBE firms to non-DBE firms 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 from the US Census database

(see Attachment 1.2). This is performed for each county and each type of activity. The results are as follows:

NAICS	NAICS Description	Ratio of DBE/Total
237990	Other Heavy Civil Engineering Construction	35.63%
238910	Site Preparation Contractors	9.98%
531312	Nonresidential Property Managers	0.00%
531390	Other Activities Related to Real Estate	0.74%
541219	Other Accounting Services	0.35%
541310	Architectural Services	1.99%
541330	Engineering Services	6.70%
541620	Environmental Consulting Services	14.33%
541820	Public Relations Agencies	14.56%

Finally, the Step One Base Figure is calculated by multiplying the DBE ratios by their corresponding weights, summing the results for each activity, and taking its percentage. The calculation of the Step One Base Figure is shown in Attachment 1.2.

Step One Base Figure = SUM (Weight * Ratio) for each activity = 6.28%.

The Step One Base Figure, weighted by type of work to be performed, is 6.3%.

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 adopted policies and procedures in July 2006 to monitor and track DBE participation. The TJPA's DBE participation history can assist in determining whether an adjustment to the Step One Base Figure is warranted.

As shown in Attachment 1.3, an analysis of the TJPA's current contracts reveals that they fall into one major work category: NAICS 54 – Professional, Scientific, and Technical Services. Over the past three years, from FY 2005 to FY 2007, the TJPA has achieved an average DBE participation level of 21.88% for activities in the NAICS 54 work category.

The past participation level of 21.88% can be applied to adjust the FY 2007-08 Base Figure for activities under the NAICS 54 category (see Attachment 1.3). The total calculated participation level for NAICS 54 contracts in the FY 2007-08 DBE Base Figure is 6.3%. Averaging that figure with the NAICS 54-past participation level of 21.88% results in a percentage of 13.08%. This new percentage for NAICS 54 can now be added to the participation percentages of the remaining work codes, which results in a revised DBE participation level of **15.08%**.

Other factors in the Step Two analysis involve the consideration of disparity studies conducted in the market area and evidence of past discrimination. Since there are no known disparity studies for the region at this time and no adequate evidence of past discrimination, further adjustments to the AADPL will not be made based on this information. However, the California Department of Transportation (Caltrans) is currently conducting a statewide disparity study in response to the U.S. Ninth Circuit Court of Appeals ruling (see below). TJPA may choose to reevaluate and amend the AADPL at a later date when the results of the Caltrans statewide disparity study are released.

The overall AADPL, or the Step Two adjustment figure, is 15.1%.

Race-Neutral / Race-Conscious Split:

Race-neutral DBE participation is defined as any time a DBE obtains a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, obtains a subcontract from a prime contractor that did not consider its DBE status in making the award. A race-neutral measure is one that is, or can be, used to assist all small businesses, not just DBEs.

Race-conscious DBE participation is the component of the overall goal that focuses on assisting only DBEs. The use of contract goals is the primary example of a race-conscious measure in the DBE Program. Local agencies establish contract goals to meet any portion of their overall goal they do not project being able to meet using race-neutral means.

On May 9, 2005, the United States Ninth Circuit Court of Appeals filed an opinion on the *Western States Paving Co. vs. Washington State Department of Transportation (WSDOT)*. The opinion found that while the Federal DBE Program is constitutional, judgment was entered against the State because WSDOT's DBE goal was not separately supported with controlled, statistical evidence of discrimination for the race-conscious portion of the goal. WSDOT was required to conduct a disparity study to determine the presence or effects of discrimination in its marketplace before being allowed to continue using race-conscious components to meet its DBE goal. This ruling applies to all states within the jurisdiction of the Ninth Circuit Court, including California.

In response to this ruling, the California Department of Transportation (Caltrans) implemented a race-neutral DBE program on May 1, 2006, which means local agencies may no longer advertise and award contracts with Federal-aid funds containing race-conscious DBE goals. Caltrans also committed to lead a statewide disparity study over the next year to evaluate what, if any, discrimination exists for minority groups included in its DBE Program. This study is expected to be the basis of determining what, if any, changes will be made to the Caltrans DBE Program.

As advised by Caltrans and FTA, TJPA prepared its DBE Program under the race-neutral guidelines from the California Department of Transportation. In compliance with the

Caltrans decision, the revised AADPL of 15.1% will be exclusively race-neutral. The TJPA may later reevaluate and amend its DBE Program when the results of the DOT's statewide disparity study are released. Should Caltrans or FTA notify TJPA of mandatory changes to the DBE Program, an amendment to this program, once approved, will likely be required.

Conclusion:

The Annual Anticipated Disadvantaged Business Enterprise (DBE) Participation Level (AADPL) for FY 2007-08 is 15.1% and will be exclusively race-neutral.

ATTACHMENT 1.1
FY 2007-08 Anticipated Federal Funded Contracts

FY 2007-08 Project/Contract	NAICS	NAICS Description	TJPA Award Date	Federal Portion of Contract	Weight
CM for Bus Storage	237990	Other Heavy Civil Engineering Construction	Feb-08	\$ 2,639,000	5.30%
CM for Temporary Terminal		Other Heavy Civil Engineering Construction	Feb-08	\$ 1,618,000	
Acquired Properties Demolition, if needed	238910	Site Preparation Contractors	Jan-08	\$ 899,000	1.12%
Property Management Services	531312	Nonresidential Property Managers	Sep-07	\$ 50,000	0.06%
Real Estate Economic Advisory Services	531390	Other Activities Related to Real Estate	Aug-07	\$ 150,000	0.19%
Financial Software Consulting Services	541219	Other Accounting Services	Jul-07	\$ 50,000	0.31%
Financial Software System Implementation		Other Accounting Services	Dec-07	\$ 200,000	
Design of Transbay Transit Center (Architectural)	541310	Architectural Services	Sep-07	\$ 35,306,000	44.10%
Design of Transbay Transit Center (Engineering)	541330	Engineering Services	Sep-07	\$ 35,306,000	47.65%
Design Services for Early Relocation of Utilities		Engineering Services	Jul-07	\$ 3,000,000	
As-Needed Env Consulting Svcs.	541620	Environmental Consulting Services	Jul-07	\$ 500,000	0.62%
Community & Public Relations	541820	Public Relations Agencies	Mar-08	\$ 675,000	0.84%
			Total	\$ 80,393,000	

ATTACHMENT 1.2
FY 2007-08 DBE Base Figure Calculation

DBE Totals by County and Activity									
	237990	238910	531312	531390	541219	541310	541330	541620	541820
Counties ^(1,2)	Other Heavy Civil Eng Construction	Site Preparation Contractors	Nonresidential Property Managers	Other Activities Related to Real Estate	Other Accounting Services	Architectural Services	Engineering Services	Environmental Consulting Services	Public Relations Agencies
Alameda (510)	6	10	0	2	2	10	41	15	12
Contra Costa (925)	6	8	0	1	0	0	24	7	3
Napa, Solano, Sonoma (707)	5	11	0	0	0	0	9	7	0
San Francisco/Marin (415)	9	12	0	0	1	10	48	9	21
San Mateo (650)	3	1	0	1	0	0	3	2	0
Santa Clara (408)	2	1	0	0	0	1	18	2	2
Totals	31	43	0	4	3	21	143	42	38
NAICS Totals by County and Activity (***)									
	237990	238910	531312	531390	541219	541310	541330	541620	541820
Counties ^(1,3)	Other Heavy Civil Eng Construction	Site Preparation Contractors	Nonresidential Property Managers	Other Activities Related to Real Estate	Other Accounting Services	Architectural Services	Engineering Services	Environmental Consulting Services	Public Relations Agencies
Alameda (510)	18	78	88	91	139	188	423	80	15
Contra Costa (925)	15	69	51	91	115	89	337	49	19
Napa, Solano, Sonoma (707)	27	129	42	45	135	103	213	38	15
San Francisco/Marin (415)	13	36	147	157	169	459	343	66	126
San Mateo (650)	4	35	55	40	104	72	157	15	32
Santa Clara (408)	10	84	124	119	192	146	662	45	54
Totals	87	431	507	543	854	1057	2135	293	261
Calculation of Step 1 Base Goal									
	237990	238910	531312	531390	541219	541310	541330	541620	541820
NAICS Code and Description	Other Heavy Civil Eng Construction	Site Preparation Contractors	Nonresidential Property Managers	Other Activities Related to Real Estate	Other Accounting Services	Architectural Services	Engineering Services	Environmental Consulting Services	Public Relations Agencies
DBE Totals for All Counties:	31	43	0	4	3	21	143	42	38
NAICS Totals for All Counties:	87	431	507	543	854	1057	2135	293	261
DBE Totals/NAICS Totals:	35.63%	9.98%	0.00%	0.74%	0.35%	1.99%	6.70%	14.33%	14.56%
Weight Values:	5.30%	1.12%	0.06%	0.19%	0.31%	44.10%	47.65%	0.62%	0.84%
	1.89%	0.11%	0.00%	0.00%	0.00%	0.88%	3.19%	0.09%	0.12%
	\$ 1,518,226.43	\$ 89,831.25	\$ -	\$ 1,125.21	\$ 875.47	\$ 704,370.46	\$ 2,565,779.31	\$ 71,448.25	\$ 98,319.71
FY 2007-08 DBE Step One Base Figure				6.28%					
(1) Nine Bay Area Counties include Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, Sonoma.									
(2) Source of DBE Query Data: http://www.dot.ca.gov/hq/bep/find_certified.htm . (Backup data on file at TJPA as Technical Attachment T.1.)									
(3) NAICS data is from the U.S. Census Bureau's 2003 County Business Patterns. (Backup data on file at TJPA as Technical Attachment T.2.)									

ATTACHMENT 1.3
FY 2007-08 DBE Base Figure Adjustment Calculation
Based on invoiced amount through June 1, 2007

DBE Past Participation of Active Contracts: FY 2004-05 to FY 2006-07					
Contract	NAICS	NAICS Description	Total Amount Paid to Date	Non-DBE	DBE
Macias	541110	Offices of Lawyers	45,584.00	100%	0%
SMW	541110	Offices of Lawyers	1,221,347.64	100%	0%
Moscone-MEQ	541110	Offices of Lawyers	89,962.76	100%	0%
Hanson Bridgett	541110	Offices of Lawyers	12,337.80	100%	0%
Singer	541820	Public Relations Agencies	328,046.23	81%	19%
Parsons	541330	Engineering Services	9,855,519.33	78%	22%
Nancy Whelan Consulting	541611	Administrative Mgmt and General Mgmt Services	253,849.31	54%	46%
URS	541330	Engineering Services	15,404,896.14	76%	24%
TOTALS			27,211,543.21		
				78.12%	21.88%
Adjustment of DBE Base Figure for NAICS 54 Contracts					
NAICS	Base Goal (from Attach. E.2)	Base Goal (by work category)	NAICS 54 Past Participation Level	NAICS 54 Adjustment	
237990	1.89%	2.00%	0.00%	2.00%	
238910	0.11%				
531312	0.00%				
531390	0.00%				
541219	0.00%	4.28%	21.88%	13.08%	
541310	0.88%				
541330	3.19%				
541620	0.09%				
541820	0.12%				
	6.28%	6.28%	DBE % =	15.08%	
FY 2007-08 Annual Anticipated DBE Participation Level					15.08%