

**STAFF REPORT FOR CALENDAR ITEM NO.: 8.2
FOR THE MEETING OF: June 11, 2026**

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION:

Approval of amendment to Board Policy No. 015, the Small Business Enterprise (SBE) Program Plan.

SUMMARY:

The TJPA's Small Business Enterprise (SBE) Program Plan, TJPA Board Policy No. 015, was established in 2009 and last updated in June 2025.

In October 2025, the U.S. Department of Transportation (USDOT) issued an Interim Final Rule (IFR) regarding DBE programs for federally-funded contracts; the Interim Final Rule is intended to ensure DBE programs are operated in a nondiscriminatory fashion. The IFR removes race- and sex-based presumptions of social and economic disadvantage from DBE programs for federally-funded contracts.

In March 2026, TJPA updated its Disadvantaged Business Enterprise (DBE) Program Plan to incorporate the requirements of the October 2025 IFR and maintain compliance with federal regulations. At that time, revisions to the SBE Program Plan were not considered necessary because the IFR expressly applied to DBE programs. However, subsequent review determined that certain provisions of the TJPA's SBE Program Plan should also be revised to ensure consistency with the new guidelines listed in the October 2025 IFR.

TJPA's SBE Program Plan includes provisions that allow for small business set-asides, which restrict competition to certified small businesses and provide opportunities for such firms to compete without the advantages typically held by larger, more established companies. To ensure consistency with federal requirements, the proposed revisions to TJPA's SBE Program Plan clarify that SBE set-asides may be used only for contracts that are not funded, in whole or in part, with federal funds.

The proposed amendments also make minor typographical clean ups.

Federal regulations are amended periodically. When regulatory changes materially affect TJPA's programs or policies, staff will incorporate the necessary revisions into the applicable Board policies to ensure continued compliance with program requirements.

RECOMMENDATION:

Approve amendment to the Board Policy No. 015 – Small Business Enterprise (SBE) Program Plan.

ENCLOSURES:

1. Resolution
2. Board Policy No. 015 – Small Business Enterprise (SBE) Program Plan – clean and redline versions

**TRANSBAY JOINT POWERS AUTHORITY
BOARD OF DIRECTORS**

Resolution No. _____

WHEREAS, The Federal Transit Administration (FTA) approved the Transbay Joint Powers Authority (TJPA) as 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

WHEREAS, The TJPA originally adopted a DBE Program Plan in July 2006 and has amended it periodically, most recently in March 2026; and

WHEREAS, The TJPA originally adopted a Small Business Enterprise (SBE) Program Plan in June 2009 and has amended it periodically, most recently in June 2025; and

WHEREAS, In October 2025, U.S. DOT issued an Interim Final Rule (“IFR”) regarding DBE programs for federally-funded contracts, and TJPA subsequently adopted conforming amendments to its DBE Program Plan; and

WHEREAS, TJPA staff has proposed updates to the TJPA SBE Program Plan to ensure it does not conflict with the U.S. DOT IFR and revised administrative details in the form presented herewith; now, therefore, be it

RESOLVED, That the TJPA Board approves the amendment to Board Policy No. 015 – Small Business Enterprise (SBE) Program Plan.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of June 11, 2026.

Secretary, Transbay Joint Powers Authority

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 (SBE Program or 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:

- increase the number of certified SBEs participating in TJPA's contract opportunities;
- increase overall competition on TJPA contracts, potentially allowing for the completion of projects at a lower overall cost;
- create a level playing field on which SBEs can compete fairly for TJPA contracts;
- help 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;
- develop programs and procedures, which will acquaint prospective SBEs with the TJPA's contract procedures, activities, and requirements and allow SBEs to provide the TJPA with feedback on existing barriers to participation and effective procedures to eliminate those barriers;
- administer the Program in collaboration with the various departments within the TJPA to facilitate the successful implementation of this Program.

The Procurement & Contract Compliance Manager has been designated the SBE Liaison Officer (SBELO). In that capacity, the SBE Liaison Officer 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 Disadvantaged Business Enterprise (DBE) Program.

The TJPA has disseminated this policy statement to its Board of Directors and to all divisions within the TJPA. This policy statement is disseminated to members of the SBE and non-SBE business communities that perform or are interested in performing work on the TJPA's non-federally funded contracts. The policy statement is on the [Doing Business page of the TJPA website \(web\)](#). Questions regarding the TJPA's SBE Program should be addressed to:

SBE Liaison Officer
Transbay Joint Powers Authority
425 Mission Street, Suite 250
San Francisco, CA 94105
(415) 597-4620
DBE-SBE@tjpa.org

Adam Van de Water
Executive Director

Date

II. Certification Standards and SBE Directories

The TJPA does not administer an SBE certification program. To be eligible for TJPA's SBE Program, firms (prime Contractor or Subconsultant/Subcontractor/Vendor) must be certified under any of the programs outlined below:

- 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)*

The State of California SBE Directory can be accessed at:

<https://caleprocure.ca.gov/pages/PublicSearch/supplier-search.aspx>

- B. *City and County of San Francisco Local Business Enterprise (LBE) as certified by the Contract Monitoring Division (CMD) Directory Certification Unit.*

The Directory of Certified LBEs can be accessed here:

<https://sfgov.org/cmd/directory-certified-lbes>

- C. *A Disadvantaged Business Enterprise (DBE), as certified by the California Unified Certification Program (CUCP).*

The CUCP Directory can be accessed at:

<https://californiaucp.dbesystem.com/>

- D. *Alameda County Small Local and Emerging Business (SLEB) program as certified by the Alameda County SLEB Certification Unit. The SLEB Supplier Query System Database can be accessed at:*

https://www.acgov.org/sleb_query_app/gsa/sleb/query/slebresultlist.jsp?smEmInd=C

- E. DVBE/LBE/LGBTBE/MBE/SBE/WBE certification from a formal certifying agency in the nine-county Bay Area, provided that the certification can be verified through a searchable database and meets the requirements of the State of California Small Business Program 1. (Disadvantaged Veteran Business Enterprise (DVBE), Local Business Enterprise (LBE), Lesbian, Gay, Bisexual, Transgender Business Enterprise (LGBTBE), Minority Business Enterprise (MBE), Small Business Enterprise (SBE), Women Business Enterprise (WBE))

Eligibility

Per Title 2, California Code of Regulations, § 1896.12. Eligibility for Certification as a Small Business.

To be eligible for certification as a small business, a business must meet all of the following qualifying criteria:

- (1) It is independently owned and operated; and
- (2) Its principal office is located in California; and
- (3) The officers of the business (in the case of a corporation); officers and/or managers, or in the absence of officers and/or managers, all members in the case of a limited liability company; partners in the case of a partnership; or the owner(s) in all other cases, are domiciled in California; and

(4) It is not dominant in its field of operation(s), and

(5) It is either:

(A) A business that, together with all affiliates, has one hundred (100) or fewer employees, and annual gross receipts of eighteen million dollars (\$18,000,000) or less as averaged for the previous three (3) tax years, as biennially adjusted by the Department in accordance with Government Code section 14837, subdivision (d)(3) (If the business or its affiliate(s) has been in existence for less than three (3) tax years, then the GAR will be based upon the number of years in existence); or

(B) A manufacturer as defined herein that, together with all affiliates, has one hundred (100) or fewer employees.

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 who have the effect of defeating or impairing 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

The TJPA has designated the following individual as its SBE Liaison Officer:

Procurement & Contract Compliance Manager
Transbay Joint Powers Authority
425 Mission Street, Suite 250
San Francisco, CA 94105
(415) 597-4620

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

VI. Information Collection and Reporting

Bidders List

The TJPA will obtain bidders list information to compile as accurate data as possible about the universe of SBE and non-SBEs who seek to work on TJPA's contracts for use in helping set its overall goals, and to provide data for evaluating the extent to which the objectives of the Program are being achieved.

The TJPA will obtain the bidders list information about all SBE and non-SBEs who bid as prime contractors and subcontractors on each contract. The bidders list information will be submitted with the bid or initial response to negotiated procurements. The bidders list information will include:

- 1) Firm name;
- 2) Firm address including ZIP code;
- 3) Firm's status as a SBE or non-SBE;
- 4) Race and gender information for the firm's majority owner;
- 5) NAICS code applicable to each scope of work the firm sought to perform in its bid;
- 6) Age of the firm; and
- 7) The annual gross receipts of the firm.

The TJPA will maintain the confidentiality of any proprietary information in accordance with applicable with Federal, state, and local laws.

TJPA collects this information in the following ways:

The TJPA has incorporated a "Bidders/Proposers Information Request Form" (Attachment 2) into its solicitation documents, requiring that bidders/proposers provide all requested information for themselves and all firms who bid, quote, or provide a proposal to perform work, provide labor, render services or provide supplies in connection with the contract.

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. The TJPA requires prime contractors to maintain records and documents of payments to SBEs for a minimum of three (3) years unless otherwise provided by applicable record retention requirements for the TJPA's federal financial assistance agreements, whichever is longer, 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 extends to all subcontractors, both SBE and non-SBE.
2. The TJPA's SBE Program includes a monitoring and enforcement mechanism to ensure that work subcontracted to all SBEs at contract award or subsequently is performed by the SBEs to which the work was committed or subcontracted to, and such work is counted according to the requirements of the Program.
3. The TJPA monitors and track the actual SBE participation through contractor and subcontractor reports of payments, by requiring a "Progress Payment Report" be completed and submitted by the prime contractor with every invoice. The TJPA will require a "Subcontractor Payment Declaration" be completed and submitted by the prime contractor for each first-tier subcontractor for every invoice submitted to the TJPA within 5 days following actual payment to subcontractor. The TJPA will also require a "Final Expenditure Report" be completed and submitted by the prime contractor at the end of the contract. Data collected from contractors may include copies of cancelled checks.

Prompt Payment Dispute Resolution

- The TJPA will take the following step to resolve disputes as to whether work has been satisfactorily completed for.
 - The TJPA will hold a dispute resolution meeting between the prime contractor and subcontractor, along with TJPA's Project Manager, SBE Liaison Officer, or representative from the TJPA as appropriate. The meeting will include those individuals who are authorized to bind each interested party and a representative from the TJPA with authority to take enforcement action.

Prompt Payment Complaints

- Complaints by subcontractors regarding the prompt payment requirements are handled according to the following procedure.
 - Subcontractors are to contact the prime contractor to discuss payment discrepancies. If a resolution is not reached regarding the payment discrepancies, then the affected subcontractor may escalate the complaint to TJPA's Project Manager or SBE Liaison Officer. The TJPA will investigate and follow up with both the subcontractor and prime contractor involved in the complaint resolution within 10 days.
 - If a subcontractor is not comfortable contacting the prime contractor directly regarding payment discrepancies, the subcontractor may contact TJPA's Project Manager or SBE Liaison Officer. The TJPA will investigate and

follow up with both the subcontractor and prime contractor involved in the complaint resolution within 10 days.

Enforcement Actions for Noncompliance of Participants

The TJPA will provide appropriate means to enforce the requirements of this Program. These means include:

- The TJPA will bring to the attention of the United States Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take steps (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) provided in §26.109.
- In the event of non-compliance with the SBE regulation by a participant in TJPA's procurement activities, including prompt payment and retainage requirements, under 49 C.F.R. §26.13 (b), the penalties imposed by the TJPA may include, but are not limited to, the following:
 - (a) Liquidated damages;
 - (b) Suspension of payment to the contractor of any monies held by the TJPA as retained on contract;
 - (c) The denial to the contractor of right to participate in future TJPA contracts for a specified time;
 - (d) Contract termination.

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 in 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 ready, willing, and able 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 Contract Unbundling for Non-Federally Funded Contracts

For contracts that are not funded, in whole or in part, with federal funds, TJPA may utilize small business set-asides when determined to be appropriate in the administration of this SBE Program. The use of set-asides is intended to expand contracting opportunities for certified SBEs and promote their participation in TJPA procurements.

TJPA shall also evaluate contracting opportunities to determine whether work can be reasonably unbundled into smaller scopes or components that are suitable for performance by SBEs. Contract unbundling may be utilized when it enhances small business participation and does not impose undue administrative, operational, or financial burdens on TJPA or its funding partners.

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" to provide all requested information for themselves and all firms who bid, quote, or provide a proposal to perform work, provide labor, render services or provide supplies in connection with the contract.

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:

Executive Director
Transbay Joint Powers Authority
425 Mission Street, Suite 250
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.

XII. 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 toward SBE Participation. 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 total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the SBE performs with its own forces, will be counted toward SBE participation.
- 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.

During the term of a contract, work performed by SBE firms whose certification has expired will continue to be counted toward the SBE participation.

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" 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, in compliance with contract terms to request new subcontractors/subconsultants, 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 in accordance with Section VIII. Monitoring 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.

APPENDIX A – GUIDANCE FOR 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.

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 (SBE Program or 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:

- increase the number of certified SBEs participating in TJPA's contract opportunities;
- increase overall competition on TJPA contracts, potentially allowing for the completion of projects at a lower overall cost;
- create a level playing field on which SBEs can compete fairly for TJPA contracts;
- help 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;
- develop programs and procedures, which will acquaint prospective SBEs with the TJPA's contract procedures, activities, and requirements and allow SBEs to provide the TJPA with feedback on existing barriers to participation and effective procedures to eliminate those barriers;
- administer the Program in collaboration with the various departments within the TJPA to facilitate the successful implementation of this Program.

The Procurement & Contract Compliance Manager has been designated the SBE Liaison Officer (SBELO). In that capacity, the SBE Liaison Officer 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 Disadvantaged Business Enterprise (DBE) Program.

The TJPA has disseminated this policy statement to its Board of Directors and to all divisions within the TJPA. This policy statement is disseminated to members of the SBE and non-SBE business communities that perform or are interested in performing work on the TJPA's non-federally funded contracts. The policy statement is on the [Doing Business page of the TJPA website \(web\)](#). Questions regarding the TJPA's SBE Program should be addressed to:

SBE Liaison Officer
Transbay Joint Powers Authority
425 Mission Street, Suite 250
San Francisco, CA 94105
(415) 597-4620
DBE-SBE@tjpa.org

Adam Van de Water
Executive Director

Date

II. Certification Standards and SBE Directories

The TJPA does not administer an SBE certification program. To be eligible for TJPA's SBE Program, firms (prime Contractor or Subconsultant/Subcontractor/Vendor) must be certified under any of the programs outlined below:

- 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)*

The State of California SBE Directory can be accessed at:

<https://caleprocure.ca.gov/pages/PublicSearch/supplier-search.aspx>

- B. *City and County of San Francisco Local Business Enterprise (LBE) as certified by the Contract Monitoring Division (CMD) Directory Certification Unit.*

The Directory of Certified LBEs can be accessed here:

<https://sfgov.org/cmd/directory-certified-lbes>

- C. *A Disadvantaged Business Enterprise (DBE), as certified by the California Unified Certification Program (CUCP).*

The CUCP Directory can be accessed at:

<https://californiaucp.dbesystem.com/>

- D. *Alameda County Small Local and Emerging Business (SLEB) program as certified by the Alameda County SLEB Certification Unit. The SLEB Supplier Query System Database can be accessed at:*

https://www.acgov.org/sleb_query_app/gsa/sleb/query/slebresultlist.jsp?smEmInd=C

- E. DVBE/LBE/LGBTBE/MBE/SBE/WBE certification from a formal certifying agency in the nine-county Bay Area, provided that the certification can be verified through a searchable database and meets the requirements of the State of California Small Business Program I. (Disadvantaged Veteran Business Enterprise (DVBE), Local Business Enterprise (LBE), Lesbian, Gay, Bisexual, Transgender Business Enterprise (LGBTBE), Minority Business Enterprise (MBE), Small Business Enterprise (SBE), Women Business Enterprise (WBE))

Eligibility

Per Title 2, California Code of Regulations, § 1896.12. Eligibility for Certification as a Small Business.

To be eligible for certification as a small business, a business must meet all of the following qualifying criteria:

- (1) It is independently owned and operated; and
- (2) Its principal office is located in California; and
- (3) The officers of the business (in the case of a corporation); officers and/or managers, or in the absence of officers and/or managers, all members in the case of a limited liability company; partners in the case of a partnership; or the owner(s) in all other cases, are domiciled in California; and

(4) It is not dominant in its field of operation(s), and

(5) It is either:

(A) A business that, together with all affiliates, has one hundred (100) or fewer employees, and annual gross receipts of eighteen million dollars (\$18,000,000) or less as averaged for the previous three (3) tax years, as biennially adjusted by the Department in accordance with Government Code section 14837, subdivision (d)(3) (If the business or its affiliate(s) has been in existence for less than three (3) tax years, then the GAR will be based upon the number of years in existence); or

(B) A manufacturer as defined herein that, together with all affiliates, has one hundred (100) or fewer employees.

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 who have the effect of defeating or impairing 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

The TJPA has designated the following individual as its SBE Liaison Officer:

Procurement & Contract Compliance Manager
Transbay Joint Powers Authority
425 Mission Street, Suite 250
San Francisco, CA 94105
(415) 597-4620

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

VI. Information Collection and Reporting

Bidders List

The TJPA will obtain bidders list information to compile as accurate data as possible about the universe of SBE and non-SBEs who seek to work on TJPA's contracts for use in helping set its overall goals, and to provide data for evaluating the extent to which the objectives of the Program are being achieved.

The TJPA will obtain the bidders list information about all SBE and non-SBEs who bid as prime contractors and subcontractors on each contract. The bidders list information will be submitted with the bid or initial response to negotiated procurements. The bidders list information will include:

- 1) Firm name;
- 2) Firm address including ZIP code;
- 3) Firm's status as a SBE or non-SBE;
- 4) Race and gender information for the firm's majority owner;
- 5) NAICS code applicable to each scope of work the firm sought to perform in its bid;
- 6) Age of the firm; and
- 7) The annual gross receipts of the firm.

The TJPA will maintain the confidentiality of any proprietary information in accordance with applicable with Federal, state, and local laws.

TJPA collects this information in the following ways:

The TJPA has incorporated a "Bidders/Proposers Information Request Form" (Attachment 2) into its solicitation documents, requiring that bidders/proposers provide all requested information for themselves and all firms who bid, quote, or provide a proposal to perform work, provide labor, render services or provide supplies in connection with the contract.

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. The TJPA requires prime contractors to maintain records and documents of payments to SBEs for a minimum of three (3) years unless otherwise provided by applicable record retention requirements for the TJPA's federal financial assistance agreements, whichever is longer, 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 extends to all subcontractors, both SBE and non-SBE.
2. The TJPA's SBE Program includes a monitoring and enforcement mechanism to ensure that work subcontracted to all SBEs at contract award or subsequently is performed by the SBEs to which the work was committed or subcontracted to, and such work is counted according to the requirements of the Program.
3. The TJPA monitors and track the actual SBE participation through contractor and subcontractor reports of payments, by requiring a "Progress Payment Report" be completed and submitted by the prime contractor with every invoice. The TJPA will require a "Subcontractor Payment Declaration" be completed and submitted by the prime contractor for each first-tier subcontractor for every invoice submitted to the TJPA within 5 days following actual payment to subcontractor. The TJPA will also require a "Final Expenditure Report" be completed and submitted by the prime contractor at the end of the contract. Data collected from contractors may include copies of cancelled checks.

Prompt Payment Dispute Resolution

- The TJPA will take the following step to resolve disputes as to whether work has been satisfactorily completed for.
 - The TJPA will hold a dispute resolution meeting between the prime contractor and subcontractor, along with TJPA's Project Manager, SBE Liaison Officer, or representative from the TJPA as appropriate. The meeting will include those individuals who are authorized to bind each interested party and a representative from the TJPA with authority to take enforcement action.

Prompt Payment Complaints

- Complaints by subcontractors regarding the prompt payment requirements are handled according to the following procedure.
 - Subcontractors are to contact the prime contractor to discuss payment discrepancies. If a resolution is not reached regarding the payment discrepancies, then the affected subcontractor may escalate the complaint to TJPA's Project Manager or SBE Liaison Officer. The TJPA will investigate and follow up with both the subcontractor and prime contractor involved in the complaint resolution within 10 days.
 - If a subcontractor is not comfortable contacting the prime contractor directly regarding payment discrepancies, the subcontractor may contact TJPA's Project Manager or SBE Liaison Officer. The TJPA will investigate and

follow up with both the subcontractor and prime contractor involved in the complaint resolution within 10 days.

Enforcement Actions for Noncompliance of Participants

The TJPA will provide appropriate means to enforce the requirements of this Program. These means include:

- The TJPA will bring to the attention of the United States Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take steps (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) provided in §26.109.
- In the event of non-compliance with the SBE regulation by a participant in TJPA's procurement activities, including prompt payment and retainage requirements, under 49 C.F.R. §26.13 (b), the penalties imposed by the TJPA may include, but are not limited to, the following:
 - (a) Liquidated damages;
 - (b) Suspension of payment to the contractor of any monies held by the TJPA as retained on contract;
 - (c) The denial to the contractor of right to participate in future TJPA contracts for a specified time;
 - (d) Contract termination.

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 in 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 ready, willing, and able 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 Contract Unbundling for Non-Federally Funded Contracts**

For contracts that are not funded, in whole or in part, with federal funds, The TJPA shall may use utilize small business set-asides for small business enterprises as when determined to be appropriate in the administration of this SBE Program. The use of set-asides is intended to expand contracting opportunities for certified SBEs and promote their participation in TJPA procurements.

Contracts TJPA shall also be analyzed forevaluate contracting opportunities to determine whether work can be reasonably unbundled into smaller scopes or components that are suitable for performance by work, in order to break large contracts into elements small enough for SBEs small businesses, to reasonably perform, where Contract unbundling may be utilized when it enhances small business participation and does not impose this would not cause an undue administrative, operational, or financial burdens to on TJPA or its funders funding partners.

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" to provide all requested information for themselves and all firms who bid, quote, or provide a proposal to perform work, provide labor, render services or provide supplies in connection with the contract.

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:

Executive Director
Transbay Joint Powers Authority
425 Mission Street, Suite 250

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.

XII. 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 toward SBE Participation. 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 total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the SBE performs with its own forces, will be counted toward SBE participation.
- 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.

During the term of a contract, work performed by SBE firms whose certification has expired will continue to be counted toward the SBE participation.

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” 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, in compliance with contract terms to request new

subcontractors/subconsultants, 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 in accordance with Section VIII. Monitoring 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.

APPENDIX A – GUIDANCE FOR 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.