

THIS PRINT COVERS CALENDAR ITEM NO. 10.13

**SAN FRANCISCO
MUNICIPAL TRANSPORTATION AGENCY**

DIVISION: Finance and Information Technology

BRIEF DESCRIPTION:

Adopting the proposed federal fiscal years 2017-2019 Overall Goal of 15 percent for participation by Disadvantaged Business Enterprises in contracts financed with assistance from the Federal Transit Administration.

SUMMARY:

- The U.S. Department of Transportation (DOT) issued a Disadvantaged Business Enterprise (DBE) Program Final Rule which requires all Federal Transit Administration (FTA) recipients who will award prime contracts in excess of \$250,000 in FTA funds in a Federal fiscal year to adopt a DBE Program.
- On August 17, 1999, the Public Transportation Commission adopted a DBE Program. On May 30, 2003, the SFMTA Board of Directors adopted a revised DBE Program.
- On May 9, 2005, the U.S. Court of Appeals for the Ninth Circuit issued a decision in *Western States Paving Co. v. Washington State Department of Transportation, et al.*, which upheld Part 26, but struck down Washington's DBE program as unconstitutional.
- In response to *Western States*, on March 23, 2006, the FTA published guidance concerning the federal DBE program that applies to grant recipients in states within the Ninth Circuit, including California.
- As a result, the SFMTA adopted a Small Business Enterprise (SBE) Program in 2006. Under this program, the SFMTA sets a contract goal for utilization of small businesses on its federally funded contracts.
- DOT requires DOT grantees to establish an overall DBE goal as a percentage of all FTA funds expected to be expended in the three forthcoming federal fiscal years. For fiscal years 2017-2019, the SFMTA proposes a goal of 15 percent for participation by DBEs in FTA-assisted contracts.

ENCLOSURES:

1. SFMTAB Resolution
2. Methodology

APPROVALS:

DATE

DIRECTOR _____ 7/12/16

SECRETARY R. Boomer _____ 7/12/16

ASSIGNED SFMTAB CALENDAR DATE: July 19, 2016

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PURPOSE

The purpose of this calendar item is for the SFMTA Board to adopt the proposed federal fiscal years 2017-2019 Overall Goal of 15 percent for participation by DBEs in contracts financed with assistance from the FTA.

GOAL

This action supports the following SFMTA Strategic Plan Goal and Objective:

Goal 3: Improve the Environment and Quality of Life in San Francisco.

Objective 3.2: Increase the transportation system's positive impact to the economy.

DESCRIPTION

Background of the DBE Program

DOT issued a DBE Program Final Rule on March 4, 1999, codified in Part 26 of Title 49 of the Code of Federal Regulations (Part 26). The DBE Regulations are intended to remedy past and current discrimination against DBEs, ensure a "level playing field," and foster equal opportunity in DOT-assisted contracts.

On August 17, 1999, in compliance with Part 26, the former Public Transportation Commission adopted a DBE Program for implementation in FTA-assisted contracts. DOT amended Part 26, effective March 5, 2010, requiring DOT grantees to establish a DBE overall goal as a percentage of all FTA funds expected to be expended in the three forthcoming federal fiscal years. This contrasts with previous DOT requirements calling for the establishment of an annual overall goal.

Under the DBE Program, the SFMTA sets the three-year DBE goal on demonstrable evidence of "ready, willing and able" DBEs that are available to work on FTA-assisted contracts.

The *Western States* Decision

On May 9, 2005, the United States Court of Appeals for the Ninth Circuit issued a decision in *Western States Paving Co. v. Washington State Department of Transportation, et al.*, 407 F.3d 983 (9th Cir. 2005). The court upheld DOT's DBE regulations on their face; however, the court struck down the Washington Department of Transportation's (WSDOT) DBE program as unconstitutional. The court held that WSDOT's DBE program was not narrowly tailored because it was not based on evidence of discrimination in the WSDOT marketplace. The court also suggested that a remedial program, such as the DBE program, is only narrowly tailored if it is limited to those minority groups that have actually suffered discrimination.

Specifically, the court noted that WSDOT had not conducted adequate statistical studies to establish the existence of discrimination in the highway contracting industry. Further, the court found that WSDOT's calculation of the capacity of DBEs to do work was flawed because it failed to take into account the effects of past race-conscious programs on current DBE participation. According to the court, the disparity between DBE participation on contracts with and without race-conscious goals did not provide any evidence of on-going discrimination.¹

¹As used in this discussion, the terms "race-conscious," "race-neutral," and "race-based" include both race and gender.

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Finally, the court observed that WSDOT did not present any anecdotal evidence of discrimination. Since this decision was issued by the U.S. Court of Appeals for the Ninth Circuit, it applies to all states comprising the Ninth Circuit, including California.

DOT Guidance in Response to the *Western States* Decision

In response to the *Western States* decision, on March 23, 2006, FTA published DOT's guidance concerning the federal DBE program that applies to grant recipients in states within the Ninth Circuit. This guidance provides that if a recipient does not currently have sufficient evidence of discrimination or its effects, the recipient must meet its annual overall DBE goal solely through race-neutral measures.

The FTA has also advised that recipients in the 9th Circuit conduct disparity studies to determine whether there is sufficient evidence of discrimination or its effects in the local market to justify race-conscious contracting.

SFMTA's Small Business Enterprise (SBE) Program

In response to DOT's guidance, and because the SFMTA did not have sufficient evidence of discrimination or its effects, the SFMTA Board approved a race-neutral Small Business Enterprise (SBE) Program in 2006 to apply to FTA-assisted contracts. An SBE is defined as a "for-profit, small business concern" that meets certain income requirements and qualifies for the program by being either verified eligible or certified under any of the following programs: the State of California's Small Business Program, the City's Local Business Enterprise (LBE) Program, or the California Unified Certification Program, through which DBEs are certified in California.

SFMTA's 2015 Availability, Utilization, and Disparity Study

Having accumulated substantial experience with race-neutral contracting through its SBE Program, the SFMTA issued a Request for Proposals (RFP) in 2013 to select a consultant to perform a disparity study to determine if substantial disparities existed in the Agency's utilization of DBEs. On July 1, 2014, the SFMTA entered into a contract with Rosales Business Partners/Exstare Federal Communications, a Joint Venture (the Study Team) to conduct the study. The Study Team completed the DBE Availability, Utilization, and Disparity Study (the Study) in November 2015.

On April 19, 2016, the SFMTA Board of Directors adopted the results of the Study and approved the submission of a request for a DBE Program waiver to the FTA in order to implement the Study's recommendations. The recommendations included the ability to set goals for woman-owned business for construction, goods, and professional and other services contracts, as well race-conscious goals designed to mitigate identified discriminatory practices and their effects on Black American construction contractors.

Overall DBE Goal

Part 26 now requires the SFMTA Board to establish a DBE overall goal as a percentage of all FTA funds expected to be expended in the three forthcoming federal fiscal years. The three-year goal tracks each federal fiscal year, which starts on October 1 and ends on September 30. The goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate in FTA-assisted contracts.

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Part 26 requires that the goal reflect SFMTA's determination of the level of DBE participation expected absent the effects of discrimination.

The Contract Compliance Office (CCO) used the availability data from the Disparity Study for minority-owned business enterprises and woman-owned business enterprises. CCO has produced weighted estimates of availability for Construction and Professional, Scientific & Technical Services. The calculated estimates give greater weight to availability in those industries that receive a larger share of SFMTA's federal contract dollars.

Following the methodology prescribed in Part 26, the CCO arrived at a proposed overall goal of 15 percent DBE participation in projected new FTA-assisted contracts for federal fiscal year (FFY) 2017-2019. A description of the methodology and the overall goal is enclosed.

SFMTA published a notice announcing its proposed DBE Goal for FFY 2017-2019 on its website and in the following local and minority focused-publications: The Bay Area Reporter, El Reportero, San Francisco Bay View, Sing Tao Daily, Small Business Exchange, World Journal, West Portal Monthly and The Western Edition. The notice informed the public of the proposed goal, that the rationale for the goal would be available for inspection and review during normal business hours for 30 days from the first publication date, and that comments on the proposed DBE goal would be accepted up to 45 days from the date of first publication of the notice. SFMTA received no comments relating to the proposed goal.

After adoption by the SFMTA Board, the SFMTA will submit its overall DBE goal to the FTA for review, along with a description of the methodology used to establish the goal. The goal must be submitted by August 1, 2016.

PUBLIC OUTREACH

To provide for public participation in this goal-setting process, the SFMTA, working in concert with the members of the Business Outreach Committee (BOC), a consortium of 13 Bay Area transit agencies, conducted a regional public participation session on April 12, 2016, at the Alameda County Transportation Commission in Oakland, California. The session was conducted to obtain pertinent input from businesses and trade group organizations that are most impacted by the DBE goals established for DOT-assisted contracts. It provided DBEs and other small businesses the opportunity to provide information about the availability of certified and potential DBEs ready, willing, and able to compete for DOT-assisted contracts, to discuss their concerns, and to provide their perspectives on how DOT recipients might more effectively administer their programs to improve DBE participation. The BOC and participating agencies sent invitations to small and DBE businesses and small business support organizations in the region. During the public participation session, the SFMTA, as did the other agencies, presented its upcoming DOT-assisted contracting opportunities.

Prior to conducting the general public session, a meeting was held with individual representatives of minority business advocacy organizations. Among those in attendance were representatives from the Conference of Minority Transportation Officials (COMTO, Norcal Chapter) and the San Francisco African American Chamber of Commerce.

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ENVIRONMENTAL REVIEW

On June 15, 2016 the SFMTA, under authority delegated by the Planning Department, determined that the FFY 2017-19 Disadvantaged Business Enterprise Overall Goal is not defined as a “project” under the California Environmental Quality Act (CEQA) pursuant to Title 14 of the California Code of Regulations Sections 15060(c) and 15378(b).

A copy of the CEQA determination is on file with the Secretary to the SFMTA Board of Directors and is incorporated herein by reference.

FUNDING IMPACT

None.

OTHER APPROVALS RECEIVED OR STILL REQUIRED

None.

The City Attorney's Office has reviewed this calendar item.

RECOMMENDATION

Staff requests that this Board adopt the proposed Federal Fiscal Years 2017-2019 Overall Goal of 15 percent for participation by DBEs in contracts financed with assistance from the FTA.

SAN FRANCISCO
MUNICIPAL TRANSPORTATION AGENCY
BOARD OF DIRECTORS

RESOLUTION No. _____

WHEREAS, On March 4, 1999, the United States Department of Transportation (DOT) issued its Disadvantaged Business Enterprise (DBE) Program Final Rule, codified in Part 26 of Title 49 of the Code of Federal Regulations (the Regulations); and

WHEREAS, In compliance with the Regulations, on August 17, 1999, the former Public Transportation Commission (now known as the San Francisco Municipal Transportation Agency (SFMTA)) (1) approved and adopted a DBE Program for implementation by the SFMTA in DOT-assisted contracts, (2) adopted a policy statement expressing the Commission's commitment to the DBE Program, stating the objectives of the DBE Program, and outlining responsibilities for its implementation; and (3) ordered distribution of the signed and dated Policy Statement throughout the SFMTA and to the business community, including DBEs and non-DBEs that perform work on DOT-assisted contracts for the SFMTA; and

WHEREAS, On May 30, 2003, the SFMTA Board of Directors approved and adopted a revised DBE Program, including a policy statement which it ordered distributed throughout the SFMTA and to the business community, including DBEs and non-DBEs that perform work on DOT-assisted contracts for the SFMTA; and

WHEREAS, On May 9, 2005, the U.S. Court of Appeals for the Ninth Circuit issued a decision in *Western States Paving Co. v. Washington State Department of Transportation, et al.*, 407 F.3d 983 (9th Cir. 2005); and

WHEREAS, The Ninth Circuit upheld DOT's DBE regulations, but the court struck down the Washington State Department of Transportation's (WSDOT) DBE program as unconstitutional because WSDOT did not have sufficient evidence of discrimination to justify a race- and gender-conscious contracting program; and

WHEREAS, In response to the *Western States* case, the Federal Transit Administration (FTA) of the DOT published guidance concerning the federal DBE program that applies to recipients of DOT grants in states within the Ninth Circuit; and

WHEREAS, This guidance instructs that if a recipient does not currently have sufficient evidence of discrimination or its effects in the local market to justify race-conscious contracting, the recipient must meet its annual overall DBE goal solely through race-neutral measures; and

WHEREAS, In 2006, the SFMTA Board approved a Small Business Enterprise (SBE) program to encourage greater participation by small business firms, including DBEs, in SFMTA contracting; and

WHEREAS, The SFMTA has been taking affirmative steps to use race- and gender-neutral means to achieve DBE participating by establishing SBE goals on federally assisted contracts and utilizing methods identified in the Regulations for obtaining DBE participation; and

WHEREAS, After issuing a Request for Proposals for a DBE Availability, Utilization, and Disparity Study (Disparity Study), on July 1, 2014, the SFMTA entered into a contract with Rosales Business Partners/Exstare Federal Communications, a Joint Venture (the Study Team) to conduct the Study; the Study Team completed the Disparity Study in November 2015; and

WHEREAS, On April 19, 2016, the SFMTA Board of Directors adopted the results of the Disparity Study and approved the submission of a request for a DBE Program waiver to the FTA in order to implement the Study's recommendations, which included the ability to set goals for woman-owned businesses for construction, goods, and professional and other services contracts, as well race-conscious goals designed to mitigate identified discriminatory practices and their effects on Black American construction contractors; and

WHEREAS, On April 21, the SFMTA submitted a request for a DBE Program waiver to the FTA to implement the recommendations of the Study and is awaiting a response from the FTA; and

WHEREAS, The Regulations require the SFMTA to (1) set an overall goal for DBE participation in its DOT-assisted contracts; and (2) base the overall goal on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on DOT-assisted contracts; and

WHEREAS, The Regulations set forth a choice of methodologies that the SFMTA must use to determine, achieve and count its overall DBE Participation goal for federal fiscal year (FFY) 2017-2019; and

WHEREAS, SFMTA staff followed one of the methodologies set forth in Part 26 and arrived at an overall annual goal of 15 percent for DBE participating in DOT-assisted contracts for FFY 2017-2019; and

WHEREAS, The SFMTA advertised the proposed overall DBE goal beginning April 23, 2016 for a 30-day public review period and a concurrent 45-day comment period, and received no comments; and

WHEREAS, The SFMTA, under authority delegated by the Planning Department, determined that the FFY 2017-2019 Disadvantaged Business Enterprise Overall Goal is not defined as a "project" under the California Environmental Quality Act (CEQA) pursuant to Title 14 of the California Code of Regulations Sections 15060(c) and 15378(b), now therefore, be it

RESOLVED, That the SFMTA Board of Directors has reviewed the methodology used to determine the proposed FFY 2017-2019 three-year overall Disadvantaged Business Enterprise goal for contracting by the SFMTA, and adopts a three-year overall goal of 15 percent for DBE participation in Federal Transit Administration-assisted contracts for Federal Fiscal Year 2017-2019; and be it

FURTHER RESOLVED, That pending the FTA's response to the SFMTA's DBE Program waiver request, the SFMTA Board of Directors authorizes the SFMTA to use exclusively race- and gender-neutral measures to achieve the DBE, including continuing to set Small Business Enterprise goals on federally assisted contracts to encourage greater participation by small business firms in SFMTA contracting, and utilizing methods identified in 49 CFR Section 26.51(b); and be it

FURTHER RESOLVED, That the SFMTA Board of Directors directs the Director of Transportation to transmit the FFY 2017-2019 three-year overall DBE goal report to the Federal Transit Administration.

I certify that the foregoing resolution was adopted by the San Francisco Municipal Transportation Agency Board of Directors at its meeting of July 19, 2016.

Secretary to the Board of Directors
San Francisco Municipal Transportation Agency

SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY

FY 2017 – 2019 OVERALL DBE GOAL ANALYSIS REPORT FOR FEDERAL TRANSIT ADMINISTRATION

I. INTRODUCTION

In Part 26 of Title 49 of the Code of Federal Regulations (Part 26), the Department of Transportation (DOT) sets forth regulations regarding Disadvantaged Business Enterprise (DBE) participation in federally assisted programs. Part 26 includes provisions pertaining to how a recipient should establish an overall goal. These provisions are intended to provide the maximum flexibility for recipients while ensuring that the recipients' goals are based on the availability of ready, willing and able DBEs in each recipient's relevant market area. These measures are intended to meet the DOT's obligation to ensure that the DBE program is narrowly tailored to remedy the effects of past discrimination.

In accordance with subsections 26.45(f)(2) and (3) of Part 26, the San Francisco Municipal Transportation Agency (SFMTA) proposes to adopt an overall goal of 15 percent for DBE contracting for federal fiscal years (FFY) 2017-2019. A description of the methodology and the project goal is enclosed.

II. THE WESTERN STATES PAVING DECISION

On May 9, 2005, the United States Court of Appeals for the Ninth Circuit issued a decision in *Western States Paving Co. vs. Washington State Department of Transportation, et al.*, 407 F.3d 983 (9th Cir. 2005). The court upheld DOT's DBE regulations on their face; however, the court struck down the Washington Department of Transportation's (WSDOT) DBE program as unconstitutional. The court held that WSDOT's DBE program was not narrowly tailored because it was not based on evidence of discrimination in the WSDOT's marketplace. The court also suggested that a remedial program, such as the DBE program, is only narrowly tailored if it is limited to those minority groups that have actually suffered discrimination.

Specifically, the court noted that WSDOT had not conducted adequate statistical studies to establish the existence of discrimination in the Washington highway construction contracting industry. Further, the court found that WSDOT's calculation of the capacity of DBEs to do work was flawed because it failed to take into account the effects of past race-conscious programs on current DBE participation. According to the court, the disparity between DBE participation on contracts with and without race-conscious goals did not provide any evidence of ongoing discrimination.¹ Finally, the court noted that WSDOT did not present any anecdotal evidence of discrimination. Since this decision was issued by the U.S. Court of Appeals for the Ninth Circuit, it applies to all states comprising the Ninth Circuit, including California.

III. DOT GUIDANCE IN RESPONSE TO THE WESTERN STATES DECISION

In response to *Western States*, on March 23, 2006, FTA published DOT's guidance concerning the federal DBE program that applies to grant recipients in states within the Ninth Circuit. This guidance provides that if a recipient does not currently have sufficient evidence of discrimination or its effects, the recipient must meet its annual overall DBE goal solely through race-neutral measures. Since the SFMTA has not had sufficient evidence of discrimination or its effects to justify submission of race-conscious goals, the SFMTA has been using race-neutral measures to achieve its annual goal.

¹As used in this discussion, the terms "race-conscious," "race-neutral," and "race-based" include both race and gender.

IV. THE SFMTA'S SMALL BUSINESS ENTERPRISE (SBE) PROGRAM

In 2006, the SFMTA Board approved a small business enterprise (SBE) program to be used for federally assisted contracts. An SBE is defined as a "for-profit, small business concern" that meets certain income requirements and qualifies for the program by being either verified eligible or certified under any of the following programs: the State of California's Small Business Program, the City and County of San Francisco's LBE Program, or the California Unified Certification Program (the Federal DBE program).

V. DISPARITY STUDY

On April 19, 2016, the SFMTA Board of Directors adopted the DBE Availability, Utilization, and Disparity Study (Disparity Study or Study), which was conducted to determine if disparities exist in the SFMTA's utilization of DBEs in FTA-funded contracts.

1. Study Scope

The Study examined whether there are disparities between utilization of minority-owned business enterprises (MBEs) and woman-owned business enterprises (WBEs), and what contract participation might be expected based on their availability for FTA-funded transportation contracts. The Study encompassed SFMTA FTA-funded contracts awarded from October 1, 2008 through June 30, 2015 (the Study Period).

2. Market Area Analysis

The Study Team identified the relevant geographic market area in which the SFMTA spent the substantial majority of its FTA-funded contracting dollars and where the substantial majority of interested contractors, subcontractors, and other goods and services providers that seek to do business with SFMTA are located. The Study Team used SFMTA contracting data and its lists of interested firms to help determine the market areas. The Study Team determined that the relevant geographic market area for SFMTA construction contracts consisted of San Francisco, Alameda, San Mateo, Santa Clara, and Los Angeles Counties. For SFMTA professional services contracts, the relevant geographic market area consisted of San Francisco, Alameda, San Mateo, and Santa Clara Counties.

3. Availability Analysis

The Study Team collected relevant data relating to the availability of capable and qualified contractors and evaluated the data consistent with evidence-gathering efforts approved by the federal courts. The Study team engaged in extensive efforts to identify all firms in the relevant geographic market area that are "ready, willing, and able" to participate in SFMTA FTA-funded contracts, including conducting interviews with local business establishments within relevant subindustries. This is known as a "custom census" approach, which was used to estimate the availability of MBEs/WBEs and majority-owned businesses for the construction and professional services contracts awarded by SFMTA during the Study Period.

4. Utilization Analysis

To determine the SFMTA's utilization of MBEs and WBEs, the Study Team ascertained the dollar value of all contracts awarded during the Study Period, including subcontracts. This task required an in-depth review of SFMTA contract data, as well as a determination of the use of MBEs, WBEs, and majority-

owned firms in SFMTA contracts. The Study Team also determined the type of contract and total dollar value of contracts awarded to MBEs, WBEs, and majority-owned firms as prime contractors, subcontractors, suppliers and consultants.

5. Marketplace Conditions and Anecdotal Evidence

The Study Team conducted quantitative and qualitative analyses of conditions in the SFMTA's local marketplace to examine whether barriers exist in the construction and engineering industries for MBEs/WBEs, and whether such barriers affect the utilization and availability of MBEs/WBEs for SFMTA contracting.

The Study Team gathered anecdotal evidence of discrimination through public hearings, surveys, and one-on-one interviews.

6. Disparity Analysis

The availability and utilization data was evaluated to identify substantial statistical disparities, if any, between MBE and WBE utilization on SFMTA contracts and MBE/WBE firms' availability in the relevant geographic market areas.

The Study Team found substantial disparities for non-Hispanic white woman-owned businesses, which received only 50% of the contract dollars that they were expected to receive based on their availability. Additionally, Black American-owned construction firms showed a substantial disparity, receiving only 64% of the contract dollars expected given their availability. The Study Team did not find any other significant disparities for which remedial measures would be required.²

7. Assessment of Procurement Policies, Procedures, and Practices

The Study Team assessed the SFMTA's procurement policies, procedures, and practices to identify and determine the effectiveness of race-neutral techniques and whether discrimination or other barriers exist in the SFMTA's implementation and enforcement of these policies, procedures, and practices. The Study found that "SFMTA has done a good job implementing and enforcing its procurement policies, procedures and practices and that no barriers to MBE/WBE/DBE participation were found in the agency's policies or processes."

8. Recommendations

From the substantial contract data and anecdotal evidence gathered and assessed, the Study Team concluded that marketplace discrimination continues to be a substantial barrier for Black American and woman-owned businesses seeking to participate in SFMTA contracts. The Study recommended that the SFMTA implement certain policies and program measures to help address this discrimination. The programmatic recommendations are:

1. Implement a WBE element (to include businesses owned by women of all races and ethnicities) to SFMTA's DBE program for construction, professional services and goods and other services contracts. The WBE program needs to have both prime contractor and subcontractor components, including, but not limited to (1) robust outreach to WBEs; (2) contract-specific

² Although disparities were found for Native-Americans, there were only six Native American-owned businesses in the availability data. Given the low availability numbers, the Study Team could not draw an inference of discrimination against Native American-owned business.

goals focused on woman-owned firm participation; (3) direct matchmaking techniques between WBEs and contract opportunities; and (4) a continuation of bonding and financial assistance measures SFMTA has employed.

2. Implement its DBE program with an element designed to mitigate the discriminatory practices and their effects on Black American construction contractors, including (1) robust outreach to Black American construction contractors, (2) contract-specific goals focused on Black American firm participation; (3) direct matchmaking techniques between Black American firms and contract opportunities; and (4) a continuation of bonding and financial assistance measures SFMTA has employed.
3. Implement a small contract element within SFMTA's SBE Program that is focused on small construction contracts, defined as under \$5MM, and on small professional services prime contracts, defined as under \$1MM. Engage in robust outreach to SBEs in the SFMTA marketplace, unbundle large contract opportunities to the described small contract thresholds, and utilize SBE set-asides where feasible.
4. Continue implementation of SFMTA's race- and gender-neutral SBE Program for all federally funded contracts, including SBE set-asides.
5. Seek a DBE program waiver from the FTA pursuant to Part 26 for implementing the programmatic recommendations (Nos. 1 and 2 above).
6. Monitor the effectiveness of the SBE Program and each of its elements to ensure that DBEs enjoy a level playing field without discrimination as is required by Part 26. Ensure outreach efforts reach Native American firms and determine if any barriers exist to their participation in SFMTA contracts. Implement mitigation measures should race/gender-neutral measures prove ineffective.

On April 21, 2016, the Director of Transportation submitted a DBE Program Waiver to the FTA and is awaiting a response.

VI. METHODOLOGY

In compliance with Section 26.45 of Part 26, the SFMTA has chosen the following methodology:

STEP 1-CALCULATE BASE FIGURE: Determine a base percentage figure for relative availability of DBEs in specific areas of expertise using a percentage figure derived from data in a valid, applicable disparity study. This figure will generally represent the ready, willing and able DBEs available to work on SFMTA FFYs 2017-2019 FTA-assisted contracts.

STEP 2-ADJUST BASE FIGURE: After the calculation of the base figure, examine other evidence available in our market area regarding DBE availability to determine if any adjustment is needed to the base figure in order to arrive at the overall goal. DOT has published "Tips for Goal-Setting in the Disadvantaged Business Enterprise Program." (See <http://www.osdbu.dot.gov/DBEProgram/tips.cfm>). Under the heading "Adjustments Based on Past Participation," DOT cites several examples. One of the examples relates to using the median past participation as a means of adjusting the Step 1 Base Figure (see below under B).

Once applying any adjustments, the adjusted goal represents the anticipated DBE participation that will be achieved as a percentage of all SFMTA FFYs 2017-2019 FTA-assisted contracts.

A. STEP 1 - DETERMINING A BASE FIGURE

1. Choice of Methodology

In order to select the proper methodology to generate its overall goal, the SFMTA sought a method that, given the available data and evidence, would most accurately calculate the relative availability of DBEs to participate in SFMTA's DOT-assisted contracts. Because it meets the requirements of Part 26, *Western States* decision, and FTA guidance, it was determined that the Disparity Study was the most accurate source of availability data.

2. Evidence Used to Calculate Base Figure

The SFMTA's required DBE goal analysis uses only data from those contracts projected to be awarded under the procurement requirements of the FTA.

The SFMTA gathered data on the types of contracts, the dollar amount of each contract, the nature of work for each contract, and the appropriate North American Industry Classification System (NAICS) for that work. The SFMTA assigned a two-digit NAICS Code for every contract for FFYs 2017-2019 FTA-assisted contracts.

As mentioned above, the annual DBE goal includes only contracts that the SFMTA, at the time it sets the goal, expects to award during FFYs 2017-2019. Thus, the DBE goal analysis may not include all of the federally assisted contracts or subcontracts the SFMTA will actually award during this fiscal period. Conversely, the SFMTA may not award all the contracts that it expected to award when it calculated the goals.

STEP 1 – BASE FIGURE

These contracts in Table 1 are in applicable 5-digit NAICS Code. In Table 2, the contracts are summarized by 2-digit NAICS Code. Note that one contract may include participation in more than one NAICS Code.

**TABLE ONE
FFY 2017-2019 FTA Contracting Opportunities**

Item #	Project Name	Target Date	Civil Engineering Construction	Electrical Engineering Construction	Equipment	Track Material	Overhead Material	Other Material	Professional, Scientific & Technical Services	Fiscal Year 2017 - 2019 Total	% of Contracts
Class		MM/YR	NAICS 237990	NAICS 238210	NAICS 238290	NAICS 333997	NAICS 335122	NAICS 335312	NAICS 541330		
1	Fire Life Safety Upgrade	Nov-16		\$1,675,000					\$750,000	\$2,425,000	0.3%
2	Rehab of 1508 Bancroft	Nov-16		\$1,600,000	\$1,400,000			\$2,500,000	\$200,000	\$5,700,000	0.7%
3	MME Phase 2	Feb-17	\$3,700,000	\$2,500,000		\$9,800,000	\$5,000,000		\$4,000,000	\$25,000,000	3.1%
4	Special Trackwork Replacement in the Subway	Feb-17	\$3,300,000			\$2,800,000			\$600,000	\$6,700,000	0.8%
5	M-Ocean View Track Replacement Project at 19th Avenue and Rossmoor Drive	Feb-17	\$2,800,000	\$600,000		\$1,320,000	\$240,000			\$4,960,000	0.6%
6	Divide Feeder Circuit Car 11	Apr-17		\$3,600,000						\$3,600,000	0.4%
7	Muni Forward 22 Fillmore: 16th St Transit and Streetscape Enhancement - Ph I	Jul-17	\$10,000,000			\$3,000,000	\$1,750,000	\$250,000		\$15,000,000	1.9%
8	Historic Streetcar Rehabilitation	Jul-17			\$15,000,000				\$5,000,000	\$20,000,000	2.5%
9	ATCS Tunnel Wiring Replacement	Aug-17		\$11,000,000						\$11,000,000	1.4%
10	Flynn Lifts	Aug-17	\$300,000	\$600,000	\$2,100,000				\$150,000	\$3,150,000	0.4%

FFY 2017-2019 FTA Contracting Opportunities (cont.)

Item #	Project Name	Target Date	Civil Engineering Construction	Electrical Engineering Construction	Equipment	Track Material	Overhead Material	Other Material	Professional, Scientific & Technical Services	Fiscal Year 2017 - 2019 Total	% of Contracts
Class		MM/YR	NAICS 237990	NAICS 238210	NAICS 238290	NAICS 333997	NAICS 335122	NAICS 335312	NAICS 541330		
11	San Jose Substation Upgrade Phase I	Aug-17		\$700,000						\$700,000	0.1%
12	Geary BRT Phase 2	Nov-17	\$94,600,000	\$32,000,000				\$15,000,000	\$52,900,000	\$194,500,000	24.2%
13	Various Facility Plans (Burke, Woods, etc)	May-18		\$5,000,000	\$5,000,000			\$10,000,000	\$2,000,000	\$22,000,000	2.7%
14	L Taraval Track Rail and Overhead Rehab and Muni Forward (TE0129)	May-18	\$34,800,000	\$2,300,000		\$12,780,000	\$2,750,000			\$52,630,000	6.6%
15	As-Needed Specialized Engineering Services	Jun-18							\$15,000,000	\$15,000,000	1.9%
16	Better Market Street	Sep-18	\$91,200,000	\$72,400,000	\$36,400,000	\$17,700,000	\$72,400,000	\$73,500,000	\$42,500,000	\$406,100,000	50.5%
17	Miscellaneous Commodities Purchases	Ongoing			-			\$15,000,000	-	\$15,000,000	1.9%
TOTAL:			\$240,700,000	\$133,975,000	\$59,900,000	\$47,400,000	\$82,140,000	\$116,250,000	\$123,100,000	\$803,465,000	100.0%
PERCENTAGE:			29.96%	16.67%	7.46%	5.90%	10.22%	14.47%	15.32%		

**SUMMARY OF PROJECTED FTA FUNDING AVAILABILITY
PER NORTH AMERICAN INDUSTRIAL CLASSIFICATION (NAICS) CATEGORIES**

**TABLE TWO
FFY 2017-2019 FTA Dollars by Two-Digit NAICS Code**

Item #	Project Name	Target Date	Construction	Professional, Scientific & Technical Services	Fiscal Year 2017 - 2019 Total	% of Contracts
Class		MM/YR	NAICS 23	NAICS 54		
1	Fire Life Safety Upgrade	Nov-16	\$1,675,000	\$750,000	\$2,425,000	0.3%
2	Rehab of 1508 Bancroft	Nov-16	\$3,000,000	\$2,700,000	\$5,700,000	0.7%
3	MME Phase 2	Feb-17	\$21,000,000	\$4,000,000	\$25,000,000	3.1%
4	Special Trackwork Replacement in the Subway	Feb-17	\$6,100,000	\$600,000	\$6,700,000	0.8%
5	M-Ocean View Track Replacement Project at 19th Avenue and Rossmoor Drive	Feb-17	\$4,960,000	\$0	\$4,960,000	0.6%
6	Divide Feeder Circuit Car 11	Apr-17	\$3,600,000	\$0	\$3,600,000	0.4%
7	Muni Forward 22 Fillmore: 16th St Transit and Streetscape Enhancement - Ph I	Jul-17	\$14,750,000	\$250,000	\$15,000,000	1.9%
8	Historic Streetcar Rehabilitation	Jul-17	\$15,000,000	\$5,000,000	\$20,000,000	2.5%
9	ATCS Tunnel Wiring Replacement	Aug-17	\$11,000,000	\$0	\$11,000,000	1.4%
10	Flynn Lifts	Aug-17	\$3,000,000	\$150,000	\$3,150,000	0.4%
11	San Jose Substation Upgrade Phase I	Aug-17	\$700,000	\$0	\$700,000	0.1%
12	Geary BRT Phase 2	Nov-17	\$126,600,000	\$67,900,000	\$194,500,000	24.2%
13	Various Facility Plans (Burke, Woods, etc)	May-18	\$10,000,000	\$12,000,000	\$22,000,000	2.7%
14	L Taraval Track Rail and Overhead Rehab and Muni Forward (TE0129)	May-18	\$52,630,000	\$0	\$52,630,000	6.6%
15	As-Needed Specialized Engineering Services	Jun-18	\$0	\$15,000,000	\$15,000,000	1.9%
16	Better Market Street	Sep-18	\$290,100,000	\$116,000,000	\$406,100,000	50.5%
17	Miscellaneous Commodities Purchases	Ongoing	\$0	\$15,000,000	\$15,000,000	1.9%
TOTAL:			\$564,115,000	\$239,350,000	\$803,465,000	100.0%
PERCENTAGE:			70.2%	29.8%		

Note: Commodities and other services have been included as construction or professional services contracts based on the type of work or goods supplied.

TABLE THREE
Availability by Minority Group and Industry for San Francisco Market Area, All Firms

Industry	NAICS	Black American-Owned	Hispanic American-Owned	Asian-Pacific American-Owned	Subcontinent Asian American-Owned	Native American-Owned	Woman-Owned	Total MBE/WBE Availability [G]
		% of Total [A]	% of Total [B]	% of Total [C]	% of Total [D]	% of Total [E]	% of Total [F]	
Construction	23	1.5%	7.0%	2.5%	0.1%	0.0%	4.8%	15.9%
Professional, scientific, & technical services	54	3.1%	5.5%	9.2%	0.6%	0.0%	5.6%	23.9%

Notes:

- 1) For construction, this table represents data from San Francisco, Alameda, San Mateo, Santa Clara and Los Angeles Counties. For professional, scientific, and technical services, this table represents data from San Francisco, Alameda, San Mateo, and Santa Clara Counties.
- 2) Total MBE/WBE availability was calculated for each industry using the following formula: $[G]=[A] + [B] + [C] + [D] + [E] = [F]$

Source: DBE Availability, Utilization, and Disparity Study (2015)

Narrow-Tailoring Factors to Availability Data

The U.S. DOT regulation refers to the procedure of using "weighting" wherever possible to increase the accuracy of the base figure. The SFMTA made adjustments by weighting the relative availability of DBEs in various fields, giving more weight to the fields in which the SFMTA spends more contract dollars.

TABLE FOUR
FFY 2017–2019 Summary of DBE Availability
By NAICS Code and Weighted By FTA Dollars

NAICS CODE	Scope of Work	% MBE/WBE Availability	% of Dollar	Weighted % of MBE/WBE Availability
23	Construction	15.9%	70.2%	11.16%
54	Professional, Scientific, & Technical Services	23.9%	29.8%	7.12%
TOTAL:			100.0%	18.28%

The formula used to calculate the Base Figure is:

Percentage of Ready, Willing, and Able MBE/WBEs in the SFMTA's Market Area by Industry
X Percentage of Contract Dollars over Three-Year Period

BASE FIGURE=

.159 Construction MBE/WBE Availability X .702 Construction Contracting Dollars =

.1116

+

.239 Professional Services MBE/WBE Availability X .298 Professional Services Contract Dollars = .0712

BASE FIGURE=

(.1116) + (.0712) = 18.28%

B. STEP 2 - ADJUSTMENT OF THE BASE FIGURE

The regulations require examination of all of the evidence available in the recipient's jurisdiction in order to determine if, after the calculation of the base figure, any adjustment is needed. DOT has published "Tips for Goal-Setting in the Disadvantaged Business Enterprise Program" (Reference: <http://www.osdbu.dot.gov/DBEProgram/tips.cfm>), which, in addition to Part 26, cite several examples of the types of evidence that recipients should consider, including statistical disparities in the ability of DBEs to get financing, bonding, and insurance; and data on employment, self-employment, education and training, and union apprenticeship programs. The Disparity Study gathered evidence regarding several factors that impacting DBE participation, such as 1) entry and advancement in the construction, professional services, and other services industries, 2) business ownership in transit-related industries in SFMTA's market area, 3) access to capital for business formation and success, and 4) success of businesses in transit-related industries in SFMTA's market area. As these factors were already considered in developing Step 1 Availability, it was determined that they should not result in an adjustment of the base figure.

Another of 49 CFR Part 26's Step 2 adjustments is based on past participation of DBEs. The SFMTA examined the volume of work committed to DBEs on SFMTA's FTA-funded projects from 2013-2015 as follows:

FY 2014-15: Overall DBE goal was 19%; actual DBE commitments equaled 15.7%

FY 2013-14: Overall DBE goal was 19%; actual DBE commitments equaled 8.8%

In DOT's "Tips for Goal-Setting in the Disadvantaged Business Enterprise Program," under the heading "Adjustments Based on Past Participation," DOT cites several examples. One of the examples relates to using the median past participation as a means of adjusting the Step 1 Base Figure. The SFMTA determined the median past participation was 12.3% percent. In using this figure to determine the adjustment for past participation, the following formula was used:

Steps:

1. Base Figure = 18.28%
2. Median Past Participation = 12.3%
3. Adjustment factor = (base figure 18.28%) + (median past participation 12.3%) divided by 2 = 15%

The impact of past DBE participation has resulted in an adjustment to the base figure of 18.28% DBE participation for FTA-assisted contracts to be awarded in FFYs 2017-2019. The adjusted DBE participation goal is 15.3% or 15% for FFY 2017-2019.

VII. RACE-NEUTRAL MEASURES

The SFMTA intends to continue to employ the following race-neutral means to increase DBE participation:

- **Arranging solicitations, times for presentation of bids, quantities, specifications and delivery schedules in ways that facilitate DBE and other small business participation.** This includes evaluation of when it would be beneficial to unbundle contracts. Where feasible, rather than issuing one large procurement with FTA terms under which local and/or FHWA funds can be expended, the SFMTA breaks the procurement down into multiple, smaller contracts to accommodate different funding sources. This approach has been used for several as-needed contracts, such as As-Needed Printed Materials (three FTA-funded contracts and three locally-funded contracts - awarded), As-Needed Environmental and Transportation Analysis and Documentation RFPs (one FTA-funded, one FHWA-funded, one locally funded) and As-Needed Translation and Interpretation Services RFPs (one FTA-funded and one locally funded).
- **Providing assistance in overcoming limitations such as inability to obtain bonding or financing** (e.g., simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs and other small businesses obtain bonding and financing). The SFMTA's Small Business Bonding and Financing Assistance Program provides guarantees to private bonding companies and financial institutions in order to encourage those entities to provide required bonding to eligible prime contractors and subcontractors bidding on our construction contracts. The Program also provides training and technical assistance to firms currently performing on our projects in various areas, including preparation of financial reports and business plans, insurance placement, preparation of invoices and certified payroll, development of internal and financial operational systems, payment of prevailing wage, and establishment of assets or credit resources for operating capital.
- **Ensuring distribution of the DBE directory to the widest group of potential prime contractors.** The SFMTA includes the weblink to the DBE directory in all of its bid solicitations and offers all prime contractors assistance with accessing the directory.
- **Providing technical assistance and other services.** In addition to the services provided under the Small Business Bonding and Financial Assistance Program, SFMTA staff meets individually with newly certified DBEs and small businesses to provide them information about contracting opportunities and processes at the SFMTA and other agencies.
- **Providing information and communications programs on contracting procedures and specific contract opportunities** (e.g., ensuring the inclusion of DBEs and other small businesses on recipient mailing lists for bidders, ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors, and providing information in languages other than English, when appropriate). The SFMTA individually, and in partnership with the Business Outreach Committee (see below), hosts regular outreach events for the DBE and small business community. Since January 2009, the SFMTA has participated in more than 85 outreach events focusing on topics such as certification, contracting, and purchasing. In addition, the SFMTA conducts outreach to DBEs and small businesses on a contract-by-contract basis.
- **Networking opportunities with local, state and federal agencies that provide contracting opportunities to the small business owner.** As mentioned above, the SFMTA engages in extensive outreach to the small business and DBE community.
- **Implementing SBE goals and SBE set-asides on contracts to encourage greater participation by small business firms in public contracting.** SFMTA staff establishes SBE goals on contracts on a case-by-case basis. During FFY 2015, the SFMTA implemented nine SBE set-asides (six 100% SBE set-asides and three subcontracting scope of work SBE set-asides). As a result, two prime contracts were awarded to DBEs and three subcontracts were awarded to DBEs for a total of \$2,112,048.82 (\$1,576,817.33 DBE

prime award dollars and \$535,231.49 DBE subcontract award dollars). Going forward, SFMTA will continue to assess the feasibility of utilizing SBE set-asides as a way of maximizing opportunities for DBE participation.

VIII. Public Participation Process

To provide for public participation in this goal-setting process, the SFMTA, working in concert with the members of the Business Outreach Committee (BOC) conducted a regional public participation session on April 12, 2016, at the Alameda County Transportation Commission in Oakland, California. The BOC membership is comprised of the Alameda-Contra Costa Transit District, Alameda County Transportation Commission, Bay Area Rapid Transit District, Central Contra Costa Transit Authority, Golden Gate Bridge, Highway and Transportation District, Metropolitan Transportation Commission, San Francisco Bay Area Water Emergency Transportation Authority, San Francisco Municipal Transportation Agency, San Mateo County Transit District, Santa Clara Valley Transportation Authority, Western Contra Costa Transit Authority, Marin Transit, Solano County Transit, and the Transbay Joint Powers Authority.

The session was conducted to obtain pertinent input from businesses and trade group organizations that are most impacted by the DBE goals established for DOT-assisted contracts. It provided DBEs and other small businesses the opportunity to provide information about the availability of certified and potential DBEs ready, willing, and able to compete for DOT-assisted contracts, to discuss their concerns, and to provide their perspectives on how DOT recipients might more effectively administer their programs to improve DBE participation. The BOC and participating agencies sent invitations to small and DBE businesses and small business support organizations in the region. During the public participation session, the SFMTA, as did the other agencies, presented its upcoming DOT-assisted contracting opportunities.

Prior to conducting the general public session, a meeting was held with individual representatives of minority business advocacy organizations. Among those in attendance were representatives from the Conference of Minority Transportation Officials (COMTO, Norcal Chapter) and the San Francisco African American Chamber of Commerce.

The following questions were addressed during the meeting:

- How are goals set? Is there a standard goal setting methodology?
- How valid is the number of available DBE's utilized to establish goals? How can you be sure the database you are using to collect DBE information is correct?
- What are the consequences to DOT recipients if they fail to meet their established DBE goals?
- How do agencies ensure that the availability data used for goal setting is not skewed?
- Does the DBE community have access to local funds?

The following comments were made during the meeting with individual representatives of minority business advocacy organizations:

- It is good to see the number of agencies represented at the meeting.
- Advocates would like to see a base percentage goal required by each agency.
- It is difficult to believe that ferry projects have no contracting opportunities available.

- The key to providing more opportunities for DBEs is to unbundle contracts.

The following comments were made during the general public participation session:

- During outreach events with prime contractors, it is an insult to DBEs when primes have no real interest in working with the DBE/SBE community. Agencies need to make sure representatives from prime companies work within decision making capacity and want to contract with DBEs and SBEs.
- It would be helpful to make transparent information related to DBE utilization, such as that used for goal setting, set-aside projects, and for other efforts made to provide DBE contract opportunities.
- Part 26 defines wholesalers and suppliers as businesses with stocked inventory that is accessible to the public. Most wholesalers and suppliers have products shipped from a business that stores its inventory, such as Amazon. This is most cost-effective for the businesses. The current regulations should be changed to reflect this change in business practices.

The BOC provided the following information:

- Explained DBE goal setting methodology used by agencies, including identifying contracting opportunities, establishing the base figure, and how base figure is adjusted.
- Answered questions regarding DBE certification and other certification programs.
- Explained how NAICS codes are assigned.
- Answered questions regarding how brokers and wholesalers are defined.
- Provide guidance for how to obtain information about upcoming contracts.
- Provided guidance for how to access contract opportunities.

Conclusion:

The SFMTA has prepared this methodology report for submission to Region IX of the FTA, in compliance with the procedures outlined in Part 26, requiring DOT grantees to establish a DBE overall goal as a percentage of all FTA funds expected to be expended in the three forthcoming federal fiscal years. The overall goal has been narrowly tailored based on the SFMTA's 2015 Disparity Study.

The SFMTA has established a 15 percent overall DBE goal for all FTA-funded contracts anticipated to be awarded for FFYs 2017-2019.

The SFMTA will monitor its DBE annual goals by tracking each individual contract throughout the term of the contract for DBE participation and payments respective to the federal fiscal year of award.