

**SAN FRANCISCO
MUNICIPAL TRANSPORTATION AGENCY**

DIVISION: Finance and Information Technology

BRIEF DESCRIPTION:

Adopting the proposed federal fiscal years 2020-2022 Overall Goal of 22 percent for participation by Disadvantaged Business Enterprises in contracts financed with assistance from the Federal Transit Administration, with a breakdown of 15% to be achieved by race-neutral means and 7% to be achieved by race-conscious means.


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 March 21, 2017, the SFMTA Board of Directors adopted the most recently-revised DBE Program, taking into consideration legislative and regulatory changes.
- 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*, the FTA published guidance that applies to grant recipients in states within the Ninth Circuit, including California that stated if a recipient does not currently have sufficient evidence that its contract awards have been affected by discrimination against DBEs, the recipient must use race- and gender-neutral means to attain its annual overall DBE goal,
- As a result, the SFMTA adopted a Small Business Enterprise (SBE) Program. Under this program, the SFMTA sets contract goals for utilization of small businesses on its federally funded contracts.
- The DOT amended Part 26 in 2010, requiring 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 2020-2022, the SFMTA proposes a goal of 22 percent for participation by DBEs in FTA-assisted contracts
- On April 19, 2016, the SFMTA Board of Directors adopted the results of the DBE Availability, Utilization, and Disparity Study (Disparity Study) and approved the submission of a DBE Program waiver request to the FTA in order to implement the Disparity Study's recommendations.
- The DOT approved the SFMTA's waiver request. The SFMTA submitted a report requesting permission to extend the terms of the waiver for an additional three years.

ENCLOSURES:

1. SFMTAB Resolution
2. Methodology

APPROVALS:

DIRECTOR 

SECRETARY 

DATE
July 9, 2019

July 9, 2019

ASSIGNED SFMTAB CALENDAR DATE: July 16, 2019

PAGE 2

PURPOSE

The purpose of this calendar item is for the SFMTA Board to adopt the proposed federal fiscal years 2020-2022 Overall Goal of 22 percent for participation by DBEs in contracts financed with assistance from the FTA, with a breakdown of 15% to be achieved by race-neutral means and 7% to be achieved by race-conscious means.

GOAL

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

- Goal 3: Improve the quality of life and the environment in San Francisco and the region.
Objective 3.1: Use agency programs and policies to advance San Francisco's commitment to equity.

DESCRIPTION

Background of the DBE Program

The 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 or the DBE Regulations). 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 by SFMTA 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 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 also advised recipients in the 9th Circuit to 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 accordance with 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 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 an 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.

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 women-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 were:

1. Implement a Woman-owned Business Enterprise (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)

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

robust outreach to WBEs; (2) contract-specific goals focused on women-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. [This is already an SFMTA practice.]
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 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. DOT granted SFMTA's waiver request on January 19, 2017, for federal fiscal years 2017, 2018 and 2019. Under the terms of the waiver, DOT required the SFMTA to submit a report, through the FTA, detailing the impact of the waiver on utilization of all disadvantaged groups and whether a need for the waiver continues. On March 31, 2019, the SFMTA submitted a report to the FTA detailing the SFMTA's FTA-funded contracting activities since the approval of the waiver. The report requested a continuation of the waiver for another three federal fiscal years due to the low number of contract opportunities during the initial three-year period, which did not provide a sufficient basis on which to draw definitive conclusions regarding the impact of the waiver. The SFMTA has not received a response to the report and intends to continue to implement the terms of the waiver until otherwise directed by DOT or the FTA.

Overall DBE Goal

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

PAGE 5

The Contract Compliance Office (CCO) used the availability data from the Disparity Study for minority-owned business enterprises and women-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, CCO arrived at a proposed overall goal of 22 percent DBE participation in projected new FTA-assisted contracts for federal fiscal years (FFYs) 2020-2022, with a breakdown of 15% to be achieved by race-neutral means and 7% to be achieved by race-conscious means.

Part 26 requires recipients to include a projection of the portions of the overall goal that they expect to meet through race-neutral and race-conscious measures, respectively. A "race-neutral" measure is defined in Part 26 as one "that is, or can be, used to assist all small businesses." Examples of race-neutral measures include:

- (1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under §26.39 of this part.
- (2) Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as 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);
- (3) Providing technical assistance and other services;
- (4) Carrying out 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; provision of information in languages other than English, where appropriate);
- (5) Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;
- (6) Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;
- (7) Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;
- (8) Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and
- (9) Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

Under Part 26, a “race-conscious” measure or program “is one that is focused specifically on assisting only DBEs, including women-owned DBEs.” The most commonly used race-conscious measure is the establishment of contract goals for DBEs.

In order to calculate the proposed race-neutral/race-conscious breakdown, CCO applied the availability data from the Disparity Study for women-owned DBEs in construction and professional services and Black American-owned DBEs in construction to the weighted estimates of proposed contracting activity for FFYs 2020-2022. A description of the methodology and the overall goal, including calculation of the proposed race-neutral/race-conscious breakdown, is enclosed.

On May 2, 2019, the SFMTA published a notice announcing its proposed DBE overall goal for FFYs 2020-2022 on its website. 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. The 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, 2019.

STAKEHOLDER ENGAGEMENT

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 2, 2019, at the Alameda-Contra Costa Transit District (AC Transit) in Oakland, California. The BOC membership is comprised of AC Transit, Alameda County Transportation Commission (ACTC), Bay Area Rapid Transit District (BART), Central Contra Costa Transit Authority (CCCTA), Golden Gate Bridge, Highway and Transportation District (GGBHTD), Metropolitan Transportation Commission (MTC), San Francisco Bay Area Water Emergency Transportation Authority (WETA), San Francisco Municipal Transportation Agency (SFMTA), San Mateo County Transit District (SamTrans/Caltrain), Santa Clara Valley Transportation Authority (VTA), Western Contra Costa Transit Authority (WESTCAT), Marin Transit, Solano County Transit (Soltrans), Transbay Joint Powers Authority (TJPA), California High Speed Rail, City of Santa Rosa, Livermore Transit Authority/Tri-Valley Wheels(LAVTA), Santa Cruz Metropolitan Transit District, San Francisco County Transportation Authority (SFCTA), Sonoma-Marín Area Rail Transit (SMART), and County Connection Delta Breeze.

ENVIRONMENTAL REVIEW

On June 5, 2019, the SFMTA, under authority delegated by the Planning Department, determined that the Disadvantaged Business Enterprise Overall Goal for Fiscal Year 2020-2022 is not 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.

PAGE 7

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 2020-2022 Overall Goal of 22 percent for participation by DBEs in contracts financed with assistance from the FTA, with a breakdown of 15% to be achieved by race-neutral means and 7% to be achieved by race-conscious means.

SAN FRANCISCO
MUNICIPAL TRANSPORTATION AGENCY
BOARD OF DIRECTORS

RESOLUTION No. _____

WHEREAS, On March 4, 1999, the United States Department of Transportation (USDOT) 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 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 USDOT'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), an operating administration of USDOT, published guidance concerning the federal DBE program that applies to recipients of USDOT 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 women-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, 2016 the SFMTA submitted a request for a DBE Program waiver to the FTA to implement the recommendations of the Study; and

WHEREAS, On January 19, 2017, DOT granted the SFMTA's waiver request for federal fiscal years 2017, 2018 and 2019, requiring the SFMTA to submit a report, through the FTA, detailing the impact of the waiver on utilization of all disadvantaged groups and whether a need for the waiver would continue; and

WHEREAS, On March 21, 2017, 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 March 31, 2019, the SFMTA submitted a report to the FTA detailing the SFMTA's FTA-funded contracting activities since the approval of the waiver and requesting a continuation of the waiver for another three federal fiscal years due to the low number of contract opportunities during the initial three-year period, which did not provide a sufficient basis on which to draw definitive conclusions regarding the impact of the waiver; and

WHEREAS, The SFMTA has not received a response to the March 31, 2019, report and intends to continue to implement the terms of the waiver until otherwise directed by USDOT or the FTA; and

WHEREAS, The Regulations require the SFMTA to (1) set an overall goal for DBE participation in its FTA-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 FTA-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 years (FFYs) 2020-2022; and

WHEREAS, SFMTA staff followed one of the methodologies set forth in Part 26 and arrived at an overall goal of 22 percent for DBEs participating in FTA-assisted contracts for FFY 2020-2022, with a breakdown of 15% to be achieved by race-conscious means and 7% to be achieved by race-neutral means; and

WHEREAS, The SFMTA advertised the revised overall DBE goal beginning May 2, 2019 for a 30-day public review period and a concurrent 30-day comment period, and received no comments; and

WHEREAS, The SFMTA, under authority delegated by the Planning Department, determined that the Disadvantaged Business Enterprise Overall Goal for Fiscal Years 2020-2022 is not 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 2020-2022 three-year overall DBE goal for contracting by the SFMTA, and adopts a three-year overall goal of 22 percent for DBE participation in FTA-assisted contracts for FFYs 2020-2022, with a breakdown of 15% to be achieved by race-neutral means and 7% to be achieved by race-conscious means; and be it

FURTHER RESOLVED, That the SFMTA Board of Directors authorizes the SFMTA to use race- and gender-neutral measures and race- and gender-conscious measures to achieve the Disadvantaged Business Enterprise (DBE) overall goal, including the establishment of Small Business Enterprise goals, goals for women-owned DBEs in construction and professional services, and goals for Black American-owned DBEs on FTA-funded construction contracts; and be it

FURTHER RESOLVED, That the SFMTA Board of Directors directs the Director of Transportation to transmit the revised FFY 2020-2022 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 16, 2019.

Secretary to the Board of Directors
San Francisco Municipal Transportation Agency

SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY

FYs 2020 – 2020 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 U.S. Department of Transportation (USDOT) 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 USDOT'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 22 percent for DBE contracting for federal fiscal years (FFY) 2020-2022 with a breakdown of 15% to be achieved by race-neutral means and 7% to be achieved by race-conscious means. A description of the methodology and the overall 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 USDOT'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

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

In response to *Western States*, on March 23, 2006, FTA published USDOT'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.

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 results of 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 women-owned business enterprises (WBEs), and what contract participation might be expected based on their availability for FTA-funded transportation contracts. The Study encompassed SFMTA's 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 women-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 women-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 were:

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 goals focused on women-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

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.

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 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. USDOT approved the DBE Program waiver request on January 19, 2017 for federal fiscal years 2017, 2018 and 2019 and required the SFMTA to submit a report detailing the impact of the waiver on utilization of all disadvantaged groups and whether a need for the waiver would continue. On March 31, 2019, the SFMTA submitted a report to the FTA detailing the SFMTA's FTA-funded contracting activities since the approval of the waiver and requesting a continuation of the waiver for another three federal fiscal years. The SFMTA has not received a response to the March 31, 2019 report and intends to continue to implement the terms of the waiver until otherwise directed by USDOT or the FTA.

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 2020-2022 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. USDOT 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," USDOT 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).

After applying any adjustments, the adjusted goal represents the anticipated DBE participation that will be achieved as a percentage of all SFMTA FFYs 2020-2022 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 the SFMTA's FTA-assisted contracts. Because it meets the requirements of Part 26, *Western States* decision, and FTA guidance, the SFMTA 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 2020-2022 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 2020-2022. Thus, the DBE goal analysis may not include all of the federally assisted contracts (with 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 2020-2022 FTA Contracting Opportunities**

Item#	Project title	Target Award Date	Civil Engineering Construction	Electrical Engineering Construction	Equipment	Track Material	Overhead Material	Other Material	Professional, Scientific & Technical Services	Fiscal Year 2020 - 2022 Total	% of Contracts
			NAICS 237990	NAICS 238210	NAICS 238290	NAICS 333997	NAICS 335122	NAICS 335312	NAICS 541330		
1	Translation and Interpretation Services	10/1/2019							\$450,000	\$450,000	0.1%
2	Vintage Streetcar Rehabilitations	10/1/2019			\$12,562,500				\$4,187,500	\$16,750,000	2.3%
3	Islais Creek Bridge Overhead Reconstruction	10/31/2019		\$1,750,000						\$1,750,000	0.2%
4	Woods Facility Rehabilitation	11/15/2019	\$6,000,000	\$4,000,000					\$300,000	\$10,300,000	1.4%
5	San Jose Substation Upgrade Phase I	11/19/2019		\$700,000						\$700,000	0.1%
6	As-Needed Specialized Engineering (Transit)	2/1/2020							\$15,000,000	\$15,000,000	2.1%
7	Cable Car Barn Turn Table	2/15/2020		\$500,000	\$7,300,000					\$7,800,000	1.1%
8	Subway Special Track Replacement	6/1/2020	\$3,300,000			\$2,800,000			\$600,000	\$6,700,000	0.9%
9	As-Needed Specialized Engineering (CP&C)	6/1/2020							\$15,000,000	\$15,000,000	2.1%
10	Job Order Contract	6/1/2020	\$4,000,000	\$1,000,000						\$5,000,000	0.7%
11	Better Market Street Phase I A	11/13/2020	\$91,200,000	\$72,400,000	\$36,400,000	\$17,700,000	\$72,400,000	\$73,500,000	\$42,500,000	\$406,100,000	57.0%
12	Cable Car Curved Track Replacement	12/24/2020	\$2,000,000			\$1,000,000				\$3,000,000	0.4%
13	Geary BRT Phase 2	2/2/2021	\$94,600,000	\$32,000,000				\$15,000,000	\$52,900,000	\$194,500,000	27.3%
14	As-Needed Specialized Engineering (CP&C)	6/1/2022							\$15,000,000	\$15,000,000	2.1%
15	Miscellaneous Commodities Purchases	Ongoing						\$7,500,000	\$7,500,000	\$15,000,000	2.1%
Total:			\$201,100,000	\$112,350,000	\$56,262,500	\$21,500,000	\$72,400,000	\$96,000,000	\$153,437,500	\$713,050,000	100.0%
Percentage:			28.2%	15.8%	7.9%	3.0%	10.2%	13.5%	21.5%	100.0%	

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

**TABLE TWO
FFY 2020-2022 FTA Dollars by Two-Digit NAICS Code**

Item#	Project title	Target Award Date	Construction	Professional, Scientific & Technical Services	Fiscal Year 2020 - 2022 Total	% of Contracts
			NAICS 23	NAICS 54		
1	Translation and Interpretation Services	10/1/2019		\$450,000	\$450,000	0.1%
2	Vintage Streetcar Rehabilitations	10/1/2019	\$12,562,500	\$4,187,500	\$16,750,000	2.3%
3	Islais Creek Bridge Overhead Reconstruction	10/31/2019	\$1,750,000		\$1,750,000	0.2%
4	Woods Facility Rehabilitation	11/15/2019	\$10,000,000	\$300,000	\$10,300,000	1.4%
5	San Jose Substation Upgrade Phase I	11/19/2019	\$700,000		\$700,000	0.1%
6	As-Needed Specialized Engineering (Transit)	2/1/2020		\$15,000,000	\$15,000,000	2.1%
7	Cable Car Barn Turn Table	2/15/2020	\$7,800,000		\$7,800,000	1.1%
8	Subway Special Track Replacement	6/1/2020	\$6,100,000	\$600,000	\$6,700,000	0.9%
9	As-Needed Specialized Engineering (CP&C)	6/1/2020		\$15,000,000	\$15,000,000	2.1%
10	Job Order Contract	6/1/2020	\$5,000,000		\$5,000,000	0.7%
11	Better Market Street Phase I A	11/13/2020	\$363,600,000	\$42,500,000	\$406,100,000	57.0%
12	Cable Car Curved Track Replacement	12/24/2020	\$3,000,000		\$3,000,000	0.4%
13	Geary BRT Phase 2	2/2/2021	\$141,600,000	\$52,900,000	\$194,500,000	27.3%
14	As-Needed Specialized Engineering (CP&C)	6/1/2022		\$15,000,000	\$15,000,000	2.1%
15	Miscellaneous Commodities Purchases	Ongoing	\$7,500,000	\$7,500,000	\$15,000,000	2.1%
Total:			\$559,612,500	\$153,437,500	\$713,050,000	100.0%
Percentage:			78.5%	21.5%	100.0%	

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	Women-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 USDOT 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 2020-2022 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%	78.5%	12.5%
54	Professional, Scientific, & Technical Services	23.9%	21.5%	5.1%
TOTAL:			100%	17.6%

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 .785 Construction Contracting Dollars = .125

+

.239 Professional Services MBE/WBE Availability X .215 Professional Services Contract Dollars = .051

BASE FIGURE=

(.125) + (.051) = 17.6%

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. USDOT 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, cites 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 impacted 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 FFYs 2016-2018, the most recent three federal fiscal years for which complete DBE commitment data was available and which were not used in prior DBE overall goal calculation adjustments, as follows:

FY 2017-18: Overall DBE goal was 15%; actual DBE commitments equaled 25.3%

FY 2016-17: Overall DBE goal was 15%; actual DBE commitments equaled 34.6%

FY 2015-16: Overall DBE goal was 19%; actual DBE commitments equaled 16.5%

In "Tips for Goal-Setting in the Disadvantaged Business Enterprise Program," under the heading "Adjustments Based on Past Participation," USDOT 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 25.3% percent. In using this figure to determine the adjustment for past participation, the following formula was used:

Steps:

1. Base Figure = 17.6%

2. Median Past Participation = 25.3%

3. Adjustment factor = (base figure 17.6%) + (median past participation 25.3%) divided by 2 = 22%

The impact of past DBE participation has resulted in an adjustment to the base figure of 17.6% DBE participation for FTA-assisted contracts to be awarded in FFYs 2020-2022. The adjusted DBE participation goal is 21.5% or 22% for FFY 2020-2022.

VII. RACE-CONSCIOUS/RACE-NEUTRAL BREAKDOWN

Pursuant to subsection 26.45(f)(3), the SFMTA is required to include a projection of the portions of the overall goal anticipated to be met through race-neutral and race-conscious measures, respectively. In order to calculate the race-neutral/race-conscious breakdown, the SFMTA considered the availability of women-owned DBEs in construction and professional services and Black American-owned DBEs in construction to determine the portion of the overall goal that the SFMTA could expect to be achieved based on the projected contracting activity for FFYs 2020-2022.

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	Black American-Owned	1.5%	78.5%	1.2%
		Women-Owned	4.8%		
54	Professional, Scientific, & Technical Services	Women-Owned Availability	5.6%	21.5%	1.2%
TOTAL RACE CONSCIOUS:					6.2%

The SFMTA examined the volume of work committed to DBEs on SFMTA's FTA-funded projects using race-conscious means for FFY 2017-2018, the only year for which complete DBE race-conscious commitments were available, and adjusted the projected race-conscious breakdown as follows:

Steps:

1. Base Race-Conscious Figure = 6.2%
2. FFY 2017-2018 Race-Conscious Participation = 7.9%
3. Adjustment factor = (base figure 6.1%) + (past participation 7.9%) divided by 2 = 7%

The race-neutral portion is the difference between the portion expected to be met through race-conscious measures and the DBE overall goal of 22%, as follows:

22% DBE overall goal - 7% to be achieved using race-conscious measures = 15% to be achieved using race-neutral means.

VIII. 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. Since January 2017, this approach has been used on two procurements: As-Needed Public Participation, Outreach & Engagement (two FTA-funded, two FHWA-funded, two locally funded) and As-Needed Ambassador Services (two FTA-funded and two 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 March 2018, SFMTA engaged Rosales Business Partners (RBP), one of the lead Disparity Study consultants, to provide business support services to minority- and women-owned businesses to increase the availability of African American-owned and women-owned construction contractors ready, willing, and able to participate on SFMTA’s construction contracts funded by the FTA. Services provided by RBP included:
 - a. Assembled and updated the Disparity Study contact list for outreach to market area firms and community-based organizations (CBOs).
 - b. Obtained and analyzed the listing of certified DBEs and likely to be certified DBEs (M/WBEs) from the Disparity Study database, focusing on firms who are likely to be available for the L-Taraval Project.
 - c. Researched and analyzed certified DBE Black American firms listed with the California Department of Transportation to include in the contact list for outreach.
 - d. Reviewed 2017 San Francisco Commission on Community Investment & Infrastructure (OCII) public records for SBE participation in OCII projects, with special attention to identifying Black American- and women-owned construction firms who could be eligible for DBE certification and participation in 2018 SFMTA FTA funded projects.
 - e. Prepared a draft letter to M/WBE firms soliciting their interest in becoming certified as DBEs for 2018 SFMTA FTA funded projects.
 - f. Issued the invitation letter to the list of market area firms and CBOs for the Stakeholder Focus Group meeting (the Meeting), scheduled for May 17, 2018, and subsequently conducted follow up outreach to stakeholders. The RBP project team facilitated and participated in the Meeting.
 - g. Attended and managed the Good Faith Networking Event, providing information and assistance to interested primes and sub-contractors for the L-Taraval Project.
 - h. Provided technical assistance, including DBE certification support, to minority- and women-owned firms and certified DBEs interested in competing for the L-Taraval Project.
 - i. Provided technical, bonding, match making and certification assistance efforts to interested subcontract bidders for the L-Taraval Project.
 - j. Prepared a customized “global” list of certified DBEs, focusing on Black American- and women-owned firms by relevant NAICS codes, for targeted outreach for the L-Taraval Project.
 - k. Issued emails to all firms on the customized global DBE list for the L-Taraval Project, informing them of the business opportunity and the availability of assistance with technical requirements, as well as bonding, certification and match making/networking for the L-Taraval Project.

1. Conducted outreach to potential prime contractor bidders for the L-Taraval Project, to help with meeting the DBE goals on the L-Taraval Project solicitation.

In addition, CCO 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 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. Since January 2017, the SFMTA has implemented four 100% SBE set-asides (three construction and one professional services). As a result, two prime contracts were awarded to a Black American-owned DBE and one prime contract was awarded to a Hispanic-owned DBE. 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 2, 2019 at the Alameda-Contra Costa Transit District (AC Transit) in Oakland, California. The BOC membership is comprised of AC Transit, Alameda County Transportation Commission (ACTC), Bay Area Rapid Transit District (BART), Central Contra Costa Transit Authority (CCCTA), Golden Gate Bridge, Highway and Transportation District (GGBHTD), Metropolitan Transportation Commission (MTC), San Francisco Bay Area Water Emergency Transportation Authority (WETA), San Francisco Municipal Transportation Agency (SFMTA), San Mateo County Transit District (SamTrans/Caltrain), Santa Clara Valley Transportation Authority (VTA), Western Contra Costa Transit Authority (WESTCAT), Marin Transit, Solano County Transit (Soltrans), Transbay Joint Powers Authority (TJPA), California High Speed Rail, City of Santa Rosa, Livermore Transit Authority/Tri-Valley Wheels(LAVTA), Santa Cruz Metropolitan Transit District, San Francisco County Transportation Authority (SFCTA), Sonoma-Marin Area Rail Transit (SMART), and County Connection Delta Breeze. The BOC invited over 170 community-based organizations to the public participation session, including chambers of commerce, small business support organizations, and small business advocates. In addition, 8,700 individual firms, including DBEs, were invited. Approximately 50 individuals, including agency representatives, participated in the session.

The session was conducted to obtain pertinent input from businesses and trade group organizations that are 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, provided information about its upcoming DOT-assisted contracting opportunities.

Prior to conducting the general public session, a meeting was held for minority business advocacy organizations. One firm, a DBE and advocate for DBEs participated in the meeting for minority business advocacy organizations.

At the meeting for minority business advocacy organizations, the attendee was advised that the BOC member agencies present were in the process of establishing their three-year overall DBE goals for FFY 2020-2022. The BOC asked for feedback on the following items:

- Issues within the DBE/SBE community
- Challenges to the DBE program
- What agencies can do to assist DBE/SBE's

The participant asked how the BOC could better reach contractors since their firm was the only participant in attendance at the meeting. BOC advised them that it utilizes a variety of avenues to get information out, including mass email distribution. Individual agencies also have registration options on their respective websites to receive notifications of events, procurements, etc. The participant stated that it would be beneficial to DBEs and small businesses if one main website could be established (at least at the regional level) of all agency contracting opportunities, so that these businesses would not have to register through individual websites.

BOC asked the participant how they can get in front of job opportunities before they are advertised. They replied that they participate in many networking opportunities and agency events. The BOC stated that it is considering fine-tuning its annual "Meet the Primes" events to create more 1-on-1 opportunities/interviews for DBEs/SBEs and prime contractors.

The participant stated that DBEs need assistance with completing financial forms in the procurement process if they have not done it before. They said it would be helpful to DBEs and small businesses if agencies conducted information sessions to assist them with completing financial and other contract compliance forms, and that all involved departments should be present at those meetings.

BOC asked the participant what types of financial requirements they have for firms they work with. They stated that they generally have payment mechanisms in place that are consistent with state law. Some BOC member agencies spoke to how they encourage their primes to submit bills in a timely manner to ensure subcontractors are being paid in a timely manner. It was noted by the participant that many small businesses cannot sustain themselves when they have to wait months for payment. VTA noted that it uses a payment mechanism that uses an escrow account to ensure subcontractors are paid promptly when they have completed their work. It is currently being used on a major VTA contract. VTA suggested that this is something agencies can consider during the contract negotiations process.

The participant recommended more outreach and partnering up with different organizations, such as the Conference of Minority Transportation Officials (COMTO). They suggested RFPs and bid solicitations could be posted on the websites of minority and small business support organizations.

The following is a summary of what was discussed during the general outreach session.

BOC explained the DBE goal setting methodology used by agencies, including identifying contracting opportunities, establishing the base figure, and how base figure is adjusted. BOC also provided information

about DBE certification, use of NAICS codes, how wholesalers and brokers are defined, and how to access contract opportunities.

A representative from Norcal Procurement Technical Assistance Center (PTAC) provided an overview of free services available to DBEs. These support services include bid matching, strategic planning, procurement counseling, and assistance with bid proposals/submittals.

BOC was asked to explain difference between race-neutral and race-conscious programs. BOC explained how race-conscious programs can only be implemented provided there is a disparity study finding that supports it. BOC noted that agencies will publish and post on their websites their proposed three-year DBE overall goal for 30 days.

One business stated that it would be helpful to see BOC member agencies' past DBE participation/goal attainment on their websites. BOC noted that the Federal Transit Administration (FTA) website lists its top 50 grantees' past goals and attainment. An audience participant, who was a small business and DBE advocate, requested all agencies to make a coordinated effort in creating one major report that captures cumulative data related to the DBE program. This may include types of contracts, progress, challenges, participation, payments, etc. She also stated that there are challenges with DBEs and SBEs being paid on time, and that the DBE program should help small businesses grow and profit in the State of California.

A business asked at what tier levels are DBEs participating at on contracts and how can DBEs move from 5th or 6th tier to 1st or 2nd tier? BOC responded that unbundling contracts can provide opportunities for DBEs to prime and participate at 1st tier. Agencies are encouraged to unbundle large contracts, but many find it administratively challenging to do so.

An SBE asked what resources are available to assist SBEs with obtaining work. BOC advised them that most agencies have a separate SBE component or program and that many agencies establish SBE goals for their DOT-assisted contracts.

A business asked how to get on teams before a RFP is advertised given that most teams that respond to RFPs are formed in advance. BOC responded that it will be looking into creating more opportunities to help DBEs/SBEs build more working relationships through events such as matchmaking, networking, and interviews/one-on-ones with primes. BOC encouraged reaching out to project managers at the specific agency and to primes in advance. It was noted that MTC has a vendor database used during the procurement process, which will list everyone interested in a specific project.

Another business expressed its interest in an SFMTA solicitation. It has begun the process of reaching out to DBEs, but not all DBEs call back/respond or they are not interested. It asked what it can do to reach these DBEs. BOC encouraged the business to reach out to the agency for assistance, as some DBEs need to update their phone numbers, have moved, etc. Individual agencies can assist businesses with locating and/or contacting the businesses.

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 USDOT 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 22 percent overall DBE goal for all FTA-funded contracts anticipated to be awarded for FFYs 2020-2022, with a breakdown of 15% to be achieved by race-neutral means and 7% to be achieved by race-conscious means.

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.