

THIS PRINT COVERS CALENDAR ITEM NO. 14

**SAN FRANCISCO
MUNICIPAL TRANSPORTATION AGENCY**

DIVISION: Finance and Information Technology

BRIEF DESCRIPTION:

Adopting the Disadvantaged Business Enterprise (DBE) Availability, Utilization, and Disparity Study, which was conducted to determine if disparities exist in the SFMTA's utilization of DBEs in FTA-funded contracts; and approving seeking a DBE Program waiver from the Federal Transit Administration (FTA) for implementing two programmatic recommendations in the Study.

SUMMARY:

- To comply with federal DBE guidelines, in July of 2014, the SFMTA contracted with Rosales Business Partners/Exstare Federal Services Group, a Joint Venture (the Study Team) to conduct a disparity study (the Study) to determine the continuing existence of discrimination or its effects on SFMTA's contracting.
- The Study was completed in November of 2015, and found that: 1) woman-owned business enterprises (WBEs) are substantially underutilized on SFMTA FTA-funded contracts, and 2) Black American construction contractors are substantially underutilized on SFMTA FTA-funded construction contracts. This underutilization supports an inference of discrimination and the implementation of race-and gender-conscious remedial measures.
- The Study recommends implementation of: 1) a WBE element to SFMTA's DBE Program for construction, professional services, and goods or other services contracts, and 2) a Black American construction contractor element to SFMTA's DBE Program for construction contracts.
- In order to implement these programmatic recommendations, the SFMTA will need to seek a DBE Program waiver from the FTA.

ENCLOSURES:

1. SFMTAB Resolution
2. DBE Program Waiver Request
3. DBE Availability, Utilization, and Disparity Study

APPROVALS:

DATE

DIRECTOR _____

4/11/16

SECRETARY R. Boomer _____

4/11/16

ASSIGNED SFMTAB CALENDAR DATE: April 19, 2016

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PURPOSE

Adoption of the Disadvantaged Business Enterprise (DBE) Availability, Utilization, and Disparity Study, which was conducted to determine if disparities exist in the SFMTA's utilization of DBEs in FTA-funded contracts, and to approve seeking a DBE Program waiver from the Federal Transit Administration for implementing two programmatic recommendations of the Study.

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

The U.S. DOT issued a DBE Program Final Rule on March 4, 1999, codified in Part 26 of Title 49 of the Code of Federal 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.

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 Washington State 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 discrimination¹.

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

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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.

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 be utilized for federally assisted contracts. An SBE is defined as a "for-profit, small business concern" that qualifies for the program by being 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.

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 exist in the Agency's utilization of DBEs. The SFMTA selected Rosales Business Partners/Exstare Federal Communications, a Joint Venture (the Study Team) to conduct the study. The Study Team commenced work in 2014, and in November 2015 completed the DBE Availability, Utilization, and Disparity Study (the Study).

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 encompasses 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 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.

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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 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 utilization 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 minorities, women, and 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 (at p. 63) 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 recommends 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 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. [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.

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.

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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.

In order to implement recommendations 1 and 2, the SFMTA will need to seek a DBE Program waiver from the FTA.

PUBLIC OUTREACH

On October 23, 2014, the SFMTA and the Study Team held a kick-off meeting to share information on the purpose and objectives of the Study. Attendees were informed that the Study would include completing a market area analysis and additional outreach to stakeholders to elicit anecdotal evidence of SFMTA and transportation industry business practices and challenges.

On June 10, 2015, a second public hearing was held by SFMTA and the Study Team to report on the progress of the Study and for the Study Team to receive anecdotal evidence on business experiences with SFMTA and relevant information on transportation industry practices within the market area counties. The Study Team reached out to firms to attend and provide public testimony. An invitation was emailed to market area firms, and phone calls were also made to encourage people to attend the hearing. If firms were unable to attend the hearing, they were encouraged to deliver a copy of their written comments to SFMTA, where the June 10 hearing was conducted, or email/mail/personally deliver them to the Study Team's offices in San Francisco.

On February 23, 2016, the SFMTA conducted a public hearing on the proposed waiver. In advance of the February 23rd hearing, SFMTA released the 2015 Disparity Study to the public on its website. In the public hearing invitation to stakeholders, including the DBE community, SFMTA also provided the website link to the Study to allow stakeholders to review it prior to the public hearing.

The Disparity Study consultant team presented the Study's methodology, findings and recommendations, in detail, to approximately 60 hearing attendees representing DBEs, minority-owned, woman-owned, and other small businesses, as well as representatives of minority- and women-focused business organizations. The consultants explained that the purpose of the Disparity Study was to determine if there are any substantial disparities in SFMTA's utilization of DBEs on federally assisted contracts.

The SFMTA and members of the consultant team responded to questions asked at the hearing and submitted in writing after the public hearing. Stakeholders expressed the following concerns:

- Whether the market area had been identified appropriately;
- Whether the availability determinations reflected the actual number of minority owned businesses in the marketplace;
- Disparity results, particularly for Black American-owned construction and professional services firms;

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- Concern was expressed over the exclusion of certain groups from the Study recommendations; and
- How quickly the study recommendations would be implemented.

Since the February 23, 2016 public hearing, staff from the SFMTA's Contract Compliance Office (CCO) has continued to consult with various stakeholders regarding the study results, including representatives of the Asian-American, Latino, African-American, Women-Owned, and small business communities.

ENVIRONMENTAL REVIEW

On March 22, 2016, the SFMTA, under authority delegated by the Planning Department, determined that the Study is not a "project," as defined under the California Environmental Quality Act (CEQA) pursuant to Title 14 of the California Code of Regulations Sections 15060(c) and/or 15378(b) because the Study would not result in a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. The proposal is therefore not subject to CEQA review.

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 the Board adopt the Disadvantaged Business Enterprise Availability, Utilization, and Disparity Study, and approve the SFMTA's seeking a DBE Program waiver for implementing the Study's programmatic recommendations from the Federal Transit Administration.

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, which contained 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 San Francisco Public Transportation Commission (1) approved and adopted a DBE Program for implementation by the San Francisco Municipal Transportation Agency (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), in which the Court upheld DOT's DBE regulations, but struck down the Washington State Department of Transportation's DBE program as unconstitutional because Washington 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 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; and

WHEREAS, In July of 2014, the SFMTA contracted with Rosales Business Partners/Exstare Federal Services Group, a Joint Venture, to conduct a disparity study (the Study) to determine the continuing existence of discrimination or its effects on SFMTA's procurement program; and

WHEREAS, On March 22, 2016, the SFMTA, under authority delegated by the Planning Department, determined that the Study is not a "project," as defined under the California Environmental Quality Act (CEQA) pursuant to Title 14 of the California Code of Regulations Sections 15060(c) and/or 15378(b), because the Study would not result in a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment; and

WHEREAS, The Study was completed in November of 2015, and found that woman-owned business enterprises (WBEs) are substantially underutilized on SFMTA FTA-funded contracts, which finding supports an inference of discrimination and the implementation of gender-conscious remedial measures; and

WHEREAS, The Study also found that Black American construction contractors are substantially underutilized on SFMTA FTA-funded construction contracts, which finding supports an inference of discrimination and the implementation of race-conscious remedial measures; and

WHEREAS, The Study recommends implementation of a WBE element to SFMTA's DBE Program for construction, professional services, and goods or other services contracts; and

WHEREAS, The Study also recommends implementation of a Black American construction contractor element to SFMTA's DBE Program for construction contracts; and

WHEREAS, In order to implement the these two programmatic recommendations, the SFMTA will need to seek a DBE Program waiver from FTA, and

WHEREAS, The Study also recommends that the SFMTA continue with its SBE Program for all other types of FTA-funded contracting; now, therefore, be it

RESOLVED, That the SFMTA Board of Directors adopts the Disadvantaged Business Enterprise Availability, Utilization, and Disparity Study; and be it

FURTHER RESOLVED, That the SFMTA Board of Directors approves seeking a Disadvantaged Business Enterprise Program waiver from the Federal Transit Administration for implementing the Study's programmatic recommendations.

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

Secretary to the Board of Directors
San Francisco Municipal Transportation Agency

April 20, 2016

**Secretary Anthony Foxx
Office of the Secretary of Transportation
U.S. Department of Transportation**

1200 New Jersey Avenue, SE

Washington DC, 20590

RE: SFMTA Request for DBE Program Waiver Pursuant to 49 CFR Part 26.15

Dear Secretary Foxx:

The San Francisco Municipal Transportation Agency (SFMTA or Agency) requests your consideration and approval of a waiver that will allow the Agency to implement the Federal Disadvantaged Business Enterprise (DBE) Program in a narrowly tailored manner, consistent with federal regulations and relevant case law. The waiver will allow the agency to limit its use of race- and gender-conscious measures to those DBE groups for which compelling statistical evidence of discrimination exists in the relevant geographic market areas. The SFMTA bases this waiver request on its recent Availability, Utilization and Disparity Study (2015 Disparity Study or Study), enclosed as Exhibit A.

WAIVER REQUEST

As required by 49 Code of Federal Regulations (CFR) Section 26.15(b), if a recipient seeks “to operate a DBE program that achieves the objectives of Part 26 by means that may differ from one or more of the provisions of Subpart B or C,” it must apply to the Office of the Secretary of Transportation for the Federal Transit Administration (FTA) for a program waiver. Through this letter, the SFMTA requests a waiver from the requirement in Subpart C, Section 26.51(e)(4) that any contract goals “provide for participation by all certified DBEs and must not be subdivided into group specific goals.”

Based on the findings and recommendations in its 2015 Disparity Study, the SFMTA seeks to implement contract-specific DBE goals for the following categories of DBEs:

1. Woman-owned firms for participation in construction, professional services, and goods and other services contracts
2. Black American firms for participation in construction contracts

We intend to monitor the modified program annually to ensure that we make ongoing efforts to address barriers to full participation for DBEs on our projects, and make adjustments as necessary until we conduct our next disparity study, scheduled to start January 2022.

SUMMARY OF DISPARITY STUDY FINDINGS AND RECOMMENDATIONS

The SFMTA Disparity Study was issued on November 19, 2015. The Study covered 656 FTA-funded construction, professional services, and goods and services contracts awarded during Federal Fiscal Years (FFYs) 2009 through the third quarter of FFY 2015 (Study Period). The Study looked at firms that were certified as DBEs and also those that could be potentially certified as DBEs.

In conducting the Study, the consultant team: (1) determined SFMTA's contracting market areas for construction and professional services; (2) reviewed utilization and availability of minority- and woman-owned firms; (3) determined disparities in the utilization of certain racial, ethnic and gender groups; (4) assessed race-neutral and race-conscious measures employed by SFMTA during the Study Period; and (5) made recommendations to SFMTA for administering its DBE program.

The Study determined that there were two market areas for SFMTA contracts during the Study Period, one for construction contracts and another for professional services contracts, including goods and other services. Both contracting categories cover the same four Bay Area counties of San Francisco, Alameda, Santa Clara, and San Mateo. For construction contracts, the market area includes Los Angeles County.

Some of the key findings of the Study are:

- Marketplace discrimination continues to be a significant barrier for minority- and woman-owned businesses seeking to do transportation-related business in California, including on SFMTA FTA-funded contracts;
- Woman-owned businesses of all races and ethnicities are substantially underrepresented in construction and professional services contracts as prime contractors and subcontractors;
- Black American-owned firms are substantially underrepresented in construction contracts;
- Race-neutral methods implemented by SFMTA over the last eight fiscal years are effective in assisting Asian Pacific- and Hispanic American-owned firms to successfully compete for contracts;
- While statistical data showed substantial disparities for Native American owned firms, an inference of discrimination against Native American owned firms cannot be drawn based on low availability data (only six firms in the relevant marketplace).

SFMTA adopted the following recommendations in response to the noted key findings from the Study:

- 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 woman-owned firm participation (subject to approval of a program waiver by the FTA); (3) direct matchmaking techniques between WBEs and contract opportunities; and (4) a continuation of bonding and financial assistance measures SFMTA has employed.

- Implement the DBE program with an element designed to mitigate the discriminatory practices and their effects on Black American construction contractors. SFMTA will pay particularly close attention to addressing the obstacles faced by Black American construction contractors. The programmatic measures include (1) robust outreach to Black American construction contractors, (2) contract-specific goals focused on Black American firm participation (subject to approval of a program waiver by the FTA),; (3) direct matchmaking techniques between Black American firms and contract opportunities; and (4) a continuation of bonding and financial assistance measures SFMTA has employed.
- Continue to implement a small contract element within SFMTA's SBE Program that is focused on small construction contracts, defined as under \$5,000,000, and on small professional services prime contracts, defined as under \$1,000,000. SFMTA will 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.
- Except as provided above, continue implementation of SFMTA's race- and gender-neutral SBE Program for all federally funded contracts, including SBE set-asides.
- Continue to review and track 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 that 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.

JUSTIFICATION FOR PROGRAM WAIVER

49 CFR Part 26.15 (b) 2 requires a waiver application to demonstrate the following:

- (i) There is a reasonable basis to conclude that you could achieve a level of DBE participation consistent with the objectives of this part using different or innovative means other than those that are provided in subpart B or C of this part;**

The Disparity Study concludes that the SFMTA SBE program has provided opportunities for participation for certain DBEs, but not with respect to WBEs and Black American owned construction firms. This waiver request seeks to permit the SFMTA to continue to implement its SBE program, while simultaneously addressing areas of deficiencies by setting DBE goals for WBEs and Black American owned construction firms. It is reasonable to

conclude that supplementing the SBE program with DBE goals for underutilized firms will result in a level playing field for DBE participation.

(ii) Conditions in your jurisdiction are appropriate for implementing the proposal;

The City and County of San Francisco and the SFMTA have a long history of innovative efforts to remedy contracting discrimination. The SFMTA submits this waiver application as a continuation of those efforts and to demonstrate its strong commitment to creating a level playing field for all DBE contractors to participate on its contracts and to remedy identified discrimination. Approval of this waiver application will allow SFMTA to continue to implement the successful race neutral elements of its SBE program, while targeting deficiencies prohibiting full participation for all DBEs.

(iii) Your proposal would prevent discrimination against any individual or group in access to contracting opportunities or other benefits of the program;

The SFMTA proposal is narrowly tailored to remedy the discrimination identified in its disparity study. The SFMTA also intends to monitor the modified program annually to ensure that we make ongoing efforts to address barriers to full participation for DBEs on our projects, and make adjustments as appropriate until we conduct our next disparity study, scheduled for January, 2022.

(iv) Your proposal is consistent with applicable law and program requirements of the concerned operating administration's financial assistance program.

This waiver request will enable the Agency to comply with the decision in *Western States Paving Co. v. Washington State Dept. of Transportation*, 407 F.3d 983 (9th Cir. 2005). In *Western States*, the court held that a state department of transportation, facing an as-applied equal protection clause challenge, did not pass constitutional scrutiny by simply relying on or implementing the USDOT's requirements or the programmatic features of the federal DBE program. (*Id.* at 997; 1002-1003). In order to meet the "narrowly tailored" requirement of *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995), the court found that the state, in applying the federal DBE regulations, had to demonstrate evidence of past or present discrimination in its market against **each** benefited ethnic business group the state included in its DBE program. (*Id.* at 998 [emphasis added].) By limiting the waiver request to those DBE groups and contracting categories for which the Study found significant discrimination (i.e., women in all contracting categories and Black Americans in construction contracting), the Agency's proposed program will meet the "narrowly tailored" requirement of *Western States* and *Adarand*.

PUBLIC PARTICIPATION

49 CFR Section 26.15(b)(1) requires recipients to solicit and engage public and stakeholder participation and feedback on the waiver proposal by holding at least one public hearing.

Under the federal regulations, the SFMTA must also consult with the DBE community on the waiver proposal.

On February 23, 2016, the SFMTA conducted a public hearing on the proposed waiver. A transcript of the proceedings is attached to this letter and marked as Exhibit B.

In advance of the February 23rd hearing, SFMTA released the 2015 Disparity Study to the public on its website. In the public hearing invitation to stakeholders, including the DBE community, SFMTA also provided the website link to the Study to allow stakeholders to review it prior to the public hearing.

At the public hearing, SFMTA Director of Transportation Edward Reiskin and DBE Liaison Officer Virginia Harmon expressed SFMTA's strong commitment to (1) remedying market area discrimination through its contract solicitation and award process; and (2) creating a level playing field for woman- and minority-owned DBEs and other small businesses to successfully compete for and perform on SFMTA contracts. Ms. Harmon explained that the hearing was for SFMTA to report on the 2015 Disparity Study results and recommendations, and receive stakeholder comments, questions or concerns about the Study prior to SFMTA submitting a waiver application to the FTA to adjust SFMTA's DBE program to address the findings of the Study.

The Disparity Study consultant team presented the Study's methodology, findings and recommendations, in detail, to approximately 60 hearing attendees representing DBEs, minority-owned, woman-owned, and other small businesses, as well as representatives of minority- and women-focused business organizations. The consultants explained that the purpose of the Disparity Study was to determine if there are any substantial disparities in SFMTA's utilization of DBEs on federally assisted contracts.

The SFMTA and members of the consultant team responded to questions asked at the hearing and submitted in writing after the public hearing. The majority of questions and comments from stakeholders concerned the following topics:

- Market area determinations
- Availability determinations
- Disparity results, particularly for Black American-owned construction and professional services firms
- Discrimination findings
- SFMTA outreach efforts
- Timing and implementation of Study recommendations

Since the February 23, 2016 public hearing, staff from the SFMTA's Contract Compliance Office (CCO) has consulted with various stakeholders regarding the study results, including representatives of the Asian-American, Latino, African-American, Women-Owned, and small business communities. On April 19, 2016, the proposed waiver request was approved by the SFMTA Board of Directors after at its duly-noticed regular meeting.

In conclusion, FTA's approval of this waiver request will ensure that SFMTA's implementation of its DBE program is narrowly tailored, in compliance with case law, and able to help remove barriers to the participation of all DBEs in FTA-funded contracts.

If you have any questions regarding this submission, please do not hesitate to contact me at Ed.Reiskin@sfmta.com. Thank you for your consideration of this request.

Sincerely,

Edward D. Reiskin
Director of Transportation