

**THIS PRINT COVERS CALENDAR ITEM NO.: 10.3**

**SAN FRANCISCO  
MUNICIPAL TRANSPORTATION AGENCY**

**DIVISION:** Finance and Information Technology

**BRIEF DESCRIPTION:**

Adopting the proposed federal fiscal years 2023-2025 Overall Goal of 21% 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 6% 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  \_\_\_\_\_

**DATE**  
October 12, 2022

SECRETARY  \_\_\_\_\_

October 12, 2022

**ASSIGNED SFMTAB CALENDAR DATE:** October 18, 2022

**PURPOSE**

The purpose of this calendar item is for the SFMTA Board to adopt the proposed federal fiscal years 2023-2025 Overall Goal of 21% 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 6% to be achieved by race-conscious means.

**GOAL**

This action supports the following SFMTA Strategic Plan Goal:

Goal 1: Identify and reduce disproportionate outcomes and resolve past harm towards marginalized communities.

**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.<sup>1</sup> 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

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

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 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.

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 21 percent DBE participation in projected new FTA-assisted contracts for federal fiscal years (FFYs) 2023-2025, with a breakdown of 15% to be achieved by race-neutral means and 6% 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 2023-2025. A description of the methodology and the overall goal, including calculation of the proposed race-neutral/race-conscious breakdown, is enclosed.

On September 7, 2022, the SFMTA published a notice announcing its proposed DBE overall goal for FFYs 2023-2025 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. To date, the SFMTA has 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.

## **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 June 7, 2022, via Zoom webinar. 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 September 22, 2022, the SFMTA, under authority delegated by the Planning Department, determined that the Disadvantaged Business Enterprise Overall Goal for Fiscal Year 2023-2025 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.

**ALTERNATIVES CONSIDERED**

None.

**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 2023-2025 Overall Goal of 21 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 6% 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) 2023-2025; and

WHEREAS, SFMTA staff followed one of the methodologies set forth in Part 26 and arrived at an overall goal of 21 percent for DBEs participating in FTA-assisted contracts for FFY 2023-2025, with a breakdown of 15% to be achieved by race-conscious means and 6% to be achieved by race-neutral means; and

WHEREAS, The SFMTA advertised the revised overall DBE goal beginning September 7, 2022 for a 30-day public review period and a concurrent 30-day comment period, and has received no comments; and

WHEREAS, On September 22, 2022, the SFMTA, under authority delegated by the Planning Department, determined that the Disadvantaged Business Enterprise Overall Goal for Fiscal Year 2023-2025 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); and

WHEREAS, A copy of the CEQA determination is on file with the Secretary to the SFMTA Board of Directors and is incorporated herein by reference, now therefore, be it

RESOLVED, That the SFMTA Board of Directors has reviewed the methodology used to determine the proposed FFY 2023-2025 three-year overall DBE goal for contracting by the SFMTA, and adopts a three-year overall goal of 21 percent for DBE participation in FTA-assisted contracts for FFYs 2023-2025, with a breakdown of 15% to be achieved by race-neutral means and 6% 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 2023-2025 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 October 18, 2022.

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Secretary to the Board of Directors  
San Francisco Municipal Transportation Agency

# SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY

## FYs 2023 – 2025 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 21 percent for DBE contracting for federal fiscal years (FFY) 2023-2025 with a breakdown of 15% to be achieved by race-neutral means and 6% 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 (9<sup>th</sup> 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.<sup>1</sup> 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.

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

### **III. DOT GUIDANCE IN RESPONSE TO THE WESTERN STATES DECISION**

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.<sup>2</sup>

## **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

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<sup>2</sup> 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 2023-2025 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 2023-2025 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 2023-2025 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 2023-2025. 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 20203-20225 FTA Contracting Opportunities**

| Item#              | Project title   | Target Award Date | Civil Engineering Construction | Electrical Engineering Construction | Equipment           | Track Material      | Other Material       | Professional, Scientific & Technical Services | Fiscal Year 2020 - 2022 Total | % of Contracts |
|--------------------|---|-------------------|--------------------------------|-------------------------------------|---------------------|---------------------|----------------------|---|-------------------------------|----------------|
|                    |   |                   | NAICS 237990                   | NAICS 238210                        | NAICS 238290        | NAICS 333997        | NAICS 334290         | NAICS 541330                                  |                               |                |
| 1                  | Transbay Transit Center Traction Power Upgrade                            | 1/1/2023          |                                | \$4,188,896                         |                     |                     |                      |   | \$4,188,896                   | 0.7%           |
| 2                  | New Castro Station Elevator   | 1/1/2023          | \$10,000,000                   |                                     | \$4,000,000         |                     |                      |   | \$14,000,000                  | 2.3%           |
| 3                  | Transit Operator Convenience Facilities Phase III                         | 1/3/2023          | \$670,000                      |                                     |                     |                     |                      |   | \$670,000                     | 0.1%           |
| 4                  | Muni Metro Expansion  | 2/7/2023          | \$90,000,000                   |                                     |                     |                     |                      |   | \$90,000,000                  | 14.9%          |
| 5                  | Cable Car Holdback and Rewinder   | 4/1/2023          |                                |                                     | \$800,000           |                     |                      | \$150,000                                     | \$950,000                     | 0.2%           |
| 6                  | As-Needed Consulting Services Supporting the Train Control Upgrade (TCUP) | 5/30/2023         |                                |                                     |                     |                     |                      | \$28,115,000                                  | \$28,115,000                  | 4.6%           |
| 7                  | Folsom Streetscape  | 6/30/2023         | \$34,000,000                   |                                     |                     |                     |                      |   | \$34,000,000                  | 5.6%           |
| 8                  | Cable Car Curved Track Replacement  | 8/11/2023         | \$5,500,000.00                 |                                     |                     | \$2,700,000         |                      |   | \$8,200,000                   | 1.4%           |
| 9                  | 1399 Marin  | 9/7/2023          | \$37,000,000                   |                                     |                     |                     |                      |   | \$37,000,000                  | 6.1%           |
| 10                 | Communications-Based Train Control (CBTC) Design, Procurement and Support | 10/15/2023        |                                |                                     |                     |                     | \$216,140,000        | \$100,000,000                                 | \$316,140,000                 | 52.2%          |
| 11                 | Subway Special Track Replacement  | 6/7/2024          | \$24,000,000                   |                                     |                     | \$18,000,000        |                      |   | \$42,000,000                  | 6.9%           |
| 12                 | Complete Rehab of Historic Streetcars                                     | 9/1/2024          |                                |                                     | \$7,500,000         |                     |                      | \$2,000,000                                   | \$9,500,000                   | 1.6%           |
| 13                 | CBTC Installation   | 7/1/2025          | \$20,800,000                   |                                     |                     |                     |                      |   | \$20,800,000                  | 3.4%           |
| <b>Total:</b>      |   |                   | <b>\$221,970,000</b>           | <b>\$4,188,896</b>                  | <b>\$12,300,000</b> | <b>\$20,700,000</b> | <b>\$216,140,000</b> | <b>\$130,265,000</b>                          | <b>\$605,563,896</b>          | <b>100.0%</b>  |
| <b>Percentage:</b> |   |                   | <b>36.7%</b>                   | <b>0.7%</b>                         | <b>2.0%</b>         | <b>3.4%</b>         | <b>35.7%</b>         | <b>21.5%</b>                                  | <b>100.0%</b>                 |                |

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

**TABLE TWO  
FFY 2023-2025 FTA Dollars by Two-Digit NAICS Code**

| Item#              | Project Title   | Target Award Date | Construction         | Professional, Scientific & Technical Services | Fiscal Year 2023 – 2025 Total | % of Contracts |
|--------------------|---|-------------------|----------------------|---|-------------------------------|----------------|
|                    |   |                   | NAICS 23             | NAICS 54                                      |                               |                |
| 1                  | Transbay Transit Center Traction Power Upgrade                            | 1/1/2023          | \$4,188,896          |   | \$4,188,896                   | 0.7%           |
| 2                  | New Castro Station Elevator   | 1/1/2023          | \$14,000,000         |   | \$14,000,000                  | 2.3%           |
| 3                  | Transit Operator Convenience Facilities Phase III                         | 1/3/2023          | \$670,000            |   | \$670,000                     | 0.1%           |
| 4                  | Muni Metro Expansion  | 2/7/2023          | \$90,000,000         |   | \$90,000,000                  | 14.9%          |
| 5                  | Cable Car Holdback and Rewinder   | 4/1/2023          | \$800,000            | \$150,000                                     | \$950,000                     | 0.2%           |
| 6                  | As-Needed Consulting Services Supporting the Train Control Upgrade (TCUP) | 5/30/2023         |                      | \$28,115,000                                  | \$28,115,000                  | 4.6%           |
| 7                  | Folsom Streetscape  | 6/30/2023         | \$34,000,000         |   | \$34,000,000                  | 5.6%           |
| 8                  | Cable Car Curved Track Replacement  | 8/11/2023         | \$8,200,000          |   | \$8,200,000                   | 1.4%           |
| 9                  | 1399 Marin  | 9/7/2023          | \$37,000,000         |   | \$37,000,000                  | 6.1%           |
| 10                 | Communications-Based Train Control (CBTC) Design, Procurement and Support | 10/15/2023        |                      | \$316,140,000                                 | \$316,140,000                 | 52.2%          |
| 11                 | Subway Special Track Replacement  | 6/7/2024          | \$42,000,000         |   | \$42,000,000                  | 6.9%           |
| 12                 | Complete Rehab of Historic Streetcars                                     | 9/1/2024          | \$7,500,000          | \$2,000,000                                   | \$9,500,000                   | 1.6%           |
| 13                 | CBTC Installation   | 7/1/2025          | \$20,800,000         |   | \$20,800,000                  | 3.4%           |
| <b>Total:</b>      |   |                   | <b>\$259,158,896</b> | <b>\$346,405,000</b>                          | <b>\$605,563,896</b>          | <b>100.0%</b>  |
| <b>Percentage:</b> |   |                   | <b>42.8%</b>         | <b>57.2%</b>                                  | <b>100.0%</b>                 |                |

*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 2023-2025 Summary of DBE Availability**  
**By NAICS Code and Weighted by FTA Dollars**

| <b>NAICS CODE</b> | <b>Scope of Work</b>                           | <b>% MBE/WBE Availability</b> | <b>% of Dollar</b> | <b>Weighted % of MBE/WBE Availability</b> |
|-------------------|--|-------------------------------|--------------------|---|
| 23                | Construction                                   | 15.9%                         | 42.8%              | 6.8%                                      |
| 54                | Professional, Scientific, & Technical Services | 23.9%                         | 57.2%              | 13.7%                                     |
| <b>TOTAL:</b>     |  |                               | <b>100%</b>        | <b>20.5%</b>                              |

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 .428 Construction Contracting Dollars = .068

+

.239 Professional Services MBE/WBE Availability X .572 Professional Services Contract Dollars = .137

**BASE FIGURE=**

(.068) + (.137) = 20.5%

**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.

SFMTA considered making Step 2 adjustments under Part 26. However, it was decided not to make any such adjustment, as SFMTA believes that the past three years of contracting data was enormously impacted by the Covid-19 pandemic. As the calculated base figure of 21% is very close to the 22% goal that had been set for the previous three fiscal years, SFMTA believes those percentages accurately represent what might have been achieved without the disruption caused by the pandemic, and what we think can be achieved as we return to normal activity.

**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 2023-2025.

**TABLE FIVE  
FFY 2023–2025 Summary of DBE Availability  
By NAICS Code and Weighted by FTA Dollars**

| <b>NAICS CODE</b>            | <b>Scope of Work</b>                           | <b>% MBE/WBE Availability</b> |      | <b>% of Dollar</b> | <b>Weighted % of MBE/WBE Availability</b> |
|------------------------------|--|-------------------------------|------|--------------------|---|
| 23                           | Construction                                   | Black American-Owned          | 1.5% | 42.8%              | 0.6%                                      |
|                              |  | Women-Owned                   | 4.8% | 42.8%              | 2.1%                                      |
| 54                           | Professional, Scientific, & Technical Services | Women-Owned Availability      | 5.6% | 57.2%              | 3.2%                                      |
| <b>TOTAL RACE CONSCIOUS:</b> |  |                               |      |                    | <b>5.9%</b>                               |

As with the overall goal, SFMTA determined that an adjustment to the base race-conscious figure was not necessary, given the impact of the pandemic on recent contracting data.

The race-neutral portion is the difference between the portion expected to be met through race-conscious measures and the DBE overall goal of 21%, as follows:

21% DBE overall goal - 6% 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.
- **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 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. Additionally, SFMTA has implemented SBE set-asides on both construction contracts and professional services contracts, when feasible. Going forward, SFMTA will continue to assess the feasibility of utilizing SBE set-asides as a way of maximizing

opportunities for DBE participation.

## **IX. 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 June 7, 2022 at 10 AM Pacific Time via Zoom Webinar – ID 875-2604-9711. 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. 104 registered for the event and 59 attended (including 51 firms from the public).

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.

### **Questions and Comments Received:**

- Several attendees made comments that the DBE goals and certification processes are complicated, regressive, ineffective, and in need of change. The DBE program certification and participation is costly in terms of time commitment necessary to prepare documents and attend public outreach meetings. The costs yield unsustainable returns on investment in terms of new business.
- It was suggested that a congressional review is needed to address racial disparities in the FTA procurement processes.
- A request to the panelists was made to address the availability and effectiveness of DBE certification and mentor/protégé programs at their respective agencies.
- Statements were made regarding how low goals are discouraging to DBEs and an impediment to participation in the program. Goals should be over 20%. Less than 10% will discourage DBEs and lead to reduced participation.
- One commenter mentioned scheduling of public DBE outreach meetings should take into consideration smaller mom-and-pop businesses that find it challenging to attend meetings during regular business hours; daytime meeting attendance will be low because small businesses do not have sufficient staff to both run their businesses and attend meetings.
- Funding is needed to allow transit agencies to hire more staff dedicated to DBE outreach, education, and mentor programs.

- Dismal results of disparity studies are not sufficiently considered during the goal setting process in a way that will increase DBE participation.
- Positive DBE participation outcomes in individual projects should be highlighted on social media as a means to attract greater DBE participation.
- Staff at the agency level need to innovate new ways to put DBEs in contact with prime contractors and advocate for DBEs with their respective boards and other stakeholders.
- A request was made for agency staff to include specific NAICS codes in RFPs.
- One attendee asked if it is possible to have the NAICS code assigned to their business changed or re-evaluated.
- Caltrans has minor contracts and emergency contracts that are often smaller in size dollar wise. Do the panel agencies have similar sized projects that may be more accessible for DBEs to perform as primes?
- Transit staff need more agencies to respond immediately to feedback from Caltrans, DBEs, internal stakeholders and the FTA.

**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 21 percent overall DBE goal for all FTA-funded contracts anticipated to be awarded for FFYs 2023-2025, with a breakdown of 15% to be achieved by race-neutral means and 6% 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.