

THIS STAFF REPORT COVERS CALENDAR ITEM NO.: 7.2
FOR THE MEETING OF: October 8, 2009

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION:

Approval of an amendment to the TJPA Small Business Enterprise (SBE) Program, allowing utilization of set-asides for SBEs as appropriate given market availability.

EXPLANATION:

The TJPA SBE Program was officially adopted by the TJPA Board on June 11, 2009. The Program allows TJPA to set enforceable contract goals for SBE utilization.

The SBE Program currently states in Section VI that, "The TJPA will not use quotas or set-asides in any way in the administration of this SBE Program." Since adoption of the SBE Program, TJPA staff has conducted further research as to whether or not the U.S. Department of Transportation (USDOT) will allow small business set-asides and has found that small business set-asides are allowable. The following guidance has been published by the USDOT Office of Small and Disadvantaged Business Utilization (emphasis added):

"The DBE rule defines a set-aside as "a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms." (49 CFR Part 26.5)

The rule limits set-asides, defined in this way, to "limited and extreme circumstances, when no other method could be reasonably expected to remedy egregious instances of discrimination." (49 CFR Part 26.43(b))

A race-neutral small business set-aside (i.e., in which a recipient sets aside certain contracts for competition only among small businesses, regardless of race or gender) does not restrict contract eligibility solely to DBEs.

For this reason, the rule's limit on DBE set-asides does not apply to a race-neutral small business set-aside."

TJPA staff believes that several trade packages offer opportunities that may be appropriately targeted towards SBEs, including logistics (such as fencing, temporary power, etc.), site protection, trucking, utility relocation and miscellaneous finishes. If this amendment to the SBE Program is approved, staff will work with the CM/GC to continue to develop and refine a trade package work plan for the Transit Center & Bus Ramps that may include small business set-asides as appropriate. This amendment would revise Section VI of the SBE Program to state, "The TJPA shall use set-asides for small business enterprises as appropriate in the administration of this SBE Program."

RECOMMENDATION:

Approve the proposed amendment to the TJPA Small Business Enterprise Program, allowing the use of small business set-asides as appropriate.

ATTACHMENTS:

1. Resolution
2. TJPA Small Business Enterprise (SBE) Program, Revised

**TRANSBAY JOINT POWERS AUTHORITY
BOARD OF DIRECTORS**

Resolution No. _____

WHEREAS, The Transbay Joint Powers Authority (TJPA) has implemented a Small Business Enterprise (SBE) Program since June 2009 to encourage greater participation by small business firms, including Disadvantaged Business Enterprises (DBE) in TJPA contracting; and

WHEREAS, The DBE regulations (49 CFR Part 26) prohibit the use of quotas or set-asides except in "limited and extreme circumstances" in the implementation of a DBE Program, but the U.S. Department of Transportation (USDOT) does not prohibit the use of small business set-asides; and

WHEREAS, SBE participation may be maximized by the use of small business set-asides on trade work packages or contracts as appropriate given the availability of small businesses in the marketplace; now, therefore, be it

RESOLVED, That the TJPA Board approves an amendment to the SBE Program, allowing for the use of small business set-asides as appropriate in the implementation of the SBE Program.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of October 8, 2009.

Secretary, Transbay Joint Powers Authority

TRANSBAY JOINT POWERS AUTHORITY

Board Policy No. 015

Category: Financial Matters

SMALL BUSINESS ENTERPRISE (SBE) PROGRAM

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Transbay Joint Powers Authority Small Business Enterprise (SBE) Program

I. Certification Requirements

Any business that is certified under any of the programs outlined below shall qualify to participate in the Transbay Joint Powers Authority (TJPA) Small Business Enterprise (SBE) Program.

A. California Certified Small Business (SB) as certified by the California Department of General Services (DGS) – Procurement Division (PD) – Office of Small Business and Disabled Veteran Business Enterprise Services (OSDS)

- Must be independently owned and operated; not dominant in its field of operation;
- With its principal office located in California; its owners (or officers in the case of a corporation) domiciled in California; and
- Together with its affiliates, be either:
 - A business with 100 or fewer employees, and an average annual gross receipts of \$12 million or less over the previous three tax years, or
 - A manufacturer with 100 or fewer employees. A *manufacturer* is a business that is both of the following:
 1. Primarily engaged in the chemical or mechanical transformation of raw materials or processed substances into new products.
 2. Classified between Codes 2000 to 3999, inclusive, of the Standard Industrial Classification (SIC) Manual published by the United States Office of Management and Budget, 1987 edition.

B. City and County of San Francisco Local/Minority/Woman-Owned Business Enterprise (L/M/WBE) as certified by the San Francisco Human Rights Commission (HRC)

- A Local Business Enterprise (LBE) is a Small or Micro business that has had its principal place of business in San Francisco for more than six months, has gross income that does not exceed the economic threshold set by San Francisco Administrative Code Chapter 14B for the applicable industry and has any necessary license.
- A Minority-Owned Business Enterprise (MBE) is any HRC-certified LBE that is owned and controlled by one or more people who belong to one or more of the following ethnic groups: (1) African Americans, defined as persons whose ancestry is from any of the Black racial groups of Africa or the Caribbean; (2) Arab Americans, defined as persons whose ancestry is from an Arabic speaking country that is a current or former member of the League of Arab States; (3) Asian Americans, defined as persons with Chinese, Japanese, Korean, Pacific Islander, Samoan, Filipino, Asian Indian, and Southeast Asian ancestry; (4) Iranian Americans, defined as persons whose ancestry is from the country of Iran; (5) Latino Americans, defined as persons with Mexican, Puerto Rican, Cuban, Central

American or South American ancestry; and (6) Native Americans, defined as any person whose ancestry is from any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition. The minority-owner must be the license qualifier and own at least 51 percent of the business.

- A Woman-Owned Business Enterprise (WBE) is any HRC-certified LBE and is owned and controlled by one or more women. The woman-owner must be the license qualifier and own at least 51 percent of the business.

C. A Disadvantaged Business Enterprise (DBE), as certified by the California United Certification Program (CUCP); a for-profit small business concern:

- That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
- Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.
 - A Socially and Economically Disadvantaged Individual is any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is:
 - (1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.
 - (2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
 - (i) “Black Americans,” which includes persons having origins in any of the Black racial groups of Africa;
 - (ii) “Hispanic Americans,” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
 - (iii) “Native Americans,” which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
 - (iv) “Asian-Pacific Americans,” which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
 - (v) “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
 - (vi) Women;

- (vii) Any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration (SBA), at such time as the SBA designation becomes effective.

Businesses interested in certification may obtain information at the following sites:

- California Department of General Services, OSDS:
<http://www.pd.dgs.ca.gov/smbus/certapps.htm>
- City & County of San Francisco HRC: <http://www.sfgov.org/sfhumanrights>
- California United Certification Program:
http://www.dot.ca.gov/hq/bep/business_forms.htm

II. Objectives / Policy Statement

The TJPA hereby establishes a Small Business Enterprise (SBE) Program. It is the policy of the TJPA to ensure that SBEs, as defined above, have an equal opportunity to receive and participate in TJPA contracts. It is also the TJPA's intention to:

- create a level playing field on which SBEs can compete fairly for TJPA contracts;
- remove barriers to SBE participation in the bidding, award and administration of TJPA contracts;
- assist SBEs to develop and compete successfully outside of the Program
- ensure that only SBEs meeting the eligibility requirements are allowed to participate as SBEs
- identify business enterprises that are qualified as SBEs and are qualified to provide TJPA with required materials, equipment, supplies and services; and to develop a good rapport with the owners, managers and sales representatives of those enterprises

The Contract Compliance Manager has been designated the SBE Liaison Officer (SBELO). In that capacity, the Contract Compliance Manager is responsible for implementing all aspects of the SBE Program. Implementation of the SBE Program is accorded the same priority as compliance with the TJPA DBE Program.

The Contract Compliance Manager has disseminated this policy statement to the TJPA Board of Directors and all components of the TJPA's organization. The TJPA has made the draft SBE Program and final SBE program available to SBE and non-SBE business communities that perform work for it by publishing an announcement of availability in general circulation, woman/minority-focused, and trade association publications.

III. Nondiscrimination

The TJPA will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract on the basis of race, color, sex, or national origin, nor on the fact or perception of a person's creed, religion, ancestry, age, sexual orientation, gender identity, domestic partner status, marital status, height, weight, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status). In administering its SBE Program, the TJPA will not, directly or

through contractual or other arrangements, use criteria or methods of administration whose purpose is to defeat or substantially impair accomplishment of the objectives of the SBE Program with respect to individuals in the groups or categories or having the characteristics listed above.

IV. SBE Participation

TJPA will not provide bid discounts or bid preferences for SBE participation. For contracts with no SBE goal, TJPA strongly encourages the prime contractor to make good faith efforts to include SBEs to perform meaningful work in all aspects of the project. To count towards an SBE contract goal, a business must be certified on the date bids or proposals are received.

1. Nature of SBE Participation. SBE participation includes contracts (other than employee contracts) with SBEs for any goods or services specifically required for the completion of the work under the contract. An SBE may participate as a prime contractor, subcontractor, joint venture partner with a prime contractor, vendor of material or supplies incorporated or expended in the work, or a supplier of other services such as shipping, transportation, testing, equipment rental, insurance services and other support services necessary to fulfill the requirements of the contract.
2. Function. An SBE must perform a commercially useful function, i.e., must be responsible for the execution of a distinct element of work and must carry out its responsibility by actually performing, managing and supervising the work. However, an SBE may contract out a portion of the work if it is considered to be a normal industry practice. There is a rebuttable presumption that if the SBE is not responsible for at least 30 percent of the work with its own forces, or subcontracts a greater portion of the work than the normal industry standard, it is not performing a commercially useful function. An SBE trucking company is performing a commercially useful function if it is responsible for the overall management and supervision of the transportation services involved and uses at least one truck that is owned, insured and operated by its own employees.
3. Determining the Amount of SBE Participation. SBE participation includes that portion of the contract work actually performed by a certified SBE with its own forces. An SBE's participation can only be counted if it is performing a commercially useful function on the contract, as defined above.

The Contractor shall determine the amount of SBE participation for each SBE performing work on the contract in terms of both the total value of the work in dollars and the percentage of the total contract bid price. The Contractor shall also determine the total amount of SBE participation for the entire contract. The Contractor shall count SBE participation according to the following guidelines:

- a. **SBE Prime Contractor** - Count the entire dollar amount of the work performed or services provided by the SBE's own forces, including the cost of materials and supplies obtained for the work and the reasonable fees and commissions charged for the services. Do not count any work subcontracted to another firm as SBE participation by the SBE Prime Contractor.

- b. SBE Subcontractor - Count the entire amount of the work performed or services provided by the SBE's own forces, including the cost of materials and supplies obtained for the work (except for materials and supplies purchased or leased from the Prime Contractor) and reasonable fees and commissions charged for the services. Do not count any work subcontracted by an SBE subcontractor to another firm as SBE participation by said SBE subcontractor. If the work has been subcontracted to another SBE, it will be counted as SBE participation by that other SBE.
- c. SBE Joint Venture Partner - Count the portion of the work that is performed solely by the SBE's forces or if the work is not clearly delineated between the SBE and the joint venture partner, count the portion of the work equal to the SBE's percentage of ownership interest in the joint venture.
- d. SBE Regular Dealer - Count 60 percent of the costs of materials and supplies obtained from an SBE regular dealer that owns, operates or maintains a store or warehouse in which the materials and supplies are regularly bought, kept in stock and sold or leased to the public in the usual course of business (except regular dealers of bulk items such as petroleum, cement and gravel who own and operate distribution equipment in lieu of maintaining a place of business). This applies whether an SBE is a prime contractor or subcontractor.
- e. Other SBEs - Count the entire amount of fees or commissions charged for assistance in procuring or delivering materials and supplies when purchased from a SBE that is not a manufacturer or regular dealer. Do not count the cost of the materials and supplies.
- f. SBE Trucking Company - Count the entire amount of the transportation services provided by an SBE trucking company that performs the work using trucks it owns, insures and operates with its own employees.

Count the entire amount of the transportation services provided by an SBE trucking company that performs the work using trucks it leases from another SBE (including an owner-operator) provided that it is responsible for the overall management and supervision of the service and that it uses at least one truck that it owns, insures and operates with its own employees on the contract.

Count the entire amount of fees and commissions charged for providing the management and supervision of transportation services using trucks it leases from a non-SBE trucking company (including owner-operator) provided that it is responsible for the overall management and supervision of the service and that it uses at least one truck that it owns, insures and operates with its own employees on the contract.

V. SBE Program Updates

The TJPA will continue to carry out this Program until significant changes to the Program are adopted.

VI. Small Business Set-Asides

The TJPA shall use set-asides for small business enterprises as appropriate in the administration of this SBE Program.

VII. SBE Liaison Officer (SBELO)

The TJPA has designated the following individual as the SBE Liaison Officer (SBELO):

Contract Compliance Manager
Transbay Joint Powers Authority
201 Mission Street, Suite 2100
San Francisco, CA 94105
(415) 597-4620

In this capacity, the Contract Compliance Manager is responsible for implementing all aspects of the SBE Program. The Contract Compliance Manager has direct, independent access to the TJPA Executive Director concerning SBE Program matters. The SBELO is responsible for developing, implementing, and monitoring the SBE Program, in coordination with other appropriate officials. Duties and responsibilities include the following:

1. Gather and report statistical data and other information as required.
2. Review third-party contracts and purchase requisitions for compliance with this Program.
3. Ensure that bid notices and requests for proposals are available to SBEs in a timely manner.
4. Identify contracts and procurements so that SBE goals are included in solicitations and monitor results.
5. Analyze the TJPA's progress toward goal attainment and identify ways to improve progress.
6. Participate in pre-bid meetings.
7. Advise the TJPA Executive Director and Board of Directors on SBE matters and achievement.
8. Participate with legal counsel and project staff to determine contractor compliance with good faith efforts.
9. Provide SBEs with information and assistance in preparing bids.
10. Plan and participate in SBE training seminars.
11. Provide outreach to SBEs and community organizations to advise them of opportunities.

VIII. Directories

The TJPA will refer interested persons to the SBE directories available from the following certification agencies:

- California Department of General Services Procurement Department website - <http://www.eprocure.dgs.ca.gov/default.htm>

- San Francisco Local Business Enterprise Directory
website - http://sfgov.org/site/uploadedfiles/sfhumanrights/directory/vlistS_1.htm
- California United Certification Program (CUCP)
website - <http://www.dot.ca.gov/hq/bep/ucp.htm>

IX. Monitoring and Enforcement Mechanisms

1. Monitoring Actual SBE Participation

The SBELO shall monitor and track the actual SBE participation through contractor and subcontractor reports of payments. The SBELO will maintain a running tally of payments actually made to SBE firms and may require prime contractors and SBE subcontractors and suppliers to provide appropriate documentation to verify such payments.

The SBELO shall ensure that SBE participation is counted toward contract and overall goals on TJPA contracts in accordance with the SBE Program. Credit toward overall or contract goals may only be given upon satisfactory evidence that payments were actually made to SBEs.

2. Contracting and Tracking SBE Participation

Only the work actually performed by a SBE will be counted towards contract and overall goals. The cost of supplies and materials obtained by the SBE or equipment leased (except from the prime contractor or its affiliate) may also be counted.

Work that a SBE subcontracts to a non-SBE firm does not count toward the contract goal. Expenditures may only be counted if the SBE is performing a commercially useful function. A SBE should perform at least thirty percent (30%) of the total cost of its contract with its own work force.

If materials or supplies are obtained from a SBE manufacturer, 100 percent (100%) of the cost will be counted. If the materials and supplies are purchased from a SBE regular dealer, 60 percent (60%) of the cost will be counted.

SBE achievement will not be counted toward the goal until the SBE has been paid. Additionally, the SBELO will not count that portion of a SBE's participation that is achieved after the certification of the SBE has been removed during the performance of a contract.

3. Construction Contract Monitoring

The TJPA will assign, or engage under a professional services contract, a Resident Engineer (RE) or Contract Manager to monitor and track actual SBE participation through contractor and subcontractor reports of payments in accordance with the following:

A. After Contract Award

After the contract award, the TJPA will review the award documents for the portion of items each SBE and first-tier subcontractor will be performing and the dollar value of that work. With these documents, the RE/Contract Manager will be able to determine the work to be performed by the SBEs or subcontractors listed.

B. Pre-construction Conference

A pre-construction conference will be scheduled between the RE/Contract Manager and the contractor or its representative to discuss the work each SBE subcontractor will perform.

Before work can begin on a subcontract, the TJPA will require the contractor, supplier, vendors, or manufacturers to submit a completed “Bidders/Proposers Information Request Form.” (see Attachment A). The RE/Contract Manager will ensure that the RE/Contract Manager’s staff (inspectors) knows what items of work each SBE is responsible for performing based on the “Bidders/Proposers Information Request Form.” Inspectors will notify the RE/Contract Manager immediately of apparent violations.

When a firm other than the listed SBE subcontractor is found performing the work, the RE/Contract Manager will notify the contractor of the apparent discrepancy and potential loss of payment. Based on the contractor’s response, the RE/Contract Manager will take appropriate action: The SBELO will perform a preliminary investigation to identify any potential issues related to the SBE subcontractor performing a commercially useful function. Any substantive issues will be forwarded to the relevant certification office. If the contractor fails to adequately explain why there is a discrepancy, payment for the work will be withheld and a letter will be sent to the contractor referencing the applicable specification violation and the required withholding of payment.

Providing evidence of SBE payment is the responsibility of the contractor. The TJPA will require the contractor to submit a “Progress Payment Report” (see Attachment C) with every invoice, which summarizes the actual amounts due to every SBE and non-SBE subcontractor for services performed in that period. The contractor will also be required to submit to the TJPA a “Subcontractor Payment Declaration” (see Attachment D) as proof of payment to SBE and non-SBE subcontractors.

4. Substitution

When a SBE substitution is requested, the RE/Contract Manager will request a letter from the contractor explaining why substitution is needed. The RE/Contract Manager must review the letter to be sure names and addresses are shown, dollar values are included, and the reason for the request is explained. If the RE/Contract Manager agrees to the substitution, the RE/Contract Manager will notify the SBE subcontractor in writing regarding the proposed substitution and procedure for written objection from the SBE subcontractor in accordance with the Subletting and Subcontracting Fair Practices Act. If the contractor is not meeting the contract goal with this substitution, the contractor must provide the required good faith effort to the RE/Contract Manager for consideration.

If there is any doubt in the RE/Contract Manager’s mind regarding the requested substitution, the RE/Contract Manager may contact the SBELO for assistance and direction.

5. Record Keeping and Final Report

The contractor shall maintain records and prepare a “Final Expenditure Report” (see Attachment E) showing the name and address of each first-tier subcontractor. The “Final Expenditure Report” shall also show:

- a) The name and business address, regardless of tier, of every SBE subcontractor, SBE vendor of materials, and SBE trucking company; and
- b) The date of final payment and the total dollar figure paid to each of the firms. The SBE prime contractor shall also show the date of work performed by its own forces, along with the corresponding dollar value of the work claimed toward SBE goals.

When a contract has been completed, the contractor will provide the “Final Expenditure Report” and a summary of the records stated above. The RE/Contract Manager will compare the completed “Bidders/Proposers Information Request Form” to the contractor’s completed “Final Expenditure Report.” The SBEs shown on the completed records should be the same as those originally listed unless an authorized substitution was made or the contractor used additional SBEs. The dollar amount should reflect any changes made in planned work done by the SBEs. The contractor will be required to explain in writing why the names of the subcontractors, the work items, or the dollar figures are different from what was originally shown on the completed “Bidders/Proposers Information Request Form”. The explanation will be attached to the completed “Final Expenditure Report” for submittal. The RE/Contract Manager will file this in the project records.

The SBELO will keep track of the SBE certification status and keep the RE/Contract Manager informed of changes that affect the contract. The RE/Contract Manager will require the contractor to act in accordance with existing contractual commitments regardless of decertification.

The TJPA will bring to the attention of the relevant certification agency any false, fraudulent, or dishonest conduct in connection with the Program. The TJPA also will consider similar action under its own legal authority, including responsibility determinations in future contracts.

X. Contract Goals

The TJPA shall use contract goals for SBE participation on contracts that have subcontracting possibilities. Contract goals shall be enforceable and compliance with the goal or good faith efforts to do so shall be a condition of contract award. Contract goals need not be established on every such contract, and the size of contract goals will be adapted to the circumstances of each such contract (e.g., type and location of work and availability of SBEs to perform the particular type of work). The contract work items will be compared with eligible SBE contractors willing to work on the project. A determination will be made regarding which items are likely to be performed by the prime contractor and which ones are likely to be performed by the subcontractor(s). The goal will then be incorporated into the contract documents. Contract goals will be expressed as a percentage of the total amount of a contract.

XI. Good Faith Efforts

1. Information to be Submitted

The TJPA treats bidders'/proposers' compliance with good faith effort requirements as a matter of responsiveness. A responsive proposal meets all the requirements of the advertisement and solicitation. Each solicitation for bids/proposals will require the bidders/proposers to submit the "Bidders/Proposers Information Request Form" (Attachment A), which should include:

- a) The names and addresses of known SBE firms that will participate in the contract;
- b) A description of the work that each SBE will perform;
- c) The dollar amount of each SBE firm's participation;
- d) Written and signed documentation of commitment to use a SBE subcontractor whose participation is submitted to meet a contract goal;
- e) Written and signed confirmation from the SBE that it is participating in the contract as provided in the prime contractor's commitment; and
- f) If the contract availability advisory is not met, evidence of good faith efforts (Attachment B).

2. Demonstration of Good Faith Efforts

The obligation of the bidder/proposer is to make good faith efforts. The bidder/proposer can demonstrate that it has done so either by meeting the contract goal or by documenting good faith efforts. Examples of good faith efforts are found in Appendix A, attached.

The Contract Compliance Manager is responsible for determining whether a bidder/proposer who has not met the contract goal has documented sufficient good faith efforts to be regarded as responsive.

The TJPA will ensure that all information is complete and accurate and adequately documents the bidder's/proposer's good faith efforts before a commitment to the performance of the contract by the bidder/proposer is made.

3. Administrative Reconsideration

Within ten (10) days of being informed by the TJPA that it is not responsive because it has not documented sufficient good faith efforts, a bidder/proposer may request administrative reconsideration. Bidders/proposers should make this request in writing to the following reconsideration official:

Maria Ayerdi-Kaplan, Executive Director
Transbay Joint Powers Authority
201 Mission Street, Suite 2100
San Francisco, CA 94105
(415) 597-4620

The reconsideration official will not have played any role in the original determination that the bidder/proposer did not make or document sufficient good faith efforts.

As part of this reconsideration, the bidder/proposer will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The bidder/proposer will also have the opportunity to meet in person with the reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. The TJPA will send the bidder/proposer a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the State of California, City and County of San Francisco, or U.S. Department of Transportation.

4. Good Faith Efforts when a SBE is Replaced on a Contract

The TJPA will require a contractor to make good faith efforts to replace a SBE that is terminated or has otherwise failed to complete its work on a contract with another certified SBE, to the extent needed to meet the contract goal. The prime contractor is required to notify the RE/Contract Manager immediately of a SBE's inability or unwillingness to perform, and it must provide reasonable documentation.

In this situation, the prime contractor will be required to obtain the TJPA's prior approval of a substitute SBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts. If the contractor fails or refuses to comply in the time specified, the TJPA's contracting office will issue an order stopping all or part of the payment and/or work until satisfactory action has been taken. If the contractor still fails to comply, the contracting officer may issue a termination for default proceeding.

XII. Information Collection and Reporting

1. Bidders List

The TJPA will create and maintain a bidders list, consisting of information about all SBE and non-SBE firms that bid or quote on its contracts. The bidders list will include the name, address, SBE/non-SBE status, age, and annual gross receipts of firms. The TJPA has incorporated a "Bidders/Proposers Information Request Form," (Attachment A) hereto into its solicitation documents, requiring that bidders/proposers provide all requested information in their submissions.

2. Monitoring Payments to SBEs

Prime contractors are required to maintain records and documents of payments to SBEs for three (3) years following the performance of the contract. These records shall be made available for inspection upon request by any authorized representative of the TJPA. This reporting requirement also extends to any certified SBE subcontractor.

Payments to SBE subcontractors will be reviewed by the TJPA to ensure that the actual amount paid to SBE subcontractors equals or exceeds the dollar amounts stated in the schedule of SBE participation.

3. Confidentiality

The TJPA will safeguard from disclosure to third parties information that may reasonably be regarded as confidential business information, consistent with Federal, state, and local laws.

APPENDIX A

GUIDANCE CONCERNING GOOD FAITH EFFORTS

- I. When a goal has been established on a contract, a bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by SBE firms sufficient for this purpose. Second, even if it does not meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a SBE goal or other requirement of this Program that, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient SBE participation, even if they were not fully successful.
- II. In any situation in which a contract goal has been established, it is up to the TJPA to make a fair and reasonable judgment as to whether a bidder that did not meet the goal made adequate good faith efforts. TJPA shall consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain SBE participation sufficient to meet the SBE contract goal. Mere *pro forma* efforts are not good faith efforts to meet the SBE contract requirements; however, meeting quantitative formulas is not required.
- III. The TJPA shall not require that a bidder meet a contract goal (*i.e.*, obtain a specified amount of SBE participation) in order to be awarded a contract if the bidder makes an adequate good faith efforts showing. This rule specifically prohibits TJPA from ignoring *bona fide* good faith efforts.
- IV. The following is a list of types of actions that TJPA shall consider as part of the bidder's good faith efforts to obtain SBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases:
 - A. Soliciting through all reasonable and available means (*e.g.*, attendance at pre-bid meetings, advertising, and/or written notices) the interest of all certified SBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the SBEs to respond to the solicitation. The bidder must determine with certainty if the SBEs are interested by taking appropriate steps to follow up initial solicitations.
 - B. Selecting portions of the work to be performed by SBEs in order to increase the likelihood that the SBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate SBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.

- C. Providing interested SBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.
 - D. 1. Negotiating in good faith with interested SBEs. It is the bidder's responsibility to make a portion of the work available to SBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available SBE subcontractors and suppliers, so as to facilitate SBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of SBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for SBEs to perform the work.

2. A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including SBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using SBEs is not in itself sufficient reason for a bidder's failure to meet the contract SBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from SBEs if the price difference is excessive or unreasonable.
 - E. Not rejecting SBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.
 - F. Making efforts to assist interested SBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.
 - G. Making efforts to assist interested SBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
 - H. Effectively using the services of available woman/minority community organizations, woman/minority contractors' groups, local, state, and Federal woman/minority business assistance offices, and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of SBEs.
- V. In determining whether a bidder has made good faith efforts, TJPA may take into account the performance of other bidders in meeting the contract goal. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average SBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.