

**THIS STAFF REPORT COVERS CALENDAR ITEM NO.: 9
FOR THE MEETING OF: April 9, 2009**

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION:

Amending Contract No. 08-04-CMGC-000, Construction Manager/General Contractor ("CM/GC") Services for the Construction of the Transbay Transit Center Building and Related Structures, with the joint venture of Webcor Builders and Obayashi Corporation, to place a binding Small Business Enterprise (SBE) utilization goal of 17 percent on the contract.

SUMMARY:

- On March 12, 2009, the TJPA Board approved the award of the CM/GC contract, with the caveat that a contract amendment would be brought to the Board in April to add a small business enterprise component to the contract.
- TJPA staff has proposed a Small Business Enterprise Program for adoption by the Board; it is the subject of a separate calendar item and its adoption would allow for the placement of a binding goal for small business utilization on a contract. The Program would recognize certification from any one of three existing certification programs—the California Department of General Services Procurement Division Office of Small Business and Disabled Veteran Business Enterprise Services, the City and County of San Francisco Human Rights Commission, and the California United Certification Program.

EXPLANATION:

The CM/GC was brought on board to work closely with the TJPA's staff and other consultants in performing preconstruction services to assist in the development of the design and packaging and bidding of the construction work. Recommendations regarding pricing, procurement strategies and cost savings opportunities are a key component of the CM/GC scope, and that scope is one of the primary reasons having the CM/GC under contract at this time is so important to the Transbay Transit Center Program.

Webcor/Obayashi will agree to the inclusion of an SBE utilization goal on this contract. Webcor/Obayashi will begin the process of generating subcontractor interest and analyzing the best methods for packaging the work at the beginning of pre-construction services. This process also includes looking at external market conditions, and analysis will include trade-offs between cost premiums and SBE utilization, in order for a detailed SBE work plan to be developed and appropriate SBE goals to be placed on the various trade packages. The goals will be met by a combination of direct bidding to SBE contractors plus prime contractors meeting SBE percentage goals. The direct bidding effort will include early notification and specific outreach to all certified SBE's in each of the 3 programs. Early training seminars will be held to investigate their capabilities, prepare them for the bidding requirements and inform them of the projects requirements. Should they need assistance to submit their pre-qualifications, prepare their bids, acquire insurance and bonding, etc; an appropriate level will be provided. Pre-bid meetings will be held prior to bid to insure an understanding of the scope, terms and conditions prior to bid. After award of contract, additional assistance in submittal preparation, reporting, billings, scheduling and safety will be provided to assist them in a successful contract execution. For SBE's bidding to prime contractors, much of the same efforts will be required of the prime contractors with Webcor/Obayashi overseeing their efforts.

The 17 percent goal was arrived at using standard methodology, looking at U.S. Census Bureau data to determine the size of the marketplace for each type of work needed for construction of the Transbay Transit Center, and then looking at the availability of Small and Disadvantaged Business Enterprises in each work category. Staff recommends using the 17 percent figure that was calculated as a DBE availability advisory percentage due to significant overlap in the directories of the three certifying agencies to be used in the TJPA Small Business Enterprise Program. The 17 percent is an overall contract goal; based on availability of small businesses in a

particular work category, trade packages will have differing goals. Webcor/Obayashi must meet the overall contract goal or make good faith efforts to do so. Meeting the goal for a trade package or demonstrating good faith efforts to do so will also be the responsibility of any subcontractor bidding on a trade package. Guidance regarding good faith efforts has been included in the TJPA Small Business Program.

RECOMMENDATION:

Staff recommends that the TJPA Board of Directors authorize amending Contract No. 08-04-CMGC-000, Construction Manager/General Contractor ("CM/GC") Services for the Construction of the Transbay Transit Center Building and Related Structures, with the joint venture of Webcor Builders and Obayashi Corporation, to place a binding Small Business Enterprise (SBE) utilization goal of 17 percent on the contract.

ENCLOSURE:

1. Resolution
2. Amended Contract Section 00 08 21

**TRANSBAY JOINT POWERS AUTHORITY
BOARD OF DIRECTORS**

Resolution No. _____

WHEREAS, On January 17, 2008, the TJPA Board adopted Resolution No. 08-002 approving the use of Integrated Project Delivery for the Phase 1 Construction of the Transbay Transit Center and authorizing the Executive Director to issue a Request for Qualifications for a Construction Manager/General Contractor (CM/GC); and

WHEREAS, On June 20, 2008, the Transbay Joint Powers Authority (TJPA) issued a Request For Qualifications for TJPA Contract No. 08-04-CMGC-000, CM/GC Services for the Construction of the Transbay Transit Center Building and Related Structures, which is part of the Transbay Transit Center Program; and

WHEREAS, Under this Contract, the CM/GC will provide pre-construction services and construction services; and

WHEREAS, During the Pre-Construction Services Phase, the CM/GC will work closely with the TJPA and the Architect to most efficiently and cost effectively scope, design, bid and construct Phase 1 of the Transbay Transit Center; and

WHEREAS, The CM/GC will perform construction services consistent with those of a general contractor to coordinate, bid, and manage all construction work through subcontractors and provide construction administration and management services for the Phase 1 construction of the Transbay Transit Center; and

WHEREAS, On February 12, 2009, TJPA received and opened publicly three competitive Cost Proposals; and

WHEREAS, TJPA determined that the joint venture of Webcor Builders and Obayashi Corporation is the responsible bidder submitting the lowest responsive bid, with a bid of \$49,940,000 (not including Direct Costs of Phase I Construction Trade Packages); and

WHEREAS, On March 12, 2009, the TJPA Board adopted Resolution No. 09-004 authorizing the award of TJPA Contract No. 08-04-CMGC-000, Construction Manager/General Contractor Services for the Construction of the Transbay Transit Center Building and Related Structures, Phase 1, to Webcor/Obayashi, JV and further resolving that TJPA Staff and Webcor/Obayashi, JV, would return to the TJPA Board at the at the April 2009 Board meeting to recommend a proposed amendment to the Contract, adding a small business enterprise component to the Contract; and

WHEREAS, TJPA Staff has developed a Small Business Enterprise Policy and recommends a 17% binding small business enterprise utilization goal on Contract No. 08-04-CMGC-000; now, therefore, be it,

RESOLVED, That the TJPA Board of Directors authorizes amending Contract No. 08-04-CMGC-000, Construction Manager/General Contractor ("CM/GC") Services for the Construction of the Transbay Transit Center Building and Related Structures, with the joint venture of Webcor Builders and Obayashi Corporation, to place a binding Small Business Enterprise (SBE) utilization goal of 17 percent on the contract.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of April 9, 2009.

Secretary, Transbay Joint Powers Authority

SECTION 00 08 21

DISADVANTAGED & SMALL BUSINESS ENTERPRISE AND EQUAL EMPLOYMENT
OPPORTUNITY/EMPLOYMENT NON-DISCRIMINATION REQUIREMENTS

1.1 SUMMARY

- A. This Document includes the TJPA's Disadvantaged Business Enterprise, Small Business Enterprise and Equal Employment Opportunity/Employment Non-discrimination compliance provisions.
- B. Comply with all provisions to the extent necessary to fulfill their intent except where prohibited by state or federal law or regulation.

1.2 DISADVANTAGED BUSINESS ENTERPRISE (DBE) REQUIREMENTS

- A. It is the policy of the TJPA to ensure nondiscrimination on the basis of race, color, sex or national origin in the award and administration of U.S. Department of Transportation (DOT)-assisted contracts. It is the intention of the TJPA to create a level playing field on which DBEs can compete fairly for contracts and subcontracts relating to the TJPA's construction, procurement and professional services activities.

Pursuant to 49 CFR Section 26.13, the TJPA is required to make the following assurance in every DOT-assisted contract and subcontract:

The contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the TJPA deems appropriate.

The Contractor is responsible for reviewing the policies outlined in the attached Caltrans Exhibits 10-I, Notice to Bidders/Proposers DBE Information, and 10-J, Standard Agreement for Subcontractor/DBE Participation, in addition to the TJPA's DBE Program. The TJPA DBE Program is available on the TJPA website: <http://www.transbaycenter.org> > Documents > Other Documents/Forms > Disadvantaged Business Enterprise (DBE) Program.

- B. The TJPA has established a DBE Availability Advisory Percentage of 17% for this Contract. The DBE Availability Advisory Percentage is not an enforceable goal under the Caltrans-mandated changes to the DBE Program, and compliance with the advisory is not a condition of contract award; however, Contractor is referred to Paragraph 1.3 below, Small Business Enterprise Requirements.
- C. Only DBEs currently certified in the California United Certification Program (CUCP) may participate as DBEs in the TJPA's DBE Program. The CUCP Directory may be found on the Caltrans website at http://www.dot.ca.gov/hq/bep/find_certified.htm.
- D. Pursuant to the monitoring requirements outlined in Section XIII of the TJPA's DBE Program and 49 CFR 26.37, Contractor will be required to complete and submit the Bidders/Proposers Information Request Form whenever subcontractor information is updated,

regardless of DBE participation. The Contractor will be required to submit the TJPA's Progress Payment Report with every invoice request, the Subcontractor Payment Declaration as proof of payment to DBE and non-DBE subcontractors, and the Final Expenditure Report with the completion of the contract. These forms are available on the TJPA website: <http://www.transbaycenter.org> > Documents > Other Documents/Forms > DBE Forms.

1.3 SMALL BUSINESS ENTERPRISE (SBE) PROGRAM REQUIREMENTS

- A. It is the policy of the TJPA to encourage participation by small business firms in TJPA contracting. It is the intention of the TJPA to create a level playing field on which SBEs can compete fairly for contracts and subcontracts relating to the TJPA's construction, procurement and professional services activities.

The Contractor is responsible for reviewing the policies outlined in the TJPA's SBE Program. The TJPA SBE Program is available on the TJPA website: <http://www.transbaycenter.org> > Documents > Other Documents/Forms > Small Business Enterprise (SBE) Program.

- B. The TJPA has established a SBE Utilization Goal of 17% overall for this Contract. The SBE Utilization Goal is an enforceable goal under the SBE Program, and compliance with the SBE Program is mandatory.
- C. If the Contractor is unable to meet the SBE Utilization Goal, the Contractor is required to submit sufficient evidence of good faith efforts to meet the goal, in compliance with the TJPA SBE Program.
- D. DBEs currently certified in the California United Certification Program (CUCP) may participate as SBEs in the TJPA's SBE Program, as well as SBEs certified by the City and County of San Francisco Human Rights Commission, and the California Department of General Services Office of Small Business and Disabled Veteran Business Enterprise Services (OSDS). The CUCP Directory may be found on the Caltrans website at http://www.dot.ca.gov/hq/bep/find_certified.htm. The SF LBE Directory may be found on the City's website at http://sfgov.org/site/uploadedfiles/sfhumanrights/directory/vlistS_1.htm. The California OSDS directory may be found online at <http://www.eprocure.dgs.ca.gov/default.htm>.
- E. Pursuant to the monitoring requirements outlined in Section IX of the TJPA's SBE Program, Contractor will be required to complete and submit the Bidders/Proposers Information Request Form whenever subcontractor information is updated, regardless of SBE participation. The Contractor will be required to submit the TJPA's Progress Payment Report with every invoice request, the Subcontractor Payment Declaration as proof of payment to SBE and non-SBE subcontractors, and the Final Expenditure Report with the completion of the contract. These forms are available on the TJPA website: <http://www.transbaycenter.org> > Documents > Other Documents/Forms > DBE Forms.

1.4 EMPLOYMENT NON-DISCRIMINATION REQUIREMENTS

- A. Contractor shall promote and ensure equal employment opportunities for persons of all ethnic backgrounds and genders in the construction workforce. Prior to award of the contract, Contractor shall agree in its proposal that it will abide by Administrative Code Chapter 12B by not discriminating against any employee or applicant for employment because of race, color, religion, ancestry, national origin, age, sex, sexual orientation, gender identity, domestic partner

status, marital status, height, weight, disability or AIDS/HIV status, or association with members of classes protected under this chapter or in retaliation for opposition to any practices forbidden under Chapter 12B. This prohibition includes discrimination in employment, upgrading, demotion, transfer, recruitment advertising or recruitment, layoff or termination, rates of pay or other forms of compensation, and selection for training including apprenticeship. Contractors shall place the same requirements in its subcontracts.

- B. Contractor and its subcontractors shall send to each labor union with which they have a collective bargaining agreement a notice advising the union of this commitment to nondiscrimination and shall post copies of this notice in conspicuous places available to employees and applicants for employment.
- C. Neither the provision of a collective bargaining agreement nor the failure of a union with whom contractor has a collective bargaining agreement to refer any group of persons for employment shall excuse contractors' or its subcontractors' obligations not to discriminate under these provisions.
- D. Contractor and its subcontractors shall ensure that all forepersons, superintendents and other on-site supervisory personnel maintain a working environment free of harassment, intimidation, and coercion.
- E. Contractor and its subcontractors shall ensure that all facilities and company activities are non-segregated except that separate or single-user toilet and changing facilities shall be provided to accommodate all workers.
- F. Contractor agrees that the ratio of apprentices to journeypersons employed by contractor on this job will comply with the ratio required on public works projects by California Labor Code section 1777.5.
- G. Upon TJPA request, an authorized representative of contractor, its subcontractors and suppliers will actively participate in compliance review meetings with a representative of the TJPA to review the implementation of these nondiscrimination requirements. The authorized representative of the company in attendance must have authority to commit the organization. Contractor shall be responsible to notify and to require the attendance of its subcontractors at such meetings. Contractors and subcontractors shall abide by any nondiscrimination program imposed by the San Francisco Human Rights Commission (HRC) under San Francisco Administrative Code Chapter 12B.4.
- H. Non-Compliance and Sanctions:
 - 1. A complaint of discrimination in employment initiated by any party after contract award will be processed in accordance with the HRC Rules of Procedures, adopted pursuant to Chapter 12B of the San Francisco Administrative Code.
 - 2. A finding of discrimination may result in imposition of financial penalties and debarment from TJPA contracting.

1.5 SUBMITTALS

- A. With each subcontractor update, submit a completed and signed Bidders/Proposers Information Form.

- B. With each progress payment application, submit a properly completed and executed Progress Payment Report.
- C. Within five days of each payment to a subcontractor, submit to the TJPA Contracts Compliance Manager at the address specified above a completed and signed Subcontractor Payment Declaration.
- D. When processing a contract amendment, modification, or supplemental change order that cumulatively increases the original contract amount by more than 20%, and then for all subsequent modifications, Contractor shall complete and submit to the TJPA Contracts Compliance Manager at the address specified above a Contract Modification Form.
- E. At contract close, submit to the TJPA Contracts Compliance Manager at the address specified above a Final Expenditure Report.

1.6 REGULATORY REQUIREMENTS

- A. A prime contractor or subcontractor shall pay a subcontractor not later than ten (10) days of receipt of each progress payment in accordance with the provision in Section 7108.5 of the California Business and Professions Code concerning prompt payment to subcontractors. The ten (10) days is applicable unless a longer period is agreed to in writing. Any violation of Section 7108.5 shall subject the violating contractor or subcontractor to the penalties, sanction and other remedies of that Section. Federal regulation (49 CFR 26.29) requires that any delay or postponement of payment over thirty (30) days of receipt of each payment may take place only for good cause and with the TJPA's prior written approval. These requirements shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise, available to the prime contractor or subcontractor in the event of a dispute involving late payment, or nonpayment by the prime contractor, deficient subcontract performance, or noncompliance by a subcontractor. This provision applies to both DBE and non-DBE prime contractors and subcontractors.
- B. If the TJPA requires retainage from the prime contractor, and prompt and regular incremental acceptances of portions, as determined by the TJPA, of the contract work and retainage is paid to the prime contractor based on these acceptances, then the prime contractor or subcontractor shall return all monies withheld in retention from all subcontractors within thirty (30) days after receiving payment for work satisfactorily completed and accepted including incremental acceptances of portions of the contract work by the TJPA. Any delay or postponement of payment may take place only for good cause and with the TJPA's prior written approval. Any violation of these provisions shall subject the violating prime contractor to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise, available to the prime contractor or subcontractor in the event of a dispute involving late payment, or nonpayment by the contractor, or deficient subcontractor's performance, or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

1.7 QUESTIONS

Written questions concerning DBE/SBE/nondiscrimination requirements should be addressed to:

Ms. Sara Gigliotti
Contracts Compliance Manager
Transbay Joint Powers Authority
201 Mission Street, Suite 2100
San Francisco, CA 94105
(415) 597-4615 fax
Email: sgigliotti@transbaycenter.org

END OF SECTION 00 08 21

ATTACHMENT A

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM REQUIREMENTS (CALTRANS EXHIBIT 10-I)

The Transbay Joint Powers Authority (“TJPA”) has established a DBE Availability Advisory Percentage for this Agreement. Contractor is encouraged to obtain DBE participation for this Agreement.

1. Terms As Used In This Document

- a) The term “Disadvantaged Business Enterprise” or “DBE” means a for-profit small business concern as defined in Title 49, Part 26.5, Code of Federal Regulations (“CFR”).
- b) The term “bidder” also means “proposer” or “offerer.”
- c) The term “Agreement” also means “Contract.”
- d) Authority also means the local entity entering into this contract with the Contractor or Consultant. The term “Small Business” or “SB” is as defined in 49 CFR 26.65.

2. Authority and Responsibility

- a) DBEs and other small businesses are strongly encouraged to participate in the performance of Agreements financed in whole or in part with federal funds. (See 49 CFR 26, “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs.”) The Contractor should ensure that DBEs and other SBs have the opportunity to participate in the performance of the work that is the subject of this solicitation and should take all necessary and reasonable steps for this assurance. The bidder/proposer shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of subcontracts.
- b) Bidders/Proposers are encouraged to use services offered by financial institutions owned and controlled by DBEs.
- c) Meeting the DBE Availability Advisory Percentage is not a condition for being eligible for award of the Agreement.

3. Submission of DBE Information

The TJPA’s “Bidders/Proposers Information Request Form” will be included in the Agreement documents to be executed by the successful bidder. The purpose of the form is to collect data required under 49 CFR 26. Even if no DBE participation will be reported, the successful bidder must execute and return the form.

4. DBE Participation General Information

It is the bidder’s responsibility to be fully informed regarding the requirements of 49 CFR 26, and the TJPA’s DBE program developed pursuant to the regulations. Particular attention is directed to the following:

- a) A DBE must be a small business firm defined pursuant to 13 CFR 121 and be certified through the California Unified Certification Program (CUCP).

- b) A certified DBE may participate as a prime contractor, subcontractor, joint venture partner, as a vendor of material or supplies, or as a trucking company.
- c) A DBE joint-venture partner must be responsible for specific contract items of work or clearly defined portions thereof. Responsibility means actually performing, managing and supervising the work with its own forces. The DBE joint venture partner must share in the capital contribution, control, management, risks and profits of the joint-venture commensurate with its ownership interest.
- d) A DBE must perform a commercially useful function, pursuant to 49 CFR 26.55, that is, must be responsible for the execution of a distinct element of the work and must carry out its responsibility by actually performing, managing and supervising the work.
- e) The bidder (prime contractor) shall list only one subcontractor for each portion of work as defined in their bid/proposal and all DBE subcontractors should be listed in the bid/cost proposal list of subcontractors.
- f) A prime contractor who is a certified DBE is eligible to claim all of the work in the Agreement toward the DBE participation except that portion of the work to be performed by non-DBE subcontractors.

5. Resources

- a) The CUCP database includes the certified DBEs from all certifying agencies participating in the CUCP. If you believe a firm is certified that cannot be located on the database, please contact the Caltrans Office of Certification's toll free number 1-866-810-6346 for assistance. Bidders/Proposers may call (916) 440-0539 for web or download assistance.
- b) Access the CUCP database from the Department of Transportation, Civil Rights, Business Enterprise Program website at: <http://www.dot.ca.gov/hq/bep/>.
- Click on the link in the left menu titled [Find a Certified Firm](#).
 - Click on [Query Form](#) link, located in the first sentence.
 - Click on [CUCP Database \(Certified DBEs\)](#) located in the center of the page.
 - Click on [Click To Access DBE Query Form](#).
 - Searches can be performed by one or more criteria.
 - Follow instructions on the screen.
 - "START SEARCH," "CLEAR FORM," "Civil Rights Home," and "Caltrans Home" links are located at the bottom of the query form.
- c) If you do not have Internet access, Caltrans also publishes a directory of certified DBE firms extracted from the on-line database. A copy of the directory of certified DBEs may be ordered from the Caltrans Division of Procurement and Contracts/Material and Distribution Branch/Publication Unit, 1900 Royal Oaks Drive, Sacramento, CA 95815, Telephone: (916) 445-3520.

6. When Reporting DBE Participation, Material or Supplies Purchased From DBEs May Count As Follows:

- a) If the materials or supplies are obtained from a DBE manufacturer, one hundred percent of the cost of the materials or supplies will count toward the DBE participation. A DBE manufacturer is a firm that operates or maintains a factory, or establishment that produces on the premises, the materials, supplies,

articles, or equipment required under the Agreement and of the general character described by the specifications.

b) If the materials or supplies purchased from a DBE regular dealer, count sixty percent of the cost of the materials or supplies toward DBE participation. A DBE regular dealer is a firm that owns, operates or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the Agreement are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a DBE regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A person may be a DBE regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone or asphalt without owning, operating or maintaining a place of business provided in this section.

c) If the person both owns and operates distribution equipment for the products, any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not an ad hoc or Agreement-by-Agreement basis. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not DBE regular dealers within the meaning of this section.

d) Materials or supplies purchased from a DBE, which is neither a manufacturer nor a regular dealer, will be limited to the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on the job site, provided the fees are reasonable and not excessive as compared with fees charged for similar services.

7. When Reporting DBE Participation, Participation of DBE Trucking Companies May Count As Follows:

a) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible.

b) The DBE must itself own and operate at least one fully licensed, insured and operational truck used on the Agreement.

c) The DBE receives credit for the total value of the transportation services it provides on the Agreement using trucks it owns, insures, and operates using drivers it employs.

d) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the Agreement.

e) The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by the DBE.

f) For the purposes of this Section D, a lease must indicate that the DBE has exclusive use and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, as long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM REQUIREMENTS
STANDARD AGREEMENT FOR SUBCONTRACTOR/DBE PARTICIPATION
(CALTRANS EXHIBIT 10-J)

1. Subcontractors

- a) Nothing contained in this Agreement or otherwise shall create any contractual relation between the TJPA and any subcontractors, and no subcontract shall relieve the Contractor of his/her responsibilities and obligations hereunder. The Contractor agrees to be as fully responsible to the TJPA for the acts and omissions of its subcontractors and of persons either directly or indirectly employed by any of them as it is for the acts and omissions of persons directly employed by the Contractor. The Contractor's obligation to pay its subcontractors is an independent obligation from the TJPA's obligation to make payments to the Contractor.
- b) Any subcontract in excess of \$25,000, entered into as a result of this Agreement, shall contain all the provisions stipulated in this Agreement to be applicable to subcontractors.
- c) Contractor shall pay its subcontractors within ten (10) calendar days from receipt of each payment made to the Contractor by the TJPA.
- d) Any substitution of subcontractors must be approved in writing by the TJPA's Contract Manager in advance of assigning work to a substitute subcontractor.

2. Disadvantaged Business Enterprise (DBE) Participation

- a) The TJPA has established a DBE Availability Advisory Percentage of 17% for this Agreement. This Agreement is subject to Title 49, Part 26 of the Code of Federal Regulations entitled "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs." Bidders who obtain DBE participation on this contract will assist Caltrans in meeting its federally mandated statewide overall DBE goal.
- b) DBE and other small businesses (SB), as defined in Title 49 CFR, Part 26 are encouraged to participate in the performance of agreements financed in whole or in part with federal funds. The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. The contractor shall carry out applicable requirements of 49 CFR, Part 26 in the award and administration of US DOT-assisted agreements. Failure by the contractor to carry out these requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as the recipient deems appropriate.
- c) Any subcontract entered into as a result of this Agreement shall contain all of the provisions of this section.

3. Performance of DBE Contractors, and other DBE Subcontractors/Suppliers

- a) A DBE performs a commercially useful function when it is responsible for execution of the work of the Agreement and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible with respect to materials and supplies used on the Agreement, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To

determine whether a DBE is performing a commercially useful function, evaluate the amount of work subcontracted, industry practices; whether the amount the firm is to be paid under the Agreement is commensurate with the work it is actually performing, and other relevant factors.

b) A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, Agreement, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, examine similar transactions, particularly those in which DBEs do not participate.

c) If a DBE does not perform or exercise responsibility for at least thirty percent of the total cost of its Agreement with its own work force, or the DBE subcontracts a greater portion of the work of the Agreement than would be expected on the basis of normal industry practice for the type of work involved, it will be presumed that it is not performing a commercially useful function.

4. Prompt Payment of Funds Withheld to Subcontractors

If the TJPA requires retainage from the prime contractor and prompt and regular incremental acceptances of portions, as determined by the TJPA of the contract work and retainage is paid to the prime contractor based on these acceptances, then the prime contractor or subcontractor shall return all monies withheld in retention from all subcontractors within 30 days after receiving payment for work satisfactorily completed and accepted including incremental acceptances of portions of the contract work by the TJPA. Federal law (49CFR26.29) requires that any delay or postponement of payment over the 30 days may take place only for good cause and with the TJPA's prior written approval. Any violation of this provision shall subject the violating prime contractor or subcontractor to the penalties, sanctions and other remedies specified in Section 7108.5 of the Business and Professions Code. These requirements shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise, available to the prime Contractor or subcontractor in the event of a dispute involving late payment or nonpayment by the prime contractor, deficient subcontract performance, or noncompliance by a subcontractor. This provision applies to both DBE and non-DBE prime contractors and subcontractors.

Any subcontract entered into as a result of this Agreement shall contain all of the provisions of this section.

5. DBE Records

a) The Contractor shall maintain records of materials purchased and/or supplied from all subcontracts entered into with certified DBEs. The records shall show the name and business address of each DBE or vendor and the total dollar amount actually paid each DBE or vendor, regardless of tier. The records shall show the date of payment and the total dollar figure paid to all firms. DBE prime contractors shall also show the date of work performed by their own forces along with the corresponding dollar value of the work. The TJPA will require the Contractor to submit a "Progress Payment Report" with every invoice, summarizing the records as described above.

b) Upon completion of the Agreement, a summary of these records shall be prepared and submitted on the form "Final Expenditure Report," certified correct by the Contractor or the Contractor's authorized representative and shall be furnished to the Contract Manager with the final invoice. Failure to provide the summary of DBE payments with the final invoice will result in twenty-five percent (25%) of the dollar value of the invoice being withheld from payment until the form is submitted. The amount will be returned to the Contractor when a satisfactory "Final Expenditure Report" is submitted to the Contract Manager.

- i. Prior to the fifteenth of each month, the Contractor shall submit documentation to the TJPA's Contract Manager showing the amount paid to DBE trucking companies. The Contractor shall also obtain and submit documentation to the TJPA's Contract Manager showing the amount paid by DBE trucking companies to all firms, including owner-operators, for the leasing of trucks. If the DBE leases trucks from a non-DBE, the Contractor may count only the fee or commission the DBE receives as a result of the lease arrangement.
- ii. The Contractor shall also submit to the TJPA's Contract Manager documentation showing the truck number, name of owner, California Highway Patrol CA number, and if applicable, the DBE certification number of the truck owner for all trucks used during that month. This documentation shall be submitted on the Caltrans "Monthly DBE Trucking Verification," CEM-2404(F) form provided to the Contractor by the TJPA's Contract Manager.

6. DBE Certification and De-Certification Status

If a DBE subcontractor is decertified during the life of the Agreement, the decertified subcontractor shall notify the Contractor in writing with the date of de-certification. If a subcontractor becomes a certified DBE during the life of the Agreement, the subcontractor shall notify the Contractor in writing with the date of certification. Any changes should be reported to the TJPA's Contract Manager within 30 days.

7. When Reporting DBE Participation, Material or Supplies purchased from DBEs may count as follows:

- a) If the materials or supplies are obtained from a DBE manufacturer, 100% of the cost of the materials or supplies will count toward the DBE participation. A DBE manufacturer is a firm that operates or maintains a factory or establishment that produces on the premises, the materials, supplies, articles, or equipment required under the Agreement and of the general character described by the specifications.
- b) If the materials or supplies are purchased from a DBE regular dealer, count 60% of the cost of the materials or supplies toward DBE goals. A DBE regular dealer is a firm that owns, operates or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the Agreement, are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a DBE regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A person may be a DBE regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone or asphalt without owning, operating or maintaining a place of business provided in this section.
- c) If the person both owns and operates distribution equipment for the products, any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not an ad hoc or Agreement-by-Agreement basis. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not DBE regular dealers within the meaning of this section.
- d) Materials or supplies purchased from a DBE, which is neither a manufacturer nor a regular dealer, will be limited to the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on the job site, provided the fees are reasonable and not excessive as compared with fees charged for similar services.

8. When Reporting DBE Participation, Participation of DBE Trucking Companies may count as follows:

- a) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible.
- b) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the Agreement.
- c) The DBE receives credit for the total value of the transportation services it provides on the Agreement using trucks it owns, insures, and operates using drivers it employs.
- d) The DBE may lease trucks from another DBE firm including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the Agreement.
- e) The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by the DBE.
- f) For the purposes of this section, a lease must indicate that the DBE has exclusive use and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, as long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

END OF ATTACHMENT A