



Agenda Item No. (5)

To: Rules, Policy and Industrial Relations Committee/Committee of the Whole Meeting of April 25, 2024

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Subject: **ANNUAL PROGRESS/STATUS REPORT AND UPDATE ON DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM**

Recommendation

This report is to provide information only and does not require any action.

Summary

In accordance with the U.S. Department of Transportation (U.S. DOT) Disadvantaged Business Enterprise (DBE) regulations, 49 Code of Federal Regulations (C.F.R.) Section 26.21, the Golden Gate Bridge, Highway and Transportation District (District) is required to have a DBE Program. As part of the DBE Program, the District is required to implement a Small Business Enterprise (SBE) element to foster small business concern participation (SBE Program). The purpose of the DBE/SBE Program is to create a level playing field on which DBEs/SBEs can compete fairly for U.S. DOT-assisted contracts by removing barriers to DBEs/SBEs and their participation in the bidding, award and administration of federally funded contracts.

A DBE is defined as 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. In the District's SBE Program, an SBE is defined by Small Business Administration (SBA) regulations, 13 C.F.R. Part 121, for the appropriate type(s) of work that a firm performs; and whose average annual gross receipts over the previous three years does not exceed a maximum cap of \$30.70 million (or as adjusted for inflation by the Secretary of U.S. DOT).

This report is an annual update of the DBE Program and summarizes the participation of DBEs in District contracts and procurements funded in whole or in part with Federal Transit Administration (FTA) funds during the recently completed Federal Fiscal Year (FFY) 2022/2023, beginning on October 1, 2022 through September 30, 2023.

A. Federal Transit Administration (FTA) Update FFY 2022/2023

On July 21, 2022, the Biden-Harris Administration and U.S. DOT issued a Notice of Proposed Rulemaking (NPRM) to modernize the Disadvantaged Business Enterprise (DBE) and Airport Concession DBE (ACDBE) program regulations. The intent of the NPRM is to improve the DBE/ACDBE Program by optimizing performance, improving operational cohesiveness, strengthening monitoring and oversight, updating certification provisions, and making technical corrections to provide clarification of the rules to recipients, program applicants, and participants.

U.S. DOT invited comments to the NPRM from all interested parties to be received by the extended deadline of October 31, 2022. The District did submit comments to U.S. DOT before the deadline stating some concerns with the proposed changes such as increased administrative burdens, and the definition of a Transit Vehicle Manufacturer which now includes ferry vessels that creates ambiguity in how to comply with the regulations for new ferry procurements.

On April 9, 2024, USDOT announce the Final Rule in response to the NPRM to the DBE/ACDBE regulations. Changes that impact the District include:

- a) Additional reporting requirements to include race, gender, and applicable North American Industry Classification System (NAICS) codes to each scope of work proposed on the bid/proposal from all owners who bid/propose on a contract, contract number and dollar value of the contract. The additional information will be reported on the semi-annual Uniform Report (Appendix B) which the Report is now removed from the regulations. U.S. DOT will develop a centralized, comprehensive, and searchable database that recipients can use to establish overall triennial DBE goals. (§ 26.11 and Appendix B)
- b) Tiered program requirements for recipients that receive planning, capital, or operating assistance that exceeds \$670,000 in prime contract awards (excluding transit vehicle purchases) per fiscal year must comply with all Part 26 requirements and implement a full DBE program otherwise known as Tier I recipients. Tier II recipients are required to comply with reporting and recordkeeping, contract assurance, policy statement, SBE program, and TVM procurements. (§ 26.21)
- c) Monitoring requirements by a “running tally” applies to contract specific goals and overall goals each year. The responsibility of DBE participation on contracts falls on all District staff who have a hand in the contract, meaning, resident engineers, inspectors, procurement staff, and project managers, as well as the DBE Office must monitor DBE participation from cradle to grave to ensure prompt payment mechanism are in place and DBEs awarded contracts are actually utilized on the contract. (§ 26.37)
- d) Prompt payment and the return of retainage for satisfactory work under the regulations is 30 days. Recipients in states that require a shorter time frame will prevail over the 30-day requirement. According to California Public Contract Code 10262.5 for construction contracts, “*prime contractor or subcontractor shall pay to any subcontractor, not later than seven days after receipt of each progress payment*” and California Civil Code 3321 for architectural and engineering (A&E) professional services states, “*in each contract for public works of improvement, a prime design professional shall pay to each subconsultant design professional the amount due him or her from the payment received, not later than*

15 days after receipt of each progress payment or final retention payment.” The District will abide by California’s shorter prompt payment and return of retainage terms for all tier subcontractors. (§ 26.29)

- e) U.S. DOT recognizes the ambiguity to the TVM definition as it applies to transit vehicle procurements and therefore will provide training, guidance, and technical assistance rather than provide a “one-size-fits-all” regulatory definition. As there are no shipyards currently on FTA’s approved TVM eligibility list to bid on contracts, recipients can continue to establish project goals on TVM procurements to comply with the regulations. Recipients may now establish project goals for TVM procurements, with FTA’s approval to make the **decision** to establish a project goal before public solicitation, without seeking approval of the project goal before issuance of the solicitation.

For ferry vessels procurements, FTA may approve the counting of DBE awards on project goals if the DBE is certified in a different state other than the recipient’s home state for sufficient justified reasons. (§§ 26.5 & 26.49)

- f) Procedures to Good Faith Efforts (GFE) on design-build contracts with goals will require a “DBE Open Ended Performance Plan” to be submitted with proposals to allow primes to make a commitment to meet the goal by continuous GFEs, including the types of subcontracting work/services, projected dollar amount, and an estimated timeframe in which the DBE subcontract will be executed. This will require ongoing monitoring and oversight to evaluate proposer’s sufficient and adequate GFE to comply with the DBE Open Ended Performance Plan and schedule. (§ 26.53)
- g) A new “distributor” definition has been added to limit 40 percent in credit that can be counted for many drop-shipped goods, provided the DBE bears the risk for loss or damages. (§ 26.55(e))
- h) The current business size cap is \$30.72 million. U.S. DOT will adjust the amount annually and post on its website. District staff must update its standard contract language annually to reflect any changes. (§ 26.65)

Other changes to the rule intended to strengthen and modernize the DBE regulations are faster processing times for DBE certification (90 days to 30 days), expedited interstate certification within 10 days, increase to the Personal Net Worth from \$1.32 million to \$2.047 million (to be adjusted every three years), NAICS code business size standard of gross receipts from three to five years, expansion of MAP-21 data collection to track gender and ethnicity, and expansion of the DBE directory for additional DBE information such as the firm’s website.

Recipients are required to implement the new rules by May 9, 2024. The District’s Diversity Program for Contracts that includes the DBE and SBE program will be updated accordingly.

B. Federal Highway Administration (FHWA) Update FFY 2022/2023

As a subrecipient of FHWA funding through the California Department of Transportation (Caltrans), the District is mandated to adhere to Caltrans’ Local Assistance requirements as outlined in the Local Assistance Procedures Manual (LAPM) whenever contracts are assisted in

whole or in part with FHWA funds. The Caltrans statewide DBE goal for FFY 2022/2023 is 22.2%, which is expected to be achieved in proportions of 3.9% race-neutral and 18.3% race-conscious. The District is required to establish DBE contract-specific goals on FHWA-assisted contracts to aid Caltrans in fulfilling its statewide DBE goal.

During the reporting period, the District did not award any new FHWA-assisted contracts with established DBE goals. Nonetheless, there were Change Orders issued on previously awarded FHWA-assisted contracts, totaling \$1,387,384.30. Of that amount, 6.77% was disbursed to a single DBE firm.

Caltrans Division of Local Assistance, Office of Guidance and Oversight, has issued several Office Bulletins to update its LAPM. Updates include the following areas:

- LAPM Chapter 9, *Civil Rights and DBE*, revised commercially useful function reviews, and Good Faith Efforts - termination and replacement of DBE subcontractors;
- LAPM Chapter 10, *Consultant Selection*, revised boilerplate DBE participation language for consultant contracts;
- LAPM Chapter 12, *Plans, Specifications & Estimate*, revised form FHWA-1273, “Required Contact Provisions Federal-Aid Construction Contracts” specific to Davis-Bacon and Related Acts, local hiring preference for labor on construction projects, and Cargo Preference Act requirements; and,
- LAPM Chapter 16, *Administer Construction Contracts*, revised administration of the DBE requirements, including new forms for prompt payment, commercially useful function, and joint check agreement requests.

Because the DBE regulations remain consistent for both FHWA and FTA contracts, staff has seamlessly integrated some of the standard language into the boilerplate contract language for FTA-assisted contracts with the intent to strengthen oversight and monitoring procedures.

C. Disadvantaged Business Enterprise Project Goal

The District is in the process of purchasing one or more new ferries to add to its fleet. In accordance with 49 C.F.R. Section 26.49, Transit Vehicle Manufacturers (TVMs) are required to establish annual overall DBE goals to be approved by FTA in order to bid or propose on FTA-assisted contracts. TVMs must implement all applicable requirements of 49 C.F.R. Part 26, except requirements relating to the Unified Certification Program or DBE certification procedures. As there are currently no shipyards on FTA’s approved list of TVMs to meet these requirements, recipients may establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of complying with Section 26.49.

On January 7, 2022, the District received approval from FTA to establish a 1.55% DBE Project Goal on Contract No. 2022, F-012, *Engineering and Detailed Design Services for the Construction of a New Build Ferry*. By Resolution No. 2022-070, the Board approved the award of Contract No. 2022-F-012, *Engineering and Detailed Design Services for the Construction of a New Build Ferry* to Aurora Marine Design of San Diego, CA, a Small Business Enterprise that was able to commit 1.67% of DBE participation. As of the time of this written report, the DBE subconsultant has not begun its portion of work.

D. Status Report on Small Business Enterprise (SBE) Contract-Specific Goals

The District’s SBE Program applies to all District contracts, regardless of funding source, where race-neutral and gender-neutral methods are employed. During FFY 2022/2023, the District established four (4) SBE contract-specific goals on the following contracts:

Contract No./Title	Established SBE Goal	SBE Commitment	DBE Participation
2022-B-084 , Suicide Deterrent System Rescue Training Net	9.2%	83.8%	0%
2022-B-104 , Golden Gate Bridge Toll Plaza Administration Building Door and Window Rehabilitation Project	9.6%	55.9%	39.5%
2022-B-114 , Golden Gate Bridge Toll Plaza Pavement Overlay	8.9%	12.1%	10.7%
2022-F-014 , Larkspur Ferry Terminal Fuel Tanks Rehabilitation	6%	91.1%	0%

District staff will continue to leverage its SBE Program to promote DBE participation achieved through analysis of all contracts that have subcontracting opportunities to establish appropriate SBE goals.

E. Annual Progress Report on FFY 2022/2023 Diversity Program for Contracts

Staff monitors DBE participation in District purchasing and contracting in three different categories determined by the funding source: District funds, FTA funds, and FHWA funds. The tables presented below summarize the District’s DBE achievements in the context of the three funding sources. The DBE achievement data for FTA and FHWA tables exclusively reflect awards and commitments, including any value change orders for additional scopes of work on existing contracts. Meanwhile, the data in the District-wide table represents actual DBE payments disbursed directly from the District and/or from prime contractors.

Federal Transit Administration:

Applies to:	Contracts funded in whole or in part by FTA.
Goal:	1.4% overall race-neutral goal for FFY 2022/2023. Goal is based on an analysis of the level of DBE participation that might, in the absence of discrimination, be achieved on FTA-funded contracts that are anticipated for award over a three- federal fiscal year period, in accordance with FTA directives.
Source of Data:	Uniform Report of DBE Awards or Commitments and Payments submitted to FTA on a semi-annual basis as prepared by the DBE Program Administrator.
Actual FTA Dollars Awarded:	\$7,207,871.
DBE Participation:	\$26,673 or 0.4%, thus falling short of the overall goal for the federal fiscal year.

Federal Highway Administration:

Applies to:	Awarded contracts funded in whole or in part by FHWA. Value Change Orders/Amendments are considered new awards.
Goal:	With the approval of Caltrans Division of Local Assistance, District staff determines individual contract goals for each FHWA-assisted contract posted for bid.
Source of Data:	Staff financial records of contract awards/commitments and/or Change Orders and Amendments.
Actual FHWA Dollars Awarded:	\$1,387,384.30.
Awarded DBE Participation:	\$93,964.26 or 6.77% of the FHWA Dollars Awarded.

District-wide:

Applies to:	All District purchases and contracts, regardless of funding source, that are available to DBEs.	
Goal:	The District does not set an annual DBE participation goal for purchases and contracts, in light of Proposition 209 prohibiting preferences in public contracts based on race, national origin, or sex, and related judicial decisions.	
Source of Data:	The District’s financial records for actual payments to DBE vendors, as well as prompt payments reported by prime contractors, that show actual payments to DBEs.	
Total to DBEs:	DBE Prime, Minority and Women-Owned Businesses	\$2,385,825
	DBE Sub, Minority and Women-Owned Businesses	\$74,971
DBE Participation:		\$2,460,796

F. FTA Shortfall Analysis for FFY 2022/2023

The District goal for FFY 2022/2023 is 1.4%, primarily due to the inclusion of ferry-related contracts in the triennial goal. Historically, there has been a scarcity of certified DBE firms within the marine industry, which hinders the ability to elevate DBE participation or establish higher overall DBE goals. Furthermore, the District has refrained from establishing SBE goals on marine-related contracts to support limited DBE participation. However, this is an aspect the District is willing to explore after meeting with stakeholders to discuss the District’s SBE program and the evaluation process of contracts with established SBE goals.

The District fell short of meeting its overall goal by 1%. Factors that contributed to the shortfall include \$6.8M in awarded contracts and change orders for services such as scheduled drydocking and capital improvements to several vessels, fuel tank rehabilitation in Larkspur, CA, and on-call engineering for shipcheck and onsite shipyard services. Persistent barriers continue for DBE firms to perform in these specialized sectors, largely due to special licenses/certifications, bonding, and marine insurance requirements.

During FFY 2022/2023, staff maintained an aggressive outreach calendar of events to increase DBE participation in the District’s procurement activities as listed below:

- (1) **“Virtual Procurement Series, Professional Services”** – information shared on teaming readiness, mentor pairing, proposal reviews, and strategies for successful proposal submittals;
- (2) **“Breaking Barriers in the Marine Industry”** – District staff, Bay Area Water Emergency Transportation Authority (WETA), shipyards, insurance companies, and marine contractors discussed barriers from the perspectives of contractors, agencies, and DBE firms and how to overcome such challenges;
- (3) **“Virtual Procurement Series, Construction”** – DBE consultant gave an overview of public works contracting, basic protocols and processes for submitting sub-bids, and administrative requirements for bonding and insurance;
- (4) **“Estimating and Bidding Series, Week One”** – DBE consultant taught basic bid concepts, bid estimating, and provided a sample scope letter;
- (5) **“Estimating and Bidding Series, Week Two”** – DBE consultant provided a deeper dive into project estimating and bidding on heavy civil construction projects;
- (6) **“DBE/ACDBE Certification Workshop, Day 1”** – Agency members of the California Unified Certification Program (CUCP) and Business Outreach Committee (BOC) hosted a virtual event to discuss the DBE/ACDBE program, identifying NAICS codes, and how to navigate the online certification application portal;
- (7) **“DBE/ACDBE Certification Workshop, Day 2 (Northern/Southern California)”** – CUCP and BOC member agencies provided a follow-up to the virtual event to offer in-person networking opportunities and technical assistance from certifying agencies and resource partners.

The abovementioned outreach events do not encompass all events in which District staff have participated in organized by other agencies. Materials for listed outreach events are available on the District’s website at <https://www.goldengate.org/district/doing-business/business-outreach-committee/>. To support the attainment of the 1.4% DBE goal for FFY 2023/2024, staff will maintain an assertive outreach schedule, prioritizing events that focus on DBE certification, access to capital, insurance and bonding, stakeholder meetings, and how to do business with the District.

In accordance with federal DBE regulations, a copy of the District’s shortfall analysis and corrective action plan will remain on file for three years and be made available to the FTA upon request.

Fiscal Impact

There is no fiscal impact associated with this report.

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