

# FTA

F E D E R A L T R A N S I T A D M I N I S T R A T I O N

## Transbay Joint Powers Authority (TJPA) Disadvantaged Business Enterprise Program Final Compliance Review Report

September 2012

FTA Report No. 0000  
Federal Transit Administration

PREPARED BY

Jack Faucett Associates and  
Ken Weeden & Associates



U.S. Department of Transportation  
Federal Transit Administration

*This page has been intentionally left blank to facilitate duplex printing*

---

## Contents

Executive Summary .....	5
1. General Information.....	7
2. Jurisdiction and Authorities .....	8
3. Purpose and Objectives .....	9
3.1 Purpose .....	9
3.2 Objectives .....	9
4. Introduction to TJPA.....	11
4.1 Introduction to TJPA .....	11
4.2 Net Assets .....	13
4.3 DBE Program .....	14
4.4 Recent Complaints Regarding TJPA’s DBE Program .....	15
5. Scope and Methodology .....	17
5.1 Scope .....	17
5.2 Methodology.....	18
6. Issues and Recommendations .....	19
6.1 DBE Program Plan .....	19
6.2 DBE Policy Statement .....	19
6.3 DBE Liaison Officer.....	21
6.4 Minority and Women Owned Financial Institutions .....	21
6.5 DBE Directory .....	22
6.6 Overconcentration .....	22
6.7 Business Development Programs .....	23
6.8 Fostering Small Business Participation.....	24
6.9 Determining/Meeting Goals .....	25
6.10 Required Contract Provisions .....	34
6.11 Certification Standards .....	38
6.12 Certification Procedures .....	38
6.13 Record Keeping and Enforcements .....	38

*This page has been intentionally left blank to facilitate duplex printing*

## Executive Summary

<b>Agency:</b>	<b>Transbay Joint Powers Authority (TJPA)</b>
<b>Date:</b>	<b>April 17 to 19, 2012</b>
<b>Reviewer:</b>	<b>Jack Faucett Associates and Ken Weeden &amp; Associates</b>

**Objective and Methodology** - This report details the findings of a Compliance Review of the Disadvantaged Business Enterprise (DBE) program operated by the Transbay Joint Powers Authority (TJPA) in San Francisco, California. The primary activity of the TJPA is the construction of a \$4 billion regional transit hub connecting 11 transit systems. The Compliance Review was based on an examination of TJPA's procedures, management structures, actions, and documentation. Documents and information were collected from the Federal Transit Administration (FTA) and TJPA. Interviews were held with officials from TJPA, local chambers of commerce, and TJPA contractors. This included an interview with the African American Chamber of Commerce. The 3-day review included interviews, review of data collection systems, and analysis of contract documents.

The selection of TJPA for this compliance review was partially motivated by a recent complaint regarding TJPA's DBE program. This complaint included an allegation of a prompt payment violations and reporting fraud by a prime contractor. In addition, the African American Chamber of Commerce has reported a lack of contracting opportunities for African American owned firms.

**TJPA's DBE Program has Effective Elements** – TJPA has demonstrated a dedication to administering an effective DBE program. ES-1 documents some of the positive program elements observed in the review.

### ES-1: Positive Program Elements

- Good methodology for acquiring information for bidders list
- A designated DBELO with direct access to executive leadership

**The Program has Administrative Deficiencies that are Easily Correctable** - Several administrative corrections remain to be addressed. ES-2 lists administrative deficiencies TJPA can quickly address to bring their program into increased compliance with 49 CFR Part 26.

### ES-2: Administrative Deficiencies

- Elaborate in the Program Plan how overconcentration might be assessed and addressed
- Formalize how and when scans for minority and women owned financial institutions will be performed
- Expand language in the Program Plan and solicitation documents on counting DBE participation
- Ensure proper data entry on DBE Uniform Reports

**The TJPA DBE Program Exhibits Several Substantive Deficiencies** – TJPA, which operates a wholly race neutral DBE program due to a ruling by the Ninth Circuit Court, has not met its DBE participation goals in recent years. In order to increase DBE participation, TJPA should consider strengthening their race neutral program by breaking out more contacts and increasing business development programs and DBE outreach. TJPA should also consider whether it could examine the potential existence of discrimination within the local DBE contracting community such that a race conscious element could be added to their program. In the absence of such an effort, TJPA should consider modifying or eliminating their use of contract specific "DBE Availability Advisories" and their descriptions of Good Faith Efforts so as not to give the impression that they currently have a race conscious element to their program.

TJPA must also ensure that DBE contract provisions flow down to subcontractors and that formal subcontract agreements are in place. The review team observed an instance of an informal contracting agreement that did not include the flow down of contract clauses. Lastly, although TJPA conducts outreach and attempts to elicit public participation, they would benefit from expanding their efforts to local chambers of commerce and minority business associations.

**ES-3: Substantive Deficiencies**

- TJPA did not meet DBE goals
- Insufficient race neutral attainment may require additional effort to break out contracts and improve business development programs
- Use of program elements that give the impression of a race conscious element despite a court ruling
- Insufficient flow down of contract clauses to subcontracts
- Expand outreach efforts to chambers of commerce and minority business associations

## 1. General Information

This chapter provides basic information concerning this compliance review of TJPA. Information on TJPA, the JFA/KWA review team, and the dates of the review is presented below.

<b>Grant Recipient:</b>	Transbay Joint Powers Authority (TJPA)
<b>City/State:</b>	San Francisco, California
<b>Grantee Number:</b>	6536
<b>Executive Official:</b>	Maria Ayerdi-Kaplan, Executive Director, TJPA
<b>On-site Liaison:</b>	Sara Gigliotti, Chief Financial Officer
<b>Report Prepared By:</b>	<p>Jack Faucett Associates (JFA)  4550 Montgomery Ave. Suite 300N  Bethesda, Maryland 20814</p> <p><i>And</i></p> <p>Ken Weeden &amp; Associates (KWA)  3955 Market St. Suite A  Wilmington, North Carolina 28403</p>
<b>Dates of On-site Visit:</b>	April 17 – April 19, 2012
<b>Review Team Members:</b>	<p>Linda Ford, Acting Director, Officer of Civil Rights, FTA  Derrin Jourdan, Region IX RCRO, FTA  Rami Chami, Lead Reviewer, JFA  Ken Weeden, Principal, KWA</p>

## 2. Jurisdiction and Authorities

The Federal Transit Administration (FTA) Office of Civil Rights is authorized by the Secretary of Transportation to conduct civil rights compliance reviews. The reviews are undertaken to ensure compliance of applicants, recipients, and sub-recipients with Section 12 of the Master Agreement, Federal Transit Administration M.A., (17), October 1, 2010 and 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation (DOT) Programs."

TJPA is a recipient of FTA funding assistance, including funding from the American Recovery and Reinvestment Act of 2009 (ARRA), and is therefore subject to the Disadvantaged Business Enterprise (DBE) compliance conditions associated with the use of these funds pursuant to 49 CFR Part 26. These regulations define the components that must be addressed and incorporated in TJPA's DBE program and were the basis for the selection of compliance elements that were reviewed.



### 3. Purpose and Objectives

This chapter discusses the purposes and objectives of the DBE program and the compliance review process.

#### 3.1 Purpose

The FTA Office of Civil Rights periodically conducts discretionary reviews of grant recipients and sub-recipients to determine whether they are honoring their commitment, as represented by certification to FTA, to comply with their responsibilities under 49 CFR Part 26. The FTA decided to conduct one such review of TJPA.

The primary purpose of the compliance review is to determine the extent to which TJPA has implemented 49 CFR Part 26, as represented to FTA in its DBE Program Plan. This compliance review is intended to be a fact-finding process to: (1) examine TJPA's Disadvantaged Business Enterprise Program Plan and its implementation, (2) make recommendations regarding corrective actions deemed necessary and appropriate, and (3) provide technical assistance. This compliance review is not intended to directly investigate whether there has been discrimination against disadvantaged businesses by the grant recipient or its sub-recipients, or to adjudicate these issues in behalf of any party.

#### 3.2 Objectives

The objectives of DOT's DBE regulations, as specified in 49 CFR Part 26, are to:

- Ensure nondiscrimination in the award and the administration of DOT-assisted contracts in the Department's financial assistance programs.
- Create a level playing field on which DBEs can compete fairly for DOT-assisted contracts.
- Ensure that the Department's DBE program is narrowly tailored in accordance with applicable laws.
- Ensure that only firms that fully meet 49 CFR Part 26's eligibility standards are permitted to participate as DBEs.
- Help remove barriers to the participation of DBEs in DOT-assisted contracts.
- Assist the development of firms that can compete successfully in the marketplace outside the DBE program.
- Provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

The objectives of this compliance review are to:

- Determine whether TJPA is honoring its commitment represented by its certification to FTA that it is complying with its responsibilities under 49 CFR Part 26, “Participation by Disadvantaged Business Enterprises in DOT Programs.”
- Examine the required components of TJPA’s DBE Program Plan against the compliance standards set forth in the regulations and to document the compliance status of each component.
- Gather information and data regarding the operation of TJPA’s Disadvantaged Business Enterprise Program Plan from a variety of sources, including DBE program managers, other TJPA management personnel, DBEs, and prime contractors.

## **4. Introduction to TJPA**

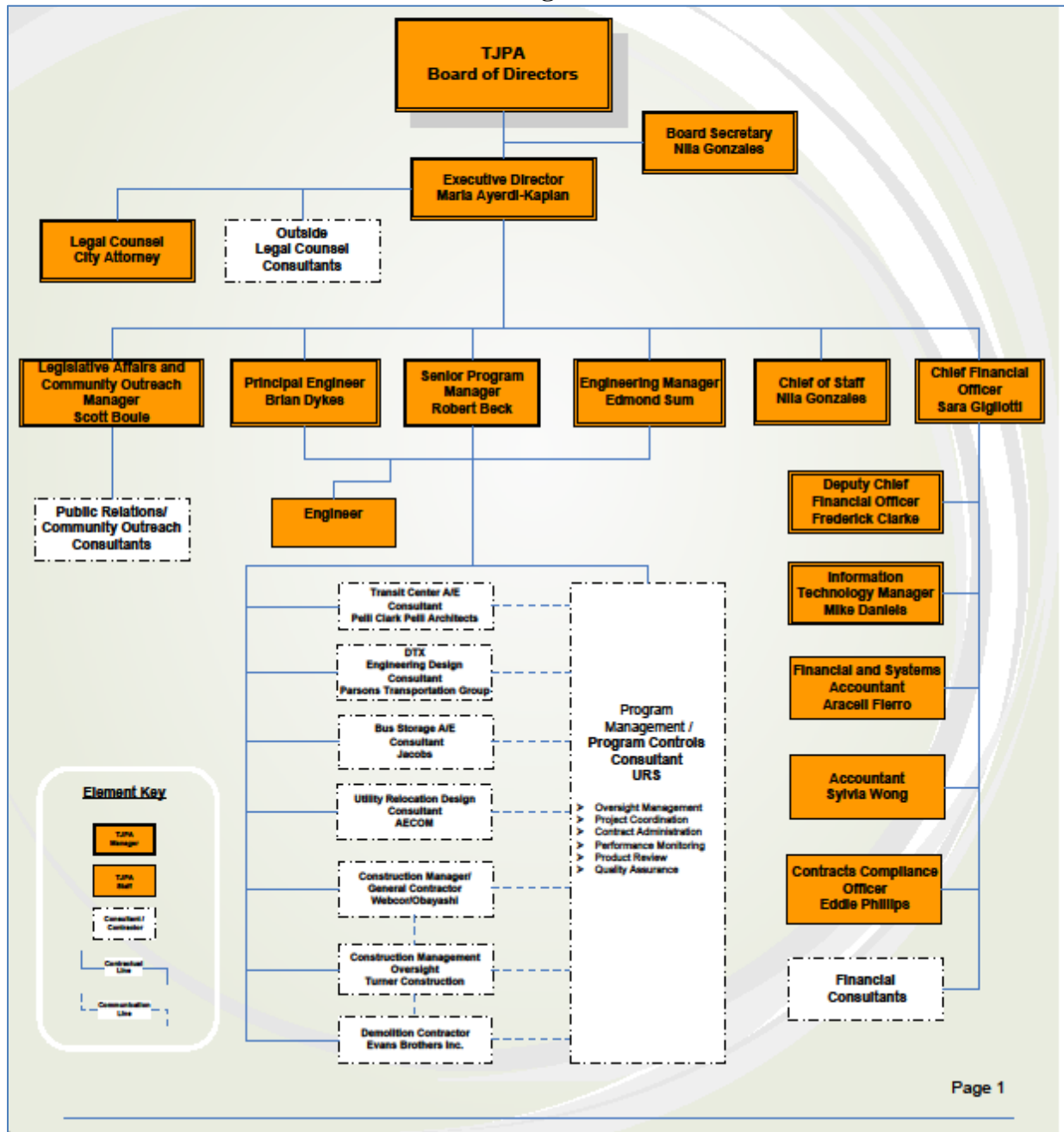
This chapter provides an introduction to TJPA and highlights its services, budget, and DBE program. The purpose of this section is to provide readers with an understanding of TJPA's operations and scale.

### **4.1 Introduction to TJPA**

The Transbay Joint Powers Authority, or TJPA, is a joint venture consisting of government agencies and transit organizations within the San Francisco Bay Area. The primary activity of TJPA is the Transbay Transit Center Program. This \$4 billion program will result in the construction of a regional transit hub in place of the former Transbay Terminal at First and Mission Streets in downtown San Francisco. The new Transit Center will house 11 transit systems (heavy rail, bus, paratransit, and potentially high speed rail, or HSR) and connect eight Bay Area counties with the state as a whole. The Program will include replacing the former terminal, extending underground Caltrain and California HSR service lines to the new Transit Center, and created transit-oriented development around the new Transit Center. The completed center will accommodate more than 100,000 passengers each weekday and over 45 million passengers annually. Construction began in December 2008 and operations in temporary facilities began in August 2010.

Exhibit 1 presents the organizational chart for TJPA. TJPA staff, which is headed by the Executive Director, reports to a six-person Board of Directors. The Chief Financial Officer is designated as the Disadvantaged Business Enterprise Liaison Officer (DBELO).

**Exhibit 1: TJPA Organizational Chart**

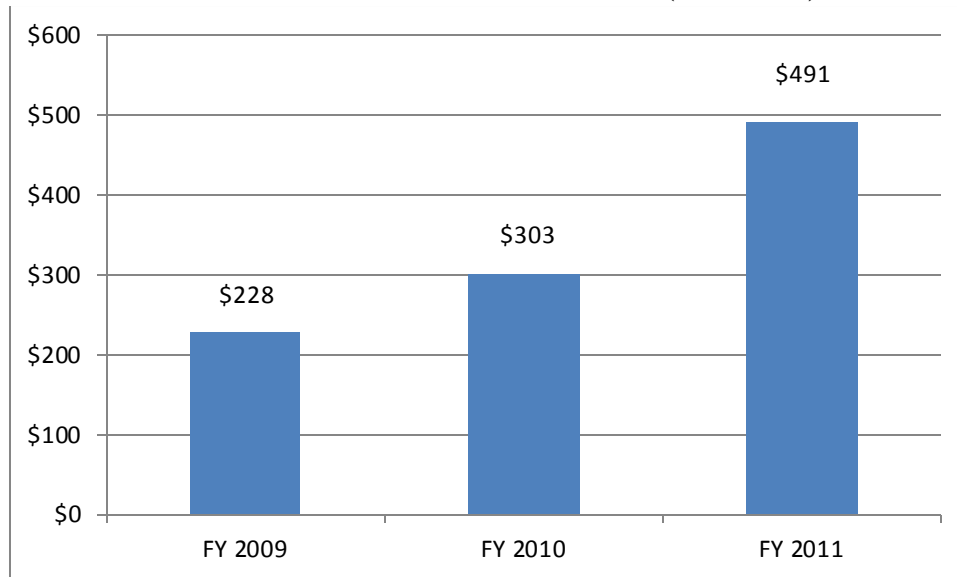


Source: Email from Sara Gigliotti, CFO, TJPA. April 5, 2012.

## 4.2 Net Assets

TJPA receives funding from state, local, and federal sources. Exhibit 2 displays a time series of TJPA’s annual net assets between fiscal years 2009 and 2011. Annual assets include net revenue and value (grants, property value, interest payments, and other inputs) minus net operating expenses. During those years, TJPA’s net assets have increased from \$228 million to \$491 million.

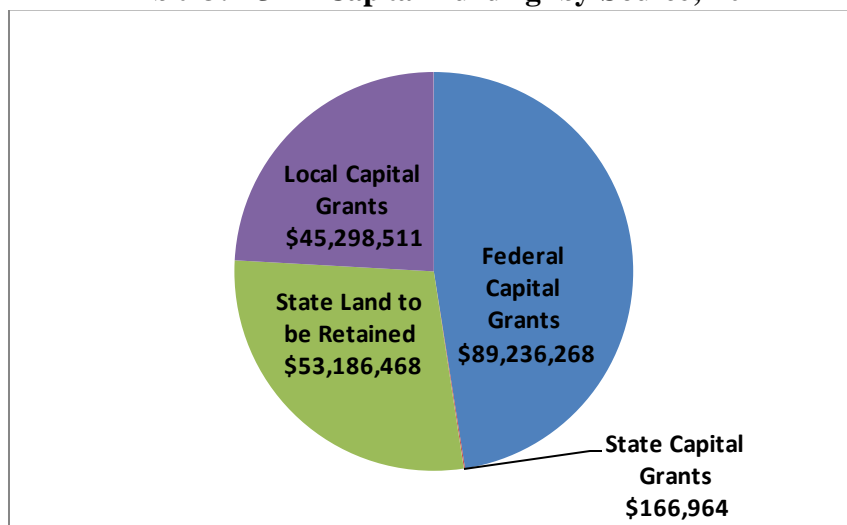
**Exhibit 2: TJPA Annual Net Assets (Millions \$)**



Source: TJPA website, “TJPA Financial Documents” <http://transbaycenter.org/tjpa/documents/tjpa-financial>

Exhibit 3 provides an examination of TJPA’s capital funding in 2012 by source. Federal grants constitute nearly half of TJPA capital funding.

**Exhibit 3: TJPA Capital Funding by Source, 2012**



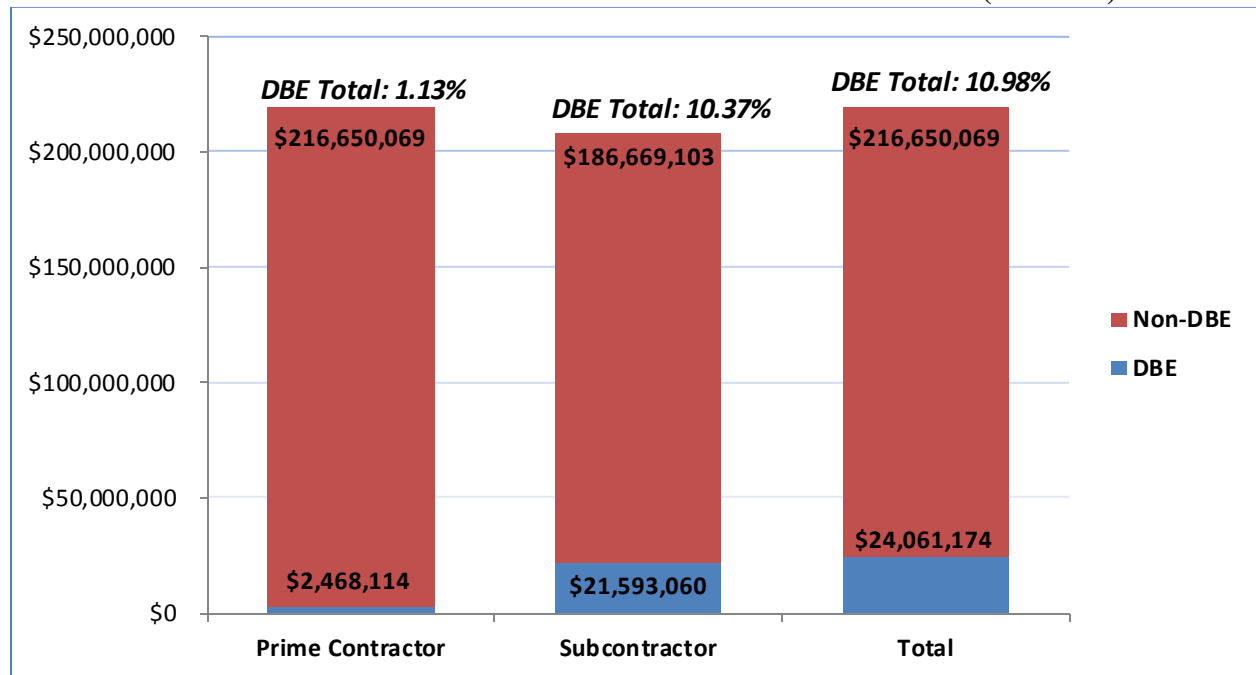
Source: TJPA FY 2010-11 Financial Statements, Page 7, [http://transbaycenter.org/uploads/2011/12/FY2010-2011\\_TJPA\\_Financial\\_Statements1.pdf](http://transbaycenter.org/uploads/2011/12/FY2010-2011_TJPA_Financial_Statements1.pdf)

### 4.3 DBE Program

The TJPA DBE liaison officer (DBELO) is responsible for monitoring and enforcing TJPA’s internal and external DBE programs to ensure compliance with appropriate federal and state laws and regulations. The DBELO has direct access to the TJPA Executive Director and other members of the management.

Exhibit 4 provides information on the contracts awarded to DBE and non-DBE contractors. The exhibit also highlights the share of contracts that DBEs won either as prime contractors or subcontractors. During federal fiscal year 2011, DBE contractors were awarded 1.1 percent of all prime contract dollars, 10.8 percent of all subcontract dollars, and 11.0 percent of all contract dollars. TJPA’s DBE participation goal for FY 2011 to 2013 is 18.5 percent and as a result TJPA FY 2011 attainment was only 59 percent of the stated goal.

**Exhibit 4: TJPA Funded Contracts Awarded to Contractors (FY 2011)**



Source: TJPA’s FY11Uniform Reports of DBE Commitments/Awards and Payments

The TJPA goal is a race neutral goal. In 2005, the U.S. Court of Appeals for the Ninth Circuit, which encompasses the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, issued a decision that holds that race conscious goals may not be used in the absence of an established history of discrimination within a state contracting community. Accordingly, TJPA cannot assign race conscious goals unless localized discrimination is proven.

The San Francisco region contains a sizable number of minority and women owned firms, although these firms account for a small percentage of economic activity in the region. Exhibit 6 provides U.S. Census Bureau information about the availability of women and minority owned firms in the San Francisco-Oakland-Fremont metropolitan area in 2007. The San Francisco-Oakland-Fremont area contains 150,105 minority-owned firms and 143,170 female owned firms.

Minority owned firms account for 33.0 percent of all firms but only 5.1 percent of sales. Women owned firms account for 31.5 percent of all firms and 3.3 percent of all sales. It must be noted that Census Bureau definitions for minority and women owned businesses do not correlate exactly with DBE status qualifications. For example, a woman or minority business owner might have a personal net worth above \$1.32 million, the threshold for DBE qualification. Exhibit 5 also presents the combined number and sales of minority and women owned firms. This metric may contain some double-counting (a minority women owned business for example) but is included to provide an approximation of total availability. The review team also examined data on the statewide level, which identifies statistics for firms that are both minority and women owned, but their prevalence is relatively limited. For example, removing double-counted female minority business owners on the state level lowers the percentage of firms with paid employees and the sales receipts from firms with paid employees by 6.0 and 1.2 percent respectively.

**Exhibit 5: Firms in the San Francisco-Oakland-Fremont MSA (2007)**

	Number of firms with or without paid employees	Sales, receipts, or value of shipments of firms with or without paid employees (\$1,000)	Number of firms with paid employees	Sales, receipts, or value of shipments of firms with paid employees (\$1,000)
All firms	454,743	\$690,000,654	97,623	\$669,868,934
All minority owned firms	150,105	\$34,988,741	25,986	\$29,821,248
All women owned firms	143,170	\$23,103,858	16,774	\$18,338,366
Combined minority and women owned	293,275	\$58,092,599	42,760	\$48,159,614
Percent share of minority owned firms	33.0%	5.1%	26.7%	4.5%
Percent share of women owned firms	31.5%	3.3%	17.2%	2.7%
Percent share of minority and women owned firms	<b>64.5%</b>	<b>8.4%</b>	<b>43.9%</b>	<b>7.2%</b>

Source: U.S. Census Bureau website, American FactFinder, 2007 Survey of Business Owners, <http://www.census.gov/econ/sbo/>

#### 4.4 Recent Complaints Regarding TJPA's DBE Program

The review team has identified two recent complaints regarding the TJPA DBE Program. The first, originally filed in 2007 but referencing events from 2004 onwards, was filed by [REDACTED]. The president of [REDACTED] alleged that:

- TJPA did not properly monitor the DBE program, resulting in prime contractor Parsons Transportation Group (PTG) submitting false documentation regarding DBE subcontract goals
- PTG violated the Prompt Payment Act by withholding timely payment of invoices
- Incorrect reporting of contract amounts promised to [REDACTED]

This claim was investigated by the U.S. Department of Transportation's Office of the Inspector General. The claim was recommended for closure in May 2011 and found that TJPA had addressed the prompt payment issue and that the other allegations could not be substantiated.

The second complaint was registered by the San Francisco African American Chamber of Commerce in August 2010. In an email copied to TJPA officials, one of a series of emails between the Chamber and TJPA, the chamber president pointed out that, out of 52 companies contracted to perform work on Transit Center High Speed Rail Buttress, Shoring, and Excavation Package, none were owned by African Americans.

In November 2010, TJPA responded that 4 of their 48 active prime contracts were primed by DBEs, one of which was African American owned, while 35 of 140 active subcontractors are DBEs or graduated DBEs, of which four were African American owned.



## 5. Scope and Methodology

This chapter describes the scope of the FTA regulations that the review team considered during its compliance review as well as the methodology employed for the compliance review.

### 5.1 Scope

Implementation of the following 13 required DBE program components specified by the FTA are reviewed in this report:

1. A DBE program plan signed by a concerned operating administration (OA) [49 CFR 26.21].
2. A signed policy statement that expresses a commitment to the agency's DBE program, states its objectives, and outlines responsibilities for its implementation [49 CFR 26.23].
3. Designation of a liaison officer and support staff as necessary to administer the program, and a description of the authority, responsibility, and duties of the officer and the staff [49 CFR 26.25].
4. Efforts made to use DBE financial institutions, by the recipient as well as prime contractors, if such institutions exist [49 CFR 26.27].
5. A DBE directory including addresses, phone numbers and types of work performed made available to the public and updated at least annually [49 CFR 26.31].
6. Determination if overconcentration exists and address this problem if necessary [49 CFR 26.33].
7. Assistance provided to DBEs through Business Development Programs to help them compete successfully outside of the DBE program [49 CFR 26.35].
8. A small business participation element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements [49 CFR 26.39].
9. An overall goal based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate on a recipient's DOT-assisted contracts [49 CFR 26.43 – 26.53]. Additionally, in establishing an overall goal, the recipient must provide for public participation and then provide information on this goal to the public through published notices [49 CFR 26.45].
10. Inclusion of a contract non-discrimination clause, a prompt payment clause and implementation of appropriate mechanisms to ensure compliance by all participants [49 CFR 26.13, 26.29, 26.37].

11. A certification process to determine if a potential DBE is legitimately socially and economically disadvantaged. The potential DBE must submit an application, a personal net worth statement and a statement of disadvantage, along with the proper supporting documentation [49 CFR 26.67].
12. A certification procedure to include document review and an on-site visit and determination of eligibility consistent with Subpart D of the regulations [49 CFR 26.83].
13. Implementation of appropriate mechanisms to ensure compliance with the part's requirements by all program participants. The DBE program must also include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award is actually performed by DBEs [49 CFR 26.37]. Reporting must include information on payments made to DBE firms [49 CFR 26.11, 26.55].

## 5.2 Methodology

The initial step in the scope of this Compliance Review consisted of consultation with the FTA Office of Civil Rights and a review of available information from FTA's TEAM System and other sources. Subsequent to this review, potential dates for the site visit were coordinated.

An agenda letter was then compiled and sent to TJPA by FTA's Office of Civil Rights. The agenda letter notified TJPA of the planned site visit, requested preliminary documents, and informed TJPA of additional documents needed and areas that would be covered during the on-site portion of the review. It also informed TJPA of staff and other parties that would potentially be interviewed.

The documents received prior to the on-site portion of the review were examined and an itinerary for the site visit was developed. An opening conference was conducted at the beginning of the Compliance Review with FTA representatives, TJPA staff and the review team.

Subsequent to the opening conference, a review was conducted of TJPA's DBE Program Plan and other documents submitted to the review team by the DBE Liaison Officer or equivalent. The review team then conducted interviews with TJPA officials regarding DBE program administration, project procurement, grant administration record keeping, monitoring, and legal remedies. The review team also selected a sample of FTA funded contracts, which were then reviewed for their DBE elements. The review team interviewed personnel from TJPA, local contractor associations, and recent TJPA contractors.

At the end of the review, an exit conference was held with FTA Regional Civil Rights Officers, TJPA staff, and the review team. At the exit conference, initial findings and potential corrective actions were discussed with TJPA.

Following the site visit, this draft report was compiled. This report will be amended and resubmitted as a final report after allowing TJPA to respond to the report findings and corrective actions.

## 6. Issues and Recommendations

This chapter details the review team's findings for each of the areas pertinent to the 49 CFR Section 26 regulations outlined in the Scope and Methodology section above. The review team has provided an overview of the relevant regulations, a discussion of the regulations as they apply to TJPA's DBE program, and a suggested corrective action and timetable for each of the requirements and sub-requirements where necessary.

### 6.1 DBE Program Plan

**Basic Requirement:** (49 CFR 26.21) Recipients must have a DBE program that meets the requirements of 49 CFR Part 26. Usually, recipients do not have to submit regular updates of DBE programs. However, significant changes in the program must be submitted for approval. In recent years because of changes in DBE program rules, such as the new small business element (26.39), the FTA required submission of an updated DBE program which incorporated this new element.

**Discussion:** During this DBE Compliance Review, deficiencies were found with the Program Plan requirements. TJPA completed a Revised DBE Program Plan dated April 2012 and submitted it to the review team. The Program Plan has many elements required by 49 CFR Part 26, but there are some deficiencies in various subsections of the Program Plan, including an unsigned Policy Statement; insufficient descriptions of procedures for identifying financial institutions or evaluating overconcentration. There is also inclusion of a good faith effort requirement that suggests the DBE program has race conscious goals. A link to TJPA's 2012 Program Plan is posted on TJPA's website.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final report, TJPA must again revise its Program Plan to address the issues identified in other sections of this compliance review report.

**TJPA Response:** Included with this response is a draft revised DBE Program Plan that addresses the issues identified in the Compliance Review (Attachment A). This revised Plan will be brought to the TJPA Board of Directors for approval at its next regular meeting on September 13, 2012. Following Board approval of the Plan, it will be formally submitted to FTA via TEAM.

**FTA Response:** FTA agrees with TJPA's response. TJPA's Program Plan and their responses to FTA's initial comments address many, but not all, of the comments and concerns raised by FTA. FTA's responses in the subsequent sections of this report highlight where FTA agrees with corrective actions already taken by TJPA and where TJPA needs to take further actions to address outstanding issues. These findings will remain open until these issues are resolved.

### 6.2 DBE Policy Statement

**Basic Requirement:** (49 CFR 26.23) Recipients must formulate and distribute a signed and dated DBE policy statement, which states the objectives and the entity's commitment to the DBE

---

program. This policy must also be circulated throughout the recipient's organization and to the DBE and non-DBE business communities.

**Discussion:** During the DBE Compliance Review, a deficiency was found with TJPA's Policy Statement. The Policy Statement included in the revised 2012 TJPA DBE Program Plan is unsigned. Additionally, neither the Policy Statement nor the Program Plan describes how, when, and where the Policy Statement will be distributed either within or outside of the organization. A link to TJPA's 2012 Program Plan, which includes the unsigned Policy Statement, is posted on TJPA's website.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final report, TJPA must have a signed Policy Statement signed by the CEO (Executive Director) that identifies the agency's new DBELO. Either the Program Plan or the Policy Statement should also describe in detail the distribution procedures for the Policy Statement. TJPA must also follow-through and disseminate the Policy Statement throughout their organization and to minority, female, and non-minority community and business organizations, as required by the rule.

**TJPA Response:** The revised DBE Program Plan, which already included the required Policy Statement in Section I, now has a signature block for the DBELO and the TJPA Executive Director. It will be signed upon the TJPA Board's approval and formally submitted to FTA via TEAM. Additionally, Section I now includes a description of how, when and where the Plan will be distributed within and outside of the organization. Specifically:

- The DBELO disseminates the Plan to the Transbay Joint Powers Authority Board of Directors whenever there are significant revisions for review and approval.
- The TJPA also disseminates the Program Plan upon revision to members of TJPA's organization (staff and management consultants) at a regular staff meeting and via email.
- The TJPA makes the Program Plan available to DBE and non-DBE business communities that perform work for it on DOT-assisted contracts by publishing an announcement of availability of revisions to the Plan in general circulation, minority-focused, and trade association publications such as the San Francisco Chronicle, San Francisco Examiner, El Mensajero, Small Business Exchange, San Francisco Bay View, La Oferta Review, Thoi Bao, Philippine News, and China Press.
- The Program Plan is available on the TJPA website, [www.transbaycenter.org](http://www.transbaycenter.org) > Doing Business with the TJPA, and notice of its availability is sent to over 100 Bay Area chambers of commerce. A list of the chambers is maintained by the DBELO (Attachment B).

When setting Program goals, the draft goal is published in the media outlets listed above and on the TJPA website ([www.transbaycenter.org](http://www.transbaycenter.org) > Documents > Items for Public Comment) to solicit comments from the business community prior to TJPA Board approval of the final goal. The draft goal is sent to the following TJPA project stakeholders and funders for comment: Alameda-Contra Costa Transit District, CalTrain/SamTrans, Metropolitan Transportation Commission, San Francisco Municipal Transportation Agency, San Francisco County Transportation Authority. The draft goal is also publicized to the business community for input by sending notice to the Bay Area chambers of commerce and at the DBE Public Participation meeting hosted by the Business Outreach Committee, a working group of Bay Area

transportation agencies dedicated to assisting small disadvantaged and local firms in doing business with the agencies, a group of which TJPA is a member.

**FTA Response:** FTA does not agree with TJPA's response. TJPA have conflated the DBE Policy Statement and Program Plan. TJPA has updated the Policy Statement to identify the Chief Financial Officer as the DBELO. TJPA has also added language to the Policy Statement, which they include within their Program Plan, that describes how the Program Plan will be distributed to relevant stakeholders. These actions address two of the concerns raised in the discussion section above.

The Policy Statement is not signed by an executive of TJPA. Instead, TJPA plans to have its Executive Director sign the Program Plan when TJPA Board's approves the document. TJPA's Policy Statement must be a standalone statement that is signed by a TJPA executive at the end of the statement. Even though the Policy Statement must be signed itself, it can still be included as part of the Program Plan document. A sample Policy Statement is attached for your review.

### 6.3 DBE Liaison Officer

**Basic Requirement:** (49 CFR 26.25) Recipient/Grantees must have a currently designated DBE Liaison Officer (DBELO) who has direct and independent access to the CEO of the recipient organization. The DBELO is responsible for implementing all aspects of the DBE program and must have adequate staff to properly administer the program.

**Discussion:** During this DBE Compliance Review, no deficiency was found with the requirements for the DBE Liaison Officer (DBELO). In the revised DBE Program Plan of April 28, 2012, and Policy Statement, TJPA's DBELO is identified as the agency's "Chief Financial Officer" i.e., Sara Gigliotti. Ms. Gigliotti is TJPA's current DBELO and Chief Financial Officer. Consistent with the requirement, she has independent and direct access to the TJPA Executive Director regarding DBE matters.

### 6.4 Minority and Women Owned Financial Institutions

**Basic Requirement:** (49 CFR 26.27) Recipients must investigate the existence of minority and women owned financial institutions and make efforts to utilize them. Recipients must encourage prime contractors to use these minority and women owned financial institutions.

**Discussion:** During this DBE Compliance Review, a deficiency was found within the Financial Institutions section of the DBE Program Plan. The Program Plan states contractors can obtain information about women and minority owned financial institutions from the DBELO (page 4). TJPA's DBELO said that she finds information about relevant firms by using the Federal Reserve Bank's Minority-Owned Financial Institutions list. The DBELO also named some of the relevant financial institutions in the San Francisco area. However, this information was not documented in a form that can easily be shared and distributed. TJPA needs to elaborate in its Program Plan both how and how often it will identify relevant financial institutions. TJPA must also formulate a plan to encourage use of these institutions by prime contractors and subcontractors.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final report, TJPA must conduct an analysis of available financial institutions. TJPA must expand the Financial Institutions section of their DBE Program Plan to include information about how and how often TJPA will identify relevant financial institutions and how they will promote their use. The Financial Institutions section must also describe how information about minority and women owned financial institutions will be shared with contractors.

**TJPA Response:** TJPA has updated its Plan to include the website for the Federal Reserve's list of minority-owned banks. Contractors will thus have direct access to the list of minority-owned financial institutions by consulting the TJPA Plan. Each year TJPA finance staff sends a letter to all vendors, consultants, and contractors regarding the deadline for fiscal year-end billing and including other project information as relevant. This year's letter (Attachment C) specifically encouraged recipients to consider minority-owned financial institutions for their banking needs. The Plan notes that this practice will be continued. The Plan also now unambiguously states that TJPA will consult the list whenever seeking proposals for its own banking needs, as has been done in the past but not documented in the Plan.

**FTA Response:** FTA agrees with TJPA's response. To close this deficiency, TJPA must submit to FTA a copy of their Broad approved Program Plan within 60 days of receipt of the Final DBE Program Compliance Review Report.

## 6.5 DBE Directory

**Basic Requirement:** (49 CFR 26.31) A DBE directory must be available to interested parties including addresses, phone numbers, and types of work each DBE is certified to perform. This directory must be updated at least annually and must be available to contractors and the public upon request.

**Discussion:** During this DBE Compliance Review, no deficiency was found within the DBE Directory section of the DBE Program Plan. The California DBE directory is maintained by the California Department of Transportation (Caltrans). TJPA's Program Plan (page 4) and website have links to the DBE Directory (<http://www.dot.ca.gov/hq/bep/>)

The review team viewed the web-based directory during the site visit. The directory includes the information required by 49 CFR Part 26 regulations. The directory provides the following information for each certified firm: the firm's name, mailing address, telephone number, and the type of work the firm has been certified to perform as a DBE. Caltrans updates their online directory with firm additions and deletions as changes are reported, in real time.

## 6.6 Overconcentration

**Basic Requirement:** (49 CFR 26.33) If the transit agency determines that DBE firms are so over concentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, the agency must devise appropriate measures to address this overconcentration.

**Discussion:** During this DBE Compliance Review, a deficiency was found in the procedures for determining overconcentration. TJPA's Program Plan states on page 4 that, "TJPA has not identified any types of work in DOT-assisted contracts that have an over-concentration of DBE participation." However, TJPA does not describe how they evaluate overconcentration or how frequently they perform such evaluations. The Program Plan also does not identify steps TJPA would take if overconcentration were observed.

TJPA's FTA-funded contracts between FYs 2009 and 2011 have funded contracts primarily related to real estate, finance, and DBE outreach. The frequent use of DBEs in these fields indicates a level of overconcentration, which must be analyzed by TJPA.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final DBE Compliance Review Report, TJPA must complete an overconcentration analysis of its current DBE contracts. In addition, TJPA must enhance the overconcentration section of their Program Plan. The Program Plan must describe overconcentration identification procedures, how frequently TJPA will investigate this issue, and what actions TJPA would take if an overconcentration is identified.

**TJPA Response:** TJPA has amended its Plan to describe:

- How it will identify overconcentration - by comparing the number of DBE firms in a given work code to the number of non-DBE firms
- When it will analyze overconcentration - at the time overall Program DBE goals are set, triennially
- What actions TJPA would take if an overconcentration is identified - notify DOT and request concurrence, and if concurrence is received, propose specific measures to address the overconcentration for DOT's approval. While several potential measures are listed in the Plan, it would be premature to state exact measures that would be used until the nature and cause of an overconcentration were analyzed.

**FTA Response:** FTA agrees with TJPA's response. To close this deficiency, TJPA must submit to FTA a copy of their Broad approved Program Plan within 60 days of receipt of the Final DBE Program Compliance Review Report.

## 6.7 Business Development Programs

**Basic Requirement:** (49 CFR 26.35) The recipient may establish a Business Development Program (BDP) to assist firms in gaining the ability to compete successfully in the marketplace outside the DBE program.

**Discussion:** During this DBE Compliance Review, no deficiencies were found in the area of Business Development Programs. TJPA states in their Program Plan that they do not provide business development programs (page 6). However, it might be useful to identify business development programs offered by other organizations and entities in the San Francisco region. This might enhance the success of TJPA's race neutral program element by strengthening the

capabilities of DBE firms. TJPA could provide the names of the programs, web links to more information, and contact person(s) in the Program Plan, solicitation documents, and on their website.

**Advisory Comment:** TJPA should identify organizations that provide business development programs provided in the region in their Program Plan and website.

**TJPA Response:** TJPA agrees that identifying organizations that provide business development programs would be useful to the business community, and has been working with the BOC to attempt to compile a directory of such programs since 2010. Unfortunately our experience has been that collecting comprehensive information about the myriad programs in existence is difficult. BOC members have developed a simple intake form and disseminated it on multiple occasions to every business development program known to BOC members. No responses have ever been received, despite several follow up attempts. TJPA will continue to try to work with fellow BOC members to develop such a resource, but we can only identify organizations that are responsive to our requests.

## 6.8 Fostering Small Business Participation

**Basic Requirement:** (49 CFR 26.39) Grantees are required to develop a Fostering Small Business Participation Element pursuant to *49 CFR Part 26*, "Participation by Disadvantaged Business Enterprises in Department of Transportation Programs," particularly the Final Rule set forth in the Federal Register [76 FR 5083 – Disadvantaged Business Enterprise: Program Improvements] published January 28, 2011. The Small Business Element was to be developed for incorporation into a revised DBE Program Plan and submitted to the FTA by February 28, 2012.

**Discussion:** During this DBE Compliance Review, deficiencies were found in the TJPA submission of its Fostering Small Business Participation Element. TJPA had an already existing Small Business Enterprise (SBE) Program, which it adopted in 2009. In its April 2012 DBE Program Plan, the 2009 SBE Program was referenced as satisfying the requirement for Part 26.39. However, the 2009 SBE Program does not meet all the requirements of the Small Business Element. For example, the 2009 SBE Program does not specify how TJPA's contracting requirements will be structured or obstacles will be eliminated to facilitate competition by small businesses (e.g. assessing contract sizes, requiring prime contractors to identify small business subcontracting opportunities on large contracts, and identifying or providing business development opportunities). Additionally, the SBE Program is sometimes vague. For example, the document states that the SBE Liaison Officer will "provide outreach to SBEs and community organizations to advise them of opportunities," (SBE Program page 7), but does not state how or how often these outreach activities will be done. Furthermore, the SBE Program's section on allowable certifications to qualify for SBE status suggests that only DBEs certified by the California United Certification Program are eligible to participation in the SBE Program. Such a requirement is contrary to federal guidelines on projects with federal funding.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final DBE Compliance Review Report, TJPA must update their Fostering Small Business Participation Element to



specify how TJPA's contracting requirements will be structured and obstacles will be eliminated to facilitate competition by small businesses, detail SBE program related outreach activities, and remove limitations on participation by DBEs certified outside of California.

**TJPA Response:** TJPA has amended the SBE Program to specifically state that a certification from any state's UCP will be accepted. This was already TJPA practice, as noted in our February 2012 memo to DOT regarding our SBE Program. It is also current TJPA practice to unbundle contracts where practical to facilitate small business participation; this is noted in the February 2012 memo and now also specifically noted in the SBE Program.

The Compliance Review report also suggests that the SBE Program should discuss how and how often outreach activities will be done. We do not see outreach mentioned in 49 CFR Part 26.39, and do not believe that the SBE Program document is the appropriate forum for detailing an outreach plan. Outreach means, methods and timing will vary according to the available contracting opportunities, and should be planned on a contract-by-contract basis.

**FTA Response:** FTA does not agree with TJPA's response. TJPA has added a section to their SBE Program Plan that describes how they will use small business set-asides and unbundle contracting opportunities to increase contracting opportunities for small businesses. TJPA has also expanded participation in the SBE Program to DBEs certified in any state. However, TJPA must take two further steps. One, they must describe in greater detail the process they will follow to ensure contracting requirements will be structured and obstacles will be eliminated to facilitate competition by small businesses (e.g. assessing contract sizes, requiring prime contractors to identify small business subcontracting opportunities on large contracts, and identifying or providing business development opportunities). For example, the SBE Program Plan vaguely states "The TJPA shall use set-asides for small business enterprises as appropriate in the administration of this SBE Program. Contracts shall also be analyzed for opportunities to unbundle work, in order to break large contracts into elements small enough for small businesses to reasonably perform, where this would not cause an undue burden to TJPA or its funders." (SBE Program Plan, Page 6 of 12). This paragraph does not provide sufficient detail. TJPA must describe in detail the process in which they will: (1) identify contracts that can be unbundled, (2) unbundle large projects into smaller projects and tasks, and (3) account for the capabilities of local SBE firms when unbundling projects. Two, they must include the SBE Program Plan within their DBE Program Plan.

To close this deficiency, TJPA must submit to FTA a copy of their Broad approved Program Plan that includes: (1) greater detail on the processes they will follow to ensure contracting requirements will be structured and obstacles will be eliminated to facilitate competition by small businesses and (2) a SBE Plan within the DBE Program Plan. These two steps must be completed within 60 days of receipt of the Final DBE Program Compliance Review Report.

## 6.9 Determining/Meeting Goals

This requirement includes sub-requirements related to determining and meeting goals.

---

## A. Calculation

**Basic Requirement:** (49 CFR 26.45) In 2010, 49 CFR Part 26 was amended concerning the requirement for an annual overall DBE goal, which had in previous years coincided with the annual federal fiscal year and typical grant year. Instead, beginning with FY 2011, based on a schedule determined by the FTA, overall goal documents are now required on a triennial basis.

**Discussion:** During this DBE Compliance Review, deficiencies were found in the calculation of TJPA's "Anticipated DBE Participation Level" (ADPL). TJPA's triennial goal is 18.5 percent for FY 2010-2013. The information provided by TJPA in their Program Plan about their Step 1 and Step 2 process is described below.

### *Step 1:*

According to TJPA's FY 2010-13 Anticipated DBE Participation Level (ADPL) Methodology document, TJPA defines the market area for consultants who have demonstrated an interest or are anticipated to participate in TJPA contracts to include the following San Francisco Bay Area counties:

- Alameda County
- Contra Costa County
- Marin County
- Napa County
- San Francisco County
- San Mateo County
- Santa Clara County
- Solano County
- Sonoma County

TJPA does not provide additional information about how they made the assessment of their contractor market area. The contractor market area should be the area in which the substantial majority of the contractors and subcontractors with which TJPA does business are located and the area in which TJPA spends the substantial majority of its contracting dollars. TJPA does not provide sufficient information for an independent assessment of their contractor market area. FTA considers the lack of information about the process of determining the contractor market area to be a deficiency.

TJPA identified the types of contacts it expects to execute during FY 2010 - 2013. These projects are expected to include: Construction Management, Construction Management - Bus Storage Facilities, Bus Storage Facilities Construction, Public Relations & Outreach, Independent Auditing Services, Outside Legal Services, and Financial & Grant Management. These activities were matched with their respective North American Industry Classification System (NAICS) codes, which are used to identify firms in the California United Certification Program DBE and U.S. Census Bureau's County Business Patterns databases. TJPA then weighted each work category as a percentage of the total amount of the contracts planned for award. The Step 1 base figure, weighted by type of work to be performed, is 21.4 percent.

**Step 2:**

The TJPA Program Plan's description of the Step 2 process states that TJPA's DBE participation history can be used to determine whether an adjustment to the Step 1 base figure is warranted. TJPA used their past participation levels to adjust the Step 1 base figure for each NAICS category and then averaged those results across all the NAICS categories. Using this method, TJPA adjusted their DBE participation level to 18.5 percent.

TJPA's use of their past participation levels for their Step 2 adjustment is deficient. This deficiency arises because an adjustment can only be based on historic DBE participation if future contracting opportunities are expected to be similar. Although TJPA provides a list of expected future contracting opportunities, they do not provide a listing of historic contracting opportunities for comparison sake. Without the ability to compare TJPA's historical contracting opportunities with their expected future contracting opportunities, it is not possible to assess if the use of historical DBE participation is an appropriate approach to perform the Step 2 adjustment.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final DBE Compliance Review Report, TJPA should develop a new DBE participation goal and document their methodology thoroughly. The methodology description should include a clear explanation of the contractor market area in the Step 1 process. The Step 2 description should compare TJPA's historic contracts with their expected future contracts to justify use of historic DBE participation as a basis for the Step 2 adjustment.

**TJPA Response:** TJPA will continue to seek small and disadvantaged business participation to the maximum extent possible on contracts, regardless of funding source. Nonetheless, we have calculated a new DBE goal of 10 percent for only those contracts planned to be funded all or in part with FTA funds, and will maintain the previously calculated 18.5 percent goal for the overall Program as a Program SBE goal, as seeking this higher level of participation is very important to the TJPA Board. The revised DBE goal requires approval from the Board prior to circulation for a 45-day comment period. This approval will be sought at the next regular meeting (September 13, 2012). Following circulation of the draft goal, the TJPA will seek final approval from the Board before submission to FTA. This would occur at the November 8, 2012 TJPA Board meeting and the goal would be submitted to FTA thereafter. The new goal methodology is attached to the draft revised DBE Program Plan.

The Compliance Review goes on to describe TJPA's "Step 2" process but incorrectly states that past participation is averaged across all NAICS categories. Past participation is averaged NAICS category by NAICS category. The Review also incorrectly states that the historic contracting opportunities are not listed; however, they are listed on the same page that the past participation is averaged for each NAICS category: Temp Terminal CM (Construction Management) was a historic contracting opportunity; Temp Terminal Construction was a historic contracting opportunity, and so forth. We are unsure what other information is necessary to "compare TJPA's historical contracting opportunities with their expected future contracting opportunities."

---

**FTA Response:** FTA does not agree with TJPA's response. TJPA's updated Program Plan now provides a rationale for their definition of their contractor market area. Although TJPA is correct in stating that their April 2012 DBE Program Plan does include a list of their historical contracts, neither the April 2012 Program Plan nor the latest one provide an analysis that examines if DBE participation in historical contracts can be reasonably compared to expected DBE participation in their future contracts based on the types of projects completed in the past and the types of projects expected in the future. A Step 2 adjustment can only be performed if past and future projects are of a similar nature. To close this deficiency, TJPA must submit to FTA a copy of their Broad approved Program Plan that includes a detailed analysis that examines whether DBE participation in historical contracts is reasonably comparable to expected DBE participation in their future contracts based on the types of projects completed in the past and the types of projects expected in the future. TJPA must also describe in greater narrative detail the analysis and calculations performed to develop the new DBE participation goal of 10 percent. TJPA must submit this updated Program Plan within 60 days of receipt of the Final DBE Program Compliance Review Report.

## **B. Public Participation and Outreach**

**Basic Requirement:** (49 CFR 26.45). In establishing an overall goal, the recipient must provide for public participation through consultation with minority, women, and contractor groups regarding efforts to establish a level playing field for the participation of DBEs. A published notice announcing the overall goal must be available for 30 days. The public must be notified that the recipient is accepting comments on the goal for 45 days following the date of the notice.

**Discussion:** During this DBE Compliance Review, deficiencies were found with the requirements for public participation and outreach. TJPA brings draft of DBE participation goals to meetings of the TJPA Board of Directors, which are open to the public. TJPA also circulates and discusses goals with other local transit agencies as well the Business Outreach Committee, a working group of the local transportation agencies that is focused on assisting small and disadvantaged businesses. TJPA advertises in nine local newspapers as well. However, the African American Chamber of Commerce claimed they were not consulted during TJPA's goal development process.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final report, TJPA must develop a plan that details how they will consult with local women and minority associations and chambers of commerce in future efforts to develop DBE participation goals. TJPA must involve outside organizations in its DBE goal setting process. The inclusion of consultation from women and minority business associations and chambers of commerce is required.

**TJPA Response:** The Compliance Review seems to state that TJPA is discussing its draft DBE goals only with local transit agencies and the Business Outreach Committee (BOC). This is not a correct characterization of each BOC member's outreach efforts as they relate to the BOC. The BOC members do not simply circulate their respective agency's goals to each other; instead, a large outreach event is planned in which each agency has a chance to publicize its upcoming contract opportunities and proposed goal to an audience of several hundred attendees. In the

past, these events were held annually; they are now held triennially to coincide with the BOC agencies' goal submission schedule (all BOC agencies are in FTA Goal Scheduling Group "A").

**FTA Response:** FTA does not agree with TJPA's response. TJPA's distribution of draft DBE goals with other local transit agencies and the Business Outreach Committee is commendable. However, TJPA must have a robust consultation process that includes direct outreach to local chambers of commerce and minority business associations, for example, during the development of DBE goals. TJPA's DBE Program Plan now describes a mechanism to distribute the Program Plan to more than 100 local chambers of commerce and business associations. However, TJPA does not describe in detail the consultation process that TJPA will follow as it develops its DBE goal. The consultation efforts described by TJPA in an email to the compliance review team must be included in TJPA's Program Plan. To close this deficiency, TJPA must submit to FTA a copy of their Broad approved Program Plan that includes a description of their consultation procedures with regard to local chambers of commerce and business associations. TJPA must submit this updated Program Plan within 60 days of receipt of the Final DBE Program Compliance Review Report.

### C. Goal Attainment

**Basic Requirement:** (49 CFR 26.47) This subpart explains the ramifications of failing to meet yearly overall DBE participation goals. The government may not punish an agency or consider it to be noncompliant if the agency's DBE program has been administered in good faith. If an agency's awards and commitments fall short of the overall DBE goal as reflected in the semi-annual Uniform Report of Awards or Commitments and Payments, the agency must take proper steps to demonstrate that they are operating their DBE program in good faith.

**Discussion:** During this DBE Compliance Review, a deficiency was found regarding TJPA's goal attainment. TJPA's four most recent Uniform Reports obtained by the compliance review team (fiscal years 2010 and 2011) indicate that TJPA did not meet its race neutral DBE participation goals. Prior to the triennial review recalculation, TJPA had a race neutral goal of 25.4 percent. TJPA did not meet this goal as recorded in both Uniform Reports from FY 2010. During FY 2011, TJPA achieved 11 percent total DBE attainment, which was achieved exclusively through race neutral means. This attainment falls below the 18.5 percent goal established during the latest triennial review.

**Corrective Action and Schedule:** TJPA must submit a goal attainment shortfall analysis to FTA within 60 days of the issuance of the final report. TJPA must conduct a shortfall analysis that:

- (1) Analyzes in detail the reasons for the difference between the overall goal and TJPA's awards and commitments in the relevant fiscal year.
- (2) Establishes specific steps and milestones to correct the problems identified in the short fall analysis and to enable TJPA to meet fully their current goal.

In addition, since TJPA has not met its DBE goals through race neutral means, TJPA must consider other measures to help it meet its DBE goal. While a Ninth Circuit decision held that

transit agencies cannot include a race conscious element within their DBE program without proving discrimination within the contracting community, there are disparity studies available to TJPA that demonstrate discrimination against certain groups in the San Francisco area. TJPA should utilize such studies or conduct one of its own to determine whether contract goals should be set as a way to help TJPA meet its DBE goal.

**TJPA Response:** TJPA had a goal of 25.4 percent in FY2010 and achieved 20 percent DBE participation. When DOT issued the proposed rulemaking changing DBE goal submission to a triennial, rather than annual, schedule, TJPA submitted comments (Attachment H) noting that our contract activity fluctuates from year to year, unlike a traditional transit operating agency, and that a three-year goal number would not be an accurate reflection of our expected contract activity for each of the individual years in the three year period. We raise this point here because the shortfall analysis for FY2011 is straightforward—the bus storage construction contract has not been awarded yet. As shown in our original methodology for FY2011-2013, this contract represents 67 percent of the planned contract activity for the three year period. There are no problems to be corrected to fully meet our goal for the three year period. As noted above, however, we have re-calculated our DBE goal to 10 percent (the bus storage construction contract is not among those planned to be funded with TJPA’s current FTA grants).

**FTA Response:** FTA does not agree with TJPA’s response. TJPA’s explanation for not meeting its goal does not amount to a short fall analysis. TJPA must perform a comprehensive short fall analysis as described in the discussion section above. A sample short fall analysis is provided for your reference at the end of this report. To close this deficiency, TJPA must submit to FTA a short fall analysis within 60 days of receipt of the Final DBE Program Compliance Review Report.

#### **D. Transit Vehicle Manufacturers (TVM)**

**Basic Requirement:** (49 CFR 26.49) The recipient must ensure that transit vehicle manufacturers (TVM) have complied with the DBE regulations prior to procuring transit vehicles.

**Discussion:** During this DBE Compliance Review, no deficiency was found with the requirements for Transit Vehicle Manufactures. TJPA does not procure transit vehicles, but the agency does include an appropriate section about how it might procure a transit vehicle in the future in its Program Plan (page 8). The section mentions that TJPA will require Transit Vehicle Manufacturers to prove they have complied with the DBE Program.

**Advisory Comment:** As a best practice, TJPA could update its Program Plan to state that they will obtain FTA’s list of approved transit vehicle manufacturers and evidence that a TVM is approved to bid on FTA-assisted transit vehicle procurements. TJPA should add they will check to ensure the TVM approval is valid at the time the purchase contract is executed.

**TJPA Response:** TJPA has updated its Plan to specifically state that, “TJPA is not a transit operating agency and does not procure transit vehicles.” We do not feel that it is relevant to describe how we would certify that a transit vehicle manufacturer has complied with the DBE

regulations. If TJPA's mission changes in the future and transit vehicles are procured with FTA assistance, the Plan will be revised at that time.

### **E. Race Neutral**

**Basic Requirement:** (49 CFR 26.51) The recipient must meet the maximum feasible portion of the overall goal by using race neutral means of facilitating DBE participation. (Examples of how to reach this goal amount are listed in the regulations).

**Discussion:** TJPA's race neutral goal-setting (referred to as Average Anticipated DBE Participation Level, or AADPL) methodology is presented in Attachment E of their DBE Program Plan. However, the goal-setting methodology employed is not clearly explained.

**Advisory Comment:** TJPA should revise their goal-setting methodology discussion within Attachment E. The narrative should fully outline and explain all assumptions and calculations and be transparent and replicable. While not a deficiency in this section, please see discussion and finding in Section F (Race Conscious).

**TJPA Response:** TJPA has never received a comment that our goal-setting methodology is unclear. We note that our methodology has been submitted to FTA every year since 2006 and our goal accepted each year. However, as noted above, we have re-calculated our DBE goal and new methodology is attached to the draft revised DBE Program Plan. If there is any aspect of the methodology that is unclear, please let us know so that we may address it (the Compliance Review simply states that the "methodology employed is not clearly explained").

### **F. Race Conscious**

**Basic Requirement:** (49 CFR 26.51). The recipient must establish contract goals to meet any portion of its overall goals it does not project to be met using race neutral means. The recipient must also project a percentage of its overall goal that will be met through race-conscious means, as part of the goal methodology. Race conscious goals may only be established on contracts with subcontracting opportunities and are not required to be set on each individual contract.

**Discussion:** During this DBE Compliance Review, deficiencies were found with the regard to the race conscious program. This is because TJPA's DBE program is required to be race neutral in the absence of proven discrimination within the contracting community, as part of the Ninth Circuit requirements. However, when TJPA bids projects, it provides what it calls "DBE availability advisories" in RFPs for projects with potential subcontracting opportunities. In addition, TJPA's Program Plan includes a good faith effort requirement, although the Program Plan says it does not apply. This is because some of TJPA's project managers and several contractors expressed an opinion that prime contractors had to demonstrate a good faith effort to find DBE subcontractors if they are unable to meet the "DBE availability advisory" through their teaming arrangement. These two observations may create the impression that these contracts have race conscious subcontracting goals.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final report, TJPA must revise its DBE Program plan and not require good faith efforts from prime contractors since they are supposed to only operate a race neutral DBE program. All references to a good faith effort requirement must be removed from the Program Plan, solicitation documents, TJPA's website, contract templates, and other relevant documents and webpages.

**TJPA Response:** TJPA has never required contractors to make good faith efforts to meet a DBE availability advisory level. TJPA solicitation documents have always clearly and explicitly stated, "The DBE availability advisory percentage is not an enforceable goal and compliance with the advisory is not a condition of contract award." TJPA staff have also unequivocally stated this at public meetings regarding procurements, such as pre-bid meetings. However, per FTA's direction in the Compliance Review, we will no longer use DBE availability advisories. The appendix regarding good faith efforts in the DBE Program Plan noted that it would only be in effect if TJPA had a race-conscious program. Nonetheless, we have removed that section altogether.

Because good faith efforts are a required element of our SBE Program when an SBE goal is placed on a contract, please note that TJPA's procurement documents and website will refer to good faith efforts to meet an SBE utilization goal.

**FTA Response:** FTA agrees with TJPA's response. TJPA's Program Plan has appropriately removed mention of DBE availability advisories. However, FTA cautions TJPA that the inclusion of good faith efforts in the SBE Program is not acceptable. Good faith efforts do not apply to the SBE program because good faith efforts only apply to race conscious contract goals. The deficiency identified in the discussion and corrective action sections have been addressed and is now considered closed.

## G. Good Faith Efforts

**Basic Requirement:** (49 CFR 26.53) The recipient may only award contracts which contain DBE contract goals to bidders who either meet the stated goals or document sufficient good faith efforts (GFE) to meet the goals. The bidders must provide documentation of these efforts to the recipient. The recipient should have a written Good Faith Efforts procedure, including an administrative reconsideration process for cases where apparent successful bidder does not meet requirement. However, it must be noted that the application of the Good Faith Effort criteria is only for race-conscious goal programs.

**Discussion:** During this DBE Compliance Review, a deficiency was found with the requirements for good faith efforts. As noted in the discussion section on "Race Conscious" goals, the TJPA DBE program is required to be race neutral. However, when TJPA bids projects with potential subcontracting opportunities, it provides "DBE availability advisories," which bidders may mistakenly interpret to be contract goals. TJPA's Program Plan also provides a detailed description of the good faith effort they require (page 9) if the goals are not met. These instructions give the impression of a race conscious program.



**Corrective Action and Schedule:** Within 60 days of the issuance of the final report, TJPA must stop issuing DBE availability advisories and remove all references to good faith efforts from their Program Plan, solicitation documents, website, contract templates, and other relevant documents and webpages.

**TJPA Response:** TJPA has never required contractors to make good faith efforts to meet a DBE availability advisory level. TJPA solicitation documents have always clearly and explicitly stated, “The DBE availability advisory percentage is not an enforceable goal and compliance with the advisory is not a condition of contract award.” TJPA staff have also unequivocally stated this at public meetings regarding procurements, such as pre-bid meetings. However, per FTA’s direction in the Compliance Review, we will no longer use DBE availability advisories. The appendix regarding good faith efforts in the DBE Program Plan noted that it would only be in effect if TJPA had a race-conscious program. Nonetheless, we have removed that section altogether.

Because good faith efforts are a required element of our SBE Program when an SBE goal is placed on a contract, please note that TJPA’s procurement documents and website will refer to good faith efforts to meet an SBE utilization goal.

**FTA Response:** FTA agrees with TJPA’s response. TJPA’s Program Plan has appropriately removed mention of DBE availability advisories. However, FTA cautions TJPA that the inclusion of good faith efforts in the SBE Program is not acceptable. Good faith efforts do not apply to the SBE program because good faith efforts apply to race conscious contract goals. The deficiency identified in the discussion and corrective action sections has been addressed and is now considered closed.

## **H. Counting DBE Participation**

**Basic Requirement:** (49 CFR 26.55) The recipient must count only the value of work actually performed by a DBE with its own forces or a DBE subcontractor, toward actual DBE goals. The DBE must be certified at the time of award and work can be counted only if the DBE is performing a commercially useful function, as described in 26.55 c 1-5.

**Discussion:** During this compliance review, a deficiency was found with regard to counting DBE participation. TJPA’s Program Plan provides a detailed description of how the agency counts DBE participation (page 10). However, the instructions were not observed in the RFP template documents the review team examined. Furthermore, several DBE were identified as “on hold” in the documents provided to the review. It was explained to the review team that these DBEs were awarded contracts, but had not been utilized for work under the contracts. It was unclear to the review team whether TJPA counted these DBE firms in their goal attainment reports.

**Corrective Action and Schedule:** Within 60 days of issuance of the final report, TJPA must elaborate how they count DBE participation in solicitation documents. Further, TJPA must not count toward its goal attainment any DBEs awarded contracts, but put “on hold.” As part of its short-fall analysis, TJPA should reconsider this practice.

**TJPA Response:** Section 26.55 of 49 CFR Part 26, regarding how to count DBE participation, does not require that the counting methodology be included in solicitation documents such as Requests for Proposals (RFPs). TJPA has chosen to minimize the length of its procurement documents where possible. Rather than re-print information in an RFP that is available elsewhere, TJPA RFPs refer respondents to the original source of the information. The TJPA RFP template directs proposers to the location of the DBE Program Plan on the TJPA website, which includes the counting methodology.

The Compliance Review states that some contracts reviewed were “on hold.” Without more information regarding the contracts in question, TJPA is unable to address this concern in detail; however, we can assure you that TJPA counts only awarded contracts towards goal attainment.

**FTA Response:** FTA agrees with TJPA’s response. The deficiency identified in the discussion and corrective action sections has been addressed and is now considered closed.

## I. Quotas

**Basic Requirement:** (49 CFR 26.43) The recipient is not permitted to use quotas or set-aside contracts.

**Discussion:** During this DBE Compliance Review, deficiencies were found with the requirement for quotas. TJPA’s Program Plan states that they do not use quotas (page 7). However, misunderstandings about the DBE Program exist among some TJPA staff and contractors. Some TJPA staff (e.g. a TJPA Program Manager) and contractors referred to the program as “set asides” for DBEs. A non-DBE prime contractor said they would never bid on a project and use a good faith effort demonstration if they were unable to achieve the project’s DBE availability advisory through their subcontractor teaming arrangements because they did not want to be negatively perceived by TJPA for future contracting opportunities. For example, the Webcor contract should not have “availability advisories” in it.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final report, TJPA must clarify the nature of their DBE program to their staff and the contracting community. TJPA must also take out DBE availability advisories from all their future contracts.

**TJPA Response:** TJPA will stop using DBE availability advisories. TJPA has always consistently, clearly and explicitly stated that DBE availability advisory percentages are not enforceable goals and compliance with an advisory is not a condition of contract award, both in writing and verbally. Now that there will no longer be advisories, there is nothing to clarify to the contracting community. TJPA will discuss these revisions to the Program Plan with staff as appropriate in staff meeting(s) and emails.

**FTA Response:** FTA agrees with TJPA’s response. The deficiency identified in the discussion and corrective action sections has been addressed and is now considered closed.

## 6.10 Required Contract Provisions

---

This requirement includes four sub-requirements related to the inclusion of contract provisions.

### **A. Non-discrimination**

**Basic Requirement:** (49 CFR 26.13). Each contract signed with a contractor (and each subcontract prime contractors sign with a subcontractor) must include the non-discrimination clause specified by the regulations.

**Discussion:** During this compliance review, a deficiency was found with regard to contract assurance clauses. TJPA is not ensuring that required clauses are included in all contracts. An appropriate nondiscrimination clause is included in the prime contract agreements between TJPA and Robin Stevens Consulting, Business Development Inc., Nancy Whelan Consulting, and Singer Associates. However, the clause was not included in the subcontract agreement between Business Development Inc. and their DBE subcontractor, and a subcontract agreement was never executed between Singer Associates and their DBE subcontractor. The TJPA Program Plan includes a requirement for all prime contracts and subcontracts to include a DBE specific nondiscrimination clause (page 3).

**Corrective Action and Schedule:** Within seven days of the issuance of the final DBE Compliance Review Report, TJPA must include the following statement in all its solicitation and contract documents:

"The contractor, sub recipient 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 recipient deems appropriate."

Additionally, TJPA must include language in their Program Plan that assures that this and other contract provisions flow down to sub-recipient contracts and subcontractor contracts. TJPA also must collect and review all subcontract agreements.

**TJPA Response:** TJPA already places the language listed in the Corrective Action for this section in its contract documents. TJPA has revised its Plan to specifically require TJPA contractors to place the non-discrimination language in any subcontract, and to provide a copy of each subcontract to TJPA.

**FTA Response:** FTA agrees with TJPA's response. TJPA's Program Plan must provide a timeframe for when prime contracts must submit subcontract agreements to TJPA. To close this deficiency, TJPA must submit to FTA a copy of their Broad approved Program Plan that specifies the timeframe prime contractors have to submit copies of all subcontract agreements to TJPA. TJPA must submit this updated Program Plan within 60 days of receipt of the Final DBE Program Compliance Review Report.

### **B. Prompt Payment and Return of Retainage**

---

**Basic Requirement:** (49 CFR 26.29) The recipient/grantee must include a contract clause requiring prime contractors to pay subcontractors for satisfactory performance on their contracts no later than a specific number of days from the time they receive payment from the grantee. This clause must also address prompt return of retainage payments from the prime to the subcontractor (i.e., within a specific number of days after the subcontractor's work is satisfactorily completed).

**Discussion:** During this compliance review, a deficiency was found with regard to prompt payment and return of retainage clauses. Prompt payment and return of retainage clauses are included in the standard contract template and in all the prime contracts the review team examined. However, TJPA does not appear to ensure that the required prompt payment clauses are included in all contracts. An appropriate prompt payment and return of retainage clause is included in the prime contract agreements between TJPA and Robin Stevens Consulting, Business Development Inc., Nancy Whelan Consulting, and Singer Associates. However, the clause was not included in the subcontract agreement between Business Development Inc. and their DBE subcontractor, and a subcontract agreement was never executed between Singer Associates and their DBE subcontractor. The TJPA Program Plan includes a requirement for all prime contracts and subcontracts to include a DBE specific prompt payment and return of retainage clause (page 3). Inclusion and enforcement of a prompt payment contract clause might aid in reducing delays in payment to subcontractors. This was alleged to be the case between Parsons Transportation Group (PTG) and [REDACTED], which resulted in a complaint filed by CDS and a federal investigation by the U.S. DOT's Office of the Inspector General.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final DBE Compliance Review Report, TJPA must create a mechanism that ensures that a prompt payment and return of retainage clauses flow down to subcontractor contract documents. Additionally, TJPA must document in their Program Plan how they ensure flow-down of required clauses in subcontract agreements.

**TJPA Response:** The Compliance Review incorrectly states that, "The TJPA Program Plan includes a requirement for all prime contracts and subcontracts to include a DBE specific prompt payment and return of retainage clause (page 3)." The Plan - and 49 CFR Part 26.29 - require only that the clauses be in prime contracts: "The TJPA ensures that the following clauses or equivalent will be included in each DOT-assisted *prime* contract." (Emphasis added.) The prime contractor is required to promptly pay the subcontractor, and thus the clauses are appropriately required in the prime contract. TJPA places these clauses in every prime contract without exception.

**FTA Response:** FTA does not agree with TJPA's response. While TJPA correctly notes that these clauses are not required in subcontracts, TJPA is still deficient in this area because it has not provided a documented set of procedures to ensure prompt payment and return of retainage. TJPA should reference 49 CFR Part 26.29(b) and (d) for suggestions on enforcement procedures. To close this deficiency, TJPA must submit to FTA a copy of their Broad approved Program Plan that documents how they will ensure flow-down of the prompt payment and return of retainage clauses in subcontract agreements consistent with 49 CFR Part 26.29 (b) and (d). TJPA

must submit this updated Program Plan within 60 days of receipt of the Final DBE Program Compliance Review Report.

### C. Legal Remedies

**Basic Requirement:** (49 CFR 26.37) Recipients must implement appropriate mechanisms to ensure compliance of the parts requirements by all program recipients, applying the legal and contract remedies under both Federal as well as state and local laws.

**Discussion:** TJPA does include a legal remedies section in its Program Plan. These provisions are generic and nature and pertain to general contract compliance. The DBE program is not mentioned, however. Additionally, legal remedy clauses are often not included in subcontracting agreements, and TJPA has no mechanism for verification. For example, the subcontract agreement between Business Development Inc. and their DBE subcontractor does not include a legal remedy clause. A deficiency was found .....

**Corrective Action and Schedule:** Within 60 days of the issuance of the final DBE Compliance Review Report, TJPA should revise its Program Plan to describe in detail legal remedies available to TJPA in the event of contractor noncompliance with the DBE program. These legal remedies should be included in TJPA's standard contract template and in all printed and signed contracts. TJPA should also develop procedures that ensure that these clauses are also included in subcontractor agreements.

**TJPA Response:** The non-discrimination language above specifically states that failure by the contractor to carry out the requirements of 49 CFR Part 26 is a material breach of the contract. As noted above, this non-discrimination language is in every prime contract. Each TJPA prime contract contains two termination clauses—a termination for convenience clause and a termination for default clause. TJPA's standard language is already detailed; the default clause states:

On and after any Event of Default, the TJPA shall have the right to exercise its legal and equitable remedies, including, without limitation, the right to terminate this Agreement or to seek specific performance of all or any part of this Agreement. In addition, the TJPA shall have the right (but no obligation) to cure (or cause to be cured) on behalf of the Contractor any Event of Default; the Contractor shall pay to the TJPA on demand all costs and expenses incurred by the TJPA in effecting such cure, with interest thereon from the date of incurrence at the maximum rate then permitted by law. The TJPA shall have the right to offset from any amounts due to Contractor under this Agreement or any other agreement between the TJPA and the Contractor all damages, losses, costs or expenses incurred by the TJPA as a result of such Event of Default and any liquidated damages due from the Contractor pursuant to the terms of this Agreement or any other agreement.

All remedies provided for in this Agreement may be exercised individually or in combination with any other remedy available hereunder or under applicable laws, rules and regulations. The exercise of any remedy shall not preclude or in any way be deemed to waive any other remedy.

The above language from the default clause has now been added to the Plan. TJPA could exercise either the default or termination for convenience clause in case of a material breach by a contractor. Both of these remedies, as well as the TJPA's ability to determine that a contractor is not responsible, are now specifically listed in the Plan.

**FTA Response:**

FTA does not agree with TJPA's response. The legal remedies quoted in TJPA's response are general in nature. The regulation requires that TJPA must implement mechanisms to ensure compliance with DBE regulations. A potential remedy might be for TJPA to define an "event of default" as noncompliance with DBE regulation. TJPA must submit to FTA a Program Plan that includes a description of their legal remedies for enforcing the DBE program and definitions of potential events of default within 60 days of receipt of the Final DBE Program Compliance Review Report.

### **6.11 Certification Standards**

**Basic Requirement:** (49 CFR 26.67) All grantees are required to be part of a statewide Unified Certification Program (UCP). The recipient, if a certifying member of the UCP, must have a certification process intact to determine if a potential DBE firm is legitimately socially and economically disadvantaged according to the regulations. The DBE applicant must submit the required application and a signed and notarized statement of personal net worth with appropriate supporting documentation as part of this process.

**Discussion:** TJPA is not a certifying agency. The California Department of Transportation (Caltrans) certifies DBEs in the TJPA area. No deficiencies were found.

### **6.12 Certification Procedures**

**Basic Requirement:** (49 CFR 26.83) The recipient must determine the eligibility of firms as DBEs consistent with the standards of Subpart D of the regulations. The recipient's review must include performing an on-site visit and analyzing the proper documentation.

**Discussion:** As noted in Section 6.11, above, TJPA is a non-certifying member of the California UCP and therefore does not directly apply the standards and procedures of Part 26 of the DBE regulations. No deficiencies were found.

### **6.13 Record Keeping and Enforcements**

The requirement includes three sub-requirements related to recordkeeping and enforcement.

#### **A. Bidders List**

**Basic Requirement:** (49 CFR 26.11) The recipient must maintain a bidders list complete with subcontractor firm names, addresses, DBE status, and age of firm and annual gross receipts of the firm.

**Discussion:** During this compliance review, no deficiency found with regard to the bidders list requirement. TJPA maintains a bidders list. The Program Plan states on page 5 that the bidders list will contain each of the necessary elements contained within 49 CFR 26.11, including the firm name, address, DBE or non-DBE status, age, and annual receipts. TJPA includes a “Bidders/Proposers Information Request Form” form (Attachment 5B) in all solicitations, which must be included with all submissions. The form includes fields for all the required information for the bidders list.

## B. Monitoring

**Basic Requirement:** (49 CFR 26.37, 26.55) The recipient must include a monitoring and enforcement mechanism to ensure that work allocated to DBEs (at contract award or subsequently) is actually performed by the DBEs to which the work was allocated.

**Discussion:** During this compliance review, a deficiency was found with regard to monitoring. TJPA most significant monitoring short coming is that they do not collect or review subcontract agreements between prime contractors and subcontractors. Despite this short coming, TJPA’s monitoring program has positive elements. TJPA’s Program Plan has an extensive description of their monitoring and enforcement procedures (Page 10). The review team interviewed TJPA project managers who described TJPA’s frequent use of site visit by inspectors and their careful review of submitted invoice reports from prime contractors and subcontractors. During the onsite review there was concern with TJPA’s use of outsourced project management firms might compromise the integrity of their on-site monitoring programs.

**Corrective Action and Schedule:** Within 60 days of the issuance of the final DBE Compliance Review Report, TJPA must document a mechanism that ensures integrity of its on-site monitoring program using outsourced project management firms.

**TJPA Response:** We appreciate your note in the report that there are positive elements to TJPA’s monitoring program. To address the deficiency noted in this section, we have, as stated above, added language to the Plan stating that the required non-discrimination clause must be included in all subcontracts and that subcontracts must be provided to TJPA. TJPA has requested a copy of all subcontracts from each prime contractor and will have all subcontracts collected by August 10, 2012.

The Compliance Review states in this section, “During the onsite review there was concern that TJPA’s use of outsourced project management firms might compromise the integrity of their on-site monitoring programs.” We are asked to describe how TJPA will ensure the integrity of its on-site monitoring program using outsourced project management firms.

TJPA has strict internal control procedures dictating how contract work is approved and paid for. DBE and SBE participation monitoring is part of the payment approval process and thus is

included in the internal control procedures. As was explained during the review, no contract work or payments are approved by consultants, even if a consultant has a role in the management and review of the contract/invoice; ultimate approval lies solely with TJPA staff. Should TJPA receive a complaint about DBE or SBE participation, it would be investigated by TJPA staff. Additionally, it is the TJPA Contract Compliance Officer, not a consultant, who collects, collates, and analyzes all DBE/SBE forms as part of TJPA's monitoring. Please let us know what other information we can provide to alleviate this concern.

**FTA Response:** FTA does not agree with TJPA's response. FTA notes TJPA's response addresses review of payments and documents. The deficiency noted concerns a subcontractor to the prime contractor performing onsite monitoring. This practice compromises the integrity of the onsite monitoring process. To close this deficiency, TJPA must submit to FTA a copy of their Broad approved Program Plan that describes how they will ensure the integrity of their on-site monitoring program using outsourced project management firms within 60 days of receipt of the Final DBE Program Compliance Review Report.

### C. Reporting to DOT

**Basic Requirement:** (49 CFR 26.11) The recipient must provide data about its DBE program to the FTA on a regular basis. The recipient must transmit the DBE Awards or Commitments and Payments at the intervals stated. In addition, for the ARRA funds the recipient must transmit the ARRA Uniform Report of DBE Commitments/Awards and Payments.

**Discussion:** The review team observed one error regarding recent DBE reporting. When reviewing the FY 2011 Uniform Reports, the review team observed that the new FY 2011-13 race neutral goal was reported as 18.5 percent for the first period but 29.2 percent for the second period. The proper figure is 18.5 percent according to Attachment E of the DBE Program Plan.

**Corrective Action and Schedule:** TJPA must input the proper race neutral goal reporting in future DBE Uniform Reports, beginning with the first Uniform Report due after the issuance of this final compliance review report.

**TJPA Response:** TJPA does not have the ability to edit the goal field that was incorrect in TEAM and did not enter data incorrectly. The data in that field is entered by FTA. Sara Gigliotti realized that the goal was incorrect when entering data for the Uniform Report in TEAM and brought it to the attention of FTA staff. A programming fix was required. An email chain documenting this discussion—including the programmer's assertion that the goal was fixed—is Attachment J. Randelle Ripton and Derrin Jourdan of FTA were both on this email chain and are likely aware that inputting the goal is not something performed by recipients; in fact the TEAM Web Guide for Civil Rights states, "Annual DBE Goal(s)' data elements are *auto populated*" (emphasis added). Please confirm that this deficiency will be removed before issuance of the final Compliance Review.

**FTA Response:** This finding is removed as a deficiency because the data was incorrectly entered by FTA staff.



**Exhibit 6: Summary Table of Compliance Review Findings**

Item	Requirement of 49 CFR Part 26	Reference	Site Visit Finding	Description of Findings	Suggested Corrective Action	Response Days/Date
1	DBE Program Plan	26.21	Deficiency	TJPA completed a Revised DBE Program Plan dated April 2012. The Program Plan has many elements required by 49 CFR Part 26. However there are some deficiencies in various subsections of the Program Plan, including an unsigned Policy Statement, insufficient descriptions of procedures for identifying financial institutions and evaluating overconcentration. In addition, the inclusion of “contract availability advisories” may, despite disclaimers, suggest the DBE program has a race conscious element.	TJPA must develop a Program Plan that addresses the issues identified in this compliance review report.	Within 60 days of issuance of the final compliance review report
2	Policy Statement	26.23	Deficiency	TJPA includes an unsigned Policy Statement in its 2012 DBE Program Plan. Additionally, the Policy Statement or Program Plan should also describe in more detail how and where the Policy Statement will be distributed.	TJPA should have its Executive Director sign a new Policy Statement that describes in more detail how and where the Policy Statement will be distributed.	Within 60 days of issuance of the final compliance review report
3	DBE Liaison Officer	26.25	No Deficiency	TJPA’s DBELO is identified as the agency’s “Chief Financial Officer” in the 2012 Program Plan and Policy Statement. Sara Gigliotti is TJPA’s current DBELO and Chief Financial Officer. She has independent and direct access to the TJPA Executive Director regarding DBE matters.	Not applicable	Not applicable
4	Financial Institutions	26.27	Deficiency	The Program Plan states contractors can obtain information about women and minority owned financial institutions from the DBELO (page 4). TJPA’s DBELO said she finds information about relevant firms by using the Federal Reserve Bank’s Minority-Owned Financial Institutions list. The DBELO was also able to name some the relevant financial institutions in the San Francisco area. However, the information the DBELO had is not documented in a form that can easily be shared and distributed.	TJPA should expand the Financial Institutions section of their DBE Program Plan to include information about how and how often TJPA will identify relevant financial institutions and how they will promote their use.	Within 60 days of issuance of the final compliance review report
5	DBE Directory	26.31	No Deficiency	The California DBE directory is maintained by the California Department of Transportation (Caltrans). TJPA’s Program Plan (page 4) and website have links to the DBE Directory ( <a href="http://www.dot.ca.gov/hq/bep/">http://www.dot.ca.gov/hq/bep/</a> )	Not applicable	Not applicable

6	Overconcentration	26.33	Deficiency	<p>TJPA’s Program Plan states on page 4 that, “TJPA has not identified any types of work in DOT-assisted contracts that have an over-concentration of DBE participation. However, TJPA does not describe how they evaluate overconcentration and how frequently they will perform such evaluations. They also do not identify steps they would take if overconcentration were observed.</p> <p>TJPA’s Federal Transit Administration funded contracts between FYs 2009 and 2011 have funded contracts primarily related to real estate, finance, and outreach. TJPA’s frequent use of DBEs in these fields indicates a level of overconcentration, which must be analyzed by TJPA.</p>	<p>TJPA must complete an overconcentration analysis of its current DBE contracts. In addition, TJPA must enhance the overconcentration section of their Program Plan. The Program Plan must describe overconcentration identification procedures, how frequently TJPA will investigate this issue, and what actions TJPA would take if an overconcentration is identified.</p>	<p>Within 60 days of issuance of the final compliance review report</p>
7	Business Development Programs	26.35	Advisory Comment	<p>TJPA states in their Program Plan that they do not provide business development programs (page 6). They also do not identify business development programs offered by other organizations and entities in the San Francisco region. TJPA does not provide the names of the programs, web links to more information, and contact person(s).</p>	<p>TJPA should identify organizations that provide business development programs in the region in their Program Plan and website.</p>	<p>Not applicable</p>
8	Fostering Small Business Participation	26.39	Deficiency	<p>TJPA had an already existing Small Business Enterprise (SBE) Program, which it adopted in 2009. In its April 2012 DBE Program Plan, the 2009 SBE Program was referenced as satisfying the requirement for Part 26.39. However, the 2009 SBE Program does not meet all the requirements of the Small Business Element.</p>	<p>TJPA must update their Fostering Small Business Participation Element to specify how TJPA’s contracting requirements will be structured and obstacles will be eliminated to facilitate competition by small businesses, detail SBE program related outreach activities, and remove limitations on participation by DBEs certified outside of California.</p>	<p>Within 60 days of issuance of the final compliance review report</p>
9	Determining/Meeting Goals					

	A) Calculation	26.45	Deficiency	TJPA’s “Anticipated DBE Participation Level” (ADPL) goal calculation methodology describes their Step 1 and Step 2 goal development process. TJPA’s current DBE participation goal is 18.5 percent for FY 2010-2013. The methodology description does not provide a clear explanation for the determination of the contractor market area in the Step 1 process. Additionally, the Step 2 description does not compare TJPA’s historic contracts with their expected future contracts to determine if use of historic DBE participation rates is an appropriate basis for a Step 2 adjustment.	TJPA must develop a new DBE participation goal and document their methodology thoroughly.	Within 60 days of issuance of the final compliance review report
	B) Public Participation and Outreach	26.45	Deficiency	TJPA lack of outreach to contractor association and chambers of commerce during their DBE participation goal development process constitutes a deficiency.	TJPA must develop a plan that details how they will consult with local women and minority associations and chambers of commerce in future efforts to develop DBE participation goals. TJPA must involve outside organizations in its DBE goal setting process.	Within 60 days of issuance of the final compliance review report
	C) Goal Attainment	26.47	Deficiency	TJPA’s four most recent Uniform Reports obtained by the compliance review team (fiscal years 2010 and 2011) indicate that TJPA did not meet its race neutral DBE participation goals. Prior to the triennial review recalculation, TJPA had a race neutral goal of 25.4 percent. TJPA did not meet this goal as recorded in both Uniform Reports from FY 2010. During FY 2011, TJPA achieved 11 percent total DBE attainment, which was achieved exclusively through race neutral means. This attainment falls below the 18.5 percent goal established during the latest triennial review.	TJPA must conduct a shortfall analysis to demonstrate that it has operated in good faith. This analysis must include the reasons for the difference between the overall goal and your awards and commitments in that fiscal year and establish specific steps and milestones to correct the problems identified.	Within 60 days of issuance of the final compliance review report
	D) Transit Vehicle Manufacturers (TVM)	26.49	Advisory Comment	TJPA does not procure transit vehicles, but the agency does include an appropriate section about how it might procure a transit vehicle in the future in its Program Plan (page 8). The section mentions that TJPA will require Transit Vehicle Manufacturers to certify they have complied with the DBE Program.	As best practice, TJPA should update its Program Plan to state that they will obtain FTA’s list of approved transit vehicle manufacturers as verification of a TVM being approved to bid or propose on FTA-assisted transit vehicle procurements.	Not applicable

	E) Race Neutral	26.51	Advisory Comment	TJPA’s race neutral goal-setting (referred to as Average Anticipated DBE Participation Level, or AADPL) methodology is presented in Attachment E of the DBE Program Plan. However, the goal-setting methodology employed is not clearly explained.	TJPA should revise their goal-setting methodology discussion within Attachment E. The narrative should fully outline and explain all assumptions and calculations and be transparent and replicable.	Not applicable
	F) Race Conscious	26.51	The deficiency identified in the discussion and corrective action sections has been addressed and is now considered closed.	TJPA’s DBE program is required to be race neutral in the absence of proven discrimination within the contracting community, as part of the Ninth Circuit requirements. However, when TJPA bids projects, it provides what it calls “DBE availability advisories” in RFPs for projects with potential subcontracting opportunities. In addition, TJPA’s Program Plan includes a good faith effort requirement, although the Program Plan says it does not apply. This is because some of TJPA’s project managers and several contractors expressed an opinion that prime contractors had to demonstrate a good faith effort to find DBE subcontractors if they are unable to meet the “DBE availability advisory” through their teaming arrangement. These two observations may create the impression that these contracts have race conscious subcontracting goals.	TJPA must revise its DBE Program plan and not require good faith efforts from prime contractors since they are supposed to only operate a race neutral DBE program. All references to a good faith effort requirement must be removed from the Program Plan, solicitation documents, TJPA’s website, contract templates, and other relevant documents and webpages.	Not applicable
	G) Good Faith Efforts	26.53	The deficiency identified in the discussion and corrective action sections has been addressed and is now considered closed.	TJPA DBE program is required to be race neutral in the absence of proof of minority contractor discrimination as part of the requirements of the Ninth Circuit of the U.S. Court of Appeals. However, when TJPA bids projects with potential subcontracting opportunities, it provides “DBE availability advisories,” which bidders may mistakenly interpret to be contract goals. TJPA’s Program Plan also provides a detailed description of the good faith effort they require (page 9) if the goals are not met. These instructions may further cause the impression of a race conscious program.	TJPA must stop issuing DBE availability advisories and remove all references to good faith efforts from their Program Plan, solicitation documents, website, contract templates, and other relevant documents and webpages.	Not applicable

	H) Counting DBE Participation	26.55	The deficiency identified in the discussion and corrective action sections has been addressed and is now considered closed.	TJPA’s Program Plan provides a detailed description of how the agency counts DBE participation (page 10). However, the instructions were not observed in the RFP template documents the review team examined.  Furthermore, several DBE were identified as “on hold” in the documents provided to the review. It was explained to the review team that these DBEs were awarded contracts, but had not been utilized for work under the contracts. It was unclear to the review team whether TJPA counted these DBE firms in their goal attainment reports.	TJPA must elaborate how they count DBE participation in solicitation documents. Further, TJPA must not count toward its goal attainment any DBEs awarded contracts, but put “on hold.” As part of its short-fall analysis, TJPA should reconsider this practice.	Not applicable
	I) Quotas	26.43	The deficiency identified in the discussion and corrective action sections has been addressed and is now considered closed.	TJPA’s Program Plan states that they do not use quotas (page 7). However, misunderstandings about the DBE Program exist among some TJPA staff and contractors. Some TJPA staff (e.g. a TJPA Program Manager) and contractors (Jacqueline Majors & Associates) referred to the program as “set asides” for DBEs. Singer Associates, a non-DBE prime contractor, said they would never bid on a project and use a good faith effort demonstration if they were unable to achieve the project’s DBE availability advisory through their subcontractor teaming arrangements because they did not want to be negatively perceived by TJPA for future contracting opportunities.	TJPA must clarify the nature of their DBE program to their staff and the contracting community. TJPA must also take out DBE availability advisories from all their future contracts.	Not applicable
10	Required Contract Provisions					
	A) Non-discrimination	26.13	Deficiency	TJPA is not ensuring required clauses are included in all contracts. The non-discrimination clause is included in the reviewed prime contractor agreements but not in all the subcontract agreements. Also, not all prime contractors signed contracts with their subcontractors.	TJPA must ensure the clause is included in all contract documents, including subcontract agreements.	Within 60 days of issuance of the final compliance review report
	B) Prompt Payment and Return of Retainage	26.29	Deficiency	TJPA is not ensuring required clauses are included in all contracts. The TJPA Program Plan includes a requirement for all prime contracts and subcontracts to include a DBE specific prompt payment and return of retainage clause (page 3).	TJPA must ensure the clause is included in all contract documents, including subcontract agreements.	Within 60 days of issuance of the final compliance review report

	C) Legal Remedies	26.37	Deficiency	TJPA does include a legal remedies section in its Program Plan. These provisions are generic in nature and pertain to general contract compliance. The DBE program is not mentioned. Additionally, legal remedies are often not included in subcontracting agreements, and TJPA has no mechanism for verification. For example, the subcontract agreement between Business Development Inc. and their DBE subcontractor does not include legal remedies.	TJPA must ensure that robust legal remedy clauses are included in all contract documents, including subcontract agreements.	Within 60 days of issuance of the final compliance review report
11	Certification Standards	26.67	Not applicable	TJPA is not a certifying agency. The California Department of Transportation (Caltrans) certifies DBEs in California.	Not applicable	Not applicable
12	Certification Procedures	26.83	Not applicable	TJPA is not a certifying agency. The California Department of Transportation (Caltrans) certifies DBEs in California.	Not applicable	Not applicable
13	<b>Record Keeping and Enforcements</b>					
	A) Bidders List	26.11	No Deficiency	TJPA maintains a bidders list. The Program Plan states on page 5 that the bidders list will contain each of the necessary elements contained within 49 CFR 26.11, including the firm name, address, DBE or non-DBE status, age, and annual receipts. TJPA includes a "Bidders/Proposers Information Request Form" form (Attachment 5B) in all solicitations, which must be included with all submissions. The form includes fields for all the required information for the bidders list.	Not applicable	Not applicable
	B) Monitoring	26.37/26.55	Deficiency	TJPA describes its monitoring and enforcement mechanisms in its Program Plan (page 1). The Program Plan also includes several payment tracking forms TJPA uses to ensure prompt payment of prime contractors and subcontractors (Attachments C, D, and E of the TJPA Program Plan). TJPA assigns an in-house project manager to each contract that provides oversight. However, TJPA's monitoring program does have one deficiency: the monitoring checklist does not provide for verification of the inclusion of required contract clauses.	TJPA must develop monitoring mechanisms that ensure that the necessary contract provisions are included in contractual agreements with prime contractors and between prime and subcontractors. And, a plan for ensuring the integrity of on-site monitoring using outsourced project managers.	Within 60 days of issuance of the final compliance review report

	C) Reporting to DOT	26.11	No Deficiency	The review team observed one error regarding recent DBE reporting. When reviewing the FY 2011 Uniform Reports, the review team observed that the new FY 2011-13 race neutral goal was reported as 18.5 percent for the first period but 29.2 percent for the second period. The proper figure is 18.5 percent according to Attachment E of the DBE Program Plan.	Data was entered in error by FTA staff	Not applicable
--	---------------------	-------	---------------	--	--	----------------