
TRANSBAY JOINT POWERS AUTHORITY

Board Policy No. 010

Category: Financial Matters

DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM

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Transbay Joint Powers Authority Disadvantaged Business Enterprise (DBE) Program

I. Definitions of Terms

The following terms used in this Program have meanings as defined in 49 CFR §26.5:

A. Disadvantaged Business Enterprise (DBE) is a for-profit small business concern:

(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

B. Socially and Economically Disadvantaged Individual is any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is:

(1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.

(2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

(i) “Black Americans,” which includes persons having origins in any of the Black racial groups of Africa;

(ii) “Hispanic Americans,” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) “Native Americans,” which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(iv) “Asian-Pacific Americans,” which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v) “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

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

II. Objectives / Policy Statement (§§26.1, 26.23)

The Transbay Joint Powers Authority (TJPA) hereby establishes a Disadvantaged Business Enterprise (DBE) Program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26. The TJPA expects to receive Federal financial assistance from the DOT, and as a condition of receiving this assistance, the TJPA will sign an assurance that it will comply with 49 CFR Part 26.

It is the policy of the TJPA to ensure that DBEs, as defined in 49 CFR Part 26, have an equal opportunity to receive and participate in DOT-assisted contracts. It is also the TJPA's policy:

1. To ensure nondiscrimination in the award and administration of DOT-assisted contracts;
2. To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
3. To ensure that the DBE Program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
5. To help remove barriers to the participation of DBEs in DOT-assisted contracts; and
6. To assist the development of firms that can compete successfully in the marketplace outside the DBE Program.

The Contract Compliance Manager has been designated the DBE Liaison Officer (DBELO). In that capacity, the Contract Compliance Manager is responsible for implementing all aspects of the DBE Program. Implementation of the DBE Program is accorded the same priority as compliance with all other legal obligations incurred by the TJPA in its financial assistance agreements with the California Department of Transportation (Caltrans) and DOT.

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

III. Nondiscrimination (§26.7)

The TJPA will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex, or national origin. In administering its DBE Program, the TJPA will not, directly or through contractual or other

arrangements, use criteria or methods of administration whose purpose is to defeat or substantially impair accomplishment of the objectives of the DBE Program with respect to individuals of a particular race, color, sex, or national origin.

IV. DBE Program Updates (§26.21)

The TJPA will continue to carry out this Program until the TJPA has established a new goal setting methodology or until significant changes to this DBE Program are adopted. The TJPA will provide to FTA a proposed Annual Anticipated DBE Participation Level (AADPL) and methodology and other Program updates by August 1 of every year.

V. Quotas (§26.43)

The TJPA will not use quotas or set-asides in any way in the administration of this DBE Program.

VI. DBE Liaison Officer (DBELO) (§26.45)

The TJPA has designated the following individual as the DBE Liaison Officer (DBELO):

Contract Compliance Manager
Transbay Joint Powers Authority
201 Mission Street, Suite 1960
San Francisco, CA 94105
(415) 597-4620

In this capacity, the Contract Compliance Manager is responsible for implementing all aspects of the DBE Program and ensuring that the TJPA complies with all provisions of Title 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs." This is available on the Internet at the website <http://osdbuweb.dot.gov/DBEProgram/index.cfm>. The Contract Compliance Manager has direct, independent access to the TJPA Executive Director concerning DBE Program matters.

The DBELO is responsible for developing, implementing, and monitoring the DBE Program, in coordination with other appropriate officials. Duties and responsibilities include the following:

1. Gather and report statistical data and other information as required.
2. Review third-party contracts and purchase requisitions for compliance with this Program.
3. Ensure that bid notices and requests for proposals are available to DBEs in a timely manner.
4. Identify contracts and procurements so that DBE goals are included in solicitations (both race-neutral methods and contract-specific goals) and monitor results.
5. Analyze the TJPA's progress toward goal attainment and identify ways to improve progress.
6. Participate in pre-bid meetings.

7. Advise the TJPA Executive Director and Board of Directors on DBE matters and achievement.
8. Participate with legal counsel and project staff to determine contractor compliance with good faith efforts.
9. Provide DBEs with information and assistance in preparing bids and obtaining bonding and insurance.
10. Plan and participate in DBE training seminars.
11. Provide outreach to DBEs and community organizations to advise them of opportunities.

VII. Federal Financial Assistance Agreement Assurance (§26.13)

The TJPA will sign the following assurance, applicable to all DOT-assisted contracts and their administration as part of the Program Supplement Agreement for each project:

The TJPA shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE Program or the requirements of 49 CFR Part 26. The TJPA shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The TJPA's DBE Program, as required by 49 CFR Part 26 and as approved by DOT, is incorporated by reference in this Agreement. Implementation of this Program is a legal obligation, and failure to carry out its terms shall be treated as a violation of this Agreement. Upon notification to the TJPA of its failure to carry out its approved Program, the Department may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801, et seq.).

VIII. DBE Financial Institutions (§26.27)

It is the policy of the TJPA to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions, and to encourage prime contractors on DOT-assisted contracts to make use of these institutions.

Information on the availability of such institutions can be obtained from the DBELO.

IX. Directory (§26.31)

The TJPA will refer interested persons to the DBE directory available from the Caltrans Disadvantaged Business Enterprise Program website at www.dot.ca.gov/hq/bep.

X. Over-concentration (§26.33)

The TJPA has not identified any types of work in DOT-assisted contracts that have an over-concentration of DBE participation. If in the future the TJPA identifies the need to address over-

concentration, measures for addressing over-concentration will be submitted to the FTA Civil Rights Officer (CRO) for approval.

XI. Business Development Programs (§26.35)

The TJPA does not have a business development or mentor-protégé program. If the TJPA identifies the need for such a program in the future, the rationale for adopting such a program and a comprehensive description of it will be submitted to the CRO.

XII. Required Contract Clauses (§§26.13, 26.29)

1. Contract Assurance

The TJPA ensures that the following clause is placed in every DOT-assisted contract and subcontract:

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

2. Prompt Payment

The TJPA ensures that the following clauses or equivalent will be included in each DOT-assisted prime contract:

Prompt Progress Payment to Subcontractors. A prime contractor or subcontractor shall pay a subcontractor not later than 10 days of receipt of each progress payment in accordance with the provision in Section 7108.5 of the California Business and Professions Code concerning prompt payment to subcontractors. The 10 days is applicable unless, a longer period is agreed to in writing. Any violation of Section 7108.5 shall subject the violating contractor or subcontractor to the penalties, sanction and other remedies of that section. Federal regulation (49 CFR 26.29) requires that any delay or postponement of payment over 30 days of receipt of each payment may take place only for good cause and with the TJPA's prior written approval. These requirements shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise, available to the prime contractor or subcontractor in the event of a dispute involving late payment, or nonpayment by the prime contractor, deficient subcontract performance, or noncompliance by a subcontractor. This provision applies to both DBE and non-DBE prime contractors and subcontractors.

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

XIII. Monitoring and Enforcement Mechanisms (§26.37)

1. Monitoring Actual DBE Participation (§ 26.37 and 26.55)

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

The DBELO shall ensure that DBE participation is counted toward contract availability advisories on DOT-assisted contracts and the AADPL in accordance with the DBE Program. Credit toward overall or contract goals may only be given upon satisfactory evidence that payments were actually made to DBEs.

2. Contracting and Tracking DBE Participation (§ 26.55)

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

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

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

DBE achievement will not be counted toward the AADPL until the DBE has been paid. The DBELO will track the participation of DBEs in availability advisory contracts separately from the participation of DBEs that is considered race-neutral. Additionally, the Administrator will not count that portion of a DBE's participation that is achieved after the certification of the DBE has been removed during the performance of a contract.

3. Construction Contract Monitoring

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

A. After Contract Award

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

B. Pre-construction Conference

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

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

When a firm other than the listed DBE subcontractor is found performing the work, the RE/Contract Manager will notify the contractor of the apparent discrepancy and potential loss of payment. Based on the contractor's response, the RE/Contract Manager will take appropriate action: The DBELO will perform a preliminary investigation to identify any potential issues related to the DBE subcontractor performing a commercially useful function. Any substantive issues will be forwarded to the FTA Civil Rights Office. If the contractor fails to adequately explain why there

is a discrepancy, payment for the work will be withheld and a letter will be sent to the contractor referencing the applicable specification violation and the required withholding of payment.

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

4. Substitution

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

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

5. Record Keeping and Final Report

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

- a) The name and business address, regardless of tier, of every DBE subcontractor, DBE vendor of materials, and DBE trucking company; and
- b) The date of final payment and the total dollar figure paid to each of the firms.

The DBE prime contractor shall also show the date of work performed by its own forces, along with the corresponding dollar value of the work claimed toward DBE goals.

When a contract has been completed, the contractor will provide the "Final Expenditure Report" and a summary of the records stated above. The RE/Contract Manager will compare the completed "Bidders/Proposers Information Request Form" to the contractor's completed "Final Expenditure Report." The DBEs shown on the

completed records should be the same as those originally listed unless an authorized substitution was made or the contractor used additional DBEs. The dollar amount should reflect any changes made in planned work done by the DBEs. The contractor will be required to explain in writing why the names of the subcontractors, the work items, or the dollar figures are different from what was originally shown on the completed "Bidders/Proposers Information Request Form" when:

- a) There have been no changes made by the RE/Contract Manager; or
- b) The contractor has not provided a sufficient explanation in the comments section of the completed "Final Expenditure Report."

The explanation will be attached to the completed "Final Expenditure Report" for submittal. The RE/Contract Manager will file this in the project records.

The DBELO will keep track of the DBE certification status on the Internet at www.dot.ca.gov/hq/bep and keep the RE/Contract Manager informed of changes that affect the contract. The RE/Contract Manager will require the contractor to act in accordance with existing contractual commitments regardless of decertification.

The TJPA will bring to the attention of the DOT through the CRO any false, fraudulent, or dishonest conduct in connection with the Program, so that the DOT can take the steps provided in §26.109 (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules). The TJPA also will consider similar action under its own legal authority, including responsibility determinations in future contracts.

XIV. Annual Anticipated DBE Participation Level (AADPL) (§26.45)

1. Amount of AADPL
See Attachment E.

2. Methodology
See Attachment E.

3. Process
Upon approval of this Program and by June 1 of each year hereafter, the TJPA will submit to the TJPA Board its draft overall AADPL and methodology (the amount of the overall AADPL and the method to calculate the AADPL).

Once the TJPA has approved the draft overall AADPL for distribution, the TJPA will publish a notice of the proposed overall AADPL, informing the public that the proposed AADPL and its rationale are available for inspection during normal business hours at the TJPA's principal office for 30 days following the date of the notice, and

informing the public that comments will be accepted on the AADPL for 45 days following the date of the notice. Advertisements in newspapers, woman/minority-focused media, trade publications, and websites will be the normal media to accomplish this effort. The notice will include addresses to which comments may be sent and addresses (including offices and websites) where the proposal may be reviewed.

The TJPA will, on or before August 1 of each year, resubmit the final overall AADPL information to the TJPA Board for approval, along with a summary of information and comments received during the public participation process and the TJPA's responses.

Following approval of the final overall AADPL by the TJPA Board, the TJPA will, on or before August 1 of each year, submit the final overall AADPL to the CRO. The TJPA may begin using the overall AADPL on October 1 of each year.

XV. Contract Availability Advisory (§26.51)

The TJPA shall use contract availability advisories to meet any portion of the overall AADPL that the TJPA does not project being able to meet by use of race-neutral means. Contract availability advisories are established to assist bidders in ascertaining what a reasonable level of DBE participation would be for any given contract. The contract availability advisory is not an enforceable goal and compliance with the advisory shall not be a condition of contract award.

Contract availability advisories will be established only on DOT-assisted contracts that have subcontracting possibilities. Contract availability advisories need not be established on every such contract, and the size of contract availability advisories will be adapted to the circumstances of each such contract (e.g., type and location of work and availability of DBEs to perform the particular type of work). The contract work items will be compared with eligible DBE contractors willing to work on the project. A determination will be made regarding which items are likely to be performed by the prime contractor and which ones are likely to be performed by the subcontractor(s). The availability advisory will then be incorporated into the contract documents. Contract availability advisories will be expressed as a percentage of the total amount of a DOT-assisted contract.

XVI. Transit Vehicle Manufacturers (§26.49)

If DOT-assisted contracts will include transit vehicle procurements, the TJPA will require each transit vehicle manufacturer, as a condition of being authorized to bid or propose on transit vehicle procurements, to certify that it has complied with the requirements of 49 CFR Part 26, Section 49. The TJPA will direct the transit vehicle manufacturer to the subject requirements located on the Internet at <http://osdbuweb.dot.gov/DBEProgram/index.cfm>.

XVII. Good Faith Efforts (§26.53)

[Good Faith Efforts shall only be required when TJPA is following a race-conscious DBE Program.]

1. Information to be Submitted

The TJPA treats bidders'/proposers' compliance with good faith effort requirements as a matter of responsiveness. A responsive proposal meets all the requirements of the advertisement and solicitation.

Each solicitation for bids/proposals will require the bidders/proposers to submit the "Bidders/Proposers Information Request Form" (Attachment A), which should include:

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

2. Demonstration of Good Faith Efforts

The obligation of the bidder/proposer is to make good faith efforts. The bidder/proposer can demonstrate that it has done so either by meeting the contract availability advisory or by documenting good faith efforts. Examples of good faith efforts are found in Appendix A to Part 26, which is attached.

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

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

3. Administrative Reconsideration

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

Maria Ayerdi-Kaplan, Executive Director
Transbay Joint Powers Authority
201 Mission Street, Suite 1960
San Francisco, CA 94105
(415) 597-4620

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

As part of this reconsideration, the bidder/proposer will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The bidder/proposer will have the opportunity to meet in person with the reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. The TJPA will send the bidder/proposer a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to Caltrans, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA) or DOT.

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

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

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

XVIII. Counting DBE Participation (§26.55)

The TJPA will count DBE participation toward the AADPL and contract availability advisories as provided in the contract specifications for the prime contractor, subcontractor, joint venture partner with prime or subcontractor, or vendor of material or supplies.

XIX. Certification (§26.83(a))

The TJPA ensures that only DBE firms currently certified in the California Unified Certification Program (UCP) will participate as DBEs in the TJPA's DBE Program. The UCP directory can be found at the website: http://www.dot.ca.gov/hq/bep/dbe_query.htm.

XX. Information Collection and Reporting

1. Bidders List

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

2. Monitoring Payments to DBEs

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

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

3. Reporting to U.S. DOT (§ 26.11)

The TJPA will continue to report DBE participation and AADPL setting methods to FTA and Caltrans on behalf of FHWA as directed. Statistical data will be maintained as prescribed on a semi-annual basis to provide reports to U.S. DOT agencies reflecting the DBE participation on the TJPA's federally-assisted procurement activities. These reports will provide DBE participation information on the TJPA's race-neutral contracts; race-conscious contracts; and the combined DBE participation on all federally-assisted procurement activities. The TJPA will report final DBE participation to the CRO using data from the "Final Expenditure Reports".

4. Confidentiality

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

APPENDIX A TO PART 26

GUIDANCE CONCERNING GOOD FAITH EFFORTS

[Good Faith Efforts shall only be required when TJPA is following a race-conscious DBE Program.]

- I. When, as a recipient, you establish a contract goal on a DOT-assisted contract, a bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it does not meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this Part that, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.
- II. In any situation in which you have established a contract goal, Part 26 requires you to use the good faith efforts mechanism of this Part. As a recipient, it is up to you to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere *pro forma* efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call; meeting quantitative formulas is not required.
- III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (*i.e.*, obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. This rule specifically prohibits you from ignoring *bona fide* good faith efforts.
- IV. The following is a list of types of actions that you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases:
 - A. Soliciting through all reasonable and available means (*e.g.*, attendance at pre-bid meetings, advertising, and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must

determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

- B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.
- C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.
- D.
 - 1. Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.
 - 2. A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.
- E. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.
- F. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.

- G. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
 - H. Effectively using the services of available woman/minority community organizations, woman/minority contractors' groups, local, state, and Federal woman/minority business assistance offices, and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.
- V. In determining whether a bidder has made good faith efforts, you may take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.

**TRANSBAY JOINT POWERS AUTHORITY
BIDDERS/PROPOSERS INFORMATION REQUEST FORM**

To be completed by Prime Contractor and submitted as part of bid/proposal.

NAME OF PROJECT/PROPOSAL							PROJECT/PROPOSAL NUMBER					
PROPOSER BUSINESS NAME AND ADDRESS												
NAME OF PERSON SUBMITTING BID					SIGNATURE OF PROPOSER					DATE		
CONTACT PERSON NAME					CONTACT PHONE NUMBER				CONTACT EMAIL			
IMPORTANT: 1) Identify all DBE/SBE firms being claimed for credit. 2) List names of all DBE/SBE subcontractors and their respective items of work. 3) Attach a copy of the proof of DBE/SBE certification for each DBE/SBE subcontractor listed on this form. 4) Attach "Intent to Perform" letter signed by the subcontractor.												
							DBE-SBE Participation					
LIST BUSINESS FIRM(s) List Name, Address, and Contact Person (if not the same as above)	Phone Number	Email Address	Age of Firm	Item of Work, Service or Materials Supplied	NAICS Code (if known) *	Annual Gross Receipts of Firm	Certified DBE or SBE (Y/N)	Certifying Agency	Type of DBE or SBE **	Award Amount	Percentage of Contract Participation	
A. PRIME Contractor												
B. Subcontractor/Vendor/Joint Venture												
TOTAL										\$0	0.00%	

* **NAICS Code:** North American Industry Classification System Code. Codes can be found at <http://www.census.gov/naics>.
 ** **Type of DBE/SBE:** (1) African-American (2) Hispanic (3) Native American (4) Asian-Pacific (5) Asian-Indian (6) Female-Woman (7) Other (designated as a Small Business)
 - DBEs must be certified by Caltrans or an agency participating in the California Unified Certification Program. Visit the Caltrans website at <http://dot.ca.gov/hq/bep/lucp.htm> for a list of participating agencies.
 - SBEs must be certified by the San Francisco Human Rights Commission (<http://www.sfgov.org/sfhumanrights>) or the California Department of General Services (<http://www.eprocure.dgs.ca.gov/default.htm>)
 - Important: Attach the proof of certification for each DBE/SBE firm used toward meeting the DBE/SBE goal.
 - This information will be used to create and maintain a federally-required Bidders List, regardless of DBE/SBE participation.
 - Use additional sheets as necessary.

**TRANSBAY JOINT POWERS AUTHORITY
PROGRESS PAYMENT REPORT**

To be completed by Prime Contractor and submitted to Project Manager with every monthly invoice.

PART 1: PROJECT SUMMARY

Contract Award Date:	TJPA Contract No.:	Contract Title:	
Prime Contractor:	Contact Person:	Contact Phone No.:	Contact Email:
Prime Contractor Address:		Signature:	
Invoice Date:	Invoice No.:	For the Period:	

1. Award amount of Prime Contract	\$ -
2. Amount of Change Orders, Amendments and Modifications to Date	\$ -
3. Total Contract Amount to Date including Change Orders, Amendments and Modifications (Line 1 + Line 2)	\$ -
4. Total Amount for this Invoice	\$ -
5. Total Previously Invoiced Awaiting Payment	\$ -
6. Total Amount Paid to Date (not including Lines 4 and 5)	\$ -
7. Total Invoice Amount Requested to Date (Line 4 + Line 5 + Line 6)	\$ -
8. Percent Complete (Line 7/Line 3)	0%

**TRANSBAY JOINT POWERS AUTHORITY
PROGRESS PAYMENT REPORT**

PART 2: CONSULTANT/SUBCONSULTANT PAYMENT DETAIL SUMMARY

A	B	C	D	E	F	G	H	I	J
Name of Firm (Including Prime, Subs, Vendors, and Joint Ventures)	DBE or SBE (Y/N)	Portion of Work (%)	Contract Amount (\$)	Amount of Change Orders to Date (\$)	Total = Contract Amount + Change Orders (D+E) (\$)	Amount Invoiced This Period (\$)	Previously Invoiced Awaiting Payment (\$)	Amount Paid to Date (\$)	Percent Complete to Date ((G+H+I) / F) (%)
TOTAL		0	0	0	0	0	0	0	0

**TRANSBAY JOINT POWERS AUTHORITY
SUBCONTRACTOR PAYMENT DECLARATION**

This form must be completed and submitted by the Prime Contractor for all subcontractors, vendors, and joint venture partners for every invoice submitted to TJPA within five (5) working days following actual payment to subconsultant. Payments to subconsultant shall be made no later than ten (10) working days following receipt of progress payment from TJPA. Use additional sheets if necessary. Failure to submit all required information may lead to partial withholding of progress payment.

Date: _____ Contract No.: _____

Contract Title: _____

Prime Contractor: _____

Invoice Date: _____ Invoice No.: _____

For the Period: _____

Total Amount of Invoice: _____ TJPA Check No.: _____

Subcontractor/ Vendor/JV	DBE/ SBE (Y/N)	Business Address Payment Sent To	Amount Paid	Payment Date	Check Number
Total Amount Paid to Subconsultants (this Pay Period)			\$0.00		

I/We declare under penalty of perjury under the laws of the State of California that the above information is complete, and that the tabulated amounts paid to date are accurate and correct.

Signature of Contact Person

Date

Print Name

Phone

**TRANSBAY JOINT POWERS AUTHORITY
FINAL EXPENDITURE REPORT**

To be completed by Prime Contractor at the end of the contract.

CONTRACT TITLE/NO.	TOTAL CONTRACT AWARD AMOUNT	DATE OF AWARD
PRIME CONTRACTOR/CONSULTANT NAME AND ADDRESS	TOTAL EXPENDITURES AT END OF CONTRACT	DATE OF CONTRACT COMPLETION
PROJECT MANAGER NAME	PROJECT MANAGER SIGNATURE	DATE
CONTACT PERSON NAME RE: FINAL EXP. REPORT	CONTACT PHONE NUMBER	CONTACT EMAIL

IMPORTANT: 1) Identify all DBE/SBE firms being claimed for credit. 2) List names of all DBE/SBE subcontractors and their respective items of work.

LIST BUSINESS FIRM(s) List Name, Address, and Contact Person (if not the same as above)	Phone Number	Email Address	Item of Work, Service or Materials Supplied	NAICS Code (if known) *	DBE Participation			Date of Work Completed	Date of Final Payment	Total Amount Paid	% of Total Expenditures
					Certified DBE/SBE (Y/N)	Certifying Agency	Type of DBE or SBE**				
A. PRIME Contractor											
B. Subcontractor/Vendor/Joint Venture											
TOTAL										\$ -	0.00%

Comments/Notes: (Explain cost overruns or discrepancies; DBE firm substitutions, etc...)

* NAICS Code: North American Industry Classification System Code. Codes can be found at <http://www.census.gov/naics>.
 ** Type of DBE/SBE: (1) African-American (2) Hispanic (3) Native American (4) Asian-Pacific (5) Asian-Indian (6) Female-Woman (7) Other (designated as a Small Business)
 - DBEs must be certified by Caltrans or an agency participating in the California Unified Certification Program. Visit the Caltrans website at <http://dot.ca.gov/hq/bep/ucp.htm> for a list of participating agencies.
 - SBEs must be certified by the San Francisco Human Rights Commission (<http://www.sfgov.org/sfhumanrights>) or the California Department of General Services (<http://www.eprocure.dgs.ca.gov/default.htm>)
 - Important: Attach the proof of certification for each DBE/SBE firm used toward meeting the DBE/SBE goal.
 - This information will be used to create and maintain a federally-required Bidders List, regardless of DBE/SBE participation.
 - Use additional sheets as necessary.

FY 2010-13
ANTICIPATED DBE PARTICIPATION LEVEL (ADPL) METHODOLOGY

The methodology to calculate an agency's DBE participation target is a two-step process described in 49 CFR Part 26. Step One of the methodology establishes a base figure for the anticipated new federally-eligible contracts to be awarded in the upcoming Federal Fiscal Year (October 1 – September 30). Per the new Rule issued earlier this year, recipients of federal funding are now to submit overall goals for review every three years, so this calculation has been done for contracts expected to be awarded between October 1, 2010 and September 30, 2013.

The base figure is derived from the relative availability of DBEs that are ready, willing, and able to participate on these anticipated contracts. Step Two relies on the agency's knowledge of its contracting markets and previous history of DBE participation to determine if an adjustment to the base figure is needed. The calculation using the two-step methodology results in an ADPL of 18.5% for FY 2010-13 for the TJPA. This methodology is outlined below.

Step One Process: Census Bureau Data and DBE Directory

The initial step in developing an AADPL is to determine the market area for consultants who have demonstrated an interest or are anticipated to participate in TJPA contracts. The counties in the TJPA's market area consist of the nine (9) 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

Second, the work categories must be determined for the anticipated contracts. TJPA may award six federally-eligible contracts in FY 2010-13: 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 US Census Bureau's County Business Patterns databases.

The third step in calculating the Step One AADPL, or Base Figure, is to weight each work category as a percentage of the total amount of the contracts planned for award. Weighting each category provides a more accurate Step One Base Figure (see Attachment 2.1).

The ratio of DBE firms to non-DBE firms must then be calculated by dividing the number of certified DBE firms ready, willing and able to work in the TJPA's market area by the total number of firms found in the same market area according to the US Census database (see Attachment 2.2). This is performed for each county and each type of activity.

Finally, the Step One Base Figure results from multiplying the DBE ratios for each work category by their corresponding weights, and summing the results for each activity. The calculation of the Step One Base Figure is shown in Attachment 2.2.

Step One Base Figure = SUM (Weight * Ratio) for each activity = 21.38%.

The Step One Base Figure, weighted by type of work to be performed, is 21.4%.

Step Two Process: Adjustment to the Base Figure

The purpose of the Step Two analysis is to determine if an upward or downward adjustment to the base AADPL is justified, based on relevant evidence available to TJPA. The TJPA's DBE participation history can assist in determining whether an adjustment to the Step One Base Figure is warranted.

Attachment 2.3 analyzes those TJPA contracts that fall into the same NAICS work categories as those planned for award, and their average DBE participation level through April of FY09-10.

The past participation levels can be applied to adjust the FY 2010-13 Base Figure by category (see Attachment 2.3). The total calculated participation level is averaged with the past participation level by category, and results in a total adjusted percentage of 18.5%. Thus the revised DBE participation level is 18.5%.

The overall AADPL, or the Step Two Adjusted Figure, is 18.5%.

Conclusion

The Anticipated Disadvantaged Business Enterprise (DBE) Participation Level (ADPL) for FY 2010-13 is 18.5%.

ATTACHMENT 2.1
FY 2010-11 Through FY 2012-13
Anticipated Federally Funded Contracts

Award Date	FY 2010-13 Project/Contract	NAICS	NAICS Description	Contract Amt.	Federally Eligible Portion of Contract (80%)	% of Total
Sept 2012	Bus Storage CM	237990	Other Heavy & Civil Engineering Construction	\$ 1,000,000	\$ 800,000	3.88%
	Bus Storage Construction	236220	Commercial & Institution Building Construction	\$ 700,000	\$ 560,000	2.71%
	Bus Storage Construction	237110	Water and Sewer Line and Related Structures	\$ 300,000	\$ 240,000	1.16%
	Bus Storage Construction	237130	Power & Communication Lines/Related Structures	\$ 500,000	\$ 400,000	1.94%
	Bus Storage Construction	238110	Poured Concrete Foundation & Structure	\$ 1,100,000	\$ 880,000	4.26%
	Bus Storage Construction	238140	Masonry Contractors	\$ 300,000	\$ 240,000	1.16%
	Bus Storage Construction	238910	Site Preparation (including Demolition)	\$ 2,200,000	\$ 1,760,000	8.53%
	Bus Storage Construction	237710	Highway, Street & Bridge Construction	\$ 12,200,000	\$ 9,760,000	47.29%
Feb 2013	Public Relations & Outreach	541820	Public Relations Agencies	\$ 750,000	\$ 600,000	2.91%
Jan 2011	Independent Auditing Services	541211	Offices of Certified Public Accountants	\$ 250,000	\$ 200,000	0.97%
Oct 2010	Outside Legal Services	541110	Offices of Lawyers	\$ 3,000,000	\$ 2,400,000	11.63%
Oct 2010	Financial & Grant Management	541611	Administrative Mgmt & General Mgmt Svcs	\$ 3,500,000	\$ 2,800,000	13.57%
			Total	\$ 25,800,000	\$ 20,640,000	100.0%

**ATTACHMENT 2.2
FY 2010-13 DBE Base Figure Calculation**

DBE Totals by County and Activity												
	<u>236220</u>	<u>237310</u>	<u>237990</u>	<u>237110</u>	<u>237130</u>	<u>238110</u>	<u>238140</u>	<u>238910</u>	<u>541820</u>	<u>541211</u>	<u>541110</u>	<u>541611</u>
Counties ^(1,2)	Commercial & Institutional Building Construction	Highway, Bridge & Street Construction	Other Heavy Civil Eng Construction	Water & Sewer Line	Power & Communication Lines/Related	Poured Concrete Foundation	Masonry	Site Preparation / Demolition	Public Relations Agencies	Offices of Certified Public Accountants	Offices of Lawyers	Administrative Management, General Management
Alameda (510)	5	23	5	4	3	12	1	10	10	2	2	34
Contra Costa (925)	5	12	5	2	1	4	1	5	1	0	0	15
Napa, Solano, Sonoma (707)	3	7	3	1	0	5	1	4	0	0	0	6
San Francisco/Marin (415)	13	20	13	4	1	10	2	7	19	4	3	21
San Mateo (650)	2	6	2	2	0	3	1	3	0	0	0	2
Santa Clara (408)	2	4	2	2	3	2	0	1	2	1	1	8
Totals	30	72	30	15	8	36	6	30	32	7	6	86
NAICS Totals by County and Activity												
	<u>236220</u>	<u>237310</u>	<u>237990</u>	<u>237110</u>	<u>237130</u>	<u>238110</u>	<u>238140</u>	<u>238910</u>	<u>541820</u>	<u>541211</u>	<u>541110</u>	<u>541611</u>
Counties ^(1,3)	Commercial & Institutional Building Construction	Highway, Bridge & Street Construction	Other Heavy Civil Eng Construction	Water & Sewer Line	Power & Communication Lines/Related	Poured Concrete Foundation	Masonry	Site Preparation / Demolition	Public Relations Agencies	Offices of Certified Public Accountants	Offices of Lawyers	Administrative Management, General Management
Alameda (510)	171	41	16	34	14	57	52	84	20	224	752	289
Contra Costa (925)	144	31	18	25	17	71	53	87	17	226	520	240
Napa, Solano, Sonoma (707)	147	47	25	57	25	115	89	169	17	186	426	122
San Francisco/Marin (415)	177	13	11	18	3	32	31	41	130	156	1616	517
San Mateo (650)	93	19	4	15	3	42	29	39	26	325	341	210
Santa Clara (408)	176	42	8	30	18	104	69	71	54	361	1005	397
Totals	908	193	82	179	80	421	323	491	264	1478	4660	1775
Calculation of Step 1 Base Figure												
	<u>236220</u>	<u>237310</u>	<u>237990</u>	<u>237110</u>	<u>237130</u>	<u>238110</u>	<u>238140</u>	<u>238910</u>	<u>541820</u>	<u>541211</u>	<u>541110</u>	<u>541611</u>
NAICS Code and Description	Commercial & Institutional Building Construction	Highway, Bridge & Street Construction	Other Heavy Civil Eng Construction	Water & Sewer Line	Power & Communication Lines/Related	Poured Concrete Foundation	Masonry	Site Preparation / Demolition	Public Relations Agencies	Offices of Certified Public Accountants	Offices of Lawyers	Administrative Management, General Management
DBE Totals for All Counties:	30	72	30	15	8	36	6	30	32	7	6	86
NAICS Totals for All Counties:	908	193	82	179	80	421	323	491	264	1478	4660	1775
DBE Totals/NAICS Totals:	3.30%	37.31%	36.59%	8.38%	10.00%	8.55%	1.86%	6.11%	12.12%	0.47%	0.13%	4.85%
Weight Values:	2.71%	47.29%	3.88%	1.16%	1.94%	4.26%	1.16%	8.53%	2.91%	0.97%	11.63%	13.57%
	0.09%	17.64%	1.42%	0.10%	0.19%	0.36%	0.02%	0.52%	0.35%	0.00%	0.01%	0.66%
FY 2010-13 DBE Step One Base Figure			21.38%									

(1) Nine Bay Area Counties include Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, Sonoma.

(2) Source of DBE Query Data: <http://www.dot.ca.gov/ucp/QuerySubmit.do>

(3) NAICS data is from the U.S. Census Bureau's 2007 County Business Patterns.

**ATTACHMENT 2.3
FY 2010-13 DBE Base Figure Adjustment Calculation**

DBE Past Participation for Active Contracts by NAICS: FY 2004-05 to FY 2009-10 (through January 2010)				
Contract	NAICS	NAICS Description	TJPA DBE %	
Temp Terminal CM	237990	Heavy & Civil Engineering, including CM	94%	
Temp Terminal Construction	23---	Construction	31%	
Outside Legal Services	541110	Offices of Lawyers	0%	
Independent Auditing Services	541211	Offices of CPAs	0%	
Financial Consulting Services	541611	Administrative Mgmt and General Mgmt Services	56%	
Public Relations	541820	Public Relations Agencies	20%	
Adjustment of DBE Base Figure for FY10-13 Contracts				
NAICS	Base Goal	Base Goal (by work category)	NAICS Past DBE Participation Level	NAICS Adjustment
236220	0.09%	18.93%	31.00%	24.96%
237110	0.10%			
237130	0.19%			
237310	17.64%			
238110	0.36%			
238140	0.02%			
238910	0.52%			
237990	1.42%	1.42%	94.00%	47.71%
541110	0.01%	0.01%	0.0%	0.01%
541211	0.00%	0.00%	0.0%	0.00%
541611	0.66%	0.66%	56.0%	28.33%
541820	0.35%	0.35%	20.0%	10.18%
	21.38%	21.38%	DBE % =	18.5%
FY 2010-13 Anticipated DBE Participation Level				18.5%