

STAFF REPORT

SUBJECT: Disadvantaged Business Enterprise (DBE) 3-Year Goal Establishment (2021-2023)

FROM: Tamara Edwards, Disadvantaged Business Enterprise Liaison Officer

DATE: August 25, 2020

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**Action Requested**

Review and recommend the board approve LAVTA's updated 3-year Disadvantaged Business Enterprise (DBE) goal for Federal Fiscal Year 2021-2023 Funding.

**Background**

Pursuant to 49 CFR Part 26, LAVTA is required to submit an overall DBE goal when it anticipates awarding at least \$250,000 in FTA funded prime contracts in a Federal fiscal year, excluding transit vehicle purchases.

**Discussion**

The overall goal spanning the next three federal fiscal years of funding is 1%, and may be adjusted annually based upon differing circumstances. Establishing an overall DBE goal is a multi-step process and the methodology used is consistent with 49 CFR Part 26.

**Determining a Base Figure**

According to LAVTA's DBE policy, the agency may determine a base figure for the relative availability of DBEs on any project by using one of the following methods (method may vary by project):

1. *DBE Directories and Census Bureau Data.* Determine the number of ready willing and able DBEs in our market from the regional directory. Using the Census Bureau's County Business Pattern data base, determine the number of all ready, willing and able businesses in our market that perform work in the same NAICS codes. Divide the number of DBEs by the number of all businesses to derive a base figure for the relative availability of DBEs in our market.
2. *A bidders list.* Determine the number of DBEs that have bid or quoted on our DOT-assisted prime contracts or subcontracts in the previous year. Determine the number of all businesses that have bid or quoted on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number for all businesses to derive a base figure for the relative availability of DBEs in the market.
3. *Use of a goal of another DOT recipient.* If another DOT recipient in the same or substantially similar market has set an overall goal in compliance with this rule, we may use that goal as a base figure for our goal.

4. *Alternative methods.* A methodology not stated in the rule that provides a goal that is rationally related to the relative availability of DBEs in our market.

The recommended three year goal for FY 2021-2023 was determined using method number 1 above. The goal has been published for public comment for the required 30 days, and staff held a public Zoom meeting to share the goal setting methodology. After the goal was released for public comment staff received ten (10) comments, all questioning the low goal. However, after staff shared the various projects anticipated for the next three years, and the availability of DBE's for each project, as well as how each project was weighted based on funding all but one commenter responded that the goal was reasonable. During the goal setting meeting the only comments/questions received were in regard to how to do business with LAVTA. Additional federal dollars may become available during this three year period and as new information becomes available, the overall DBE goal may have to be revised accordingly on an annual basis.

### **Recommendation**

Staff recommends the Finance and Administration Committee recommend that the Board adopt the three year DBE goal of 1% for Federal Fiscal Years 2021-2023.



**Livermore Amador Valley Transportation Authority**

**FFY 2021 through FFY2023  
Disadvantaged Business Enterprise  
Overall Goal and Goal Setting Methodology  
(DBE Goal Report)**

**Adopted by the LAVTA Board of Directors on September 14, 2020**

**Submitted to the  
U.S. Department of Transportation  
Federal Transit Administration**

**Region IX**

**September 15, 2020**

## **Disadvantaged Business Enterprise (DBE) Goal for Federal Fiscal Years 2021 through 2023**

### **Summary**

The Livermore Amador Valley Transit Authority (LAVTA) has developed a 1% overall Disadvantaged Business Enterprise (DBE) goal applicable to Federal Fiscal Year (FFY) 2020/21, 2021/22, and 2022/23 contracting opportunities assisted by the Federal Transit Administration (FTA) in accordance with revisions to 49 Code of Federal Regulations (CFR) Part 26 published in the Federal Register on October 2, 2014.

The goal is applicable to a total of \$3,150,866 of FTA dollars that are budgeted for 9 contracts anticipated to be awarded from October 1, 2020, through September 30, 2023. It is understood that in the event of changed circumstances, LAVTA will evaluate such changes to determine whether the present goal continues to be realistic or whether mid-course adjustments will be necessary.

The DBE goals developed for FTA-assisted contracts identify the relative availability of DBEs, based on evidence of ready, willing and able DBEs in relationship to all comparable businesses that are likely to be available to compete for the Authority's FTA-assisted contracts. The three-year overall goal reflects the Authority's determination of the level of DBE participation that would be expected absent the effects of discrimination.

The steps taken in the development of the Authority's goal are in accordance with 49 CFR Part 26, issued by the U.S. Department of Transportation (U.S. DOT). A narrative description accompanied by tables and calculations is contained in this report to provide a clear explanation of how the Authority developed its DBE goal for FFY 2020/2021 through 2022/2023.

### **Development of DBE Goal**

As an eligible recipient of federal funding, LAVTA is required to comply with 49 CFR Part 26, which states that grantees must establish and implement a DBE program and set triennial DBE participation goals.

The methodology to calculate the DBE participation goal is a two-step process described in 49 CFR part 26. Step-One of the methodology establishes a base figure for the anticipated contracts to be awarded in the period. The base figure is derived from the relative availability of DBE's that are ready, willing, and able to participate on these anticipated contracts. Step-Two relies on LAVTA'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 a DBE Goal of 1 percent for FFY18-20. This methodology is outlined below.

### **Outreach/public comment period**

In accordance with the public participation requirements of 49 CFR Part 26.45, LAVTA published the Disadvantaged Business Enterprise (DBE) Goal of 1 percent for a 30-day review/45-day public comment period. LAVTA posted the notice on its website (attachment 1).

The legal notice informed the public that information on the proposed goal and methodology is available for inspection during normal business hours at LAVTA's office for thirty days from the date of publication. The notice also advised that LAVTA and U.S. DOT would accept public comments on the proposed goal and methodology for a period of forty-five days from the date of publication. At the conclusion of the public review and comment period LAVTA received no requests from the public for information regarding development of the proposed goal and no comments about the goal-setting methodology.

### **Outreach results**

LAVTA held an outreach event via ZOOM on June 24, 2020 in order to consult with minority, women's and contractors groups regarding this goal and to help create a level playing field on which DBEs can compete fairly; to enhance outreach and communication efforts with these firms; to provide appropriate assistance and information for participation in U.S. DOT- assisted contracts and other contracts; and to develop joint resources among recipients. LAVTA sent invitation to a number of groups that represent various race/gender specific businesses as well as all DBE's within the area (Attachment 1). LAVTA had 25 attendees, and zero questions about the goal or the goal setting methodology. The questions centered around how to register with LAVTA as a vendor.

LAVTA sent invitations to all DBE's listed on the Caltrans website that do business within LAVTA's market area. LAVTA received responses from 10 DBE's requesting additional information on the proposed goal and the calculation. Staff sent a copy of the calculation including all projects, the number of DBE's available in each NAICS code, and the number of total firms available for each project. While many of the questions were in regard to how low the goal was, staff received responses from all but one of the individuals who question the goal that upon review of the calculations the goal made sense. Staff also shared that while the overall goal was low, the one non-operating project included in the goal would have a much higher goal and staff assured the participants that they would strive to meet that goal.

LAVTA's public participation and outreach activities are designed to broaden awareness of LAVTA's DBE program beyond federal dollars. Furthermore, the measures described in 49 CFR Part 26.51, focusing on race-neutral means will be actively pursued, and LAVTA will encourage its contractors to also make similar outreach efforts to include DBE participation in subcontracting opportunities. In addition, LAVTA will continue to organize and offer information programs for meeting DBE eligibility requirements, familiarize potential contractors with LAVTA procurement procedures and requirements, and to otherwise develop effective

programs to further the inclusion of DBEs in all LAVTA contracting activities.

Although LAVTA has had difficulty reaching its DBE goal in the past LAVTA will still set the goal to be reached by race/gender neutral means. The reason for this is the small number of available DBE firms who provide the type of services that LAVTA is receiving Federal Funds for, using race/gender conscious means would provide the same results.

The Authority has also focused on expanding race/gender-neutral outreach through participation in the “Business Outreach Committee” (BOC), a consortium of 26 Bay Area transit and transportation agencies formed in an effort to maximize outreach efforts. The BOC agencies include the following: Alameda-Contra Costa Transit District, Alameda County Transportation Commission, Bay Area Rapid Transit, California Department of Transportation, California High Speed Rail Authority, Central Contra Costa Transit Authority, City of Rio Vista, City of Santa Rosa, Golden Gate Bridge, Highway and Transportation District, Livermore Amador Valley Transit Authority, Marin Transit, Metropolitan Transportation Commission, Napa Valley Transportation Authority, Peninsula Corridor Joint Powers Board, San Francisco Bay Area Water Emergency Transit Authority, San Francisco County Transportation Authority, San Francisco Municipal Transportation Agency, San Mateo County Transit District, Santa Clara Valley Transportation Authority, Santa Cruz Metropolitan Transit District, Solano County Transit, Sonoma County Department of Transportation and Public Works, Sonoma-Marin Area Rail Transit District, Transbay Joint Powers Authority, Tri Delta Transit, and Western Contra Costa Transit Authority. The BOC publishes a quarterly “Contracting Opportunities” newsletter that features contracts, contacts, resources, and guidance for small businesses and DBEs.

Although LAVTA initially received many questions regarding the goal and how it was calculated, after staff shared the calculations all but one of the individuals who questioned the goal were satisfied with the information provided. The other individual did not respond. Therefore, based on the outreach results LAVTA did not change the goal as presented.

### **Projection of percentage of three-year overall DBE goal to be achieved through race neutral measures**

The U.S. DOT regulations require that the maximum feasible portion of the DBE overall goal be met by using race-neutral methods. Race-neutral methods include efforts made to assure that bidding and contracting requirements facilitate participation by DBEs and other small businesses, such as unbundling large contracts to make them more accessible, encouraging prime contractors to subcontract portions of the work, and providing, technical assistance, outreach and communications programs. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, a DBE is awarded a subcontract on a prime contract that does not carry a DBE goal, or a DBE wins a contract, even if there is a DBE, goals, from a prime contractor that did not consider its DBE status in making the award.

Due to the emphasis placed on race-neutral methods and the small dollar amounts of projected new formal contracts with subcontracting opportunities, LAVTA anticipates setting no contract-specific DBE goals on new contracts to be awarded in FFY2020 through FFY2023.

In addition, LAVTA will focus on developing, refining and implementing race-neutral methods for facilitating DBE participation by advising prospective contractors of the areas for possible subcontracting and the availability of ready, willing and able subcontractors, including DBE firms, to perform such work. LAVTA will continue to solicit DBE participation on an ongoing basis, use DBE firms that have successfully completed prior projects, encourage eligible firms to become certified as DBEs, encourage DBE certified firms to maintain their certifications, assist with access and distribution of the California UCP DBE database, work with the California UCP Executive Committee to refine the DBE certification and annual review processes, and provide requested technical assistance and related services when feasible.

Race-neutral measures will comprise 100% of the total contracting opportunities through various types of contracts, including construction, professional services, procurement of materials, supplies and equipment, and other services. LAVTA will monitor carefully its progress during the course of each year and will consider whether it will establish appropriate contract-specific goals if other race-neutral methods do not appear sufficient to achieve the three-year overall DBE participation goal. All contracts that have DBE commitments will be monitored for compliance.

### **Compliance with California Proposition 209**

The three-year overall DBE goal complies with the California Civil Right Initiative, Proposition 209, in that any continuing race-conscious measures for new contracts, or contracts in progress, apply only to U.S. DOT-assisted contracts.

The race-neutral elements of LAVTA's DBE program are applicable to all third-party contracts, regardless of funding source, in a manner that is consistent with Proposition 209. By this means, the administration of LAVTA's contracts to include the participation of DBEs on a nondiscriminatory basis is preserved.

### **Additional background on compliance standards**

In May 2005, the Ninth Circuit Court of Appeals decided a case (Western States Paving Co. Inc. v. Washington State Department of Transportation) that has an impact on the goal-setting methodology of LAVTA's DBE program. The Court ruled that the Washington State Department of Transportation (WSDOT) was applying its DBE program unconstitutionally because it did not have sufficient evidence of discrimination in its marketplace to justify its annual overall DBE goal.

The court concluded that the U.S. DOT DBE program was constitutional as written because it was a "narrowly tailored" means of remedying the effects of race and sex based discrimination within the transportation contracting industry. However, the Court held that WSDOT, in order to justify an annual DBE goal, needed to go beyond the requirements of the federal regulations and independently establish the existence of a racial/gender discrimination in the state's transportation contracting industry for each group included in its DBE program. The Court reviewed WSDOT's annual goal setting process, determined it was flawed and concluded that the WSDOT DBE program was unconstitutional.

In this court case, the majority opinion concluded that a disparity study or other documentation of discrimination in the contracting industry in the relevant geographical area for the groups covered by the DBE program should be the basis for an annual DBE goal rather than statistics based only on U.S. Census data. In response to this court ruling and further guidance from the U.S. DOT, Caltrans and some of the transit agencies in the San Francisco Bay Area awarded consultant contracts for availability/ utilization studies.

In January 1989, the U.S. Supreme Court in *City of Richmond v. J. A. Croson Co.* set constitutional limits on the use of race-conscious programs by nonfederal entities. The court found that race-based preferences would be constitutionally valid only if there is evidence that discrimination in the marketplace has caused the underutilization of minority-owned firms and that race-based preferences are necessary to remedy that discrimination. In addition, the court held that race-conscious remedies must be narrowly tailored to remedy such discrimination.

A joint DBE Disparity Study was conducted by National Economic Research Associates, Inc. (NERA) in 1994 on behalf of the RTCC MAC agencies (including LAVTA's MPO). It found disparities for each major race and gender group in each of the major industries examined in the RTCC member agency's geographical market. It also found that no minority and woman owned business enterprise group received its expected share of private-sector procurement dollars although these disparities vary greatly for each group across each agency.

Anecdotal evidence in the study provided additional support that marketplace discrimination in the greater San Francisco Bay Area limits the opportunities for minority and women owned businesses to obtain work. Evidence of discrimination was presented in various areas, including education, housing, banking, bonding, employment, and union apprenticeship programs, which have a negative effect on individuals who want to establish and expand their businesses. The DBE Disparity Study concluded that statistical and anecdotal findings strongly support the view that discrimination would lead to the underutilization of minority and women owned businesses by the RTCC agencies in the absence of their goal programs. Therefore, these goal-based programs are a reasonable remedy for ensuring that procurement spending is not used to help perpetuate discriminatory practices.

### **FFY 2021-2023**

#### **Disadvantaged Business Enterprise (DBE) Goal Methodology**

The methodology to calculate an agency's DBE goal is a two-step process described in 49CFR Part 26. Step-one of the methodology establishes a base figure for new federally funded contracts anticipated to be awarded in the upcoming three Federal Fiscal Years (October 1- September 30). This calculation has been done for contracts anticipated to be awarded between October 1, 2020 and September 30, 2023.

A number of options in calculating the base figure are available. LAVTA does not have a comprehensive bidders list that includes all DBEs and non-DBEs that submitted bids/proposals



on prior contracts or subcontracts. LAVTA does however, have a vendors list comprised of vendors who have contacted LAVTA in the past regarding potential future opportunities.

Another option is to use the goal of another U.S. DOT recipient for the goal-setting process; however, while LAVTA has considered doing this the decision was made to use a different method as LAVTA's contracting opportunities do not closely mirror those of another agency.

Therefore, LAVTA chose to calculate the DBE goal in the following manor:

The base figure is derived from the relative availability of DBEs that are presumed 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 a DBE goal of 1 percent for FFY2021-23 for LAVTA. This methodology is outlined below.

### **RELEVANT AVAILABLE EVIDENCE**

The Authority examined all evidence in its jurisdiction to determine which sources might be considered for its DBE goal-setting methodology in the Step One and Step Two process:

### **DATA CONSULTED**

#### *Census Bureau's County Business Pattern (CBP) Database*

The Authority used the Census Bureau's CBP database, updated as of April 2017, to obtain the number of all firms (DBEs and non-DBEs) ready, willing and able to bid for the Authority's FTA-assisted contracts. This data is used in Step One of the goal-setting process.

#### *California Unified Certification Program (CUCP) Database*

The Authority used the CUCP database to determine the number of certified DBEs ready, willing and able to bid for the Authority's FTA-assisted contracts. This data is used in Step One of the goal-setting process.

#### *Actual DBE Participation in Past Race/Gender-Neutral Contracts*

Actual DBE participation in race/gender-neutral contracts in past years as well as other applicable analysis was used to determine whether adjustment to the Step One Base Figure is necessary. This data was used in Step Two of the goal-setting process.

#### *Data from Disparity Studies Performed by Other Agencies*

Several Bay Area transit agencies [San Mateo County Transit District (SamTrans)/ Peninsula Corridor Joint Powers Board (Caltrain), Bay Area Rapid Transit District (BART), Santa Clara Valley Transportation Authority (VTA) and the California Department of Transportation (Caltrans)]; have completed disparity studies in the past. The local market areas of some of these agencies do overlap with that of the Authority. However, the types of contracts and the size of contracts led by the aforementioned agencies are not similar to LAVTA's and therefore limit the Authority's use in order to make a Step One Base Figure or Step Two adjustment.

### *Goals of Other U.S. DOT Recipients*

The Authority did not consider the goals of other U.S. DOT recipients due to the fact other recipients do not have substantially similar contracting opportunities and/or marketplace as the Authority.

### *Metropolitan Statistical Areas*

The Consolidated Metropolitan Statistical Area (CMSA) which closely matches the Authority's marketplace is San Francisco-Oakland-San Jose. However, this area does not cover all the counties that are in the Authority's marketplace, and therefore, would be an incomplete source for LAVTA's goal-setting process. The Census Bureau's CBP database is a more appropriate source to obtain data on the specific counties in the marketplace as discussed above.

### *Sources from Organizations and Institutions*

LAVTA did not receive information about past discrimination in public contracting; discrimination in private contracting; discrimination in credit, bonding or insurance; data on employment, self-employment, training or union apprenticeship programs; and/or data on firm information that could be used to make an adjustment to the base figure in Step Two of the goalsetting process.

### **Step-One Process: Development of Base Figure**

The initial step in developing a DBE Goal of 1 percent was to determine the market area for consultants who have demonstrated an interest or are anticipated to participate in LAVTA contracts.

The Authority determined the local market area based on the area in which the contractors and subcontractors on the Authority's Bidders List are located. These firms are located in the counties of Alameda, Santa Clara, San Mateo, Contra Costa, Solano, Sonoma, Napa, Marin, San Joaquin, Stanislaus, Amador, Calaveras, Merced, Mariposa, and Tuolumne.

The Authority will use these counties to determine the number of DBEs and all firms in its local market area.

The next stage of the methodology is to determine the amount of each contract as part of the whole FTA program for these fiscal years, which are then weighted according to their percentage of the total amount of the contracting opportunities outlined in 1A.

The projects are analyzed to determine what type of contracting work is anticipated and these activities are matched with the respective North American Industry Classification System (NAICS) codes, which are used to identify firms in the California Unified Certification Program (CUCP) SBE and U.S. Census Bureau's County Business Patterns Database. The NAICS code for each project is listed below:

<b>Project</b>	<b>NAICS Code</b>
ADA Paratransit Operations	485991

Rehab Passenger Shade Structure	238390
Repave/Restripe Parking Lot	237310
Replace Security Lighting	238210
Replace Security Cameras	561621
Replace Passenger Amenities	337127
Signage	339950
Landscaping	561730
Fixed Route Operations	485119

Both databases are searched for the number of firms in the relevant NAICS codes in the appropriate market areas. The ratio for DBE firms to non-DBE firms is then calculated by dividing the number of certified DBE firms ready, willing, and able to work in the appropriate market area, according to the CUCP database, by the total number of firms found in the same market area according to the U.S. Census Database. This is performed for each county and each type of activity shown in figure 1B.

Finally, the Step-One Base Figure results from multiplying the DBE ratios for each project by the corresponding weights, and summing the results for each activity. The calculation of the Step-One Base Figure is shown in figure 1C.

**The Step-One Base Figure, weighted by type of work to be performed, is 2.49 percent.**

### **Step-Two Process: Adjustment to the Base Figure**

The purpose of the analysis in Step-Two is to make a determination based on relevant evidence available to LAVTA if any adjustments to the Step-One Base Figure are justified. LAVTA's DBE participation history can assist in determining whether an adjustment to the Step-One Base Figure is warranted.

LAVTA adjusted this figure based on the zero percent DBE participation that LAVTA has received over the past three years.

Calculations:

FFY 2020/2021- 2022/2023 Base Figure: 2.49% Historical Median Past Participation: 0%  
 Adjustment: (base figure 2.49%) + (historical median past participation 0%) =  $2.49 \div 2 = 1.25\%$ ,  
 Rounded to 1%.

### **Conclusion**

**The Disadvantage Business Enterprise (DBE) Goal for FFY 2021-2023 is 1 percent and is a 100% race neutral goal.**

## FFY 2021-2023

## 1A. FTA Assisted Contract List:

NAICS Code	Project	Amount of DOT funds on project:	% of total DOT funds (weight)
485991	ADA Paratransit FY21	\$412,325.00	0.0620
485991	ADA Paratransit FY22	\$424,694.75	0.0639
485991	ADA Paratransit FY23	\$437,435.59	0.0658
238390	Rehab passenger shade structure	\$100,000.00	0.0150
237310	repave/restripe parking lot	\$72,675.00	0.0109
238210	replace security lighting	\$35,643.00	0.0054
561621	replace security cameras	\$32,000.00	0.0048
337127	replace passenger amenities	\$32,000.00	0.0048
339950	signage	\$36,000.00	0.0054
561730	landscaping	\$68,093.00	0.0102
485119	Operating Fixed Route	\$5,000,000.00	0.7518
<b>Total FTA-Assisted Contract Funds</b>		<b>\$6,650,866.34</b>	<b>1</b>

## 1B. Determine the relative availability of DBEs b NAICS Code:

NAICS Code	Project	Number of DBEs available to perform this work	Number of all firms available (including DBEs)	Relative Availability	
485991	ADA Paratransit FY21	2	56	0.0357	
485991	ADA Paratransit FY22	2	56	0.0357	
485991	ADA Paratransit FY23	2	56	0.0357	
238390	Rehab passenger shade structure	26	170	0.1529	
237310	repave/restripe parking lot	214	182	1.1758	
238210	replace security lighting	124	1547	0.0802	
561621	replace security cameras	11	164	0.0671	
337127	replace passenger amenities	1	4	0.2500	
339950	signage	16	103	0.1553	
561730	landscaping	29	2241	0.0129	
485119	Operating Fixed Route	0	0		

<b>Combined Totals</b>	<b>427</b>	<b>4579</b>	0.0933	<b>Overall availability of DBEs</b>
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1C. (Weight) x (Availability) = Weighted Base Figure

<b>NAICS Code</b>	<b>Project</b>	<b>Weight</b>	<b>x</b>	<b>Availability</b>	<b>Weighted Base Figure</b>
485991	ADA Paratransit FY21	0.06200	x	0.03571	0.0022
485991	ADA Paratransit FY22	0.06386	x	0.03571	0.0023
485991	ADA Paratransit FY23	0.06577	x	0.03571	0.0023
238390	Rehab passenger shade structure	0.01504	x	0.15294	0.0023
237310	repave/restripe parking lot	0.01093	x	1.17582	0.0128
238210	replace security lighting	0.00536	x	0.08016	0.0004
561621	replace security cameras	0.00481	x	0.06707	0.0003
337127	replace passenger amenities	0.00481	x	0.25000	0.0012
339950	signage	0.00541	x	0.15534	0.0008
561730	landscaping	0.01024	x	0.01294	0.0001
485119	Operating Fixed Route	0.75178	x		
				<b>Total</b>	0.0249
				<b>Expressed as a % (*100)</b>	2.49%
				<b>Rounded, Weighted Base Figure:</b>	<b>2%</b>
				<b>Adjusted base figure based on 0% past participation</b>	1.25%