

Date: April 17, 2008

Committee Meeting Date: April 17, 2008

Board Meeting Date: May 1, 2008

BOARD MEMORANDUM

ACTION ITEM

TO: Santa Clara Valley Transportation Authority
Board of Directors

THROUGH: Michael T. Burns
General Manager

FROM: Joseph T. Smith
Chief Financial Officer

SUBJECT: Accept Availability & Utilization Study & Approve the
Reestablishment of a Race Conscious Disadvantaged
Business Enterprise Program

Policy-Related Action: (Yes)

Government Code Section 84308 Applies: No

RECOMMENDATION:

Review and accept the report submitted by CRA International entitled, "Measuring Minority and Woman-Owned Construction and Professional Service Firm Availability and Utilization." Additionally approve implementation of a Race Conscious Disadvantaged Business Enterprise (DBE) program.

BACKGROUND:

In March of 2006, staff reported to the Board that, as a result of the 9th Circuit Court of Appeals decision in the *Western States Paving Co., Inc. v. Washington State Department of Transportation* case (*Western States*), race-conscious federal DBE programs were prohibited in the 9th Circuit absent evidence of discrimination in the transportation contracting industry.

At that time Caltrans determined it did not have sufficient data to satisfy the evidentiary standards established in the *Western States* case, and it notified subrecipients of Federal Highway Administration (FHWA) funds that, effective May 1, 2006, contracts must be advertised and awarded without specific DBE contract goals. VTA, as an FHWA subrecipient, entered into an Implementation Agreement with Caltrans whereby, among other things, VTA agreed to assist Caltrans achieve its Overall Statewide DBE goal by *race neutral* means. VTA had also received the same direction from the Federal Transit Administration (FTA) for grant funds received through that agency.

A race neutral program essentially means that grantees may not set DBE participation goals for individual contracts they award.

For these reasons, in May of 2007, the Board approved a contract with CRA International (CRA) to perform an Availability and Utilization Study to determine if, in fact, there was evidence of discrimination in the contracting industry that would meet the standards set forth by the 9th Circuit Court. Without such evidence, VTA would not be allowed to return to a race conscious DBE program.

DISCUSSION:

CRA has performed an exhaustive review of information relating to the availability and utilization of minority groups in the construction and professional services sectors in the San Jose-San Francisco-Oakland Combined Statistical Area. The study methodology of the report is based on the evidentiary standards set forth in the *Western States* decision and prior case law. CRA conducted both statistical analyses and collected anecdotal evidence of race and gender discrimination.

The report details the various statistical analyses employed, including Market Level, Private Sector and Agency Level Analyses. The results of these analyses show that in most instances there is “statistically significant evidence of discrimination against construction and professional services firms owned by women, African Americans, Hispanic and Asian Americans in the construction and professional services industries operating within the relevant local market.”

In the construction industry, the study finds evidence that firms owned by women, African Americans, Asian Americans and Hispanics are formed at a lower rate than predicted in a gender/race neutral environment. Additionally, using other measurements, these firms are significantly underutilized relative to their availability.

In professional services, disparity ratios for women, African American, Asian American and Hispanic owned firms show similar levels of discrimination. VTA believes the results of this study document discrimination that is significant enough (as defined by the *Western States* decision) to warrant a return to a race conscious DBE program. If the Board approves this action, staff will perform the required calculations of DBE Goals for the upcoming Federal fiscal years and submit those goals to the FTA and FHWA for review and approval. Without having performed those required calculations, staff is not able to report to the Board at this time what the goals will be, but it is predicted that they will approximate the most recently approved goal, which was 15%. When these calculations are complete staff will report those results to the Board.

ALTERNATIVES:

If the Board finds the CRA report does not adequately document disparity/discrimination, then VTA will not be able to adopt a race-conscious program. The Board’s alternative in that case would be to request an additional study and analysis from the contractor, or request staff to contract for a new study by another contractor.

FISCAL IMPACT:

There is no fiscal impact to this action.

STANDING COMMITTEE DISCUSSION/RECOMMENDATION:

The Administration & Finance Committee considered this item at their April 17, 2008 meeting. Following a discussion that is summarized below, the Committee unanimously recommended that the Board accept the report submitted by CRA International and also approve the implementation of a Race Conscious DBE program. Michael Burns, General Manager, Kevin Allmand, Acting General Counsel, Dr. Mark Berkman of CRA International and Thomas B. Smith, Purchasing & Materials Manager provided responses to the questions below.

Question: Director Casas inquired; what percentage of the firms responding with anecdotal evidence of discrimination were able to offer evidence of that discrimination?

Response: Of those firms that claimed discrimination, 15 were willing to participate in the more in depth interview process that was offered. Of those 15 firms, none were able to offer proof or evidence of discrimination. It is felt that some of the reasons for this lack of specific evidence is the fear on the part of small businesses of the consequences of filing complaints or grievances. Although we don't have solid evidence of discrimination, which would be ideal, we do have anecdotal evidence from other sources such as previous public hearings conducted by VTA and others that corroborate these anecdotal responses.

Question: Director Casas asked if the absence of specific evidence of discrimination caused a modification the statistical evidence.

Response: No, the anecdotal evidence is considered separately and is only an adjunct to the bulk of the statistical evidence which points more clearly to the presence of discrimination in the areas studied. Further the anecdotal evidence clearly showed that minority and woman owned businesses claimed that they faced certain impediments much more frequently than their white male owned counterparts.

Director Casas inquired if this case (the 9th Circuit Court of Appeals decision in the Western States Paving case) is being appealed and what changes would take place if this action were approved as requested.

Response: The case has not been appealed and is final. For the past year and a half we have been operating a Race Neutral DBE program. Should the Board approve this request, we will return to a Race Conscious program as quickly as possible. Our internal processes and calculations will remain as they have been in the past. A Race Conscious program will require the establishment of DBE goals for each federally funded contract that we solicit.

Director Casas asked that in spite of a lack of specific evidence such as difficulty in getting loans, is it still justified to recommend a return to a Race Conscious DBE program.

Response: If we relied on that evidence alone, it may not justify a conclusion that discrimination exists, however there is also significant statistical evidence that supports the claim that it is more difficult for minority firms to get loans, and in those cases where they are successful in obtaining a loan, statistically they pay a higher interest rate than non-minority firms.

Director Reed referred to the information in Table ES3 and the statistics dealing with lack of experience, finding and projects being too large as impediments to obtaining contracts. Director Reed questioned what we could do to speak to these issues if we did not have a Race Conscious DBE program.

Response: One of the seven elements that the DOT counsel has identified as being critical is looking at Race Neutral remedies as being an important part of an overall DBE program. One way this can be done is shrinking the size of contracts and reviewing experience criteria. With the information contained in this report it is our intention to review those areas where Race Neutral means can be developed and employed to speak to these issues.

Director Casas recommended that because there is a perception of discrimination among women and minority firms combined with a lack of specific anecdotal evidence to support the claim that VTA needs to take the claims seriously and develop ways to document such discrimination. Additionally Director Casas asked General Counsel if he felt that this study was defensible and supported a return to a Race Conscious DBE program.

Response: General Counsel responded that he believes the study was done in a way that is responsive to the requirements of the (Western States Paving) case and that it is defensible.

Director Gage stated that he believes that if there is discrimination present that VTA should have a policy and procedures in place that speak to that discrimination. We may want to consider ideas like having a local firm preference that could be of assistance to small and minority firms.

Director Williams inquired if, lacking a DBE program, would we require contractors to use DBE subcontractors.

Response: Without a Race Conscious DBE program we could not require the utilization of DBE subcontractors.

Director Williams stated that as a minority he is very much aware that discrimination exists and would like VTA staff to move forward in the development of a program that will speak to those issues.

Director Gage moved that the report be accepted and that staff move forward with implementation of a Race Conscious DBE program. Additionally when that program is complete, that staff will return to the Board so the program can be reviewed.

Director Reed inquired if that program contemplates a Race Neutral component that will be responsive to the issues that have been discussed at this meeting.

Response: That will be a part of the program that we bring back.

Prepared by: Andy Flores, Disadvantaged Business Enterprise Program Manager

Reviewed and verified by: _____
Thomas B. Smith, Contracts and Materials Manager