

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

**DISADVANTAGED BUSINESS ENTERPRISE
PROGRAM**

Submitted To

**FEDERAL TRANSIT ADMINISTRATION
REGION NINE
211 MAIN STREET, ROOM 1122
SAN FRANCISCO, CA 94111**

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I. Statement of Policy

It is the policy of the San Francisco Bay Area Rapid Transit District ("BART" or the "District") to ensure nondiscrimination on the basis of race, color, sex, or national origin in the award and administration of federally funded contracts. It is the intention of the District to create a level playing field on which a Disadvantaged Business Enterprise ("DBE") or Small Business Entity ("SBE") can compete fairly for federally funded agreements, contracts and subcontracts, including but not limited to construction, procurement and proposal contracts, professional and technical services agreements and purchase orders.

As a recipient of federal funds, the District is committed to carrying out all requirements of 49 Code of Federal Regulations Part 26, establishing and maintaining the District's DBE Program (the "DBE Program" or "Program"). The District's DBE Program will assure that all federally funded contracts and procurements are administered without discrimination on the basis of race, color, sex or national origin, and that DBEs and SBEs have an equal opportunity to compete for and participate in the performance of all federally funded agreements, contracts and subcontracts awarded by the District. The District will implement its DBE Program in good faith and shall not permit the use of race or gender conscious quotas or set-asides in its administration.

The District's General Manager is responsible for adherence to this DBE Program and has overall responsibility for directing development and implementation of this Program. The General Manager has designated the Department Manager of the Office of Civil Rights as the DBE Liaison Officer (the "Liaison Officer"). The Liaison Officer will be responsible for development, implementation and monitoring of the DBE Program. It is the expectation of the Board of Directors and the General Manager that the provisions of this DBE Program will be adhered to both in the spirit and letter by all District personnel. This Policy will be circulated to District employees and made available to the public.

This DBE Program is intended to implement the federal requirements pertaining to the DBE Program, including, but not limited to, 49 CFR Part 26 as amended. In the event of any inconsistencies between the terms of the District's DBE Program and the terms of 49 CFR Part 26 as amended, the latter will prevail.

II. Objectives

The objectives of this DBE Program are to:

1. Ensure nondiscrimination in the award and administration of federally funded contracts;
2. Create a level playing field on which DBEs and SBEs can compete fairly for federally funded contracts;
3. Help remove barriers to DBE and SBE participation in the bidding, award and administration of District contracts;

4. Assist in the development of DBE and SBE firms that can compete successfully in the market place outside of the DBE Program;
5. Ensure that only firms that fully meet the eligibility standards of 49 CFR Part 26 are permitted to participate as DBEs;
6. Ensure that the DBE Program is narrowly tailored in accordance with applicable law.
7. Identify business enterprises that are qualified as DBEs or SBEs and are qualified to provide the District with materials, equipment, supplies and services; and to develop a supportive rapport with the owners and management of those enterprises;
8. Develop programs and procedures which will acquaint prospective DBEs and SBEs who may participate in contracts with the District with the District's contract procedures, activities and requirements. Implement programs that allow DBEs and SBEs to provide the District with feedback on existing barriers to participation and suggestions on effective procedures to eliminate those barriers;
9. Facilitate race-neutral competition by SBE concerns through the implementation of Small Business Elements of the DBE Program ("SB Elements");
10. Administer the DBE Program in close coordination with the various departments within the District so as to facilitate the successful implementation of the DBE Program; and
11. Promoting the participation of all types of DBEs in a variety of fields, and encouraging participation both as prime contractors and as subcontractors.

III. Applicability

Pursuant to 49 CFR Sections 26.3 and 26.21, the District, as a recipient of federal financial assistance from the Federal Transit Administration ("FTA") of the United States Department of Transportation ("DOT"), is required to implement a DBE Program in accordance with 49 CFR Part 26. The DBE Program outlined herein applies to all District contracts that are funded, in whole or in part, by the DOT, including those awarded by the District's Sub-recipients, in accordance with 49 CFR Sections 26.13, 26.21, 26.23, and 26.37.

Sub-recipients are responsible for adhering to the District's DBE Program and to 49 CFR Part 26 in its entirety. This includes compliance with all Appendices to this document. The Liaison Officer shall ensure that all Sub-recipients adhere to the letter and the spirit of the District's DBE Program.

In the administration of the DBE Program, the District will not directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing the accomplishment of the objectives of this DBE Program with respect to individuals of a particular race, color, sex or national origin.

IV. Responsibility for DBE Program Implementation and Administration

A. Board of Directors

The Board of Directors is responsible for establishing DBE policy.

B. General Manager

The District's General Manager is responsible for adherence to this DBE Program and has overall responsibility for directing development and implementation of this Program

C. Office of Civil Rights

The Department Manager has been designated by the General Manager as the Liaison Officer, as referenced in 49 CFR Section 26.25. The Liaison Officer shall be responsible for overseeing the DBE Program, recommending DBE policy, developing and implementing a written DBE program and internal and external communication procedures. Pursuant to 49 CFR Section 26.25, the Liaison Officer shall have adequate staff to administer the District's DBE Program and shall have direct and independent access to the General Manager.

The Liaison Officer shall be responsible for all aspects of the DBE Program as outlined in this document, and he or she will work closely with operating divisions and other departments and consultants of the District, including the Office of the General Counsel, the Department of Procurement and Materials Management, the Department of Maintenance and Engineering, the Department of Planning, Development, and Construction, and other departments which are responsible for making decisions relative to the District's agreements, contracts and subcontracts, including but not limited to construction, procurement and proposal contracts, professional and technical services agreements and purchase orders.

The specific duties and responsibilities of the Liaison Officer or his/her designee(s) will include but not be limited to the following:

1. Gathering and reporting statistical data and other information as required by FTA and the Board of Directors;
2. Working with appropriate departments to establish overall DBE participation goals;
3. Ensuring timely notification to the DBE community of bid and contract opportunities;
4. Identifying and implementing race-neutral methods of achieving DBE participation and evaluating the success of such methods, including race and gender neutral SBE participation;
5. Analyzing and assessing the available resources and evidence for the establishment and achievement of an overall DBE participation goal;
6. Analyzing District progress toward DBE goal attainment, and identifying ways to improve progress;
7. Monitoring overall DBE participation, adjusting overall goals and means of achievement, and reporting to the District, the Board and FTA as needed;
8. Participating in the contract bid and award process including establishing contract-specific DBE goals where appropriate, reviewing contract specifications, attending pre-bid, pre-proposal and pre-construction meetings to explain the DBE Program, to respond to questions from contractors and proposers and evaluating bids for contractor responsiveness, responsibility and good faith efforts;
9. Advising the General Manager and Board of Directors on DBE matters;

10. Maintaining and updating the DBE Directory in accordance with 49 CFR Section 26.31;
11. Maintaining and updating the Bidders List in accordance with 49 CFR Section 26.11;
12. Implementing race-neutral measures to facilitate DBE participation such as outreach, matchmaking, small business program elements, other communication programs, training and business development programs, restructuring and unbundling contracting opportunities, simplifying bonding, surety and insurance requirements or other race-neutral means identified as necessary to the success of the District's DBE Program;
13. Assessing the critical technical and fiscal management needs of DBE firms; planning and conducting DBE training and providing technical assistance;
14. Providing outreach to DBEs and community organizations with advice on DBE Program issues and contract opportunities;
15. Determining all initial certification actions for DBE and small businesses elements, including certifications, annual updates, denials and removals;
16. Participating in the implementation of a statewide Unified Certification Program in accordance with 49 CFR Section 26.81;
17. Maintaining all necessary records and documentation of the DBE Program.
18. Developing and implementing the SB Elements of the District's DBE Program.

D. Procurement and Materials Management

The Department Manager is responsible for ensuring that the appropriate provisions of the DBE Program are included in all District contracts that are federally funded and for ensuring non-discrimination in the District's procurement of goods and services. The Department Manager is also responsible for ensuring the engagement of OCR staff with other District staff during project design and conception phases to ensure that contracting will be done in a manner best suited to facilitate DBE and SBE involvement.

E. Office of the General Counsel

The Office of the General Counsel is responsible for advising the Board of Directors, the General Manager, and the Office of Civil Rights in the implementation of the DBE Program.

F. Board Appointed Officers, Executive Officers, Department Managers and District Staff

All Board appointed officers, executive officers, department managers and District staff are responsible for the implementation of the DBE Program in their respective areas of authority in coordination with the Liaison Officer. The performance of the executive officers, department managers and District staff in the implementation of the DBE Program shall be a part of their employee performance appraisal.

G. Business Advisory Council

The Business Advisory Council serves as a forum for communication between the DBE and SBE contracting communities and the District and makes general recommendations on DBE/SBE policies and practices that impact DBE/SBE utilization and participation in District contracts.

H. American Public Transportation Association's Diversity Council and the Conference of Minority Transportation Officials

The American Public Transportation Association's ("APTA") Diversity Council and the Conference of Minority Transportation Officials (COMTO) serve as a forum for discussion of actions that impact minority and women in the transit industry and provide educational resources on current transit industry developments.

I. Ombudsperson

The Office of Civil Rights, in consultation with the project staff, on a contract-by-contract basis, may assign an individual or firm to act as an Ombudsperson for subcontractors and suppliers of any tier that are DBEs or SBE firms. The Ombudsperson may be available to any such firm that is experiencing difficulties in any aspect of its contract work on contracts awarded by the District. Such subcontractor or supplier will not be relieved of any of its duties, rights, or obligations under its subcontract during the review by the Ombudsperson. The Ombudsperson may be empowered to act as a mediator or fact-finder in disputes between a prime contractor and such subcontractor or supplier, and may make recommendations to the Office of Civil Rights and the project staff. (See Appendix G.)

V. Administrative Requirements

A. DBE Financial Institutions

Pursuant to 49 CFR Section 26.27, the Liaison Officer will identify and explore the range of services offered by banks and other financial institutions that qualify as DBEs in the San Francisco Bay Area and determine areas in which the District may reasonably utilize their services. The District will also encourage its prime contractors to use the services of DBE financial institutions.

B. CUCP DBE Directory

BART is a member of the California Unified Certification Program (CUCP), which maintains the DBE directory pursuant to 49 CFR Section 26.81 that identifies all firms that are eligible to participate as DBEs in this Program. The District uses the DBE directory as a resource in developing overall and contract-specific DBE participation goals and conducting outreach and other programs for DBEs and SBEs.

The CUCP DBE directory is available to contractors and the public electronically on the internet as well as in print. The CUCP updates the electronic version by including additions, deletions, and other changes as soon as they are made. The DBE directory includes the firms name, address, telephone number and types of work (utilizing the North American Industry Classification System (NAICS) for which the firm is certified as a DBE. Additionally, the DBE directory includes, whenever possible, the date the firm was established, the legal structure of the firm, the percentage owned by disadvantaged individuals, capacity, previous work experience and a contact person. A listing in the DBE directory does not in any way pre-qualify the identified DBE firms with respect to licensing, bondability, competence or financial responsibility.

C. Overconcentration

Pursuant to 49 CFR Section 26.33, if the Liaison Officer determines that DBE participation is so over-concentrated in certain types of work or contracting opportunities that it unduly burdens the participation of non-DBEs in that type of work, the Liaison Officer will develop appropriate measures to address the overconcentration. The Liaison Officer will seek approval from the FTA. Once approved, the measures will become part of this Program.

Measures to address DBE overconcentration in a particular field may include, but are not limited to the following:

1. Developing ways to assist DBEs to move into nontraditional areas of work;
2. Varying the use of contract-specific DBE goals;
3. Working with prime contractors to find and use DBEs in other industry areas;

D. Race and Gender Neutral Efforts to Attain DBE Goals

Pursuant to 49 CFR Section 26.51, the District will achieve as much of its overall DBE goal as possible by using race neutral efforts to facilitate DBE participation. Race-neutral efforts may include, but are not limited to, the following:

1. Arranging solicitations, times for presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE and other SBE participation;
2. Providing assistance in overcoming limitations such as inability to obtain bonding or financing;
3. Providing technical assistance and other similar services;
4. Providing information and communication programs on contracting and business procedures as well as specific contract opportunities;
5. Implementing a supportive service program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other SBEs;
6. Providing services to help DBEs and other SBEs improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;
7. Establishing a program to assist new, start-up firms, particularly in fields in which participation by SBEs has been historically low;
8. Ensuring distribution of the District's DBE data base through print and electronic means to the widest feasible range of potential prime contractors;
9. Assisting DBEs and other SBEs to develop their capability to utilize emerging technology and conduct business through electronic media;
10. Unbundling larger contracts when feasible into a series of manageable projects to facilitate participation by SBEs;
11. Conducting internal training seminars to facilitate better understanding among project managers and engineers regarding the DBE Program objectives;
12. Maintaining a website containing information on DBE certification, DBE Program, DBE

- procedures and a database of DBE firms;
13. Ensuring that the District's SB Elements are open and available to all small businesses, including DBEs.

E. DBE Program Small Business Elements

In accordance with 49 CFR Section 26.39, the District will establish DBE Program Small Business Elements ("SB Elements") as part of its DBE Program. DBEs are SBEs and thus including active and effective SB Elements to its DBE Program will assist the District in achieving as large a portion of its overall goal as possible through race and gender-neutral means. The SB Elements will include all reasonable steps to eliminate obstacles to small business participation on the District's contracts. This includes, but is not limited to:

1. Race and gender-neutral SBE goals on DOT funded contracts;
2. Contract set asides for SBEs on DOT funded contracts;

As a component of the SB Elements the District shall establish a means to certify small businesses and track information on the certified SBEs. The District shall develop procedures to gather and report statistical data on the SB Elements of its DBE Program.

The Liaison Officer will ensure that the SB Elements integrate with and complement the District's other race and gender-neutral DBE Program efforts. The Liaison Officer shall work in conjunction with all projects at the earliest stages of project development to ensure that the projects have, to the fullest extent feasible, been developed in a way that encourages DBE and SBE participation.

F. DBE Outreach

One method of providing race and gender-neutral efforts for DBE and SBE participation will be through the District's DBE Outreach Program (the "Outreach Program"). The Liaison Officer shall be responsible for identifying the most effective type(s) of outreach and implementing outreach. Outreach includes, but is not limited to, contract-specific outreach, matchmaking, vendor fairs, general outreach and outreach to community based organizations (CBOs) and contractor or business groups.

G. Supportive Services Program

The District may provide a Supportive Services Program to assist DBEs and SBEs. The District may also refer DBEs and SBEs to outside resources for assistance. This assistance may include, but is not limited to, general instruction and training in bid preparation, scheduling, estimating, procurement, change order preparation, negotiations, force account invoicing, certified payroll preparation, insurance, bonding and financing required for a District project. The Supportive Services Program is not intended to substitute for the performance of any contractual requirements by the DBE and SBE firms. It is expected that DBE and SBE firms will perform these tasks themselves with the assistance of such general training as may be available. Any information or assistance provided by the District will not relieve the prime contractor of the responsibility to manage subcontractor activities.

H. Mentor-Protégé Program

A mentor-protégé program allows a prime contractor to mentor a DBE firm so that the DBE firm can gain experience in the all phases of the construction industry, thereby enhancing the capacity of the DBE firm. Should the Liaison Officer determine that a mentor-protégé program would be an effective way to facilitate race-neutral DBE participation, a program will be developed. The framework for a mentor-protégé program is described in appendix I.

I. Hearing Officer

In accordance with 49 CFR Sections 26.53(d)(2) and 26.87(e) and as described more fully in appendices E and F, all proceedings by the District in connection with the removal of certification or reconsideration of a determination that a bidder has not met the DBE goal or used good faith efforts will be heard by an outside independent hearing officer selected in accordance with District procedures. The party or individual requesting the reconsideration or hearing shall equally bear the burden of payment of any fees or costs associated with the independent hearing officer with the District.

J. Unified Certification Program

A Memorandum of Agreement (the “MOA”) for a Statewide Unified Certification Program has been developed by California transportation agencies that are recipients of federal funds in accordance with 49 CFR Part 26. The MOA was accepted by the Secretary of the U.S. Department of Transportation and is effective as of January 1, 2002. There are two certifying clusters in California: Northern and Southern. BART is among the certifying agencies within the Northern California cluster.

K. Transit Vehicle Manufacturer Certification

Each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, must certify that it has complied with the requirements of 49 CFR Section 26.49, including the establishment of an annual overall DBE participation goal that has been submitted to the FTA and either approved, or not disapproved, by that agency. BART shall not include the amount of FTA assistance used in transit vehicle procurements in the base amount from which the District’s overall annual goal is established. Alternatively, the District may establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of complying with the remaining sections of 49 CFR Section 26.49, subject to approval from the FTA.

L. Caltrans Disadvantaged Business Enterprise Program

For any contracts that receive Federal Highway Administration (FHWA) funding through Caltrans, the District will include contract terms consistent with the Caltrans DBE Program Local Agency Implementation Agreement.

VI. Triennial DBE Goals

Pursuant to 49 CFR Section 26.45, the Office of Civil Rights will establish a triennial overall DBE goal (“Triennial Goal”) according to the procedures in Appendix B, subject to the approval of the Board of Directors, for the participation of DBEs in all projected contracts utilizing DOT financial assistance for a period covering three fiscal years. The Triennial Goal will be expressed as a percentage of the total amount of DOT funds the District anticipates expending in three-year period covered by the triennial goal. A report outlining the steps and calculations used to establish the District’s Triennial Goal (“Triennial Goal Report”) will be submitted to the appropriate operating administration for review no later than October 31 for each three fiscal year period to be covered by the Triennial Goal.

The Liaison Officer will track and evaluate its goal on a quarterly basis. This tracking is for informational purposes only and to ensure that the District is meeting the largest feasible portion of the Triennial Goal through race neutral means. In the event that the District amends its Triennial Goal, it shall be submitted to the appropriate operating authority in a manner consistent with 49 CFR Section 26.45.

The District's overall goal is reflective of the amount of ready, willing and able DBEs that are available to participate in contracting opportunities and is reflective of the amount of DBE participation the District would expect absent the effects of discrimination. The District intends to meet this goal, to the fullest extent feasible, through the race-neutral measures. Where race-neutral measures are inadequate to meet the annual overall goal, the District will establish contract-specific goals for particular projects with subcontracting opportunities. Contract-specific goals will be established in accordance with the findings of District’s availability and utilization study (“Disparity Study”), or any subsequent updates to the Disparity Study. Overall project goals may be set for design-build, turnkey and/or multi-year projects consistent with the requirements of 49 CFR Part 26, as outlined in Section XIV.

VII. Contract-Specific DBE Goals

In accordance with the procedures in Appendix C, the District will establish contract-specific DBE goals on contracts with subcontracting opportunities to the extent that the District cannot achieve its annual overall DBE goal with race-neutral measures. Where a contract-specific DBE goal has been established, the bidder or proposer must meet the contract-specific goal or demonstrate that it made sufficient good faith efforts to do so. Lower-tier subcontractor DBEs may count toward the DBE goal. The bidder shall be entitled to a hearing if the bidder fails to show either that it met the goal or that it made sufficient good faith efforts to meet the goal. All proceedings by the District in connection with good faith efforts will be held by an outside independent hearing officer selected in accordance with District procedures. A bidder or proposer will be ineligible for award if it does not meet the goal or demonstrate sufficient good faith efforts to do so. Contract specifications will provide that contract award is conditioned on meeting these requirements.

A contract specific goal shall only be established where supported by the findings of the District's Availability and Utilization Study or an update to that study.

VIII. DBE Eligibility

A. Disadvantaged Business Enterprise

A Disadvantaged Business Enterprise (DBE) is a for-profit, small business concern: 1) that is at least fifty-one percent (51%) owned by one or more individuals who are socially and economically disadvantaged or, in the case of a corporation, in which at least fifty-one percent (51%) of the stock is owned by one or more socially and economically disadvantaged 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. Small Business Concern

A small business concern is an existing small business, as defined by Section 3 of the Small Business Act and the Small Business Administration regulations implementing it (13 CFR Part 121), whose average annual gross receipts for itself and for its affiliates for the previous three fiscal years does not exceed \$23.98 million (or as adjusted for inflation by the Secretary of DOT) pursuant to 49 CFR Section 26.65(b).

C. Socially and Economically Disadvantaged Individuals

There is an assumption that an individual is both socially and economically disadvantaged if he or she is a citizen or lawfully admitted permanent resident of the United States and is:

1. Black American (including persons having origins in any of the Black racial groups of Africa);
2. Hispanic American (including persons of Central or South American, Cuban, Dominican, Mexican, Puerto Rican, or other Spanish or Portuguese culture or origin, regardless of race);
3. Native American (including persons who are enrolled members of a federally or state recognized Indian Tribe, Alaska Natives, or Native Hawaiians));
4. Asian-Pacific American (including persons whose origins are from Brunei, Burma (Myanmar), Cambodia (Kampuchea), China, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, Fiji, Guam, Hong Kong, Indonesia, Japan, Juvalu, Kiribati, Korea, Laos, Macao, Malaysia, Nauru, the Philippines, Samoa, Taiwan, Thailand, Tonga, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), or Vietnam);
5. Subcontinent Asian American (including persons whose origins are from Bangladesh, Bhutan, India, the Maldives Islands, Nepal, Pakistan, or Sri Lanka);
6. A Woman; or
7. A member of any additional group that is designated as socially and economically disadvantaged by the Small Business Administration.

The District will require each individual owner of a firm applying to participate as a DBE and whose ownership interest is relied upon for DBE certification to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged. The District will also require each individual owner of a firm applying to participate as a DBE and whose ownership interest is relied upon for DBE certification to submit a sign, notarized statement of personal net worth with appropriate supporting documentation.

Additionally, any individual may demonstrate, by a preponderance of evidence on a case-by-case basis, that he or she is socially and economically disadvantaged. The District will follow governmental requirements, including 49 CFR Section 26.67 and the guidelines in 49 CFR Part 26, Appendix E, for determining social and economic disadvantage.

D. Personal Net Worth

Personal Net Worth (PNW) means the value of the assets of an individual remaining after total liabilities are deducted. As defined more specifically and limited in 49 CFR Part 26, an individual's personal net worth does not include:

1. The individual's ownership interest in an applicant or participating DBE firm;
2. The individual's equity in his or her primary place of residence;

An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse. An individual owner of a firm whose ownership and control are relied on for DBE certification cannot be determined to be economically disadvantaged if he or she has a personal net worth exceeding \$1.32 million or as amended by Title 49 CFR Part 26.

E. Non-Residence Certification

BART's market area is defined in its most recent Disparity Study. In order for a firm with a principal place of business located outside of the Market Area to be eligible to benefit from the race and gender conscious program, the firm must show that it has attempted to do business in the Market area within two (2) years prior to the date of the advertisement of the solicitation. All firms whose primary place of business is located in or is domiciled within the Market Area are presumptively assumed to meet the following requirements. The requirements may include but are not be limited to:

1. Currently or previously a party to a construction contract to do work in the Market Area.
2. Attendance at a BART sponsored outreach meetings, including pre-bid meetings, town hall meetings and/or Board of Director meetings.
3. Any form of communication with BART, including purchasing contract documents, requesting information from BART and attending or registering to attend BART sponsored outreach events.

IX. Procedures to Ascertain Eligibility and Utilization of DBEs

In order to ensure that the DBE Program benefits firms actually owned and controlled by socially and economically disadvantaged individuals, the District has established certification procedures for DBEs and will follow the procedures contained in Appendix E.

A. DBE Certification

The California Unified Certification Program (CUCP), to which the District is a party, is governed by the terms of the Memorandum of Agreement (MOA) for a Unified Certification Program, effective January 1, 2002. The CUCP provides "one-stop shopping" to applicants for certification in California. An applicant need only apply once and the certification will be honored by all recipients in the State.

The District is a certifying agency under the CUCP. Prospective DBE firms may obtain the requisite DBE application forms from the District's web site at www.bart.gov, by contacting the Office of Civil Rights directly, or through the CUCP or any of its members.

DBE firms certified pursuant to the California Unified Certification Program (CUCP) will be counted towards a bidder's DBE participation goal unless successfully challenged under this DBE Program. Pursuant to 49 CFR Section 26.81(c), all certifications by the CUCP shall be pre-certifications, i.e., certifications that have been made final before the due date for bids on a contract on which a firm seeks to participate as a DBE. Only firms that are certified as eligible DBE's may participate as DBE's in the Program.

Certifying agencies of the CUCP will not process a new application for DBE certification from a firm having its principal place of business in another state unless the firm has already been certified in its home state.

When processing an application from a firm that has been certified by the SBA as a small business, the District has two choices, following CUCP policy. It may either accept the SBA certification decision, subject to the District's own on-site review, or it may use the firm's SBA application package in lieu of requiring completion of the District's own application form (in which case the District will still have to complete an on-site review, but will make its own decision).

Certification procedures, including those applicable to initial certification, removal (decertification), and certification appeals, are set forth in Appendix E.

B. Termination

Termination of DBE firms shall only be for good cause, as determined by the District in accordance with 49 CFR Section 26.53 (f). Any termination of a DBE must be essential to the contract and not merely discretionary, advantageous or for the convenience of the prime contractor, consultant, or supplier. A prime contractor, consultant, or supplier must immediately notify the Liaison Officer of a DBE's inability to perform, and must provide documentation to substantiate any claim of non-performance. In order to terminate a DBE

firm, the prime contractor, consultant, or supplier must receive prior, written approval from the District.

In the event that the District approves the termination of the DBE, the contractor will be required to make good faith efforts to substitute the terminated DBE subcontractor with another certified DBE. The contractor will be required to provide copies of new or amended subcontract agreements.

C. Remedies for Non-Compliance

Non-compliance consists of failure or refusal to implement, meet or satisfy the applicable governmental requirements related to DBE participation, including but not limited to 49 CFR Part 26 and related federal guidelines or the applicable requirements of the District's DBE Program and/or District contracts related to DBE participation.

The District may impose any remedies for non-compliance authorized by the federal, state and local regulations and District contract specifications, including withholding of progress payments, liquidated damages and termination of the contract in whole or in part.

D. Counting and Tracking DBE Participation

Only the work actually performed by a DBE will be counted towards the DBE goal. 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.

DBE participation will not be counted toward the prime contractor's achievements or the overall goal until the DBE has been paid. In accordance with 49 CFR Section 26.51(g), The Liaison Officer will track the participation of DBEs in contract-specific goal contracts separately from the participation of DBEs in contracts without contract goals. On race-conscious construction contracts, all work performed by a DBE prime and identified by the scopes of work of the contract, will be counted toward the contract's DBE goal. On all other categories of procurement, the work of a DBE prime or joint venture does not count toward any contract DBE goal. The Liaison Officer will not count towards the overall goal that portion of a DBEs participation that is achieved after the certification of the DBE has been removed during the performance of a contract. If the DBE's ineligibility is caused solely by its having exceeded the applicable size standard during the performance of the contract, the District will continue to count its participation on that contract toward overall and contract goals.

1. Expenditures may only be counted if the DBE is performing a commercially useful function on the contract. A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating prices, determining quality and quantity, ordering the material, and installing and paying for the material itself. To determine whether a DBE is performing a commercially useful function, the District will evaluate the amount of work subcontracted, industry practices, whether the

amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, as well as other relevant factors.

A DBE does not perform a commercially useful function if its role in the contract is limited to that of an extra participant through which funds are passed in order to obtain the appearance of DBE participation. If the DBE does not perform or exercise responsibility for at least 51 % of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, the DBE is presumed not to be performing a commercially useful function

2. If materials or supplies are obtained from a DBE manufacturer, 100 percent of the cost will be counted. If the materials and supplies are purchased from a DBE regular dealer, 60 percent of the cost will be counted. If the materials and supplies are purchased from a DBE broker or a manufacturer's representative, the entire amount of the fees or commissions charged for assistance in the procurement of the materials or supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site will be counted towards the DBE goal provided that the fees are reasonable and not excessive as compared with fees customarily allowed for similar services.
3. Trucking will be counted in accordance with the provisions of 49 CFR Section 26.55.
4. Work performed by DBE subcontractors and suppliers at any tier may be credited toward the DBE goal. DBE participation may not be counted more than once.
5. Prime Contractors, Consultants, or Suppliers shall submit monthly DBE Utilization Reports, and all other requested reports or forms, on forms provided by OCR.

X. Required Contract Provisions

The District will include the following provisions in federally funded contracts, where appropriate.

A. Nondiscrimination Assurance

Each federally funded contract the District signs with a contractor, and each subcontract the prime contractor signs with a subcontractor, will include the following statement:

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

B. Prompt Payment Policy and Provisions

Each federally funded contract the District signs with a contractor will include the following provisions:

“The Contractor shall include in its monthly invoice submission to BART, amounts to pay for all Subcontractors’ acceptable invoices, no later than thirty (30) Days after receipt of such invoices. As part of the monthly invoice submission, the Contractor shall include a copy of the form obtained from BART’s designated website for electronic submittal of certified payroll records with the names of Subcontractors that invoiced the Contractor during the payment application period, the amount invoiced by each Subcontractor, and the period during which the work included in the invoice was performed. This form with the above referenced Subcontractor payment information shall be completed on BART’s designated website for electronic submittal of certified payroll records. The Contractor shall promptly pay any and all Subcontractors no later than seven (7) Days after receipt of payment by BART, for satisfactory performance of its Contract, the amounts to which they are entitled, after deducting any prior payments and any amount due and payable to the Contractor by those Subcontractors. The Contractor shall pay all Subcontractors by an instrument that guarantees availability of funds immediately upon deposit of said instrument. If the Contractor determines the work of the Subcontractors to be unsatisfactory, the Contractor shall immediately notify in writing the District (with a separate notice to the Office of Civil Rights if the Subcontractor is a DBE or an SBE) and state the reasons. Failure by the Contractor to comply with this requirement will be construed to be breach of Contract and may be subject to sanctions as specified in the Contract.”

The District shall make incremental inspection of portions of the work and, upon approval of the Contractor’s work at various stages of the Contract, promptly release retainage attributable to the work that has been approved. Within thirty (30) Days after the District has made such payment, the Contractor shall release to any Subcontractor who has satisfactorily completed work covered by the District’s inspection and approval the retainage owed to the Subcontractor for such work. The District’s incremental inspection, approval, or release of a portion of the retainage under this Article shall not constitute Acceptance.

Where there has been an incremental inspection and approval pursuant to this Supplementary Conditions Article SC9.7, a Subcontractor’s work is satisfactorily completed when the Contractor certifies to the District that all the tasks called for in the Subcontract related to the work covered by the inspection and approval have been accomplished and that the Subcontractor’s retention may now be released.

The Contractor shall maintain records to verify the release of such retainage to the affected Subcontractors. Such records shall show the name and business address of such Subcontractors and the total dollar amount actually paid, including the retainage, and the date of payment. A monthly report based on these records and certified to be correct by

the Contractor shall be submitted with the monthly invoice referred to in General Conditions Article GC9.7. The Contractor's certification shall contain a formula used to calculate the amount paid to the Subcontractor. No invoice will be approved for payment unless the current report has been furnished.

The District may not pay for work that is performed or materials that are supplied by firms other than the DBE listed for such work or material, unless DBE is substituted in accordance with the supplementary conditions."

C. DBE Substitutions

The District may not pay for work that is performed or materials that are supplied by firms other than the DBE listed for such work or material, unless the DBE is substituted in accordance with the contract requirements.

XI. Contract Compliance and Reporting

The District will implement appropriate mechanisms to ensure compliance with the DBE Program by all program participants under federal, state and local law. This includes establishing contract monitoring and enforcement provisions consistent with 49 CFR Section 26.37(b).

A. Bidders List

Pursuant to 49 CFR Section 26.11(c), the District will create and maintain a bidders list consisting of all firms bidding on prime contracts and bidding or quoting subcontracts on federally funded projects. For every firm, the following information will be included: firm name, firm address, firm's status as a DBE or non-DBE, the age of the firm, and the annual gross receipts of the firm. The District may also request additional information from bidders such as the scope of work and the ethnicity and gender of the owners, although this information is not required to be provided by any bidders.

B. Reporting to the US Department of Transportation

Pursuant to 49 CFR Section 26.11(b), the District will continue to report DBE participation and Triennial Goal setting methods to the FTA as directed. In addition, the District shall maintain prescribed statistical data.

C. Other Reporting Requirements

The District will track the amount awarded to the DBE, the amount paid to the DBE as stated by the prime contractor, and the amount paid to the DBE as verified by the DBE. Pursuant to 49 CFR Section 26.37 (b), the District will certify in writing that any work committed to DBE firms is performed by the DBE firm to which the work has been committed. A final DBE Utilization Report including amounts to be paid to the DBEs at the end of the contract shall be submitted by Prime Contractors, Consultants, or Suppliers, with the project close out change order, on the form provided by OCR.

The Liaison Officer will report the actual amount paid to DBEs to FTA. Contractors performing work on the District's DOT assisted contracts are required to separately report the DBE participation of their contracts achieved through race-neutral and through race-conscious means.

XII. Public Participation and Outreach for the Triennial Goal

A. Public Participation

Prior to finalizing the Triennial Goal Report, the District will consult with minority, women's, and general contractor groups, community organizations, US DOT agencies or grantees (to the extent necessary) or other officials or organizations which could be expected to have information concerning the availability of disadvantaged, non-disadvantaged and SBEs, the effects of discrimination on opportunities for DBEs and the District's efforts to establish a level playing field for DBEs and SBEs. As part of this consultation, the District will schedule a direct interactive meeting with as many interested stakeholders as possible, focusing on obtaining information relevant to the goal setting process. The District will document the consultation process in the Triennial Goal Report.

XIII. Miscellaneous

A. Program Review

The DBE Program will be reviewed by the Liaison Officer every five (5) fiscal years, or more frequently as necessary at the sole discretion of the Board, to ensure that elements of the DBE Program are tailored to address any discrimination that may exist in the industries relevant to the District's contracting activities and to ensure that the DBE Program does not disproportionately impact any particular group.

B. Severability

Should any part, term, provision or element of this DBE Program be decided by the courts to be illegal or in conflict with any law of the United States or of the State of California or otherwise rendered unenforceable or ineffective, the validity of the remaining parts, terms, provisions, or elements shall not be affected.

XIV. Special Requirements for Design-Build Contracts Under Public Contract Code

In addition to the terms, conditions and provisions described above in Sections I through XIII, the following terms, conditions and provisions are applicable to design-build contracts awarded by the District under the authority of Public Contract Code Sections 22160 et seq:

A. Category of Work Goals

On any Design-Build contract with subcontracting opportunities, the District may establish Category-of-Work goals of a type and level appropriate to meet either the contract goal or the race-conscious portion of the project overall goal. The Category-of-Work goals will address contracting activities in various areas of work throughout the life of the contract. As more fully described in Section XIV.E, below, a bidder must commit to meet each of the

Category-of-Work DBE goal(s) or demonstrate that it could not meet said Category-of-Work DBE goal(s) despite its good faith efforts

B. Bonding Waiver for Subcontracts

The District, in its discretion and on a contract-by-contract basis, may require a prime contractor to eliminate bonding requirements for subcontracts under a certain size or which meet a specific criteria. Invocation of this provision shall be determined in consultation with the Office of Civil Rights.

C. DBE Cost-Loaded Schedule

The District, in its discretion and on a contract-by-contract basis, may require a prime Contractor to provide a DBE Cost-Loaded Schedule to the Office of Civil Rights.

D. Phased Goals

Where a Category-of Work goal has been set that is applicable to an initial project phase (e.g., design and professional services), a bidder shall identify at bid all DBE firms, their participation level and type of work to meet the initial Category-of-Work goal(s) or shall demonstrate sufficient good faith efforts to meet such goal(s). In addition, where Category-of-Work goals have been set that are applicable to subsequent project phases (e.g., construction), a bidder at bid shall commit to meet each subsequent Category-of-Work goal identified in the Design-Build documents or shall demonstrate sufficient good faith efforts to meet such goal(s). Notwithstanding a bidder’s commitment at bid to meet a specific level of DBE participation for Category-of-Work goals applicable to later project phases, a bidder shall not be required to identify at bid the DBE firms it will use for this work. Rather, the bidder’s commitment will be monitored during performance of the contract in a number of ways, including but not limited to the following:

1. Prior to commencement of work by the DBE, the contractor shall submit a monthly DBE Participation Form identifying the DBE firm, its participation level and type of work to be performed, along with a copy of the subcontract with the DBE. No credit shall be given the contractor for participation by any DBE that has not been approved by the District.
2. The contractor shall file monthly DBE Utilization Reports, and all other requested reports, on the form provided by OCR.
3. If required, the contractor shall periodically submit a DBE cost-loaded schedule.
4. BART shall undertake regular evaluation of the contractor’s progress regarding DBE participation and may request corrective action plans as appropriate.
5. In accordance with current regulations, all DBEs that are to participate on the project must be certified prior to bid. Moreover, subcontracts with DBEs are governed by the requirements of Public Contract Code Section 20209.10 (c).