

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 Parts 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, Maceo Wiggins, has been designated by the General Manager as the Liaison Officer, as referenced in 49 CFR Part 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 Part 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 or financial institutions owned and controlled by socially and economically disadvantaged individuals (minorities) 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 or minority 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 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 August 1 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 Marianas 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, and shall be done 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.

Termination procedures are set forth in Appendix G.

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).

THE APPENDICES ARE PART OF THE DBE PROGRAM. THE APPENDICES MAY BE SUBJECT TO REVISION, SUBSTITUTION, DELETION OR ADDITION BY THE OFFICE OF CIVIL RIGHTS WITHOUT BOARD REVISION OF THE CORE DBE PROGRAM OR APPROVAL OF CHANGES.

Appendix A: Definition of Terms

1. **Affiliates**. Firms are affiliates of each other when, either directly or indirectly: (1) one firm controls or has the power to control the other, or (2) a third party or parties controls or has the power to control both firms, or (3) an identity of interest between or among parties exists such that affiliation may be found. See Small Business Administration (SBA) regulations, 13 CFR Part 21; 13 CFR Section 121.401.
2. **Agreement**. An agreement between BART and a Consultant for services.
3. **Alaska Native**. A citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlakatla Indian community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.
4. **Alaska Native Corporation (ANC)**. Any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, *et seq.*).
5. **Appeal**. A formal filing with U.S. DOT by a firm, which has been denied certification by the District as a Disadvantaged Business Enterprise.
6. **Assets**. All the property of a person available for paying debts or for distribution, including one's respective share of jointly held assets. This includes, but is not limited to, cash on hand and in banks, savings accounts, IRA or other retirement accounts, accounts receivable, life insurance, stocks and bonds, real estate, and personal property.
7. **Bid**. A proposal or offer by a Bidder for a construction or procurement contract when completed and submitted on the prescribed Bid Form.
8. **Bidder**. Any individual, firm, partnership, joint venture, corporation, or combination thereof (collectively "firm"), submitting a Bid or Proposal for a contract or services agreement, acting directly or through a duly authorized representative.

9. **Business, Business Concern, or Business Enterprise.** An entity organized for profit with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the United States economy through payment of taxes or use of American products, materials, or labor.
10. **Challenge.** A written complaint filed with the District by a person alleging that a currently certified firm is ineligible.
11. **Consultant.** A firm that has entered into an Agreement with BART.
12. **Contingent Liability.** A liability that depends on the occurrence of a future and uncertain event. This includes, but is not limited to, guaranty for debts owed by the applicant concern, legal claims and judgments, and provisions for federal income tax.
13. **Contract.** Collectively means Prime Construction Contracts, Subcontracts, and Procurement Contracts.
14. **Contractor.** A Prime Construction Contractor awarded a construction contract by BART.
15. **Commercially Useful Function.** A DBE, SBE or MSBE 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 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, SBE or MSBE credit claimed for its performance of the work, and other relevant factors must be evaluated.

A DBE, SBE or MSBE does not perform a commercial 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, SBE or MSBE 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, SBE or MSBE 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, SBE or MSBE is presumed not to be performing a commercial useful function.
16. **Days.** Refers to calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next

day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where the recipient's offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

17. **Disadvantaged Business Enterprise (DBE)**. A for-profit small business concern:
 1. Which is at least 51 percent owned by one or more socially and economically disadvantaged individuals or, in the case of any publicly owned business, in which at least 51 percent 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.
18. **Disparity Study**. The Disparity Study (the Study) is to support the District's DBE Program administered in accordance with the requirements of 49 CFR Part 26. The Study determine whether or to what extent disparities exist in BART's DBE utilization in the contracting industry relevant to BART contracting activities in the BART market area.
19. **District**. The San Francisco Bay Area Rapid Transit District.
20. **DOT**. The U.S. Department of Transportation.
21. **Federally Funded Contract**. Any contract or modification of a contract between the District and a Contractor that is paid for in whole or in part with funds from the Department of Transportation.
22. **Federal Transit Administration (FTA)**. An agency of the U.S. Department of Transportation.
23. **First Tier Subcontract**. A contract between a Prime Contractor and First Tier Subcontractor.
24. **First Tier Subcontractor**. A firm that has been awarded a First Tier Contract by a Prime Contractor or a Supplier.
25. **Goal**. A numerically expressed objective.
26. **Good Faith Efforts**. As more fully explained in 49 CFR Part 26 (Appendix A) and in Appendix F of the District's DBE Program, good faith efforts consist of all those necessary and reasonable steps to achieve a DBE goal or other requirement which 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.
27. **Home State**. The state where a DBE firm maintains its primary offices.

28. **Immediate Family Member**. Refers to father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, father-in-law, mother-in-law, sister-in-law, brother-in-law, and domestic partner and civil unions recognized under State law.
29. **Indian Tribe**. Any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides.
30. **Joint Venture**. An association of a DBE firm and one or more other firms to carry out a single, for profit business enterprise, for which purpose the parties combine their property, capital, efforts, skills, and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.
31. **Liabilities**. Financial or pecuniary obligations. This includes, but is not limited to, accounts payable, notes payable to bank or others, installment accounts, mortgages on real estate, and unpaid taxes.
32. **Lower-Tier Subcontractor**. Any Subcontractor that is below the first-tier level. This could include 2nd or 3rd-Tier Subcontractors, etc.
33. **Manufacturer**. A business that operates or maintains a factory or establishment that produces on the premises the materials or supplies obtained by the Contractor.
34. **Matchmaking**. Outreach events hosted by the District where Prime contractors are paired with potential subcontractors in one-on-one meetings.
35. **Micro Small Business Entity (MSBE)** – An SBE firm certified by BART as such, whose average annual gross receipts (including those of its affiliates) over the previous three fiscal years do not exceed the following caps: i) \$10 million for contracts for construction; ii) \$6 million for contracts for professional or other services; or iii) \$6 million for contracts for procurement of goods.
36. **Native Hawaiian**. Any individual whose ancestors were natives, prior to 1778, of the area, which now comprises the State of Hawaii.
37. **Native Hawaiian Organization**. Any community service organization serving Native Hawaiians in the State of Hawaii, which is a not-for-profit organization, chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.
38. **Non-Compliance**. The condition existing when a contractor has failed to implement or meet the requirements of 49 CFR Part 26, the District's DBE Program, the District's policies and procedures pertaining to DBE participation, or any rules or

regulations implementing any of the above.

39. **Personal Net Worth**. The net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include the individual's ownership interest in an applicant or participating DBE, SBE or MSBE firm or 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.
40. **Pre-Bid or Pre-Proposal Conference**. A meeting held by the District, prior to the bid opening or proposal submittal date of a particular contract at which prospective bidders or proposers are advised of the District's DBE Program.
41. **Pre-Construction Conference**. A meeting held by the District after award of contract on a particular construction project, but prior to the commencement of any work, at which the Prime Contractor is advised of its compliance obligations including DBE, EEO, and labor standards requirements, and any final technical requirements.
42. **Primary industry classification**. The North American Industry Classification System (NAICS) code, which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is available on the Internet at the U.S. Census Bureau Web site: <http://www.census.gov/eos/www/naics/>
43. **Prime Construction Contract**. A construction contract between BART and a Prime Contractor.
44. **Prime Construction Contractor**. A firm that has been awarded a Prime Construction Contract by BART
45. **Principal Place of Business**. Refers to the business location where the individuals who manage the firm's day-to-day operations spend most working hours. If the offices from which management is directed and where the business records are kept are in different locations, the recipient will determine the principal place of business.
46. **Procurement Contract**. A contract between BART and a Supplier.
47. **Proposal**. The offer of the Proposer for the Services Agreement, in response to BART's request when completed and submitted on the prescribed Proposal Form.
48. **Race-Conscious**. A measure or program that is specifically focused on assisting only DBEs, including women-owned DBEs.
49. **Race-Neutral**. A measure or program that is or can be used to assist all small businesses. For the purposes of this Program, race-neutral includes gender neutrality.
50. **Regular Dealer**. A firm that owns, operates, or maintains a store, warehouse or

other establishment in which the materials or supplies required for the performance of a contract are bought, kept in stock, and are regularly sold to the public in the usual course of business. To be a regular dealer, the firm must engage in, as its principal business and in its own name, the purchase and sale or lease of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone and petroleum products need not keep such products in stock, if it owns or operates distribution equipment for the products.

51. **SBA.** U.S. Small Business Administration.
52. **Second-Tier Subcontractor.** a firm that has been awarded a Subcontract by a First-Tier Subcontractor.
53. **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 (including those of 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).
54. **Small Business Entity (SBE).** A small business defined as follows:
 1. A small business concern;
 2. Which is at least 51% owned and controlled by one or more individuals, or in the case of any publicly owned business, in which at least 51% of the stock is owned by one or more individuals whose personal net worth does not exceed \$1.32 million; and
 3. Whose management and daily business operations are controlled by one or more of the individuals whose personal net worth is as described in 2. above.
 4. Firms certified as a DBE by the CUCP are presumed to have met requirements of subsections 1., 2., and 3. above.
55. **Socially and Economically Disadvantaged Criteria.** Criteria based on 49 CFR Part 26 (Appendix E) which the District applies on a case-by-case basis to applicants for DBE status who are not members of a racial, ethnic or gender group presumed to be socially and economically disadvantaged. A determination of social disadvantage should be made before proceeding to making a determination of economic disadvantage.
56. **Subconsultant.** A firm that has entered into a subcontract with a Consultant.
57. **Subcontract.** A Contract entered into between a Contractor, Supplier, or Consultant with a Subcontractor, Subsupplier, or Subconsultant, respectively.

58. **Subrecipient**. A recipient of DOT or other federal funded assistance which has received these funds from the District.
59. **Subsupplier**. A firm that has entered into a Contract with a Supplier to provide supplies to the Supplier.
60. **Supplier**. A firm that has been awarded a Procurement Contract by BART or who provides supplies and/or materials to a Prime Construction Contractor or Contractor.
61. **Transit Vehicle Manufacturer**. Any manufacturer whose primary business purpose is to manufacture vehicles specifically built for public mass transportation. Such vehicles include, but are not limited to: Buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Producers of vehicles that receive post-production alterations or retrofitting to be used for public transportation purposes (e.g., so-called cutaway vehicles, vans customized for service to people with disabilities) are also considered transit vehicle manufacturers. Businesses that manufacture, mass-produce, or distribute vehicles solely for personal use and for sale “off the lot” are not considered transit vehicle manufacturers.

Appendix B: Procedures for Determining, Achieving and Counting the Triennial Goal

Pursuant to 49 CFR Section 26.45, the Office of Civil Rights will establish a triennial DBE goal (“Triennial Goal”) according to the procedures set forth herein, 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 the three(3) year period covered by the Triennial Goal, excluding any funds allocated for the procurement of transit vehicles. 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 August 1 for each fiscal three year period to be covered by the Triennial Goal.

Should the awards and commitments shown on the District’s Uniform Report of Awards or Commitments and Payments at the end of any fiscal year be less than the overall goal applicable to that fiscal year the District shall analyze in detail the reasons for the difference between the overall goal and the awards and commitments in that fiscal year, establish specific steps and milestones to correct the problems identified in the analysis which will enable the District to fully meet its goal for the new fiscal year. Additionally, the District has implemented standard operating procedures which govern data collection and reporting on the semi-annual DBE awards and commitments. Such standard operating procedures are more particularly set forth in the District’s Office of Civil Rights’ Standard Operating Procedures Section J.

The Liaison Officer will track and evaluate the Triennial Goal on a quarterly basis. This tracking is 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 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 a manner consistent with the disparity findings from the 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.

The Office of Civil Rights will use the following procedures for establishing the DBE Triennial Goal:

A. Projecting Federally Funded Contract Expenditures

In conjunction with the preparation and adoption of the budget for each fiscal year, the Liaison Officer, in consultation with the appropriate District departments responsible for contracting activities, will conduct a thorough analysis of the projected number, types of

work and dollar amounts of contracting opportunities that will be funded, in whole or in part, by DOT financial assistance for the upcoming fiscal three year period (“Triennial Period”). FTA assistance used in transit vehicle procurements is not included in the base amount from which the triennial goal is calculated.

B. Establishing a Base Figure

Pursuant to 49 CFR Section 26.45, the District will develop a base figure to express the availability of DBEs as a percentage of all contractors, subcontractors, manufacturers and suppliers in the relevant contracting markets. The District will follow one of the methodologies provided in 49 CFR Part 26, but reserves the right to choose an alternative methodology and provide the appropriate documentation in the Triennial Goal Report described in Section F of this Appendix B. Generally, the District expects to use the same data source in establishing the base figure for both all available businesses and available DBE firms.

1. The Liaison Officer, in conjunction with the appropriate District departments, will conduct a thorough analysis of the relevant contracting markets in which the District may solicit participation from contractors, subcontractors, manufacturers and suppliers for the Triennial Period. This analysis will include the relevant geographic market for the types of work to be contracted, the relevant North American Industry Classification System (NAICS) codes for the types of work to be contracted and any other indicators that the District determines to be relevant to defining its contracting markets for the Triennial Period. The Liaison Officer will then determine the total number of available businesses for the relevant contracting markets. The Liaison Officer will consult a variety of sources, which may include, but are not limited to, the County Business Patterns Database, Census Bureau data, appropriate private business databases, and relevant disparity studies.
2. The Liaison Officer will conduct a similar analysis to determine the number of DBEs that are available to participate as contractors, subcontractors, manufacturers and suppliers in the projected contracts for the fiscal year. This analysis will include the relevant geographic market for the types of work to be contracted, the relevant NAICS codes for the types of work to be contracted, and any other factors as described above. The District will consult a variety of sources, which may include, but are not limited to, the County Business Patterns Database, the Minority Business Patterns Database, Census Bureau data, appropriate private databases and relevant disparity studies.
3. The Liaison Officer will compare the number of available DBEs in the relevant contracting markets for the Triennial Period to the total number of available businesses in the relevant contracting markets for the Triennial Period. The calculation will include a weighting factor according to the contract expenditure patterns.

C. Adjusting the Base Figure

Pursuant to 49 CFR Section 26.45(d), the District will adjust the base figure based on demonstrable evidence indicating that the availability of DBEs for federally funded contracts for the specific Triennial Period may be higher or lower than the base figure indicates. At a minimum, the Liaison Officer will analyze the current capacity of DBEs and evidence from disparity studies conducted anywhere within the market area. The Liaison Officer may also consider evidence from related fields that affect the opportunities for DBEs to form, grow and compete, such as data on employment, education and training, statistical disparities in the ability of DBEs to obtain financing, bonding and insurance and the effects of past discrimination.

Based on the evaluation of the above factors, evaluation of data (if any) regarding over-concentration, and other necessary adjustments (including regulatory and contract-specific considerations, e.g., duration of individual projects), a goal will be set at the level of DBE participation expected absent the effects of discrimination.

A description of the methodology used to establish the triennial goal, including the base figure and the evidence with which it was calculated and the adjustments made to the base figure and the evidence relied on for the adjustments will be included with the overall Triennial Goal submission to DOT. The submission will also include the District's projection of the portions of the annual goal that will be met through race-neutral and race-conscious measures.

D. Projection of Percentage of Overall Goal to be Achieved Through Race-Neutral and Race-Conscious Measures

Once the Triennial Goal is proposed, the Liaison Officer will analyze and project the maximum feasible portion of that goal that can be achieved by using race-neutral methods. Where the projected portion of the goal to be met using race-neutral methods is less than the annual overall goal, the remaining portion will be achieved by establishing contract goals for particular projects that have subcontracting opportunities, in accordance with the findings of the District's Disparity Study. With prior FTA approval, the use of race-conscious contract goals may be varied where there is an overconcentration of DBEs in a particular trade.

The District intends to use race-neutral methods to the maximum extent feasible to achieve its Triennial Goal. DBE participation that is obtained on contracts that have no specific DBE goal, or where Prime Contractors are DBEs, or where Prime Contractors use a strictly competitive bidding process or do not consider the DBE's status as a DBE in awarding a subcontract, will be considered race-neutral DBE measures.

The Liaison Officer will review and analyze the adjusted goal figure to determine the amount of the annual goal that can be met through race-neutral measures and the type(s) of contracts to be selected. The District will review that portion of the annual DBE goal being met through race-neutral measures three (3) months after submission of the annual goal and on a quarterly basis thereafter and may adjust the use of contract-specific goals accordingly. As part of the review, the District will verify compliance with the DBE Program and DBE goal attainment.

As described below in Section E of this Appendix B, the Liaison Officer will monitor and adjust the use of contract-specific goals in accordance with 49 CFR Section 26.51(f). Contract goals will be used only on those federally-funded contracts that have subcontracting

opportunities and where the findings of the District's Disparity Study permit the use of contract-specific goals. DBE contract goals will be established so as to cumulatively result in meeting that portion of the District's overall goal that is not projected to be met through race-neutral means.

E. Adopting and Publishing the Overall DBE Goal

Upon completion of the analysis described above, the Liaison Officer will prepare a Triennial Goal Report. The Triennial Goal Report will document the analysis and methodology as well as the proposed goal and estimate to be achieved through race-neutral measures.

1. Pursuant to 49 CFR Section 26.45(g), the District will publish the proposed Triennial Goal and rationale in general circulation and DBE-oriented media. The notice will include a statement that the proposed Triennial Goal and its rationale are available for inspection by the public for 30 days from the date of publication. The notice will also include a statement that the District will accept public comments to the proposed Triennial Goal and rationale for a period of 45 days from the date of publication and provide instructions for the submission of comments.

The District shall identify and consult with minority, women's, general contractor and community organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and the District's efforts to establish a level playing field for the participation of DBEs. 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 and, if necessary, adjust the proposed Triennial Goal. Upon the completion of public participation, the Liaison Officer will prepare a summary report analyzing the public comments received, if any, to the General Manager.

2. The Triennial Goal Report will be furnished to the General Manager. Following the review of the Triennial Goal Report, the General Manager will approve a Triennial Goal for DBE participation, which will include a projection of the portion of that goal that can be achieved through race-neutral and race-conscious measures. Unless otherwise directed, the Triennial Goal Report will be submitted to FTA for approval by September 1st every three fiscal years.

F. Triennial Goal Accountability Reporting

If the awards and commitments shown on the District's Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, the District shall:

1. Analyze in detail the reasons for the difference between the Triennial Goal and its awards and commitments in that fiscal year;
2. Establish specific steps and milestones to correct the problems identified and to enable the District to meet fully its goal for the new fiscal year;
3. Submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed above to the appropriate operating administration for approval.

G. Adjustment of Contract Goals

Pursuant to 49 CFR Section 26.51(f), the District will monitor the use of contract goals to ensure that the Program continues to be narrowly tailored.

1. If the Triennial Goal Report indicates that the District can meet its entire overall annual goal for any given Triennial Period through race-neutral means, the District must implement its Program without setting contract goals during that year.
2. If during the course of the Triennial Period the District is using contract goals and determines that it will exceed its overall Triennial goal, the District must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the Triennial Goal. If the District determines that it will fall short of the Triennial Goal, the District must make appropriate modifications in the use of race-neutral and race-conscious goals in order to meet the overall goal.
3. If the District meets or exceeds its Triennial Goals for two (2) consecutive years, using only race-neutral means, the District will not set contract goals on any contracts in the next Triennial Period. The District will continue using only race-neutral means to meet its overall annual goals unless and until it does not meet its overall annual goal for a Triennial Period.
4. If the District's DBE participation exceeds the Triennial Goal in two (2) consecutive years through the use of contract goals, the District will reduce the use of contract goals proportionately in the following Triennial Period.
5. The District will monitor and report race-neutral and race-conscious participation separately.
6. The District has implemented standard operating procedures for monitoring the triennial race-conscious goal attainment to allow the District to make appropriate goal adjustments throughout the year. Such standard operating procedures utilizes an information management system and a DBE attainment projection model which, among other things, allows the District to project on a monthly basis the actual and projected DBE attainment levels for the year. Such standard operating procedures are more particularly set forth in the District's Office of Civil Rights' Standard Operating Procedures Section I.

Appendix C: Procedures for Determining, Achieving and Counting Contract-Specific Goals

A Contract-specific DBE goal will be established based on a recommendation and information furnished by the Liaison Officer. The Contract-specific goal will apply to the percentage participation of DBEs in the total Contract work and will be set forth in the Contract specifications. The District is not required to establish a Contract-specific goal for every prime contract with subcontracting opportunities. A Contract-specific goal shall only be established where supported by the findings of the District's Disparity Study or an update to that Study. For each Contract involving subcontracting opportunities, the factors outlined below will be considered to determine whether a Contract-specific goal should be established for the particular contract and, if so, what the percentage goal will be:

1. The projected portion of the overall annual goal that will be met by establishing Contract-specific goals;
2. The progress towards achieving the Triennial Goal;
3. The full range of activities in the proposed Contract;
4. The availability of DBEs as subcontractors or subconsultants in the types of work involved in the performance of the proposed Contract;
5. Any other relevant criteria.

A. Required Documentation From Bidders

Each solicitation for which a DBE contract goal has been established will require the bidders to submit the following information:

1. The names and addresses of DBE firms that will participate in the Contract;
2. A description of the work that each DBE will perform;
3. The dollar amount of the participation of each DBE firm;
4. Written documentation from the bidder regarding its commitment to use DBE subcontractors whose participation the bidder submits to meet a Contract goal;
5. Written confirmation from the DBE that it is participating in the Contract as provided in the bidder's commitment; and
6. If the Contract goal is not met, evidence of good faith efforts to meet the goal.

B. Process for Evaluation of Bids

The District will verify all information submitted by a bidder for completeness and accuracy prior to award. The recommendation for award will be based on an evaluation of the criteria set forth below and will be reached in accordance with the District's procedures applicable to specific types of contracting activity. No bidder will be recommended for award unless the bidder has met the Contract goal or has made good faith efforts to do so.

1. The District will require that any DBEs listed by bidders for participation in the contract be certified as eligible DBEs at the time of bid. This includes being certified to perform the specific type of work the DBE has been listed for. This will be determined by comparing the NAICS codes for the work the DBE has been listed for with the NAICS codes the DBE has been certified to perform work for.
2. Any lower-tier DBE subcontractor may be counted toward the DBE goal, although

- DBE credit cannot be double counted.
3. On Construction contracts, a DBE prime bidder is counted toward a DBE contract goal for the value of the scopes of work it would perform and for which it is certified. On all other types of contracts and agreements, DBE prime bidders are not counted toward fulfillment of a DBE contract goal.
 4. The Liaison Officer will review for accuracy the total dollar value of the work and the percentage of the total Contract bid price reported on the Bidder's DBE subcontractor listing and will compare it to the Contract goal established for the Contract.
 5. If the amount of DBE participation does not meet the Contract goal, the Liaison Officer will review the good faith efforts documentation submitted by the bidder, as required by the Contract Specifications. In accordance with 49 CFR Part 26, Appendix F of the District's DBE Program, the Liaison Officer will determine whether the bidder has made good faith efforts to meet the Contract goal.
 6. If the Liaison Officer determines that the bidder has not met the Contract goal and has not demonstrated good faith efforts, the Liaison Officer will notify the bidder in writing. The notification will explain the basis and include the reasons for the determination, and will inform the bidder of its right to submit further written documentation or to appear before an independent hearing officer prior to the time that a recommendation for award of Contract is presented to the Board of Directors. After the hearing, the District will provide the bidder with a written decision. The result of the hearing process is not appealable by the bidder to the Department of Transportation. Any bidder requesting a hearing shall be responsible for payment of half of the costs associated with the hearing.

Appendix D: DBE Certification Guidelines

Certification is the process by which all firms seeking to participate in the District's DBE Program are determined to have met the requirements set forth in 49 CFR Part 26. This Appendix provides guidance for certifying firms as DBEs.

A. Burdens of Proof

In accordance with 49 CFR Section 26.61 the firm seeking certification has the burden of demonstrating to the District, by a preponderance of the evidence, that it meets the requirements concerning group membership or individual disadvantage, business size, ownership and control. The District will presume that members of the designated groups identified herein are socially and economically disadvantaged. Where the presumption does not apply or has been rebutted, the individuals have the burden of proving, by a preponderance of the evidence, that they are socially and economically disadvantaged. The District will make determinations concerning whether individuals and firms have met the burden of demonstrating group membership, ownership, control, and social and economic disadvantage by considering all the facts in the record, viewed as a whole.

B. Group Membership Determinations

Pursuant to 49 CFR Section 26.63, if the District has reason to question whether an individual is a member of a group presumed to be socially and economically disadvantaged, the District will require the individual to demonstrate, by a preponderance of the evidence, that he or she is a member of such group. In making that determination, the District will consider whether or not the person has held himself or herself to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community. The District may require the applicant to produce appropriate documentation of group membership. If the District determines an individual claiming to be a member of a group presumed disadvantaged is not a member of such group, the individual must demonstrate social and economic disadvantage on an individual basis. The District's decision concerning membership in a designated group will be subject to the certification appeal procedures.

C. Social and Economic Disadvantage Determinations

1. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of individual social disadvantage must include at least one objective distinguishing feature that has contributed to social disadvantage such as race, ethnic origin, gender, disability, long-term residence in an isolated environment or similar causes not common to individuals not socially disadvantaged; personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and negative impact on entry into or advancement in the business world

because of the disadvantage. The District will consider any relevant evidence in its assessment of this element, and in every case the District will consider education, employment, and business history to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

2. Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged. The District requires submission of narrative and financial information from each individual claiming economic disadvantage, which must describe the conditions that are the basis for the claim in a narrative statement, and the individual must submit personal financial information. The District will require a married individual to submit separate financial information for his/her spouse unless they are legally separated. In considering diminished capital and credit opportunities, the District will examine all factors relating to personal financial condition, including personal income for the past two years, (including bonuses and the value of company stock given in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not.

The District will also consider the financial condition of applicants and compare financial profiles of small businesses in the same primary industry classification(s) or similar lines of business, which are owned and controlled by socially and economically disadvantaged individuals. The financial profiles to be compared include total assets, net sales, pre-tax profit, sales/working capital ratio, and net worth. The District will attribute to any individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, trust, or beneficiary, or DBE owner to the applicant firm for less than the fair market value within the prior two (2) years of the concern's application, unless that individual demonstrates that the transfer is to or on behalf of an immediate family member for that individual's education, medical or some other form of essential support, excluding gifts for birthdays, graduations, anniversaries, retirements or other special occasions. In determining an individual's access to capital and credit, the District will consider assets transferred by an individual within the previous two (2) year period that are not considered in evaluating the individual's assets and net worth, such as transfers to charities.

3. The District will presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found disadvantaged by the Small Business Administration are socially and economically disadvantaged individuals.
 - a. Pursuant to 49 CFR Section 26.67, 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.

- b. Pursuant to 49 CFR Section 26.67, 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 statement of personal net worth with appropriate supporting documentation that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged. In determining net worth, the District will exclude an individual's ownership interest in the applicant firm and the individual's equity in his/her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). A contingent liability does not reduce an individual's net worth.
- i. If the statement of personal net worth that an individual submits shows the individual's personal net worth to exceed \$1.32 million, the individual's presumption of economic disadvantage will be rebutted. The District is not required to have a proceeding in order to rebut the presumption of economic disadvantage in this case.
 - ii. If the statement of personal net worth that an individual submits shows the individual's personal net worth to exceed \$1.32 million, the District may consider in evaluating the individual based on these factors: (1) whether the average adjusted gross income of the owner over the most recent three-year period exceeds \$350,000; (2) whether the income was unusual and not likely to occur in the future; (3) whether the earnings were offset by losses; (4) whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm; (5) other evidence that income is not indicative of lack of economic disadvantage, and (6) whether the fair market value of all assets exceed \$6 million.
 - iii. If the District has a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged the District may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. The District must follow the procedures set forth in 49 CFR Section 26.87. The District may require the individual to produce additional information relevant to the determination of his/her disadvantage.

When an individual's presumption of social and/or economic disadvantage has been rebutted, his/her ownership and control of the firm cannot be used for purposes of DBE eligibility unless and, until he/she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$1.32 million, the individual is no longer eligible for participation in the Program and cannot regain eligibility by making an individual showing of disadvantage.

Pursuant to 49 CFR Section 26.67(d), firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may be certified by the District on a case-by-case basis. The District will determine whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm must demonstrate, by a preponderance of the evidence, that each of the individuals who own and control it is socially and economically disadvantaged. An individual whose personal net worth exceeds \$1.32 million will not be determined to be economically disadvantaged. The District will use guidance in Appendix E of 49 CFR Part 26.

D. Business Size Determinations

In accordance with 49 CFR Section 26.65, in order to be an eligible DBE, a firm (including, its affiliates) must be an existing small business as defined by SBA standards. The District will apply current SBA business size standards found in 23 CFR Part 121 appropriate to the types of work the firm seeks to perform in federally-funded Contracts. Even if the firm meets the SBA requirements, a firm is not an eligible DBE in any federal fiscal year if the firm (including its affiliates) has had average annual gross receipts as defined by SBA regulations over the firm's previous three fiscal years in excess of \$23.98 million, as adjusted for inflation from time to time.

E. Ownership Determinations

1. In accordance with 49 CFR Section 26.69, in determining whether the socially and economically disadvantaged participants in a firm own the firm, the District will consider all the facts in the record, viewed as a whole.
2. To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals. In the case of a corporation, such individuals must own at least 51 percent of each class of voting stock outstanding and at least 51 percent of the aggregate of all stock outstanding. In the case of a partnership, at least 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals and must be reflected in the firm's partnership agreement. In the case of a corporation, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.
3. The firm's ownership by socially and economically disadvantaged individuals must be real, substantial and continuing, going beyond pro forma ownership of the firm as reflected in the ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership and should be entitled to the profits and loss commensurate with their ownership interests; and any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits are grounds for denial of certification.
4. All securities that constitute ownership will be held directly by disadvantaged persons. Except as provided in 49 CFR Section 26.69(d), no securities or assets held

- in trust, or by any guardian for a minor, are considered as held by disadvantaged persons in determining ownership of a firm.
5. The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial.
 6. In a situation in which an individual's expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership, the owner's expertise must be: in a specialized field; of outstanding quality; in areas critical to the firm's operations; indispensable to the firm's potential success; specific to the type of work the firm performs; and documented in the records of the firm. The individual whose expertise is relied upon must have a significant financial investment in the firm.
 7. For purposes of determining ownership, the District will deem as held by a socially and economically disadvantaged individual all interests in a business or other assets obtained by the individual:
 - a. As the result of a final property settlement or court order in a divorce or legal separation; and
 - b. Through inheritance or otherwise because of the death of the former owner.
 8. The District will presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm which is:
 - a. Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;
 - b. Involved in the same or a similar line of business; or
 - c. Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.
 9. To overcome the foregoing presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate by clear and convincing evidence that:
 - a. The gift or transfer was made for reasons other than obtaining certification as a DBE; and;
 - b. The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.
 10. The District will apply the following rules in situations in which marital assets form a basis for ownership of a firm:
 - a. When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the

- ownership interests asserted by one spouse, the District will deem ownership interest in the firm to have been acquired by that spouse with his/her individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. The District will not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the firm.
- b. A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.
11. The District may consider the following factors in determining the ownership of a firm, but will not regard a contribution of capital as failing to be real and substantial nor find a firm ineligible, solely because:
- a. A socially and economically disadvantaged individual acquired his/her ownership interest as the result of a gift or transfer without adequate consideration other than the types set forth in Appendix D, paragraph E above;
 - b. There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or
 - c. Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, the District will give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.

F. Control Determinations

- 1. In accordance with 49 CFR Section 26.71, in determining whether socially and economically disadvantaged owners control a firm, the District will consider all the facts in the record, viewed as a whole.
- 2. Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms. In determining whether a potential DBE is an independent business, the District will scrutinize relationships with non-DBE firms in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources. The District will consider present or recent employer/employee relationships, the firm's relationship with prime contractors, and factors related to the independence of a potential DBE firm. Further, the District will consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.
- 3. A DBE firm must not be subject to any formal or informal restrictions which limit

the customary discretion of the socially and economically disadvantaged owners.'

The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations. In a corporation, disadvantaged owners must control the board of directors.

4. A disadvantaged owner must hold the highest officer position in the company (e.g. chief executive officer or president). In a corporation, disadvantaged owners must control the Board of Directors.
5. In a partnership, one or more disadvantaged owners must serve as general partners with control over all partnership decisions.
6. Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm. The socially and economically disadvantaged owners may delegate various areas of management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the District can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management and policy.
7. The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence directly related to, the type of business in which the firm is engaged and the firm's operations.
8. If the state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must be the qualifying individual for the required license or credential.
9. The District will consider differences in remuneration between socially and economically disadvantaged owners and other participants in the firm, in the context of the duties involved, normal industry practices, and the firm's policies and practices.
10. In order to be viewed as controlling the firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests which conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm.

11. A socially and economically disadvantaged individual may control the firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm. If the District cannot determine that the socially and economically disadvantaged owners, as distinct from the family as a whole, control the firm, then the socially and economically disadvantaged owners have failed to carry the burden of proof concerning control even though they may participate significantly in the firm's activities.
12. Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual now owning the firm must demonstrate by clear and convincing evidence that the transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE and that the disadvantaged individual controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.
13. In determining whether a firm is controlled by its socially and economically disadvantaged owners, the District will consider whether the firm owns equipment necessary to perform its work. The District will not determine that a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.
14. The District will grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm must demonstrate only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. The District will not require that the firm be recertified or submit a new application for certification but will verify the disadvantaged owner's control of the firm and the additional type of work.
15. The District may certify a business operating under a franchise or license agreement if it meets the standards in 49 CFR Part 26 Subpart D, and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the District will generally not consider restraints relating to standardized quality, advertising, accounting format, and other provisions imposed by the franchise agreement or license, provided the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership.
16. In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners must not have the

- power, without the specific written concurrence of the socially and economically disadvantaged partner, to contractually bind the partnership or subject the partnership to contract or tort liability.
17. The socially and economically disadvantaged individuals controlling a firm may use an employee leasing company. This does not preclude such individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees, including responsibility for hiring, firing, training, assigning, and otherwise controlling on-the-job activities of the employees as well as ultimate responsibility for wage and tax obligations related to the employees.

G. Other Considerations

1. Except as provided in Appendix D, paragraph E, below, the District will not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE. Consideration of whether a firm performs a commercially useful function or is a regular dealer pertains solely to counting toward DBE goals any participation of firms, which have already been certified as DBEs.
2. In making certification decisions, the District will consider whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program.
3. The District will evaluate the eligibility of a firm on the basis of present circumstances and will not refuse to certify a firm based solely on historical information indicating lack of ownership or control by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets ownership and control standards. The District will not refuse to certify a firm solely on the basis that it is a newly formed firm.
4. The District expects all participants in the District's DBE Program, including DBE firms and firms seeking DBE certification, to cooperate fully with requests for information relevant to the certification process and other requests for information. Failure or refusal to provide such information is a ground for denial or removal of certification or such other remedies as may be provided by 49 CFR Section 26.109(c).
5. Only firms organized for profit may be eligible DBEs. Not-for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.
6. An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided by this policy and in 49 CFR Section 26.73(e), a firm that is not owned by such individuals, but instead is owned by another firm—even a DBE firm—cannot be an eligible DBE.

If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization, or other purposes consistent with industry practice, and the parent or holding company, in turn, holds and controls an operating subsidiary, the District may certify the

subsidiary if it otherwise meets all requirements of 49 CFR Part 26, including the requirement that there be cumulatively at least 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.

7. Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by socially and economically disadvantaged individuals.
8. The District will not require that a DBE firm be prequalified as a condition for certification unless the District requires all firms that participate in its contracts and subcontracts, or in a particular contract or subcontract be prequalified.
9. The District recognizes that a firm owned by an Indian tribe, Alaska Native Corporation, or Native Hawaiian organization as an entity, rather than by Indians, Alaska Natives, or Native Hawaiians as individuals, may be eligible for certification as long as such firm meets the size standards and is controlled by socially and economically disadvantaged individuals.
10. All firms whose primary place of business is located in or is domiciled within the Market Area are presumptively assumed to meet the residency requirements. The District's Market Area is determined by the most recent Disparity Study. There may be a distinct Market Area for each type of Contracting or Procurement.

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 by meeting the following requirements:

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

Appendix E: Certification Procedures

A. Initial Certification Procedures

In accordance with 49 CFR Section 26.83, the District will ensure that only firms certified as eligible DBEs participate as DBEs in the DBE Program. The District will determine the eligibility of firms as DBEs consistent with the standards of 49 CFR Part 26, Subpart D.

1. Within ninety (90) days, the District will take all the following steps in determining whether a DBE firm meets said standards:
 - a. The District will perform an on-site visit to the offices of the firm and will interview key personnel(s) of the firm and review their resumes and/or work histories. The District will also perform visits to job sites if there are such sites on which the firm is working in the District's jurisdiction at the time of the eligibility investigation. The District may rely upon the site visit reports of any other U.S. DOT grantee with respect to a firm applying for certification;
 - b. If the firm is a corporation, the District will analyze the ownership of stock in the firm as well as all relevant documents;
 - c. Analyze the bonding and financial capacity of the firm;
 - d. The District will determine the work history of the firm, including contracts it has received, and work it has completed;
 - e. The District will obtain a statement from the firm of the type of work it prefers to perform as part of the DBE Program and its preferred locations for performing the work, if any;
 - f. The District will obtain or compile a list of equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE Program; and
 - g. The District will require potential DBEs to complete and submit an appropriate application form. The District will assure that the applicant attests to the accuracy and truthfulness of the information on the application form. This will be done either in the form of an affidavit sworn to by the applicant before a person authorized by state law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States. The District will review all information on the form prior to making a decision about the DBE eligibility of the firm.
2. When another grantee, in connection with its consideration of the eligibility of a firm, makes a written request for certification information the District has obtained about that firm, the District will promptly make the information available to the other grantee.
3. The District will not impose an application fee for firms to participate in the DBE certification process.

4. The District shall safeguard from disclosure from unauthorized persons all information gathered as part of the certification process that may be regarded as proprietary or other confidential business information, consistent with applicable federal, state and local laws.
5. Once the District has certified a firm as a DBE, it will remain certified until its certification has been removed, in whole or in part. The District will not require DBEs to reapply for certification as a condition of continuing to participate in the Program, however a certification review may be conducted whenever there has been a change in DBEs circumstances.
6. Once certified, a DBE firm must inform the District in writing of any changes in circumstances affecting the firm's ability to meet size, disadvantaged status, ownership, or control requirements, or any material change in the information provided in the certification application process, and attach supporting documentation describing in detail the nature of such changes. Changes in management responsibility among members of a limited liability company are also covered by this requirement. Such notice of change from the DBE firm must take the form of an affidavit sworn to before a person authorized by state law to administer oaths, or of an unsworn declaration executed under penalty of perjury of the laws of the United States. The written notification must be provided by the DBE within thirty (30) days of occurrence of the change(s). If the DBE fails to make timely notification of such change(s), it will be deemed to have failed to cooperate as required.
7. The District will make decisions on applications for DBE certification within ninety (90) days of receiving from the applicant firm all information required. The District may extend this time period once, for no more than an additional sixty (60) days, upon written notice to the firm explaining the reasons for the extension.

B. DBE Certification of Continuing Eligibility

Every firm certified by the District as a DBE must provide to the District every year on the anniversary of the date of initial certification, an affidavit sworn to by the firm's owners before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of 49 CFR Part 26 or any material changes to the information provided in its original application, except for changes about which it has notified the District. The affidavit will specifically affirm that the DBE continues to meet SBA business size criteria and the overall gross receipts cap set forth in 49 CFR Part 26, documenting this affirmation with supporting documentation of the DBE's size and gross receipts. If the DBE fails to provide this information in a timely manner, it will be deemed to have failed to cooperate as required.

C. Suspension of Certification

Pursuant to 49 CFR Section 26.88, the District shall immediately notify the DBE of the suspension by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE.

D. Denials and Reapplication Procedures

Pursuant to 49 CFR Section 26.85, when the District denies a request by a firm that is not currently certified, the District will provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based will be made available to the applicant firm upon request. - When a firm is denied certification, it is required to wait twelve (12) months before it may reapply for DBE certification with the District. The time period for reapplication begins to run on the date the explanation for denial of certification is received by the applicant firm.

E. Removal Procedures (Decertification)

1. Any person may file with the District a written complaint alleging that a currently certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. The District is not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint will include any information or arguments supporting the assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainants' identities will be protected. The District will review all records concerning the firm, any material provided by the firm and the complainant, and other available information. If the District determines based on this review that there is reasonable cause to believe the firm is ineligible, the District will provide written notice to the firm of its intention to find the firm ineligible with the reasons for the proposed determination. If the District determines such reasonable cause does not exist, the District will notify the complainant and the firm in writing of this determination and the reasons therefore. All statements of reasons for findings on the issue of reasonable cause will specifically reference the evidence in the records on which each reason is based.
2. Based on notification by the DBE firm of a change in its circumstances or other information that comes to the District, if the District determines there is reasonable cause to believe a currently certified firm is ineligible, the District will provide written notice to the firm of its intention to find a firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause will specifically reference the evidence in the record on which each reason is based.
3. If a U.S. DOT agency determines that information in the certification records or other information available provides reasonable cause to believe that a firm certified by the proceeding to remove the firm's certification. The agency must provide the District and the firm a notice setting forth reasons for the directive, including relevant documentation. The District will immediately commence and prosecute a proceeding to remove the eligibility of the firm.
4. When the District notifies a firm that there is cause to remove its eligibility as

provided above, the District will give the firm an opportunity for an informal hearing at which the firm may respond to the reasons for the proposal to remove eligibility in person and provide information and arguments concerning why it should remain certified. In such proceeding, the District bears the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards. The District will maintain a complete verbatim record of the hearing. If there is an appeal to U.S. DOT, the District will provide a transcript of the hearing to U.S. DOT and, on request, to the firm. The District will retain the original record of the hearing. The DBE firm may elect to present information and arguments in writing without a hearing. In such event, the District bears the same burden of proving, by a preponderance of the evidence that the firm does not meet the certification standards. All parties requesting a hearing shall be responsible for half of the cost of the hearing.

5. All proceedings by the District to remove a firm's eligibility shall be made by an outside independent hearing officer selected in accordance with District procedures.
6. The District will not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the District at the time of its certification of the firm. The District will base such decision only on one or more of the following: changes in the firm's circumstances since the certification, information or evidence not available at the time of certification, information that was concealed or misrepresented by the firm in previous certification actions, change in the certification standards or requirements of U.S. DOT since the firm was certified, or a documented finding that the District's determination to certify the firm was clearly erroneous.
7. The District will provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice will inform the firm of the consequences of the District's decision and of the availability of an appeal to U.S. DOT. The District will send copies of the notice to the complainant in an ineligibility complaint or to the concerned U.S. DOT agency that directed the District to initiate the proceeding.
8. A firm remains an eligible DBE during the proceeding. The firm does not become ineligible until the issuance of the notice of decision provided for in Appendix E, Paragraph D, above.
9. The District will take the following action upon removing a firm's eligibility:
 - a. When a Prime Contractor has made a commitment to use the ineligible firm, or the District has made a commitment to use a DBE Prime Contractor but a subcontract or contract has not been executed before issuance of the decertification notice, the ineligible firm does not count toward the Contract goal or Triennial Goal. The District will direct the Prime Contractor to meet the Contract goal with an eligible DBE or to demonstrate that it has made good faith efforts to do so.

- b. If a Prime Contractor has executed a subcontract with the firm before issuance of the decertification notice, the Prime Contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. When the District has let a Prime Contract to the DBE later ruled ineligible, the portion of the ineligible firm's performance of the Contract remaining after issuance of the notice will not count toward the Triennial Goal but may count toward the Contract goal.
 - c. If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the Contract, the District will continue to count its participation on that Contract toward the Triennial Goal and Contract Goals.
10. In the event that a firm is denied certification the firm may reapply for certification once a period of twelve (12) months has elapsed from the date the notice of denial was issued, pursuant to 49 CFR Section 26.86.

F. Process for Certification Appeals to U.S. Department of Transportation

A firm which has been denied certification or whose eligibility is removed may make an administrative appeal to the U.S. Department of Transportation pursuant to 49 CFR Section 26.89. All appeals will be sent to the U.S. Department of Transportation, Office of Civil Rights, 400 Seventh Street, S.W., Room 2401, Washington, D.C. 20590. Pending the U.S. DOT decision, the District's decision remains in effect. If a firm wishes to file an appeal, it must send a letter to U.S. DOT within ninety (90) days of the date of the District's final decision, including information concerning why the District's decision should be reversed.

An appellant firm challenging certification denial or removal by the District must submit a letter with the name and address of any other U.S. DOT grantee that currently certifies the firm, of any other grantees that may have rejected an application for certification from the firm or removed the firm's eligibility within one year prior to the date of the appeal, or of any other grantee with which an application for certification or action to remove eligibility is pending and must include in their letter a statement specifying why the certification decision is erroneous, the significant facts that were not considered, or the regulatory provisions that was improperly applied. An appellant in a third-party ineligibility complaint that appeals the District's decision to U.S. DOT will be requested by U.S. DOT to promptly provide all information requested.

The District agrees to provide to U.S. DOT the complete administrative record within twenty (20) days of its request unless U.S. DOT extends this time period. U.S. DOT will make its decision based solely on the entire administrative record without conducting a hearing.

When the District provides information to U.S. DOT, the same information will be made available to the firm and to any third-party complainant involved, consistent with applicable law.

U.S. DOT will affirm the District's decision unless it determines, based on the entire administrative record, that the decision is not supported by substantial evidence or is inconsistent with the substantive or procedural provisions concerning certification. If U.S.

DOT determines that the District's decision was unsupported, U.S. DOT will reverse the District's decision and will direct the District to certify the firm or to remove its eligibility, as applicable. The District will take the action directed by U.S. DOT immediately upon receiving written notice.

U.S. DOT is not required to reverse the District's decision if it determines a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case. If it appears that the record is incomplete or unclear, U.S. DOT may remand the record to the District with instructions seeking clarification or augmentation of the record before making a finding.

U.S. DOT will not uphold the District's decision based on grounds not specified in the District's decision. U.S. DOT's decision will be based on the status and circumstances of the firm on the date of the decision, which was appealed. U.S. DOT will provide written notice of its decision to the District, the firm, and the complainant in an ineligibility complaint. The notice will include the reasons for U.S. DOT's decision. It is U.S. DOT's policy to make a decision within one hundred eighty (180) days of receiving the complete administrative record. All decisions by U.S. DOT are administratively final and are not subject to petitions for reconsideration.

G. District Actions Following U.S. Department of Transportation Decision

Pursuant to 49 CFR Section 26.91, the decisions of U.S. DOT are binding on the District. Such decisions are not binding, however, on other U.S. DOT grantees. The District will take the following actions after U.S. DOT decisions:

1. If U.S. DOT determines that the District erroneously certified a firm, the District must remove the firm's eligibility on receipt of the determination without further proceedings.
2. If U.S. DOT determines that the District erroneously failed to find reasonable cause to remove the firm's eligibility, the District will expeditiously commence a proceeding to determine whether the firm's eligibility should be removed.
3. If U.S. DOT determines that the District erroneously declined to certify eligibility of the firm, the District must certify the firm effective on the date of receipt of the written notice.
4. If U.S. DOT determines that the District erroneously determined that the presumption of social and economic disadvantaged either should or should not be deemed rebutted, the District must take appropriate corrective action as determined by U.S. DOT.
5. If U.S. DOT affirms the District's determination, no further action is necessary.
6. Where U.S. DOT has upheld the District's denial of certification or removal of eligibility of a firm, or directed the removal of a firm's eligibility, other grantees with whom the firm is certified may commence a proceeding to remove the firm's eligibility. If the District receives information on a U.S. DOT decision of DBE

eligibility or ineligibility, the District will take the U.S. DOT action into account in any certification action involving the firm.

H. Interstate Certifications

The District will adhere to the interstate certification guidelines contained in 49 CFR Section 26.85.

1. When a firm that is currently certified in its Home State seeks certification by the District, the District has the option of accepting this certification and certifying the firm. The District will request a copy of the firm's certification notice from its Home State. Only a copy of the firm's actual certification notice from its Home State will be acceptable. Once this certification notice has been received, the District will confirm that this firm is certified in its Home State by reviewing the electronic directory of the home state and/or requesting written confirmation from the firm's home state.
2. Should the District elect not to certify the firm as described in Section 1 above, in such event the firm will be required to submit the information described below in Section 3 below, provided that the District shall take the following actions:
 - a. Within seven days contact the firm's Home State and request a copy of the site visit review report for the firm, any updates to the site visit review, and any evaluation of the firm based on the site visit.
 - b. Determine whether there is good cause to believe that the Home State's certification of the firm is erroneous or should not apply in California. Reasons for making such a determination may include the following:
 - i. Evidence that the firm's certification was obtained by fraud;
 - ii. New information, not available to the certifying agency at the time of its certification, showing that the firm does not meet all eligibility criteria;
 - iii. The original certification was clearly erroneous or was inconsistent with the requirements of this part;
 - iv. The state law of California requires a result different from that of the state law of the firm's Home State; or
 - v. The information provided by the applicant firm did not meet the requirements of 49 CFR Part 26.85(c).
 - c. If the District has determined that there is no good cause to believe that the firm's certification in its Home State is erroneous or should not apply, BART will, no later than 60 days from the date on which it received from the applicant firm all the information required by 49 CFR Part 26.85(c), send to the applicant firm a notice that it is certified and place the firm on its directory of certified firms.
 - d. If the District has determined that there is good cause to believe that the firm's certification in its Home State is erroneous or should not apply, BART will, no later than 60 days from the date on which it received from the applicant firm all the information required, send to the applicant firm a notice stating the

- reasons for its determination. This notice will state with particularity the specific reasons why the District believes that the firm does not meet the requirements of 49 CFR Part 26 for DBE eligibility and must offer the firm an opportunity to respond to the District with respect to these reasons. The applicant firm may elect to respond in writing, to request an in-person meeting with the District to discuss any objections to the firm's eligibility, or both. If the firm requests a meeting BART will schedule the meeting to take place within 30 days of receiving the firm's request.
- e. The applicant firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of the regulations with respect to the particularized issues raised by the District's notice. The District will issue a written decision within 30 days of the receipt of the written response from the firm or the meeting with the decision maker, whichever is later. During this time the firm's application for certification shall be stayed pending the outcome of the process. A decision under this section G.2. may be appealed to the Departmental Office of Civil Rights under 49 CFR Part 26.89.
3. In the event that the District chooses not to certify an applicant firm as described in section G.2 above, the applicant firm will be required to submit:
- a. A complete copy of the application form, all supporting documents, and any other information submitted to the firm's Home State or any other state related to the firm's certification. This includes affidavits of no change and any notices of changes that the applicant firm has submitted to its Home State, as well as any correspondence the applicant firm has had with its Home State's UCP or any other recipient concerning its application or status as a DBE firm.
 - b. Any notices or correspondence from states other than the applicant firm's Home State relating to the applicant firm's status as an applicant or certified DBE in those states.
 - c. Any correspondence or notices related to the filing a certification appeal with DOT. This includes the applicant firm's letter of appeal and the DOT's response.
 - d. An affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States which affirms that:
 - i. The applicant firm has submitted all the information required by 49 CFR 26.85(c) and the information is complete and, in the case of the information required by §26.85(c)(1), is an identical copy of the information submitted to the applicant firm's Home State.
 - ii. If the on-site report from the applicant firm's home state, supporting its certification in its Home State is more than three years old, as of the date

of its application to the District, that the applicant firm affirms that the facts in the on-site report remain true and correct.

- e. Within seven (7) days of receipt of the information the District shall:
 - i. Contact the certifying agency or UCP in the applicant firm's Home State and request a copy of the site visit review report for the firm, any updates to the site visit review, and any evaluation of the firm based on the site visit.
 - ii. In the event that the District does not receive the information requested from the applicant firm's Home State within fourteen (14) days from a timely request it will hold certification action required in abeyance pending receipt of the site visit review report.
 - iii. In the event that the certification action is held in abeyance the District shall notify the applicant firm within 30 days from the date on which it received from an applicant firm all the information required by section G. 3, in writing of the delay in the process and the reason for it.
- f. Upon receipt of the information requested in section G.3 the District will determine whether there is good cause to believe that the Home State's certification of the firm is erroneous or should not apply. This determination will be consistent with 49 CFR Part 26.85 (d).

Appendix F: Procedures for Good Faith Efforts to Meet Goals

Good faith efforts are those that, given all relevant circumstances, a bidder actively and aggressively seeking to meet the goal would make. The bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part, which, 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. Only those efforts made prior to Bid opening will be considered for evaluation of good faith efforts. Each bidder is strongly encouraged to attend the pre-bid meeting listed by the District in the invitation to bid. The meeting is intended to cover the DBE program requirements for the Contract, to inform DBEs of subcontracting opportunities, and to provide an opportunity for bidders to meet and/or solicit subcontractors. Regardless of whether a bidder attends the meeting, the bidder assumes responsibility for being informed and complying with the DBE requirements.

In determining whether good faith efforts have been made, the District will consider, on the basis of documentation timely submitted by the bidder, the quality, quantity, and the 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. Any bidder failing to meet or exceed a DBE goal shall be required to submit all documentation of their good faith efforts within five (5) working days of the bid or proposal submission deadline.

On construction contracts with race conscious goals, a DBE prime bidder may fulfill the DBE contract goal with its own participation in the specified scopes of work of the contract. If a DBE prime bidder fulfills all of the DBD contract goal through its own participation, it is exempt from these good faith efforts.

Only steps taken by the bidder (as opposed to those taken on the bidder's behalf by a third party) will be considered. The steps listed below are reflective of good faith efforts taken by a bidder actively and aggressively seeking to meet the DBE Contract goal.

The District considers each of the listed steps particularly significant in evaluating a bidder's good faith efforts.

A. Pre-Bid Meeting

A bidder's failure to attend the pre-bid meeting and/or matchmaking sessions will be considered a significant factor and may result in an adverse determination by the District in assessing good faith efforts.

B. Identification of Subcontracting Opportunities

It is the responsibility of the bidder to identify potential categories of work where subcontracting opportunities exist on a contract-by-contract basis. Additionally, the bidder must identify appropriate DBE firms who are capable of and certified to perform the categories of work identified in this analysis of subcontracting opportunities. Failure by a

bidder to conduct and document this analysis will be considered adversely by the District in assessing good faith efforts. As used herein, "appropriate" refers to those firms who have been certified by a member of the CUCP to perform any category of work to be subcontracted.

C. Advertisement

No fewer than 21 days prior to the bid opening date, a bidder will have in place advertisements soliciting sub-bids on this Contract from DBEs. If, due to the bidding schedule established by the District, 21 days are not available, advertisements for a shorter reasonable period of time is acceptable. Such advertisements will refer only to bids for the District's contract and will specify the categories of work for which subcontracting opportunities exist for the District's contract. The advertisements will be placed in three or more paid daily or weekly minority and/or women trade association newspapers or other minority and/or women trade focus publications or media. The advertisements will be in publications or media that can reasonably be expected to reach both women and minority DBE firms that are likely to bid on this Contract.

D. Communication with DBE Firms

A bidder will solicit sub-bids by mailing registered or certified letters to DBE firms qualified to perform those categories of work which the bidder is willing to subcontract. Solicitation letters will be mailed no fewer than 21 days prior to the bid opening date. If, due to the bidding schedule established by the District, 21 days are not available, a mailing providing a shorter reasonable period of notice is acceptable. The letters will be mailed to no fewer than 10 appropriate certified DBE firms for each category of work sought to be subcontracted, or to a number of such firms equal to 100% of the DBEs listed for each such category of work in the CUCP database, whichever is less.

The letters to certified DBE firms will:

1. Clearly identify portions of the work, which the bidder is willing to have performed by subcontractors, and offer to break down any portion of the work into economically feasible units in order to facilitate DBE participation.
2. Identify if there is a bond waiver requirement for subcontractors for this contract and the specific dollar value of subcontracts exempt from bonding requirements.
3. Offer assistance with regard to bonding requirements and insurance requirements, where applicable, and/or financing (e.g., lines of credit), specifying the type of assistance that the bidder is offering. Assistance may include, but is not limited to the following:
 - a. Contacting bonding and/or insurance companies on behalf of DBEs;
 - b. Arranging with sureties incremental or phased bonding for the DBEs;
 - c. Paying for the cost of the bond or insurance;
 - d. Waiving bond or other requirement;
 - e. Referring DBEs to Business Development Centers or other resource agencies, which may assist DBEs in obtaining bonding, insurance, or lines of credit;
 - f. Offer to make plans and specifications available to DBEs at reasonable hours for viewing, copying, or borrowing and provide a list containing the location

of plan rooms.

4. Each bidder will use the CUCP Database as a source of DBEs for solicitation.

In addition to the mandatory requirement to use the CUCP Database, each bidder is encouraged to use the services of minority, women, and small business community organizations and/or contractors' groups in order to identify potentially certifiable DBEs for work under the contract. A listing of such organizations is available from the District's Office of Civil Rights.

E. Follow-Up of Initial Solicitations

A bidder will follow up initial solicitations of DBE sub-bids no later than 10 days after the mailing of the initial solicitation letters. The follow-up will be conducted by someone familiar with the project and capable of answering questions from potential DBE subcontractors. If, due to the bidding schedule established by the District, 10 days are not available between the mailing of the solicitations and the bid opening date, follow-up shall occur within a shorter reasonable period of time. Follow up communication may be conducted via email. Such follow-up activity must be documented by telephone logs or other written documentation which provide, at a minimum, the following information:

1. Type of contact, e.g., telephone call, visit, email, letter.
2. Name and position of person who made contact on behalf of the bidder.
3. Name and address and/or email of firm contacted.
4. Name and position of person contacted, telephone number, and date of contact.
5. The response from the firm contacted with regard to its interest in submitting a sub-bid.
6. Email return receipts to document successful delivery to DBE subcontractors and, in the case of returned email correspondence, documentation from the mail server that the email was undeliverable.
7. Follow-up, if any, to the assistance offered in the initial solicitation letter with regard to breakdown of work into economically feasible units, bonding, insurance, lines of credit, and plans and specifications.
8. For each DBE contacted who declined to bid, the reason provided by the DBE for declining to bid. If the reason cited relates to bonding, financing or insurance, the bidder must provide documentation describing in detail the assistance offered by the bidder to the DBE.

F. Responses from Interested DBEs

Each bidder will submit records of responses, proposals and/or bids received from DBEs, which will include, at a minimum, the following information:

1. Names, positions, addresses and telephone numbers of all DBEs that responded to

the bidder's solicitation.

2. All responses (including requests for assistance or information), proposals, or bids received, and whether such responses, proposals or bids were in writing or verbal. In the case of written responses, copies of such responses.
3. The date each response was received by the bidders.

G. Bidder's Evaluation of Interested DBEs

Each bidder will submit documentation of its evaluation of proposals or bids received from DBEs. For each DBE that responded to the bidder's solicitation, the bidder will document the following:

1. A summary of all communications and negotiations, if any, between the bidder and the DBE.
2. A description of specific assistance agreed to be provided by the bidder to the DBE with regard to bonding, insurance, and/or obtaining plans and specifications.
3. If the bid was rejected, the reasons for rejection. The District may deem that a bidder has not made good faith efforts if DBE sub-bids have been rejected without adequate reason.
4. If the bid was rejected for any reason, a copy of the DBE's bid along with copies of all bids received by non-DBE firms for the same or similar scope of work.
5. If a DBE was rejected as unqualified, a description of the investigation conducted by the bidder prior to reaching the conclusion that the DBE was unqualified.

H. Other Efforts

Each bidder will include in the information submitted any other efforts made to meet the DBE goal that are not listed above.

I. Good Faith Efforts Assessment

In addition to determining whether a bidder has taken the actions described above, the District will consider the following factors in determining whether good faith efforts have been met:

1. A bidder's selection of a potentially certifiable firm instead of a CUCP or District-certified DBE firm is a risk assumed solely by the bidder. If any such firm is determined not to be certifiable and there are District – or CUCP – certified firms available for that work, the bidder's assumption that the firm is certifiable will not be taken into consideration for good faith efforts evaluation, and will not relieve the bidder from complying with good faith efforts requirements.

2. The District will give considerably greater weight to the final decisions made by the bidder to subcontract to DBEs, than to statements in the bidder's solicitation letters indicating its intent to subcontract, or to the number of DBEs contacted.
3. Failure of a bidder to subcontract portions of work that it would otherwise perform itself, or to enter into a joint venture arrangement in order to meet the goal, will be considered adversely if the bidder otherwise cannot reasonably have been expected to meet the goal.

J. Hearing On Good Faith Efforts Determination

If it appears to the District that the bidder has submitted all DBE documentation in compliance with these good faith efforts requirements, but has neither achieved the indicated percentage of DBE participation nor made sufficient good faith efforts to meet the goal, such bidder will be notified that its bid will be recommended for rejection and the reasons therefore. Within five (5) working days of such telephone and/or facsimile notification, the bidder may request a hearing. Such hearing will be held at the convenience of the District but no later than ten (10) working day after receipt of the request and in accordance with the Office of Civil Rights Hearing Procedures, copies of which are available upon request. Any bidder requesting a good faith efforts hearing is required to send a check for fifteen hundred dollars (\$1,500) to cover their portion of any costs associated with the good faith efforts hearing. All hearings by the District shall be made by an outside independent hearing officer selected in accordance with District procedures. At such hearing, the bidder will bear the burden of demonstrating by preponderance of the evidence:

1. Achievement of the percentage goal for DBE participation as of the date of bid opening, as documented in the bid; or
2. Good faith efforts made prior to bid submission that, given all relevant circumstances, could reasonably have been expected to produce a level of DBE participation which meets the Contract goal.

Appendix G: Procedure to Resolve Subcontractor Issues, Substitution and Termination

This Appendix outlines procedures by which project staff and the Office of Civil Rights (OCR) will work together to resolve issues that arise between a prime contractor and certain subcontractors, including payment issues, substitution, and termination of the subcontractor.

A. General Issues

1. Initiation

A subcontractor that is an MSBE, SBE or DBE (M/S/DBE) that has an unresolved issue with a prime contractor concerning the payment process or any other aspect of its contract work may seek the District's involvement in an effort to resolve the issue. The process begins when a subcontractor submits a written complaint or notification of a dispute to OCR staff's project representative. Copies of all notifications will be provided to the Project Manager (PM) and the Resident Engineer (RE) and the OCR DBE Manager.

2. Investigation and Assessment

Upon receipt of a written notification, OCR staff (with support as needed by the Project) will initiate an investigation. The investigation will include the collection and documentation of any facts relevant to the issue including: conducting interviews and reviewing any documents and records necessary to complete an initial assessment of the issue. Within 10 working days, OCR will determine whether the issue has merit and should be pursued further. If OCR staff determines the issue has no merit, such determination will be issued in writing to the RE, PM, DBE Manager, and the subcontractor involved.

If OCR staff determines there is merit to the issue between the prime contractor and the subcontractor, within 5 working days OCR staff will attend a meeting with the RE to discuss the findings and to attempt to find a means of resolving the dispute. The resolution may include additional meetings with the prime contractor and subcontractor in an attempt to mediate a settlement. If a resolution is agreed, the RE and OCR staff will jointly document the resolution. Issues involving the enforcement of contractual terms or penalties will become the RE's responsibility to administer.

3. Alert Notice: PM and OCR DBE Manager

If the issue is not resolved through the above process, OCR staff and the RE will issue an Alert Notice to the PM and the OCR DBE Manager, including the initial assessment and any information developed in previous attempts to resolve the issue. Within 5 days of receiving the Alert Notice, the PM and the OCR DBE Manager will attend a meeting to discuss the findings and attempt to resolve the issue. If a resolution is agreed, the project and OCR staff will jointly document the resolution. Issues involving the enforcement of contractual terms or penalties will become the RE's responsibility to administer.

4. Alert Notice: Group Manager and OCR Department Manager

If the issue is not resolved, the Alert Notice will be issued to the Group Manager and the Department Manager of OCR documenting the assessment and previous attempts to resolve the issue. At this point an Ombudsperson investigation may be initiated. The

Ombudsperson will be jointly selected by the project staff and OCR to conduct an independent investigation intended to provide an impartial assessment of the issue. The Ombudsperson will be authorized to collect and document any facts relevant to the issue including: conducting interviews and reviewing any records necessary to complete an assessment and a written recommendation. Once the investigation is complete, the Ombudsperson will forward the findings to the Planning, Development, and Construction Group Manager and the Department Manager of OCR. Upon receipt of the Ombudsperson's findings, the PD&C Group Manager and the OCR Department Manager will meet within 5 working days to review the report and the recommendations for resolution. If requested, the Ombudsperson may assist to attempt to mediate a resolution. If a resolution is agreed, the project staff and OCR will jointly document the resolution. Resolutions involving the enforcement of contractual terms or penalties will become the RE's responsibility to administer.

5. Alert Notice: Assistant General Manager, Planning, Development and Construction and Deputy General Manager

If the issue is not resolved, the Alert Notice, and the Ombudsperson's report, if any, will be issued to the Assistant General Manager, PD&C and the Deputy General Manager documenting the issue and all previous attempts to resolve the issue. Within 5 days of receiving the notification, Assistant General Manager and Deputy General Manager will meet and agree to a course of action. The Project staff and OCR staff will jointly document the resolution and, if needed, inform the General Manager of the relevant facts of the resolution.

B. Substitution and Termination

Prime contractors shall utilize the specific DBEs listed on their bid or proposal to perform the work and supply the materials for which each is listed unless the contractor obtains written consent from the District. Unless the District consent is provided, the contractor shall not be entitled to any payment for work or material for which a DBE is listed unless that work is performed or supplied by the listed DBE. The District may provide such written consent only if the prime contractor has good cause to substitute or terminate the listed DBE firm. Good cause includes the following circumstances:

- (i) The listed DBE subcontractor fails or refuses to execute a written contract;
- (ii) The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor;
- (iii) The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements.
- (iv) The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;
- (v) The listed DBE subcontractor is ineligible to work on public works projects because of

suspension and debarment proceedings pursuant 2 CFR Parts 180, 215 and 1,200 or applicable state law;

(vii) The District has determined that the listed DBE subcontractor is not a responsible contractor;

(vi) The listed DBE subcontractor voluntarily withdraws from the project and provides to the District written notice of its withdrawal;

(vii) The listed DBE is ineligible to receive DBE credit for the type of work required;

(viii) A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract;

(ix) Other documented good cause that the District determines compels the termination of the DBE subcontractor. Provided, that good cause does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award.

Before the prime contractor can transmit to the District a request to terminate and/or substitute a DBE subcontractor, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to the District, of its intent to request to terminate and/or substitute, and the reason for the request.

The prime contractor then must give the DBE five days to respond to the prime contractor's notice and advise the District and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why the District should not approve the prime contractor's action. If required in a particular case as a matter of public necessity (e.g., safety), the District may provide a response period shorter than five days.

If written objections are filed by the DBE, the District shall give notice in writing of at least five working days to the listed subcontractor of a hearing by the District on the prime contractor's request for substitution.

If a DBE subcontractor is terminated, substituted, or fails to complete its work on the contract for any reason, the District will require the prime contractor to substitute the terminated DBE subcontractor for another DBE subcontractor or make good faith efforts to do so. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal established. The good faith efforts shall be documented by the contractor. If the District requests documentation, the contractor shall submit the documentation within 7 days following such request, which may be extended for an additional 7 days if necessary at the request of the contractor, and the District shall provide a written determination to the contractor indicating whether or not good faith efforts have been demonstrated.

In addition to post-award terminations, the provisions of this section apply to pre-award deletions

of or substitutions for DBE firms put forward by offerors in negotiated procurements.

Appendix H: Process for Implementing Small Business Elements

The Small Business Elements of the DBE Program, which are part of the District's race neutral efforts to facilitate competition by small business concerns and to further the District's ability to reach its overall DBE goals, The SB Elements meet the requirements outlined in 49 CFR Section 26.39. Two types of firms are eligible to participate in this program: a) Small Business Entities (SBEs) and b) Micro Small Business Entities (MSBEs). The SB Elements include two components: contract-specific SBE goals and MSBE set-aside contracts. SBE contract goals represent a percentage of the total contract or agreement a prime bidder is expected to subcontract to certified SBE firms. An SBE prime bidder or joint venture partner may be able to fulfill the SBE goal. MSBE set-aside contracts represent specific contracts or agreements for which certified MSBE firms have the exclusive right to bid or propose.

A. Eligibility of SB Elements Participants

Firms or individuals that can demonstrate that they meet the following criteria are eligible to be certified as an SBE and may submit an application for certification as an SBE:

1. A Small Business Concern;
2. The firm is at least 51 percent owned by one or more individuals or, in the case of any publicly owned business, in which at least 51 percent of the stock is owned by one or more individuals whose personal net worth does not exceed \$1.32 million;
3. The firm's management and daily business operations are controlled by one or more of the individuals whose personal net worth is as described in 2. above.

Certification-eligible SBEs, are eligible to be certified as a Micro Small Business Entity (MSBE) if the firm can demonstrate that the individual's or firm's average annual gross receipts (including those of its affiliates) over the previous three fiscal years do not exceed the following caps: i) \$10 million for contracts for construction; ii) \$6 million for contracts for professional or other services; or iii) \$6 million for contracts for supplier of goods.

Firms certified as a DBE in the State of California by the CUCP or one of its participating agencies are presumptively held to have met the requirements of Appendix H, Paragraph A.1, 2, and 3. above and are certified as an SBE under Appendix H as long as the firm remains eligible as a CUCP certified DBE. These firms are still required to submit an application for certification as an MSBE and must be certified prior to any bid opening or proposal submittal deadline to be considered an MSBE for the purposes of the SB Elements. If a DBE certified by the CUCP applies for MSBE certification, it is not required to complete the full application for MSBE certification. In order to be certified as an MSBE, such firms certified as a DBE by the CUCP are required to provide:

1. The DBE certification number of their firm;
2. Tax returns for the previous three fiscal years;
3. Any other information as requested by the District needed to verify eligibility as an MSBE.

Additional information may be requested from any applicant for SBE or MSBE certification. Failure to timely provide any information requested by the District shall be grounds for the denial of a firm's certification.

A Bidder or Proposer seeking to qualify to bid on an MSBE set aside contract or agreement with BART, or a firm seeking to be recognized as an MSBE or SBE prime, subcontractor, Subsupplier, or Subconsultant, shall be qualified as an MSBE and SBE respectively under this program and be certified as an MSBE or SBE under this program prior to the Bid opening time or proposal submittal deadline applicable to any bid, contract or agreement that they wish to participate on as a qualifying MSBE or SBE.

B. Ownership and Control Requirements

A firm seeking certification has the burden of demonstrating to the District, by a preponderance of the evidence, that it meets the requirements related to business size, ownership and control. The District will make all determinations of SBE or MSBE eligibility by considering all the facts in the record, viewed as a whole, including the following factors.

1. To be an eligible SBE or MSBE, a firm must be owned and controlled by an individual or individuals who meet the personal net worth requirements of this Appendix H.
2. In the case of a corporation, such individuals must own at least 51% of the aggregate of all stock outstanding. In the case of a partnership, each class of partnership interest must be owned by an individual who meets the requirements of this section which must be reflected in the firm's partnership agreement. In the case of a corporation each class of member interest must be owned by individuals who meet the requirements of this Appendix H.
3. The firm's ownership by individuals meeting the eligibility criteria of this Appendix H must be real, substantial and continuing, going beyond pro forma ownership of the firm as reflected in the ownership documents. The owners should be entitled to the profits and loss commensurate with their ownership interests; and any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits are grounds for denial of certification.
4. All securities that constitute ownership will be held directly by the applicants.
5. The contributions of capital or expertise by applicants to acquire their ownership interests must be real and substantial.
6. In a situation in which an individual's expertise is relied upon as part of a owner's contribution to acquire ownership, the owner's expertise must be: in a specialized field; of outstanding quality; in areas critical to the firm's operations; indispensable to the firm's potential success; specific to the type of work the firm performs; and documented in the records of the firm. The individual whose expertise is relied upon must have a significant financial investment in the firm.
7. For purposes of determining ownership, the District will deem as held by an applicant all interests in a business or other assets obtained by the individual as the result of a final property settlement or court order in a divorce or legal separation and through inheritance or otherwise because of the death of the former owner.
8. The District will presume as not being held by an applicant, for purposes of

- determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any one of the following: i) an individual or firm which is involved in the applicant firm; ii) an affiliate of the applicant firm; iii) an individual or firm involved in the same or a similar line of business or engaged in an ongoing business relationship with the applicant firm or iv) an affiliate of the firm described in iii) above.
9. To overcome the foregoing presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate by clear and convincing evidence that:
- a. The gift or transfer was made for reasons other than obtaining certification as a SBE or MSBE and;
 - b. The stated owner(s) actually control the management, policy, and operations of the firm, notwithstanding the continuing participation of the individual(s) who provided the gift or transfer.
10. When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interests asserted by one spouse, the District will deem ownership interest in the firm to have been acquired by that spouse with his/her individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. The District will not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the firm. A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for SBE or MSBE certification.
11. The District may consider the following factors in determining the ownership of a firm, but will not regard a contribution of capital as failing to be real and substantial nor find a firm ineligible, solely because:
- a. an individual acquired his or her ownership interest as the result of a gift or transfer without adequate consideration other than the types set above;
 - b. there is a provision for the co-signature of a spouse who is not an applicant on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents or ownership of the firm in question; or
 - c. ownership of the firm or the assets thereof is transferred for adequate consideration from a spouse to the applicant. In this case, the District will give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by the applicant(s).
12. Only an independent business may be certified as a SBE or MSBE. An independent

- business is one the viability of which does not depend on its relationship with another firm or firms. In determining whether a potential SBE or MSBE is an independent business, the District will scrutinize relationships with other firms in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
- 13. The District will consider present or recent employer/employee relationships, the firm's relationship with prime contractors, and other similar factors related to the independence of a potential SBE or MSBE firm. Further, the District will consider the consistency of relationships between the potential SBE or MSBE firms and other firms within normal industry practice.
 - 14. An SBE or MSBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the owners.
 - 15. The owner(s) must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations. In a corporation, the owners must control the board of directors.
 - 16. The owner(s) must hold the highest officer position in the company (e.g. chief executive officer or president).
 - 17. In a partnership, the owner(s) must serve as general partners with control over all partnership decisions.
 - 18. The managerial role of the owner(s) in the firm's overall affairs must be such that the District can reasonably conclude that the owner(s) actually exercise control over the firm's operations, management and policy.
 - 19. The owner(s) must have an overall understanding of, and managerial and technical competence directly related to, the type of business in which the firm is engaged and the firm's operations.
 - 20. If the state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the person(s) who owns and controls a potential SBE or MSBE firm of that type must be the qualifying individual for the required license or credential.
 - 21. The District will consider differences in remuneration between the owner(s) and other participants in the firm, in the context of the duties involved, normal industry practices, and the firm's policies and practices.
 - 22. In order to be viewed as controlling the firm, an owner cannot engage in outside employment or other business interests which conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm.
 - 23. An owner may control the firm even though one or more of the individual's immediate family members participate in the firm. If the District cannot determine that the socially and economically disadvantaged owners, as distinct from the family as a whole, control the firm, then the socially and economically disadvantaged owners have failed to carry the burden of proof concerning control even though they may participate significantly in the firm's activities.
 - 24. Where a firm was formerly owned and/or controlled by an individual or individuals (whether or not an immediate family member), who do not meet the standards for SBE and/or MSBE certification in Appendix H, and this individual or these individuals remain involved with the firm in any capacity, the individual now owning the firm must demonstrate by clear and convincing evidence that the transfer

- of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a SBE or MSBE and that the individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of any individual who formerly owned and/or controlled the firm.
25. In determining whether a firm is controlled by its owners, the District will consider whether the firm owns equipment necessary to perform its work. The District will grant certification to a firm only for specific types of work in which the owners have the ability to control the firm. To become certified in an additional type of work, the firm must demonstrate only that owners are able to control the firm with respect to that type of work. The District will not require that the firm be recertified or submit a new application for certification but will verify the owner's control of the firm and the additional type of work. Any work for which a firm is certified to perform will be expressed by assigning the most appropriate NAICS code(s) to the firm.
 26. At the sole discretion of the District, it may conduct site visits to collect information or verify any statements made by an applicant.

C. Certification of SBE and MSBE Firms

A firm seeking certification has the burden of demonstrating to the District, by a preponderance of the evidence, that it meets the requirements related to business size, ownership and control. The District will make all determinations of SBE or MSBE eligibility by considering all the facts in the record, viewed as a whole.

Within ninety (90) days of receiving from the applicant all information required, the District will take all the following steps in determining whether an applicant firm meets the SBE and/or MSBE certification standards:

1. If the firm is a corporation, the District will analyze the ownership of stock in the firm as well as all relevant documents;
2. The District will analyze the bonding and financial capacity of the firm;
3. The District will determine the work history of the firm, including contracts it has received, and work it has completed;
4. The District will obtain or compile a list of equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the SB Elements;
5. The District will ensure that the applicant firm meets the standards established for personal net worth and business size standards of this program;
6. The District will require potential SBEs to complete and submit an appropriate application form. The District will ensure that the applicant attests to the accuracy and truthfulness of the information on the application form. This will be in the form of an affidavit sworn to by the applicant before a person authorized by state law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States. The District will review all information on the form prior to making a decision about the SBE eligibility of the firm;
7. The District will request any additional documentation needed to ensure to verify the eligibility;
8. The District will determine if an on-site visit or phone interview is necessary and

- schedule an on-site visit or phone interview. The decision to schedule an on-site visit or phone interview is made at the sole discretion of the District.
9. The District will make a determination of eligibility of the firm and issue a certification or a denial of certification to the firm.

If a firm is found to be eligible for SBE or MSBE certification, the District will add that firm to its database of SBE and/or MSBE certified firms. The District will also provide the firm with a certification document for the firm to maintain in its records. This document will contain:

1. The name of the firm;
2. NAICS codes corresponding to the categories of work the firm is certified to perform as an SBE;
3. NAICS codes corresponding to the categories of work the firm is certified to perform as an MSBE;
4. The name of the owner(s) of the firm.

Should a firm be denied certification for any reason, the District shall notify the firm in writing of the decision. Any certification decisions made by the District for SBE and MSBE certification are administratively final and may not be appealed.

The DBE Liaison Officer will be responsible for maintaining a list of all currently eligible SBEs and MSBEs and ensuring that this list is regularly updated and maintained. Audits will be performed as necessary. Firms are required to notify the District upon their knowledge of any event or action that would disqualify them from participation in the SB Elements including:

1. Changes to the economic status of the owner(s) for example any change that places an individual owner over the \$1.32 million personal net worth cap.
2. Changes in the average annual gross receipts of the firm which would place the firm over the SBA size standard for the specific NAICS code(s) for which the firm is certified to perform work or changes in the average annual gross receipts of the firm which would place the firm over the MSBE gross receipts cap for its category of work.
3. Changes in the ownership structure of the firm which results in less than 51% of the firm being owned by one or more individuals whose personal net worth meets the requirements of Section A.2 of this Appendix H.
4. Any other change in the status of the firm or owner that would disqualify the firm from participation as an SBE or MSBE.

From time to time and at the sole discretion of the District, an SBE or MSBE may be required to file a declaration of no-change. This declaration will be in the form of an affidavit sworn to by the applicant before a person authorized by state law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States. Failure to timely provide the declaration of no-change or any information requested by the District related to the declaration of no-change shall be grounds for immediate de-certification of a firm as an SBE or MSBE.

If, at any time, the District determines an SBE is no longer eligible to participate as an SBE or MSBE the District shall notify the SBE or MSBE in writing, and the District shall remove the SBE or MSBE from its SBE or MSBE database. Effective as of the date of the letter to the firm, that firm shall no longer eligible be to participate as an SBE or MSBE on the District's contracts.

D. Counting SBE Participation

SBE Participation on contracts will be counted in the following manner:

1. All certified DBEs shall be counted as both an SBE and DBE for the purposes of determining attainment of SBE and/or DBE contract specific goals or attainment. Only work actually performed by SBEs or DBEs will be counted towards attainment of the SBE goal.
2. All DBEs will be counted as race and gender neutral DBE attainment on contracts with no DBE goal.
3. Only SBEs certified at the time of bid, as either SBEs or DBEs, will be counted for the purpose of determining SBE goal attainment. This includes being certified to perform the specific type of work for which the SBE has been listed. This will be determined by comparing the NAICS codes for the work for which the SBE has been listed with the NAICS codes for which the SBE has been certified.
4. All SBEs must perform a commercially useful function in order to receive credit as an SBE.
5. The Liaison Officer will review for accuracy the total dollar value of the work and the percentage of the total contract bid price reported on the Bidder's SBE subcontractor/participation listing and will compare it to the contract-specific goal established for the contract.
6. If the amount of SBE participation does not meet the contract-specific SBE goal, the Liaison Officer will review the good faith efforts documentation submitted by the bidder, as required by the contract specifications. The Liaison Officer will determine whether the bidder has made good faith efforts to meet the contract-specific SBE goal.
7. Any evaluation of a bidder's SBE attainment towards a contract-specific SBE goal shall be performed concurrently with any evaluation of a bidder's attainment of a contract-specific DBE goal.
8. If the Liaison Officer determines that the bidder has not met the contract-specific SBE goal and has not demonstrated good faith efforts, the Liaison Officer will notify the bidder in writing. The notification will explain the basis and include the reasons for the determination, and will inform the bidder of its right to submit further written documentation or to appear before an independent hearing officer prior to the time that a recommendation for award of the contract is presented to the Board of Directors. After the hearing, the District will provide the bidder with a

- written decision. The result of the hearing process is not appealable by the bidder. Any bidder requesting a hearing is required to send a check for fifteen hundred dollars (\$1,500) to cover their portion of any costs associated with the good faith efforts hearing. In the event that a bidder on a contract with both DBE or SBE goals fails to attain both of these goals, any hearing requested by the bidder shall be held concurrently to address both deficiencies.
9. A regular dealer, as defined by 49 CFR Part 26.55, shall receive credit for sixty (60) percent of the value of the goods it provides on contracts with SBE goals.
 10. A manufacturer, as defined by 49 CFR Part 26.55, shall receive one-hundred (100) percent credit for the value of the goods it provides on contracts with SBE goals.
 11. Brokers, packagers and manufacturer's representatives and any other SBE who arranges or expedites transactions, as defined by 49 CFR Part 26.55, shall receive SBE credit only for its commission, fees charged for assistance with the procurement of materials and supplies or fees or transportation charges for the delivery of materials or supplies on contracts with SBE goals.
 12. Truckers shall be counted in a manner consistent with 49 CFR Part 26.55.
 13. The District may count work performed by a SBE prime contractor or SBE joint venture partner towards the SBE goal.
 14. All work performed by lower-tier SBE subcontractors will be credited toward meeting the SBE goal provided that the lower tier subcontractor was listed on the Designation of Subcontractors, DBEs, and SBEs form.
 15. Contractor shall file monthly SBE Utilization Reports, and all other requested forms, in the form proscribed by OCR.
 16. A final SBE Utilization Report shall be submitted with the project close out change order.

E. Contracts Eligible for the SB Elements

All federally funded contracts are eligible for consideration as part of the SB Elements. The determination of the SBE goals for a particular contract and/or the selection of a contract as a set-aside will be made by the DBE Liaison Officer in consultation with District staff at the planning stages of all federally funded contracts. The DBE Liaison Officer will take all necessary steps to facilitate SBE participation on federally-funded contracts. This may include recommendations to unbundle contracts to facilitate SBE participation prior to establishing SBE goals or identifying set-aside contracts for MSBEs. Once a contract has been identified as a potential SBE contract it will be the responsibility of the sponsoring department and the DBE Liaison Officer to determine whether the contract will be set aside for MSBEs or whether SBE goals will be set.

F. Setting SBE Goals

SBE goals will only be established on contracts that have specific subcontracting opportunities identified by the DBE Liaison Officer. The District is not required to establish a contract-specific SBE goal for every prime contract with subcontracting opportunities. Initially, the District will use the Availability and Utilization Study data regarding DBE availability in the market area as a proxy for SBE availability in the market area. This data will then be adjusted based upon the following considerations: the full range of activities in the proposed contract; the availability of SBEs as subcontractors in the types of work involved in the performance of the proposed contract, based on the number of certified SBE firms contained in the District's SBE database; and any other relevant criteria.

Any SBE goal will be expressed as a percentage of the overall bid or agreement amount for the contract or agreement and will be set forth in the contract specifications. Contracts with an established SBE goal may also be subject to DBE goals, in accordance with the District's DBE program. In the event that a DBE goal and an SBE goal are established on the same contract, the aggregate of the DBE goal and SBE goal cannot exceed the availability of SBEs willing and able to perform the work items in the BART market area.

Each solicitation for which a SBE contract goal has been established will require the bidders to submit the following information:

1. The names and addresses of SBE firms that will participate in the contract;
2. A description of the work that each SBE will perform;
3. The dollar amount of the participation of each SBE firm;
4. Written documentation from the bidder regarding its commitment to use SBE subcontractors (or prime contractors) whose participation the bidder submits to meet a contract goal;
5. Written confirmation from the SBE that it is participating in the contract as provided in the bidder's commitment; and
6. If the SBE contract goal is not met, evidence of good faith efforts to meet the goal.

The District will verify all information submitted by a bidder for completeness and accuracy prior to award. The recommendation for award will be based on an evaluation of the criteria set forth below and will be reached in accordance with the District's procedures applicable to specific types of contracting activity. No bidder will be recommended for award unless the bidder has met the contract-specific SBE goal or has made sufficient good faith efforts to do so.

G. Identifying MSBE Set-aside Contracts

The DBE Liaison Officer will identify contracts that qualify for MSBE set-asides in conjunction with the sponsoring department. Contracts are eligible for inclusion in the MSBE set-aside program if the engineer's estimate, or any other applicable estimate made by District staff, determines that the contract values will not exceed the following:

1. \$3 million for construction contracts
2. \$6 million for professional services contracts
3. \$3 million for procurement and other services contracts.

MSBE set-aside contracts are not eligible for SBE contract goals, although MSBE firms are encouraged to include other MSBE and SBE firms as subcontractors. Additionally, contracts identified as MSBE set-aside contracts are not eligible for DBE participation goals. Accordingly, no SBE or DBE goal will be established for any contract selected as an MSBE set-aside contract. However, any contract awarded to an MSBE who is also a DBE, or any subcontracts awarded to DBEs on an MSBE set-aside contract, will be counted towards the District's overall DBE goal as race and gender neutral DBE attainment, in a manner consistent with FTA regulations.

Brokers, manufacturer's representatives and any other firms who do not qualify as regular

dealers are ineligible to participate on MSBE set-aside contracts.

An MSBE's NAICS codes assigned during the certification process shall determine that firm's eligibility to bid or propose on a contract identified as an MSBE set-aside contract. The District will identify all applicable NAICS codes in the contract documents. Notwithstanding any other work the firm may perform, MSBEs shall only be eligible to propose on MSBE set-aside contracts where the firm's NAICS code(s) corresponds to at least one of the NAICS code(s) identified by the District in the set-aside contract. In addition, all MSBE firms must meet all applicable contract, licensing and legal requirements to bid or propose on contracts designated as an MSBE set-aside.

Additionally, the District will identify the category of work that the set-aside contract corresponds to (construction, professional services or procurement). Notwithstanding any other categories of work the firm may perform, an MSBE must meet the applicable category size standards established by this program in order to propose on an MSBE set-aside.

An MSBE prime contractor must self-perform a minimum portion of the Scopes of Work on an MSBE set-aside contract. The minimum percentage will be decided on a contract-by-contract basis.

H. The Contractor's Obligations under the SB Elements

In contracts and agreements with an SBE subcontracting participation goal, the Contractor shall take all reasonable steps to ensure that its SBE subcontractors or subconsultants are able to successfully perform their subcontract responsibilities.

I. Good Faith Efforts

Good faith efforts are those that, given all relevant circumstances, a bidder actively and aggressively seeking to meet the SBE goal would make. The bidder must show that it took all necessary and reasonable steps to achieve an SBE goal or other requirement of this part, which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient SBE participation, even if they were not fully successful. Only those efforts made prior to Bid opening will be considered for evaluation of good faith efforts. Each bidder is strongly encouraged to attend the pre-bid meeting listed by the District in the invitation to bid. The meeting is intended to cover the SBE program requirements for the Contract, to inform SBEs of subcontracting opportunities, and to provide an opportunity for bidders to meet and/or solicit subcontractors. Regardless of whether a bidder attends the meeting, the bidder assumes responsibility for being informed and complying with the SBE requirements.

In determining whether good faith efforts have been made, the District will consider, on the basis of documentation timely submitted by the bidder, the quality, quantity, and the 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 SBE participation sufficient to meet the SBE contract goal. Mere pro forma efforts are not good faith efforts to meet the SBE contract requirements. Any bidder failing to meet or exceed a SBE goal shall be required to submit all documentation of their good faith efforts within ten (10) working days of the bid or proposal submission

deadline.

Only steps taken by the bidder (as opposed to those taken on the bidder's behalf by a third party) will be considered. The steps listed below are reflective of good faith efforts taken by a bidder actively and aggressively seeking to meet the goal. The steps listed below are reflective of good faith efforts taken by a bidder actively and aggressively seeking to meet the SBE goal.

The District considers each of the listed steps particularly significant in evaluating a bidder's good faith efforts.

1. A bidder's failure to attend the pre-bid meeting will be considered adversely by the District in assessing good faith efforts.
2. It is the responsibility of the bidder to identify potential categories of work where subcontracting opportunities exist on a contract-by-contract basis. Additionally, the bidder must identify appropriate SBE firms who are capable of and certified to perform the categories of work identified in this analysis of subcontracting opportunities. Failure by a bidder to conduct and document this analysis will be considered adversely by the District in assessing good faith efforts. As used herein, "appropriate" refers to those firms who have been certified by the District to perform any category of work to be subcontracted.
3. No fewer than 21 days prior to the bid opening date, a bidder will have in place advertisements soliciting sub-bids on the Contract from SBEs. If, due to the bidding schedule established by the District, 21 days are not available, advertisements for a shorter reasonable period of time are acceptable. Such advertisements will refer only to bids for the District's contract and will specify the categories of work for which subcontracting opportunities exist for the District's contract. The advertisements will be placed in three or more paid daily or weekly trade association newspapers or other trade focus publications or media reasonably expected to reach SBE firms. The advertisements will be in publications or media that can reasonably be expected to reach both women and minority SBE firms that are likely to bid on this Contract.
4. A bidder will solicit sub-bids by mailing registered or certified letters to SBE firms qualified to perform those categories of work which the bidder is willing to subcontract. Solicitation letters will be mailed no fewer than 21 days prior to the bid opening date. If, due to the bidding schedule established by the District, 21 days are not available, a mailing providing a shorter reasonable period of notice is acceptable. The letters will be mailed to no fewer than 10 appropriate certified or SBE firms for each category of work sought to be subcontracted, or to a number of such firms equal to 100% of the SBEs listed for each such category of work in the District's SBE Database, whichever is less.

The letters to certified SBE firms will:

- a. Clearly identify portions of the work, which the bidder is willing to have performed by subcontractors, and offer to break down any portion of the work into economically feasible units in order to facilitate SBE participation.
- b. Identify if there is a bond waiver requirement for subcontractors for this contract and the specific dollar value of subcontracts exempt from bonding requirements.
- c. Offer assistance with regard to bonding requirements and insurance requirements, where applicable, and/or financing (e.g., lines of credit), specifying the type of assistance that the bidder is offering. Assistance may include, but is not limited to the following:
 - i. Contacting bonding and/or insurance companies on behalf of SBEs.
 - ii. Arranging with sureties incremental or phased bonding for the SBEs.
 - iii. Paying for the cost of the bond or insurance.
 - iv. Waiving bond or other requirements.
 - v. Referring SBEs to Business Development Centers or other resource agencies, which may assist SBEs in obtaining bonding, insurance, or lines of credit.
- d. Offer to make plans and specifications available to SBEs at reasonable hours for viewing, copying, or borrowing and provide a list containing the location of plan rooms.

Each bidder will use the BART SBE Database as a source of SBEs for solicitation. This Database is available on the BART website at www.bart.gov/ocr. In addition to the mandatory requirement to use the BART SBE Database, each bidder is encouraged to use the services of community organizations and/or contractors' groups in order to identify certifiable SBEs for work under the contract, as well as the CUCP DBE database.

5. A bidder will follow up initial solicitations of SBE sub-bids no later than 10 days after the mailing of the initial solicitation letters. The follow-up will be conducted by someone familiar with the contract and capable of answering questions from potential SBE subcontractors. If, due to the bidding schedule established by the District, 10 days are not available between the mailing of the solicitations and the bid opening date, follow-up shall occur within a shorter reasonable period of time. Follow up communication may be conducted via email. Such follow-up activity must be documented by telephone logs or other written documentation which provide, at a minimum, the following information:
 - a. Type of contact, e.g., telephone call, visit, email, letter.
 - b. Name and position of person who made contact on behalf of the bidder.
 - c. Name and address and/or email of firm contacted.
 - d. Name and position of person contacted, telephone number, and date of contact.
 - e. The response from the firm contacted with regard to its interest in submitting a sub-bid.
 - f. Email return receipts to document successful delivery to SBE subcontractors and, in the case of returned email correspondence, documentation from the

- mail server that the email was undeliverable.
- g. Follow-up, if any, to the assistance offered in the initial solicitation letter with regard to breakdown of work into economically feasible units, bonding, insurance, lines of credit, and plans and specifications.
 - h. For each SBE contacted who declined to bid, the reason provided by the SBE for declining to bid. If the reason cited relates to bonding, financing or insurance, the bidder must provide documentation describing in detail the assistance offered by the bidder to the SBE.
6. Each bidder will submit records of responses, proposals and/or bids received from SBEs, which will include, at a minimum, the following information:
- a. Names, positions, addresses and telephone numbers of all SBEs that responded to the bidder's solicitation.
 - b. All responses (including requests for assistance or information), proposals, or bids received, and whether such responses, proposals or bids were in writing or verbal. In the case of written responses, copies of such responses.
 - c. The date each response was received by the bidders.
7. Each bidder will submit documentation of its evaluation of proposals or bids received from SBEs. For each SBE that responded to the bidder's solicitation, the bidder will document the following:
- a. A summary of all communications and negotiations, if any, between the bidder and the SBE.
 - b. A description of specific assistance agreed to be provided by the bidder to the SBE with regard to bonding insurance, and/or obtaining plans and specifications.
 - c. If the bid was rejected, the reasons for rejection. The District may deem that a bidder has not made good faith efforts if SBE sub-bids have been rejected without adequate reason.
 - d. If the bid was rejected for any reason, a copy of the SBE's bid along with copies of all bids received by non-SBE firms for the same or similar scope of work.
 - e. If a SBE was rejected as unqualified, a description of the investigation conducted by the bidder prior to reaching the conclusion that the SBE was unqualified.
8. Each bidder will include in the information submitted any other efforts made to meet the SBE goal that are not listed above.
9. In addition to determining whether a bidder has taken the actions described above, the District will consider the following factors in determining whether good faith efforts have been met:
- a. A bidder's selection of a potentially certifiable firm instead of a District-certified SBE firm is a risk assumed solely by the bidder. If any such firm is

- determined not to be certifiable and there are District certified firms available for that work, the bidder's assumption that the firm is certifiable will not be taken into consideration for good faith efforts evaluation, and will not relieve the bidder from complying with good faith efforts requirements.
- b. The District will give considerably greater weight to the final decisions made by the bidder to subcontract to SBEs, than to statements in the bidder's solicitation letters indicating its intent to subcontract, or to the number of SBEs contacted.
 - c. Failure of a bidder to subcontract portions of work that it would otherwise perform itself, or to enter into a joint venture arrangement in order to meet the goal, will be considered adversely if the bidder otherwise cannot reasonably have been expected to meet the SBE goal.
10. If it appears to the District that the bidder has submitted all SBE documentation in compliance with these good faith efforts requirements, but has neither achieved the indicated percentage of SBE participation nor made sufficient good faith efforts to meet the goal, such bidder will be notified that its bid will be recommended for rejection and the reasons therefore. Within five (5) working days of such telephone and/or facsimile notification, the bidder may request a hearing. Such hearing will be held at the convenience of the District but no later than ten (10) working days after receipt of the request and in accordance with the Office of Civil Rights Hearing Procedures, copies of which are available upon request. Any bidder requesting a good faith efforts hearing will be responsible for half of the cost of the hearing. All hearings by the District shall be made by an outside independent hearing officer selected in accordance with District procedures. At such hearing, the bidder will bear the burden of demonstrating by preponderance of the evidence:
- a. Achievement of the percentage goal for SBE subcontract participation as of the date of bid opening, as documented in the bid; or
 - b. Sufficient Good faith efforts made prior to bid submission that, given all relevant circumstances, could reasonably have been expected to produce a level of SBE subcontract participation which meets the SBE goal.

J. Monitoring and Compliance

The Liaison Officer shall be responsible for establishing monitoring and compliance methods to ensure that the work awarded to SBEs or MSBEs is performed by SBEs or MSBEs, respectively. This program will be consistent with the monitoring and compliance program established for the overall DBE Program. All SBEs and MSBEs must perform a commercially useful function and must be certified to perform the work they have been awarded. Guidelines established for commercially useful function contained in 49 CFR Part 26.55, as it may be amended, will be used to determine if an SBE or MSBE is performing a commercially useful function.

K. Termination of SBE Firms

A contractor must immediately notify the Liaison Officer of an SBE's inability to perform, and must provide documentation to substantiate any claim of non-performance. In order to terminate an SBE, the contractor must receive prior, written approval from the District. Termination of SBEs shall only be for good cause, as determined by the District. Any

termination of a SBE must be essential to the prime contractor and may not be discretionary or advantageous. Nothing herein shall limit the ability of the District to terminate an MSBE consistent with the terms of the MSBE's contract or agreement with the District.

The contractor will be required to make good faith efforts to substitute the defaulting SBE subcontractor with another certified SBE. The contractor will be required to provide copies of new or amended subcontracts and a completed SBE certification application form for each firm seeking to be certified as a new SBE.

L. Failure to adhere to SBE requirements

The failure of a contractor, supplier, or consultant, or subcontractor, where applicable, to adhere to any of the requirements of the SB Elements shall constitute a material breach of the contract or agreement and may result in BART terminating the contract or agreement or imposing appropriate sanctions. Among other things, BART may withhold payments or portions of payments to the contractor, supplier, or consultant or undertake other enforcement measures due to the failure of the contractor, supplier, or consultant or where applicable, the subcontractors, to comply with the SBE subcontract participation requirements. Such payments withheld will be released once the contractor, supplier, or consultant or its subcontractors, conform to the requirements of the SB Elements.

Subcontractor Issue Resolution Process

Maximum Duration Days	Action		Project Representative	Office of Civil Rights Rep
10	Assess merit Resolve or send to RE	Subcontractor Notification	Support as needed	OCR Staff
5	Resolve or escalate	Written Assessment by OCR Staff	Resident Engineer	OCR Staff
5	Resolve or escalate If escalation, initiate Ombudsperson Investigation	Alert Notice	Project Manager	DBE Manager
5	Resolve or escalate	Alert Notice & Ombudsperson Investigation & Report	Project Group Manager	Department Manager
5	Resolve – notification to GM	Alert Notice & OMB Report	AGM	DBE Liaison Officer
				General Manager

Form for Appendix G:

**SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT
Alert Notice**

Office of Civil Rights

Date: _____ Notice Number: _____ Contract No. _____

Prime Contractor: _____ M/S/DBE Subcontractor or Supplier: _____

Description of Issue (s):

Parties Involved: Name: Address: Telephone:

Contractor/Subcontractor/Supplier: _____
M/S/DBE Subcontractor or Supplier: _____
Resident Engineer: _____
Project Manager: _____
OCR Staff: _____

Action Recommended:

Project Manager *Date*

Office of Civil Rights *Date*

Follow-up and Close Out:

Appendix I: Mentor-Protégé Program

A Mentor-Protégé Program implemented by BART is an optional program which, when implemented, will adhere to 49 CFR Part 26.35 and Part 26 Appendix D-Mentor Protégé Program Guidelines. BART's Mentor-Protégé Program (M-P Program) will be separate from any DBE business development plan. The objective of the M-P Program is to build up or enhance the capacity of a Protégé firm through support provided by the Mentor firm. A Protégé firm may be used for up to half of a Mentor firm's DBE goal. The following procedures will be used in implementing the M-P Program.

1. Only firms certified as DBEs, MSBEs, or SBEs before they are proposed for participation in the M-P Program are eligible to participate in the federal portion of the M-P Program.
2. If a DBE Protégé's subcontract is larger than all of its previous or current contracts, the Mentor is only awarded DBE credit for the amount equal to the Protégé's otherwise largest contract.
3. The Mentor-Protégé relationship is based on a written Protégé Development Plan, which sets forth the objectives of the Mentor and Protégé, the length of the relationship, and the resources to be provided. The Protégé Development Plan will be submitted to the District OCR for review and approval.
4. DBEs participating in the M-P Program must continue to be independent business entities, as defined by the certification standards of the DBE Program.

Please refer to the following pages for full Mentor-Protégé Program details.



San Francisco Bay Area Rapid Transit District

Proposed Mentor-Protégé Program

Rev.5/10/2017
FTA Approved 8/22/2017

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I. Introduction

The San Francisco Bay Area Rapid Transit District (BART) seeks to provide business and technical development services to Disadvantaged Business Enterprises (DBEs), Small Business Entities (SBEs), and other small businesses (SBs) (hereinafter ‘small businesses’). To this end, BART’s Mentor-Protégé (M-P) Program will assist small businesses to become more proficient in their respective areas of work. The M-P Program will focus on increasing the technical capacity of small businesses, leading to the broadening of the base of their activity and their long term stability.

Under the terms of the Mentor-Protégé Agreement, an experienced firm (Mentor) provides assistance and training to a small business with limited experience (Protégé). Mentor firms are expected to help a Protégé firm gain technical and/or business management capacity to bid and perform as a subcontractor or a prime contractor on BART contracts. The common types of assistance that a Mentor may provide a Protégé include, but are not limited to, the following: business management, financial counseling, bonding, technical assistance, record keeping, scheduling, and BART’s engineering or construction requirements. The assistance provided to a Protégé is outlined in the Protégé Development Plan, as defined below.

Construction-based Mentor-Protégé

A Construction-based Mentor-Protégé Agreement is contract based and involves a prime contractor as Mentor – or in some cases an experienced 1st-tier subcontractor – and a small business subcontractor. The Mentor-Protégé Program is required on designated contracts at the discretion of BART’s Office of Civil Rights (OCR). Generally, the M-P Program will be applied on contracts larger than \$25 million. On USDOT-funded contracts, the Protégé subcontractors will include certified DBEs listed on the California Unified Certification Program (CUCP) online database for DBEs, <http://www.dot.ca.gov/ucp/GetLicenseForm.do>; and/or Small Business Entities (SBEs) certified as an SBE or Micro Small Business Entity (MSBE) by the District as listed on <https://www.bart.gov/about/business/ocr>. On non-federally-funded contracts, a Protégé subcontractor will be a certified Small Business (SB) or Disabled Veteran Business Enterprise (DVBE) listed on the State of California Department of General Services online database for SBs, <http://www.bidsync.com/DPXBisCASB>.

The Bid invitation or solicitation will specify whether a proposed Mentor-Protégé Agreement is required of the bidders, as well as the number of required Agreements, generally between 1 and 5. The proposed Protégé firm(s) will be a subcontractor(s) listed in the Bid. In Design-Build contracts, the protégé firms may also be added after award, once the design is substantially completed. In some larger contracts, the contractor will be encouraged to have one or more subcontractors be a Mentor to one or more of their lower tier subcontractors. The Bid invitation or solicitation will ask the bidders to describe how they will fulfill this requirement in their Mentor-Protégé Agreement.

BART is especially interested in Mentor-Protégé Agreements in industries or trades where it is hard to locate small businesses. On certain contracts, BART may specify in the Bid solicitation the Scope of Work for which a Mentor-Protégé Agreement is required.

Professional Services-based Mentor-Protégé

Professional Services Mentor Protégé Agreements, such as in Architectural and Engineering

Services, are voluntary and can be established for purposes beyond the scope of a BART agreement. BART partners with the CALTRANS District 4 CalMentor program. BART secures the participation of Protégé firms and potential Mentor firms and facilitates the Mentor-Protégé Agreement. Such Mentor-Protégé Agreements would generally be for one year although they can be extended by mutual consent. Protégé firms should be small businesses.

II. Definitions

Mentor: A Prime Contractor on a BART contract, or a 1st-Tier subcontractor of a Prime Contractor, who assists a subcontractor Protégé as part of a Mentor-Protégé Agreement. In Professional Services, a Mentor is not necessarily a Consultant or Sub-Consultant on a BART agreement.

Mentor-Protégé Agreement: On a Construction Contract, an agreement between a potential Mentor and potential Protégé that stipulates the conditions of the commitment to form a Mentor-Protégé Agreement. On a contract with a required Mentor-Protégé Agreement(s), each Bidder must submit a separate Mentor-Protégé Agreement Bid Form for each required Agreement. On a Design-Build Contract, the M-P Agreement is submitted at the same time as the Protégé Development Plan, at least sixty (60) days before the start of each Protégé's scope of work.

Mentor-Protégé Agreement Commitment: On a Design-Build Contract, a form where the Proposer commits to a Mentor-Protégé Agreement(s) upon award of the Contract. Proposers briefly describe how they would fulfill the Mentor-Protégé requirement. If a Protégé's scope of work is in the design phase of the contract, the Agreement Commitment will name the Protégé firm.

Mentor-Protégé: A structured association between a Mentor and Protégé in order to provide technical or business assistance to a Protégé firm.

Mentor-Protégé Coordinator: The person at either a Mentor firm or Protégé firm that acts as a contact point for the Mentor-Protégé Agreement and coordinates participation by the Mentor or Protégé in the M-P Agreement.

Potential Mentor: A Prime Contractor or 1st-Tier Subcontractor that is named in a Bidder's Mentor-Protégé Agreement, or Agreement Commitment Form in the case of Design-Build, that will become a Mentor if the Bidder is awarded the contract.

Potential Protégé: A Subcontractor that is named in a Bidder's Mentor-Protégé Agreement.

Protégé: A 1st or 2nd Tier Subcontractor on a BART contract with a required Mentor-Protégé Agreement, who receives technical or business assistance from the Mentor. On USDOT-funded contracts the Protégé will be a Disadvantaged Business Enterprise (DBE), Small Business Entity (SBE) as certified by BART, or Micro Small Business Entity (MSBE) as certified by BART. On non-federally-funded contracts the Protégé will be a Small Business (SB) as certified by the State of California Department of General Services. In Professional Services M-P Agreements, a Protégé is not necessarily a Subconsultant on a BART agreement.

Protégé Development Plan: A guide for a Mentor-Protégé Agreement; in Construction or Design-Build contracts, created at least 60 days prior to the start of the Protégé firm's scope of work, that lists the objectives and the planned activities that will help attain the objectives. For Professional Services M-P Agreements, the Protégé Development Plan (PDP) will be

completed at the first meeting of the Mentor and Protégé.

Protégé Initial Form: A form that the Protégé fills out post-award but prior to the creation of the PDP in order to guide the development of a PDP. For Professional Services M-P Agreements, the Protégé Initial Form will be completed at the first meeting of the Mentor and Protégé, immediately prior to the completion of the PDP.

Quarterly Report: A report that the Mentor prepares and submits to BART each quarter of the M-P Agreement. The Protégé may participate in creating the Quarterly Report.

III. Construction: Required Contracts

BART's Office of Civil Rights (OCR) will designate which contracts require a Mentor-Protégé (M-P) Agreement, generally those estimated to be \$25 million or more. Any DBE Protégé, whether a 1st or 2nd Tier subcontractor, will be counted toward the prime contractor's DBE contract goal, subject to the DBE meeting the requirements in the contract.

Prior to the bid advertisement, OCR will decide how many M-P Agreements will be required on a contract. A contract may have between 1 and 5 required M-P Agreements, depending on its size. A M-P Agreement is considered fulfilled when the parties consistently meet for the length of the Protégé's subcontract or for at least 12 months, whichever is longer, and make progress toward or complete the objectives listed in the PDP (see Appendix A).

The contractor may encourage subcontractors to be Mentors. When subcontractors are Mentors, they are responsible for meeting the M-P Program requirements, including the PDP. Contractors shall include in the subcontracts with firms who will be acting as Mentors, provisions incorporating the M-P Program requirements. The prime contractor will be required to assist BART in ensuring compliance with the M-P Program requirement by subcontractors acting as Mentors.

Design-Build Contracts

The proposal solicitation may specify how many M-P Agreements are required for each phase of the Design-Build contract. Each Proposer will be required to submit a Mentor-Protégé Agreement Commitment form which will name the Mentor and their M-P coordinator and discuss the Mentor's strategy for the M-P Agreement. Among other things, the Proposers will be required to describe the phase and tier of the M-P Agreement(s). If Protégé firms have a scope of work in the design phase of the Design-Build contract, they must be named in the M-P Agreement Commitment form; otherwise they must be named no later than 90 days before the start of their scope of work and the Mentor and Protégé must complete a Protégé Development Plan, along with an M-P Agreement, no later than 60 days prior to the start of the Protégé's scope of work.

IV. Mentor Responsibilities

The Mentor-Protégé Program creates opportunities for Mentor firms and individuals to give back to the community, while also building on their own business practices as they help a Protégé. It will also give Mentors the opportunity to build trusting relationships with subcontractors that could be useful in subsequent contracts. The M-P Program encourages business relationships that foster new opportunities for both Mentor and Protégé.

For Construction contracts, the Mentor and Protégé should meet monthly or as specified by BART.

For Professional Services Mentor-Protégé relationships, the Mentor and Protégé should meet bi-monthly or as specified by BART. A Mentor firm is expected to have a M-P Coordinator who is responsible for coordinating the M-P Agreement, reporting to BART, and serving as the main contact for BART and the Protégé. For professional services M-P Agreements, the Mentor and Protégé would be expected to attend CALTRANS' quarterly CalMentor meetings.

The Mentor's experience should help Protégé(s) in various ways, including:

1. Identify any weaknesses in the Protégé's financial operations, business planning, project management, or construction/professional practices;
2. Respond to any weaknesses that can be addressed by the M-P Agreement, with the Mentor's own resources;
3. Identify the professional services, such as accounting, banking, insurance, legal, etc., that could help address the weaknesses; and
4. Identify any seminars or other educational programs that a Protégé should participate in.

Some contracts will have designated funds to reimburse Mentors for expenses related to outside resources provided for the Protégé. In other cases, the resources of BART's Small Business Supportive Services (SBSS) may be utilized to support Mentors and Protégés. Below are three examples of the type of assistance a Mentor can provide. Generally, the M-P program emphasizes the first type. The examples discussed below are not meant to be exhaustive.

1. **Technical Assistance** - The Mentor may provide guidance on technical on-the-job skills. For construction Mentor-Protégé Agreements, this may include handling BART's approvals and submittals, scheduling, permits, construction techniques, bidding, plan interpretation, estimating, and OSHA safety requirements. For professional services Mentor-Protégé Agreements, topics may include BART's work plan process, specific engineering or construction management issues, and bidding and managing an agreement as a prime consultant.
2. **Management Assistance** - The Mentor may provide guidance on business planning, project management, cost record accounting, financing the work, record keeping, and the claims process. For construction contracts, this may also include prevailing wage determinations, loaning the supplies to help expand the Protégé's work with its forces, and managing project labor agreement requirements.
3. **Bonding** – On construction contracts, the Mentor may provide the Protégé with assistance by charging a reduced amount for a bond or not charging the Protégé(s) for the Subcontractor's bond. It is expected that after gaining experience in meeting the requirements to be bondable, the Protégé may have the ability to qualify for bonds for future projects independent of the Mentor.

V. Protégé Responsibilities

Protégés also have responsibilities. On USDOT-funded contracts and professional services Mentor-Protégé Agreements, the Protégé firms will include certified DBEs as listed by the California Unified Certification Program (CUCP) and Small Business Entities (SBEs) as certified by BART. A firm certified as a Micro Small Business Entity (MSBE) is presumed to be an SBE. On non-federally-funded contracts, a Protégé subcontractor will be a certified SB or DVBE

included in by the State of California Department of General Services' Small Business database.

A Protégé firm is expected to have an M-P Coordinator to lead the Protégé's efforts on the Protégé Development Plan and to be the contact person for BART and the Mentor. Protégés are required to attend all regularly scheduled meetings and to participate in creating the agenda for those meetings. Depending on the circumstances, the Protégé may:

1. Attend seminars and/or other educational programs;
2. Implement specific changes in the management or operation of its business; and
3. Request additional assistance.

In addition to meeting with its Mentor, Protégés are required to attend special M-P meetings organized by BART. The BART-sponsored meetings will offer workshops and/or opportunities for Protégés to discuss progress or achievements made on their Protégé Development Plan (see Appendix A). For professional services M-P Agreements, the Protégé would also be expected to attend CALTRANS quarterly CalMentor meetings.

VI. M-P Program Guidelines

The M-P Program Guidelines provide the framework for assisting participants towards becoming more proficient in their respective areas of work, which may lead to growth and business success:

1. For a USDOT-funded construction contract with a race-conscious DBE goal, DBE Protégés help meet the Contractor's DBE goal, based on the amount of the subcontract, but not for more than half of the Contractor's DBE goal, subject to fulfilling the requirements of the contract.
2. BART's Mentor-Protégé Program will be implemented in accordance with the regulations set forth in 49 CFR Section 26.35. BART will "not award DBE credit to a non-DBE Mentor firm for using its own Protégé firm for" (1) "more than one half of its [DBE] goal on any contract let by the recipient;" and (2) "more than every other contract performed by the Protégé firm." (A Protégé is not guaranteed any future work to come out of the Mentor-Protégé Agreement.)
3. M-P Agreements on Construction Contracts are contract-based: the M-P Agreement should last a minimum of one year or for the duration of the Protégé's subcontract, whichever is longer. The M-P Agreement may begin prior to the start of Protégé's subcontract in order to prepare the Protégé to fulfill its scope of work.
4. The Mentor and Protégé should complete and sign a Mentor-Protégé Agreement prior to carrying out any of the planned M-P activities. M-P Agreements on construction contracts should be signed and submitted as part of the bid. For Design-Build contracts, the M-P Agreement must be signed and submitted no later than 60 days prior to the start of the Protégé's scope of work. A sample M-P Agreement is included in Appendix A.

5. A Mentor-Protégé Agreement may be terminated prior to one year, or, on construction contracts, prior to the end of the Protégé's Subcontract, by mutual consent of the parties, or by BART upon the determination that:
 - a. The Protégé no longer meets the eligibility standards for certification as a DBE, SBE, or SB;
 - b. Either party has failed or is unable to meet its obligations under the PDP;
 - c. The Protégé is not attaining benchmarks to reach the objectives outlined in the PDP;
 - d. The Protégé has reached all the benchmarks for all the objectives in the PDP and the parties are not able to identify additional objectives; or
 - e. The PDP or provisions thereof are contrary to the requirements of federal, state or local laws or regulations, or otherwise contrary to BART policy.

On construction contracts, the termination of the M-P Agreement shall not impair other contractual obligations between the Mentor and Protégé. A terminated M-P Agreement may cause the Contractor to initiate another M-P Agreement. (See Item 6 of this Section VI of the Program Guidelines below.)

6. On construction contracts, BART will independently determine whether a Mentor-Protégé Agreement terminated prior to one year has fulfilled the contractual requirements. Generally, if the Agreement is terminated less than six months after it begins, the Contractor will be required to initiate another M-P Agreement in order to fulfill the M-P contractual requirements. A Contractor initiating a new M-P Agreement, following a previously terminated one, will need to complete, together with the new Protégé, a new M-P Agreement, a Protégé Initial Form, and a PDP, which will be submitted to BART for its review and approval.
7. The PDP should be submitted to BART for its review and approval. The PDP should be submitted to BART for approval after Award but no later than 60 days before the start of the Protégé's scope of work. For professional services Mentor-Protégé relationships, the PDP will be submitted to BART at the time of completing the proposed PDP. BART will review the PDP to ensure that it is acceptable. If BART determines that the M-P Program's requirements and/or the federal guidelines are not being followed, BART may terminate the M-P Agreement or request that the PDP be changed to make it acceptable.
8. The Mentor and Protégé should meet regularly for training, discussion, and other activities which help the Protégé to meet the objectives described in the PDP. During their regular meetings, the Mentor and Protégé should cover one or more of the following:
 - a. Review the items contained in the PDP;
 - b. Review existing barriers and identify any new barriers to the Protégé's success;
 - c. Identify activities that help to overcome barriers or to reach a benchmark;
 - d. Set new specific objectives for further improvement, and identify benchmarks that measure reaching the objectives, including a set of specific actions for the Protégé to take by the time of the next meeting;
 - e. Conduct training;

- f. Review the Protégé's business plan or together create one; or
- g. Review and discuss the Protégé's recent performance, and evaluate how it compares with earlier decisions and the Protégé's overall business plan.

The Mentor and Protégé on a Construction Contract are expected to meet monthly, or as directed by BART, and may meet at the job site. A Mentor and Protégé on a professional services M-P Agreement are expected to meet bi-monthly, or as directed by BART.

9. The Mentor is responsible for preparing a Quarterly Report for each Mentor-Protégé Agreement, with input from the Protégé, that is submitted to OCR. The Quarterly Report shall contain an explanation of how the Protégé firm has progressed, such as an update of progress on the PDP (objectives met, benchmarks met, new objectives, new barriers identified, etc.) and any other summary of work accomplished during the monthly meetings. A Quarterly Report form will be provided by BART. The Quarterly Report shall address the following:
 - a. Technical and/or management assistance provided by the Mentor;
 - b. A narrative describing the benefits and successes realized by the Protégé due to the Mentor's assistance in addressing the objectives of the Protégé, together with a description of any problems encountered, during the quarter; and
 - c. Any public or private contract awarded to the Mentor where the Protégé is utilized as a subcontractor, and the value of each such contract and subcontract; or any public or private contract or subcontract awarded solely to the Protégé, and the value of each such contract.

Quarterly Reports are intended to help participants and BART to assess the results of the M-P Program. The Quarterly Reports should also help the various parties clarify and strengthen their individual roles. The Quarterly Reports should help BART to strengthen the M-P Program as a whole.

10. A Protégé is allowed to have a second Mentor on a separate contract or in a separate program if the objectives in the two M-P Agreements are not in conflict.
11. Personnel and Equipment – For construction contracts, the Mentor may provide, in limited instances, skilled personnel if the personnel are under the direct supervision of the Protégé. Any loan of skilled personnel by the Mentor shall not exceed 10% of the value of the subcontract. The Mentor may also provide equipment if a written lease or rental agreement covers the equipment. Generally, rental or lease agreements will be reviewed by OCR for conformance with the M-P Program requirements and for consistency with average industry prices.
12. BART's OCR may arrange periodic meetings of all Mentor and Protégé firms. This meeting is expected to have components of training, information, networking, and program feedback. Mentor and Protégé firms will be expected to attend.

13. Professional services Mentors and Protégés are expected to attend the Caltrans Region 4 CalMentor quarterly M-P liaison meetings.
14. A Mentor shall not require a Protégé to have an exclusive bidding agreement contrary to 15 U.S.C. §§ 1, 2, 18, 45.
15. Generally Unacceptable Practices – Protégé subcontractors are not allowed to be middlemen or passive conduits not in accord with standard industry practices or which serve no commercially useful function. Arrangements in which a Protégé subcontractor is acting essentially as a broker are not permitted. The M-P Agreement shall not include any terms that limit the Protégé owner's control and management of the Protégé firm.
16. If a 1st-tier subcontractor is a Mentor it is responsible for the reporting and meeting requirements described herein, including the PDP. Contractors shall include in the subcontracts with firms who will be Mentors, provisions incorporating the M-P Program requirements.

VII. Construction: Bidder's Mentor-Protégé Agreement (Pre-Award)

On a construction contract with a Mentor-Protégé requirement, each bidder, as part of its bid package, shall prepare a Mentor-Protégé Agreement, signed by both the Mentor and the Protégé. On contracts that require more than one Mentor-Protégé Agreement, each Agreement will need to be submitted separately. A subcontractor who will be a Mentor to one of their lower tier subcontractors will be required to complete a M-P Agreement that is submitted by the bidder.

On a design-build contract with a Mentor-Protégé requirement, the Proposers will complete a M-P Agreement Commitment that only the Proposers sign. Post-award and no later than 60 days before the start of a Protégé's scope of work on the Design-Build contract, the Mentor and Protégé shall sign and submit a M-P Agreement.

The M-P Agreement should provide an assurance that if resources of the Mentor are utilized by the Protégé in the performance of the subcontract, the resources must be separately identified, accounted for, and compensated directly by the Protégé to the Mentor. If the Mentor makes a financial investment in the Protégé firm, the M-P Agreement should provide an assurance that the Protégé will continue to perform a commercially useful function and the owner(s) of the Protégé firm will maintain majority ownership of its firm as well as day to day control. (See 49 CFR 26.5(1) and (2) (DBE) and 49 CFR 26 App. D (C)).

For construction contracts, the M-P Agreement should include the following information:

1. The name and contact information for the Mentor's M-P Coordinator. If subcontractors are Mentors, there could be multiple M-P Coordinators, one for each Mentor firm.

2. For each Protégé firm, name of the firm; the name and contact information for the M-P Coordinator; a brief description of its contractual Scope of Work; the scheduling of its contractual Scope of Work; and its DBE, SBE, SB, or DVBE certification status, as applicable.
3. For each Protégé firm, a description of the general focus of the M-P Agreement, such as business development or technical skills.
4. Whether the mentoring will be carried out by the Mentor's own personnel or by outside resources, such as classes. All resources to be offered by the Mentor should be described, such as assistance in obtaining financing, insurance, bonding, enrollment in training, professional memberships, etc.

VIII. Protégé Development Plan (Post-Award)

For construction and Design-Build contracts, following award of a contract, each Mentor and Protégé identified in the Mentor-Protégé Agreement of the awardee, shall together develop a Protégé Development Plan (PDP), to be submitted to BART no later than 30 days before the start of the Protégé's scope of work (60 days in the case of Design-Build contracts). The PDP should be consistent with the M-P Agreement. For the professional services Mentor-Protégé relationships, the first meeting of the Mentor and Protégé should be the time when they together develop a PDP. A PDP is considered a dynamic document that changes as the M-P Agreement progresses. See Appendix A for an example. OCR staff may be available to help guide the creation of the PDP. The following guidelines should be considered in the development of the PDP:

1. For construction contracts, the Protégé should complete a Protégé Initial Form (Appendix B) at the time of award or signing of the subcontract, prior to completing a PDP. The Protégé Initial Form should guide the creation of the PDP. A copy of each Protégé Initial Form should be provided to OCR by the contractor. For Design-Build contracts, the Protégé should complete a Protégé Initial Form no later than 60 days before the start of their scope of work, along with the completion of the PDP.
2. For professional services-related M-P Agreements, the Protégé firm should complete a Protégé Initial Form prior to the first meeting and send the form to BART, which will forward it to the Mentor, if necessary. A PDP should be completed by the Mentor and Protégé together at their first M-P meeting.
3. The PDP should clearly set forth the objectives of the M-P Agreement. Objectives for successive stages of the PDP may be subsequently identified prior to each successive stage.
4. The PDP should describe barriers to reaching each objective and measurable benchmarks for overcoming barriers or for moving toward reaching an objective.
5. Objectives and benchmarks could be generated by an examination of the Protégé's business plan (if they have one). If the Protégé firm doesn't have a business plan, the development of a business plan should be one of the objectives.
6. The PDP may include training to be provided by the Mentor to the Protégé. Such training could include business planning, record keeping, technical assistance, capital formation, loan packaging, financial counseling, bonding, bidding, and equipment utilization.

7. Other resources to be provided by the Mentor should be part of the PDP, including pricing arrangements if supplies, equipment, or personnel are provided. The PDP should identify the specific objective to be met by the provision of these resources.
8. The PDP may be modified by the Mentor and Protégé to meet objectives or to create new objectives.

Appendix A

Mentor-Protégé Agreement, Part 1

Template: Construction (Pre-Award), Design-Build (Pre- or Post Award)

_____ (firm name), Mentor, and _____ (firm name), Protégé, agree to enter into this Mentor-Protégé Agreement for the purpose of building a professional association and strengthening the business and technical capacity of the Protégé firm.

The Mentor and Protégé agree that they will develop a Protégé Development Plan (PDP) and will meet in order to advance toward the objectives outlined in the PDP. These meetings will be conducted monthly or as directed by BART. The parties agree to follow the PDP and update it as necessary. The parties also agree to attend or make efforts to attend all Mentor-Protégé meetings arranged by BART.

This Agreement should continue for as long as the Protégé is a Subcontractor on BART Contract _____ (Contract), expected to continue until _____. The Mentor-Protégé Agreement may also be ended by mutual consent. The parties understand that the Protégé is not guaranteed any future work as a result of the Mentor-Protégé Agreement.

The Protégé must serve a commercially useful function on the Contract and may not serve as a middleman, passive conduit, or broker. The Mentor-Protégé Agreement should not limit the ownership or control by the Protégé's owner of the Protégé firm. At all times during the term of the Mentor-Protégé Agreement, the Mentor firm shall not have a majority ownership stake in the Protégé or partial or full control of the Protégé firm. If the Protégé firm is sold during the term of the Agreement, the Mentor-Protégé Agreement is considered to be terminated.

The Mentor may provide, in limited instances, skilled personnel and equipment if a written lease or rental agreement covers the equipment and the personnel are under the direct supervision of the Protégé. Any loan of skilled personnel by the Mentor should not exceed 10% of the value of the Subcontract.

[On USDOT-funded contracts] The Protégé firm shall not fulfill more than half of the Contractor's DBE goal for this Contract. The Protégé's Subcontract is not of a substantially greater value than prior contracts performed by the Protégé.

The parties hereby agree to this statement.

Mentor

Date

Protégé

Date

Bidder (if different than the Mentor)

Date

Mentor-Protégé Agreement, Part 2

Name of Mentor Firm: _____

Name of M-P Coordinator at Mentor Firm: _____

Email of M-P Coordinator: _____

Name of Protégé Firm: _____

DBE/SBE/SB/DVBE Certification(s): _____

Name of M-P Coordinator at Protégé Firm: _____

Email of M-P Coordinator at Protégé Firm: _____

Scope of Work of Protégé Firm: _____

Approximate Start Date of the Protégé Firm's Subcontract (Month of Contract): _____

General Focus of the Mentor-Protégé Agreement: _____

Please summarize in 1 to 3 sentences the proposed plan to support the Protégé, including whether mentoring will be carried out by the Mentor's own personnel, and also including the name of any proposed outside resources to be utilized:

Appendix A

MENTOR-PROTÉGÉ AGREEMENT COMMITMENT FORM

[TEMPLATE] – Design Build Contracts (Pre Award)

Name of Mentor Firm:

Name of M-P Coordinator at Mentor Firm: _____

Email of M-P Coordinator:

Phase of Contract of the Protégé Firm's Subcontract:

[Complete if Protégé's Scope of Work is during the Design phase; otherwise do not complete]

Name of Protégé Firm: _____

DBE/SBE/SB/DVBE Certification(s):

Name of M-P Coordinator at Protégé Firm: _____

Email of Protégé Coordinator:

Scope of Work of Protégé Firm:

General Focus of the Mentor-Protégé Agreement:

Please describe in 1 to 3 sentences the proposed strategy to fulfill the Mentor-Protégé requirement, including whether mentoring will be carried out by the Mentor's own personnel, and also including the name of any proposed outside resources to be utilized:

I hereby agree to complete the requirements of the Mentor-Protégé Program upon award of this Contract.

Bidder

Date

Mentor-Protégé Agreement

Professional Services

_____ (firm name), Mentor, and _____ (firm name), Protégé, agree to form a Mentor-Protégé Agreement for the purpose of building a professional relationship and strengthening the business and technical capacity of the Protégé firm.

Appendix A

The Mentor and Protégé agree to meet in order to advance toward the objectives outlined in the Protégé Development Plan (PDP). These meetings will happen bimonthly or as directed by BART. The parties agree to follow the PDP and update it as necessary. The parties also agree to attend or make efforts to attend all Mentor-Protégé meetings arranged by BART.

This Agreement should continue for two years or longer if mutually agreeable, with BART's consent. The Mentor-Protégé Agreement may also be terminated by mutual consent. The parties understand that the Protégé is not guaranteed any future work to come out of the Mentor-Protégé Agreement.

The Mentor-Protégé Agreement should not limit the ownership or control by the Protégé's owner of the Protégé firm. At all times during the Mentor-Protégé Agreement, the Mentor firm shall not have a majority ownership stake in the Protégé or partial or full control of the Protégé firm. If the Protégé firm is sold during this relationship, the Mentor-Protégé Agreement is considered to be ended.

The Mentor may provide, in limited instances, skilled personnel and equipment if a written lease or rental agreement covers the equipment and the personnel are under the direct supervision of the Protégé.

The parties hereby agree to this statement.

Mentor

Protégé

Date

Date



Protégé Initial Form (Construction) (Post Award)
Mentor-Protégé Program (please return a copy to BART OCR)

Business Information

1. Name of Firm: _____ Date: _____
2. Name of CEO: _____ Name of M-P Coordinator: _____
3. Firm's Address: _____
4. Phone Number: _____ Fax Number (opt.): _____
5. E-mail address: _____
6. Firm Website (if any): _____
7. Industry/Trade of Business: _____
8. Scope of Work in Subcontract: _____
9. Status of Business Certification Check all that may apply.

() DBE () BART M/WBE () BART SBE/MSBE () SB (Calif. DGS)
 () DVBE (DGS)
 Other _____

10. Needs Assessment, check the categories where you need assistance:

- | | |
|---|--|
| <input type="checkbox"/> Business Plan
<input type="checkbox"/> Strategic Action Plan
<input type="checkbox"/> Market Research
<input type="checkbox"/> Marketing Plan
<input type="checkbox"/> Marketing Materials
<input type="checkbox"/> Website Development
<input type="checkbox"/> Organizational Development
<input type="checkbox"/> Operations Assessment
<input type="checkbox"/> Office computer software
<input type="checkbox"/> Technical computer software
<input type="checkbox"/> Banking Services
<input type="checkbox"/> Payroll Administration
<input type="checkbox"/> Personnel Management
<input type="checkbox"/> Prevailing Wage Requirements | <input type="checkbox"/> Cost Accounting
<input type="checkbox"/> Prompt Payment Procedures
<input type="checkbox"/> Bonding & Insurance
<input type="checkbox"/> Obtaining Permits/Subcontracts
<input type="checkbox"/> Scheduling & Purchasing
<input type="checkbox"/> Project Planning & Scheduling
<input type="checkbox"/> Construction Equipment & Materials
<input type="checkbox"/> Pre Award & Bid Assessment
<input type="checkbox"/> Blueprint Reading
<input type="checkbox"/> Job Cost & Work In Progress
<input type="checkbox"/> Preparing Job Orders & Changes
<input type="checkbox"/> Information Systems Consulting
<input type="checkbox"/> Records & Contract Management
<input type="checkbox"/> Technical work related |
|---|--|

Other _____

11. Name of Other Protégé Personnel Who May Participate in Mentor-Protégé Activities:

Name1 _____ Title1 in Protégé firm _____



Name2 _____ Title2 in Protégé firm _____

12. Do you have a Business Plan? Yes No (if yes, provide to Mentor)



Protégé Initial Form (Professional Services)
Mentor-Protégé Program (please return a copy to BART OCR)

Business Information

1. Name of Firm: _____ Date: _____
2. Name of CEO: _____ Name of M-P Coordinator: _____
3. Firm's Address: _____
4. Phone Number: _____ Fax Number (opt.): _____
5. E-mail address: _____
6. Firm Website (if any): _____
7. Industry/Trade of Business: _____
8. Scope of Work in Subcontract: _____
9. Status of Business Certification Check all that may apply.

() DBE () BART M/WBE () BART SBE/MSBE () SB (Calif. DGS)
 () DVBE (DGS)
 Other _____

10. Needs Assessment, check the categories where you need assistance:

- | | |
|--|---|
| <input type="checkbox"/> Business Plan
<input type="checkbox"/> Strategic Action Plan
<input type="checkbox"/> Market Research
<input type="checkbox"/> Marketing Plan
<input type="checkbox"/> Marketing Materials
<input type="checkbox"/> Website Development
<input type="checkbox"/> Organizational Development
<input type="checkbox"/> Operations Assessment
<input type="checkbox"/> Office computer software
<input type="checkbox"/> Technical computer software
<input type="checkbox"/> Banking Services
<input type="checkbox"/> Payroll Administration
<input type="checkbox"/> Personnel Management/Training
<input type="checkbox"/> Prevailing Wage Requirements | <input type="checkbox"/> Cost Accounting
<input type="checkbox"/> Prompt Payment Procedures
<input type="checkbox"/> Bonding & Insurance
<input type="checkbox"/> Obtaining Permits/Subcontracts
<input type="checkbox"/> Scheduling & Purchasing
<input type="checkbox"/> Project Planning & Scheduling
<input type="checkbox"/> Pre Award & Bid Assessment
<input type="checkbox"/> Responding to BART Work Plans
<input type="checkbox"/> Information Systems
<input type="checkbox"/> Records & Contract Management
<input type="checkbox"/> Technical work related
<input type="checkbox"/> BART/Industry Relationship
<input type="checkbox"/> Building
<input type="checkbox"/> Bidding and Working as a Prime
<input type="checkbox"/> BART's Specification & Design
<input type="checkbox"/> System |
|--|---|

Other _____

11. Name of Other Protégé Personnel Who May Participate in Mentor-Protégé Activities:

Name1 _____ Title1 in Protégé firm _____

Name2 _____ Title2 in Protégé firm _____

12. Do you have a Business Plan? Yes No (if yes, provide to Mentor)

TEMPLATE PROTÉGÉ DEVELOPMENT PLAN

Objectives of the M-P Agreement

Objective 1:

Barriers:

Benchmark 1:

Benchmark 2:

Objective 2:

Barriers:

Benchmark 1:

Benchmark 2:

Objective 3:

Barriers:

Benchmark 1:

Benchmark 2:

Activity or Assistance Provided and Responsible Party	Start Date	End Date	Objective/Barrier/Benchmark
1.			
2.			
3.			
(May be more than 3.)			

Protégé Development Plan (Post Award)