



# San Francisco Bay Area Rapid Transit ID #1957 Disadvantaged Business Enterprise (DBE) Program

SUBMITTAL DATE: OCTOBER 08, 2024

OFFICE OF CIVIL RIGHTS

**Note:** This DBE Program has been updated to reflect the U.S. DOT's April 9, 2024 Final Rule Update. These updates are designed to enhance the effectiveness and compliance of our DBE Program and were implemented starting May 9, 2024.



# Statement of Policy



## Disadvantaged Business Enterprise Program Policy

The District's DBE Program is intended to ensure nondiscrimination on the basis of race, color, sex, or national origin in the award and administration of federally funded contracts.

### 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.

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.

### Implementation:

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 Director 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.

Any questions regarding this policy should be directed to:

**Rudy Garza**  
DBE Liaison Officer  
Office of Civil Rights  
2150 Webster Street, 4<sup>th</sup> Floor  
Oakland, CA 94612  
(510) 464-7194 or [rudy.garza@bart.gov](mailto:rudy.garza@bart.gov)

A handwritten signature in blue ink that reads "Robert M. Powers".

Robert M. Powers  
General Manager

6/14/2024

Date

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# 1. Subpart A – General Requirements

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## Section 26.1 Objectives

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

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## Section 26.3 Applicability

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BART, as a recipient of federal financial assistance from the Federal Transit Administration ("FTA") of the United States Department of Transportation ("U.S. 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 U.S. DOT, including those awarded by BART's Sub- recipients.

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

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## Section 26.5 Definitions

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BART adopts the definitions contained in Section 26.5 for its DBE Program. See [Appendix A](#).

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## Section 26.7 Non-discrimination Requirements

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BART will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR part 26 on the basis of race, color, sex, or national origin.

In the administration of the DBE Program, BART 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.

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## Section 26.11 Record Keeping Requirements

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### Uniform Report of DBE Awards or Commitments and Payments 26.11 (a)

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

### Reporting to U.S. DOT 26.11 (b)

BART will continue to provide data about the DBE Program to the FTA as directed.

### Bidders List 26.11 (c)

Pursuant to 49 CFR Section 26.11(c), BART will create and maintain a bidders list consisting of all firms bidding as prime contractors and subcontractors on federally funded projects. For every firm, the following information will be included: firm name, firm address including ZIP code, firm's status as a DBE or non-DBE, race and gender information for the firm's majority owner, NACIS code applicable to each scope of work the firm sought to perform in its bid, the age of the firm, and the annual gross receipts of the firm. BART will obtain the above information by requiring all prime contractors bidding on U.S. DOT-funded contracts to provide the above subcontractor information at the time of bid.

BART will maintain records documenting a firm's compliance with the requirements of this part. At a minimum, BART will keep a complete application package for each certified firm and all Declarations of Eligibility, change notices, and on-site visit reports. These records will be retained in accordance with BART's record retention requirements. Other certification or compliance related records will be retained for a minimum of three (3) years.

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## Section 26.13 Assurances

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BART shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any U.S. DOT-assisted contract or in the administration of its DBE Program or the requirements of 49 CFR Part 26. BART shall take all reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of all U.S. DOT-assisted contracts.

BART will include the following provisions in U.S. DOT-funded contracts, where appropriate.

### Nondiscrimination Assurance



All federally funded contracts executed by and between BART and Contractor shall include the following statement: "The contractor and its subcontractors shall not discriminate on the basis of race, color, national origin or sex in the performance of this contract. The contractor and subcontractors shall comply with the applicable requirements of 49 CFR Part 26 in the performance of the contract. Failure to comply with these requirements by the contractor is a material breach of the contract and may be subject to sanctions, including, but not limited to, withholding progress payments, assessing sanctions, liquidated damages, termination of the contract, and/or disqualifying the contractor from future bidding as non-responsive, as appropriate."

## 2. Subpart B - Administrative Requirements

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### Section 26.21 DBE Program Updates

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BART, as a recipient of federal financial assistance from the U.S. DOT, will continue to carry out this DBE Program until all funds from U.S. DOT financial assistance have been expended. BART will provide the U.S. DOT updates representing significant changes in the Program.

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### Section 26.23 Policy Statement

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BART's Policy Statement is elaborated on the first page of this program. The policy statement is also available on BART's website.

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### Section 26.25 DBE Liaison Officer (DBELO)

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#### A. Board of Directors

The Board of Directors are responsible for establishing DBE Program Policy.

#### B. General Manager

BART'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 Director of BART's Office of Civil Rights, Rudy Garza, has been designated by the General Manager as the DBELO, as referenced in 49 CFR Part 26.25. The DBELO 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 DBELO shall have adequate staff to administer BART's DBE Program and shall have direct and independent access to the General Manager.

The DBELO 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 BART, including the Office of the General Counsel, Procurement Office, Operations, the Office of Infrastructure Delivery and other departments which are responsible for making decisions relative to BART'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 DBELO 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 BART, the Board of Directors and FTA as needed;
8. Participating in the contract bid and award process including establishing contract- specific DBE goals where appropriate, reviewing contract specifications and engineer's estimate, 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 BART'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 BART's DBE Program.



#### **D. Procurement and Materials Management**

The Director of Procurement 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 BART's construction, procurement of goods and services. The Director of Procurement 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 with regard to legal issues pertaining to the DBE Program's compliance with federal regulations.

#### **F. Board Appointed Officers, Executive Staff, Department Directors and District Staff**

All Board of Directors appointed officers, executive staff, department directors and District staff are responsible for the implementation of the DBE Program in their respective areas of authority in coordination with the DBELO. The performance of the executive staff, department directors 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 BART and makes general recommendations on DBE/SBE policies and practices that impact DBE/SBE utilization and participation in District contracts.

#### **H. 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 BART. 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.

[\(See Appendix G\)](#)

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### **Section 26.27 DBE Financial Institutions**

Pursuant to 49 CFR Section 26.27, the DBELO 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 BART may reasonably utilize their services. BART will also encourage its prime contractors to use the services of DBE or minority financial institutions.

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### **Section 26.29 Prompt Payment Mechanisms**

#### **Prompt Payment**

All U.S. DOT funded contracts executed by BART and Prime Contractor shall 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 BART (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.”

### **Early Release of Retainage**

BART 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 DBEs, non-DBEs, and Contractor work that has been approved. Within thirty (30) Days after BART has made such payment, the Contractor shall release to any Subcontractor who has satisfactorily completed work covered by BART’s inspection and approval of retainage owed to the Subcontractor for such work. BART’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 the applicable contract book Supplementary Conditions Article, a Subcontractor’s work is satisfactorily completed when 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 applicable General Conditions Article. 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.

### **Prompt Payment and Retainage Monitoring**

BART will regularly monitor Contractor compliance with prompt payment and retainage provisions during the performance of the contract. Failure to comply with these provisions shall constitute a material breach of the contract and may result in BART taking appropriate corrective actions that may include, but are not limited to terminating the contract or agreement or imposing appropriate sanctions. For more information on BART’s process to resolve subcontractor issues [see Appendix G](#).

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## Section 26.31 CUCP DBE Directory

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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. BART 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 CUCP website: (<https://californiaucp.dbesystem.com>). The CUCP updates the directory by including additions, deletions, and other changes as soon as they are made. The DBE directory includes, but is not limited to, business name, business address, business telephone number, business website, and types of work (utilizing the North American Industry Classification System (NAICS) Codes) a DBE is eligible to perform.

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## Section 26.33 Overconcentration

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If BART 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 DBELO will develop appropriate measures to address the overconcentration. The DBELO 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;
1. Varying the use of contract-specific DBE goals;
2. Working with prime contractors to find and use DBEs in other industry areas.

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## Section 26.35 Business Development Programs

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BART has elected not to administer a Business Development Program as part of its overall DBE activities. However, BART has developed the following programs:

### **Mentor-Protégé Program (Construction)**

The objective of BART's Mentor-Protégé Program (Construction) is to build up or enhance the capacity of a Protégé firm through support provided by the Mentor firm. The program will focus on increasing the technical capacity of DBEs, leading to the broadening of the base of their activity and their long-term stability. The full details of BART's Mentor-Protégé Program (Construction) are provided in [Appendix I](#).

### **Mentor-Protégé Program (Professional Services)**

The objective of BART's Mentor-Protégé Program (Professional Services) is to increase the capacity of DBEs working or trying to work on BART Agreements. Mentor-Protégé Agreements can occur on specific FTA-funded Professional Services Agreements or outside of a BART Agreement. To incentivize prime participation in the program, on FTA-funded Professional Services Agreements with DBE Goals, BART may provide a credit towards the DBE goal for the successful completion of the program. Generally, the amount of DBE credit will be between 1% and 3%. The full details of BART's Mentor-Protégé Program (Professional Services) are provided in [Appendix J](#).

### **Business Advisory Council (BAC)**

The mission of the BAC is to advise the Director of the Office of Civil Rights at BART in that Office's efforts to ensure that Disadvantaged Business Enterprises, Small Business Entities, Minority Business Enterprises, Women-Owned Business Enterprises, Small Businesses, and Veterans are afforded opportunities to participate on District contracts and agreements. The council is comprised of non-employee volunteers representing the small business community as well as community-based organizations and/or trade organizations that represent small business interests within BART's five county service areas.

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## Section 26.37 Monitoring and Enforcement Mechanisms

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

1. BART will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that U.S. DOT can take the steps provided in 49 CFR Section 26.109.
2. BART 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.
3. BART will provide a monitoring and enforcement mechanism to verify that work committed to DBEs at contract award is actually performed by the DBEs. This will be accomplished by monitoring to ensure listed subcontracts are paid listed amounts, not illegally substituted and by conducting onsite Commercially Useful Function monitoring to ensure that the scope of work committed to the DBEs are actually being performed by the DBEs. This mechanism will include a written verification that BART has reviewed contracting records and monitored a project work site to ensure the counting of each DBE's participation is consistent with its function on the contract.
4. BART will also implement running tally mechanisms with respect to achieving its overall DBE goal and with respect to each DBE commitment. 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, via the project close out change order form provided by OCR.

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## Section 26.39 Small Business Element (SBE) Program

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In accordance with 49 CFR Section 26.39, BART will establish DBE Program Small Business Elements ("SB Elements") a sub part of the DBE Program. DBEs are Small Business Entities and thus including active and effective SB Element to its DBE Program will assist BART 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 BART's contracts. This includes, but is not limited to:

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

### **MSBE Set-Asides**

The DBELO will identify contracts that qualify for Micro Small Business Entity (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.

### **SBE Administration**

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

The DBELO will ensure that the SB Elements integrate with and complement BART's other race and gender-neutral DBE Program efforts. The DBELO shall work in conjunction with all Project Teams 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. To review BART's process to implement SB Element, [see Appendix H.](#)

## **3. Subpart C – Goals. Good Faith Efforts, and Counting**

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### **Section 26.43 DBE Set-asides or Quotas**

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BART will implement its DBE Program in good faith and shall not permit the use of quotas or set-asides that are race or gender conscious in its administration, except in limited and extreme circumstances, when no other method can be reasonably expected to redress egregious instances of discrimination.

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### **Section 26.45 Overall Goals**

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BART 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 BART anticipates expending in a three-year period covered by the triennial goal. A report outlining the steps and calculations used to establish BART'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.

BART'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 BART would expect absent the effects of discrimination. BART 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, BART 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.

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## Section 26.47 Goal Setting and Accountability

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If the awards and commitments shown on BART'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, BART 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 BART 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.

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## Section 26.49 Transit Vehicle Manufacturers Goals

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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. Alternatively, BART may establish project-specific goals for DBE participation in the procurement of transit vehicles from specialized manufacturers when a TVM cannot be identified.

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## Section 26.51 Meeting Overall Goals/Contract Goals

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### Race-Neutral Measures (26.51) (a-c)

BART 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 BART'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 BART's SB Element is open and available to all small businesses, including DBEs.

### **Contract Goals 26.51 (d-g)**

BART will monitor and adjust the use of contract-specific goals in accordance with 49 CFR Section 26.51. Contract goals will be used only on those federally-funded contracts that have subcontracting opportunities and where the findings of BART'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 BART's overall goal that is not projected to be met through race-neutral means.

Any DBE contract 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.

In any year in which BART projects meeting part of its goal through race-neutral means and the remainder through contract goals, BART will maintain and report to FTA data separately on DBE achievements in those contracts with and without contract goals, respectively.

For additional details regarding BART's goal setting process, see [Appendix C](#).

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## **Section 26.53 Good Faith Efforts Procedures**

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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 BART 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.

### **Information to be Submitted: 26.53 (b)**

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

1. The names and addresses of DBE's that will participate in the contract;
2. A description of work that each DBE will perform;
3. The dollar amount of each DBE's participation;

4. Written and signed documentation of commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
5. Written and signed confirmation from the DBE that it is participating on this contract as provided in the prime contractor's commitment. Each DBE listed to perform work as a regular dealer or distributor must confirm its participation according to the requirements of 49 CFR Part 26.53((c)(1); and
6. If the contract goal is not met, evidence of good faith efforts.

### **Evaluation of Good Faith Efforts: 26.53 (a) & (c)**

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. BART 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.

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

### **Good Faith Efforts Assessment**

In addition to determining whether a bidder has taken the actions described above, BART 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. BART 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.

### **Hearing On Good Faith Efforts Determination 26.53 (d)**

If it appears to BART 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 BART 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 BART 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.

### **Design-Build: 26.53 (e)**

BART will act in accordance with 49 CFR part 26.53 (e) regarding design-build contracting situations in which the recipient solicits proposals to design and build a project with minimal-project details at time of letting, the recipient may set a DBE goal that proposers must meet by submitting a DBE Open-Ended DBE Performance Plan (OEPP). To be considered responsive the OEPP must have a commitment to meet the goal. The OEPP must also include the types of subcontracting work they anticipate to subcontract to DBEs, an estimated time frame in which actual DBE subcontracts would be executed and the anticipated dollar amount of such subcontracts. Once the design-build contract is awarded, BART will provide ongoing monitoring and oversight to evaluate whether the design-builder is using good faith efforts to comply with the OEPP and schedule. BART and the design-builder may agree to make written revisions of the OEPP throughout the life of the project, e.g., replacing the type of work items the design-builder will solicit DBEs to perform and/or adjusting the proposed schedule, as long as the design-builder continues to use good faith efforts to meet the goal.

### **Good Faith Efforts when a DBE is Terminated/Substituted on a Contract 26.53 (f)**

Prime contractors shall utilize the specific DBEs/SBEs 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 BART. Unless BART consent is provided, the contractor shall not be entitled to any payment for work or material for which a DBE/SBE is listed unless that work is performed or supplied by the listed DBE/SBE. BART may provide such written consent only if the prime contractor has good cause to substitute or terminate the listed DBE/SBE firm. Good cause includes the following circumstances:

1. The listed DBE/SBE subcontractor fails or refuses to execute a written contract;
2. The listed DBE/SBE 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/SBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor;
3. The listed DBE/SBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements.
4. The listed DBE/SBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;

5. The listed DBE/SBE 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;
6. BART has determined that the listed DBE/SBE subcontractor is not a responsible contractor;
7. The listed DBE/SBE subcontractor voluntarily withdraws from the project and provides to BART written notice of its withdrawal;
8. The listed DBE/SBE is ineligible to receive DBE/SBE credit for the type of work required;
9. A DBE/SBE owner dies or becomes disabled with the result that the listed DBE/SBE contractor is unable to complete its work on the contract;
10. Other documented good cause that BART determines compels the termination of the DBE/SBE subcontractor. Provided, that good cause does not exist if the prime contractor seeks to terminate a DBE/SBE it relied upon to obtain the contract so that the prime contractor can self- perform the work for which the DBE/SBE contractor was engaged or so that the prime contractor can substitute another DBE/SBE or non-DBE/SBE contractor after contract award. In the event that BART 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.

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

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

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

If a DBE/SBE subcontractor is terminated, substituted, or fails to complete its work on the contract for any reason, BART will require the prime contractor to substitute the terminated DBE/SBE subcontractor for another DBE/SBE subcontractor or make good faith efforts to do so. These good faith efforts shall be directed at finding another DBE/SBE to perform at least the same amount of work under the contract as the DBE/SBE that was terminated, to the extent needed to meet the contract goal established. The good faith efforts shall be documented by the contractor. If BART 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 BART 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/SBE firms put forward by offerors in negotiated procurements.

For additional good faith efforts procedures see [Appendix F](#).

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## Section 26.55 Counting DBE Participation

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BART will count DBE participation toward overall and contract goals as provided in 49 CFR 26.55.

## 4. Subpart D – Certification Standards

### Section 26.61 – 26.73 Certification Process

BART and the other certifying members of the California Unified Certification Program (CUCP) will use the certification standards of 49 CFR, Subpart D of Part 26 and the certification procedures of Subpart E of Part 26 to determine the eligibility of firms to participate as DBEs in DOT-assisted contracts. To be certified as a DBE, a firm must meet all certification eligibility standards. BART will make its certification decision based on the facts as a whole.

For information about the certification process or to apply for certification, firms will be directed to contact BART directly at (510) 874-7461 or [ocrcertifications@bart.gov](mailto:ocrcertifications@bart.gov).

Also, applications are available online: <https://bart.gob2g.com/>

#### Personal Net Worth

BART 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. A Socially and Economically Disadvantaged Owner (SEDO) whose personal net worth exceeds the personal net worth (PNW) cap indicated in 49 CFR Part 26.68(a) will not be determined to be economically disadvantaged. BART will use guidance in Appendix E of 49 CFR Part 26.

Each owner on whom the firm relies for certification must submit a Declaration of Eligibility (DOE) and a corroborating PNW statement, including required attachments. The owner must report PNW on the form, available at <https://www.Transportation.gov/DBEFORMS>. See BART's certification guidelines in [Appendix B](#).

## 5. Subpart E – Certification Procedures

### Section 26.81-85 Unified Certification Programs

The California Unified Certification Program (CUCP), to which BART 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.

DBE firms certified pursuant to the 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 Jurisdiction of Original Certification (JOC).

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

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## Section 26.86 Decision Letters

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Pursuant to 49 CFR Section 26.86, when BART denies a firm's request for certification or decertifies a firm, BART will provide the firm a NOD explaining the reasons for the adverse decision, specifically referencing the evidence in the record that supports each reason, as well as verbatim appeal instructions (with web page URL) to the USDOT Office of Civil Rights. 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 any certifying agency. The time period for reapplication begins to run on the day after the date of the decision letter is emailed. After the waiting period expires, the denied firm may reapply to any member of the CUCP. BART will inform the applicant of that right, and specify the date the waiting period ends, in its decision letter. An appeal does not extend the waiting period.

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## Section 26.87 Decertification

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To decertify a DBE, BART understands that it bears the burden of proving, by a preponderance of the evidence, that the DBE does not meet the certification standards provided for in 49 CFR Part 26. Any person may file a complaint explaining, with specificity, why the certifier should decertify a DBE. The certifier need not act on a general allegation or an anonymous complaint. BART is not required to accept a general allegation that a firm is ineligible or an anonymous complaint. BART will review all records concerning the firm, any material provided by the firm and the complainant, and other available information. If BART determines based on this review that there is reasonable cause to decertify the DBE, BART will initiate a decertification proceeding by notifying the DBE firm in writing. If BART determines that there is not such reasonable cause, BART will notify the complainant and the DBE in writing of the decision and the reasons for it.

If an OA determines that there is reasonable cause to believe that a DBE does not meet the eligibility criteria of Part 26, the OA may direct BART to initiate a proceeding to remove the DBE's certification consistent with 49 CFR Part 26.87. BART's first step in any decertification proceeding must be to email an NOD to the DBE.

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## Section 26.88 Summary Suspension of Certification

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Pursuant to 49 CFR Part 26 Section 26.88, BART must summarily suspend a DBE's certification when it has clear and credible evidence of the DBE's or its SEDO's involvement in fraud or other serious criminal activity or when the U.S. DOT directs BART. BART may summarily suspend a firm's certification as an extraordinary remedy for lapses in compliance that cannot reasonably or adequately be resolved in a timely manner by other means. The firm's certification is suspended immediately once BART notifies the DBE about the suspension by sending an electronic notification to the last known email address of the owner(s) of the DBE. During the suspension period, the DBE may not be considered to meet a contract or participation goal on contracts executed during the suspension period.

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## Section 26.89 Certification Appeals

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Applicants and decertified firms may appeal adverse Notice of Decisions (NODs) to the U.S. DOT:

1. Appellants must email appeals as directed in the certifiers decision letter within 45 days of the date of the certifier's decision letter



2. Appeals must at a minimum include a narrative that explains fully and specifically why the firm believes the decision is in error, what outcome-determinative facts the certifier did not consider, and/or what part 26 provisions the certifier misapplied
3. The certifier's decision remains in effect until the U.S. DOT resolves the appeal or the certifier reverses itself.

An appellant firm challenging certification denial or removal by BART 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 BART's decision to U.S. DOT will be requested by U.S. DOT to promptly provide all information requested.

## 6. Subpart F – Compliance and Enforcement

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### Section 26.109 Information, Confidentiality, Cooperation

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BART 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 unless written consent of the firm has been obtained. However, BART is required to transmit such information to DOT in any certification appeal proceeding under 49 CFR Part 26.89 or to any other state to which the individual's firm as applied for certification under 49 CFR Part 26.85.

Notwithstanding 49 CFR Part 26.109(a), the identity of complainants shall be kept confidential, at their election. If such confidentiality will hinder the investigation, proceeding or hearing, or result in a denial of appropriate administrative due process to other parties, the complainant must be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing.

Notwithstanding any contrary provisions of Federal, state or local law, BART shall not release personal financial information submitted in response to the personal net worth requirement to a third party (other than DOT) without the written consent of the firm that submitted the documentation.

Pursuant to Part 26.109(c), BART is required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for a finding of noncompliance.

BART shall not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by 49 CFR Part 26 or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under 49 CFR Part 26. Failure to abide by this prohibition will result in a finding of noncompliance with Part 26.

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## 7. Appendix A: Definition of Terms

1. **Affiliates.** Firms are affiliates of each other when, either directly or indirectly:
  - a. one firm controls or has the power to control the other, or
  - b. a third party or parties controls or has the power to control both firms, or
  - c. 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 BART 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. **BART.** The San Francisco Bay Area Rapid Transit District.
8. **Bid.** A proposal or offer by a Bidder for a construction or procurement contract when completed and submitted on the prescribed Bid Form.
9. **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.
10. **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.
11. **Challenge.** A written complaint filed with BART by a person alleging that a currently certified firm is ineligible.
12. **Consultant.** A firm that has entered into an Agreement with BART.

13. **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.
14. **Contract.** Collectively means Prime Construction Contracts, Subcontracts, and Procurement Contracts.
15. **Contractor.** A Prime Construction Contractor awarded a construction contract by BART.
16. **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.

17. **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.
18. **Disadvantaged Business Enterprise (DBE).** A for-profit small business concern:
  - a. 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
  - b. Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.
19. **Disparity Study.** The Disparity Study (the Study) is to support BART'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.
20. **DOT.** The U.S. Department of Transportation.
21. **Federally Funded Contract.** Any contract or modification of a contract between BART 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 BART'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. **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.
28. **Indian Tribe or Native American Tribe.** Refers to any federally or State-recognized Tribe, band, nation, or other organized group of Indians (Native Americans), or an ANC.
29. **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.
30. **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.
31. **Lower-Tier Subcontractor.** Any Subcontractor that is below the first-tier level. This could include 2nd or 3rd-Tier Subcontractors, etc.
32. **Manufacturer.** A business that operates or maintains a factory or establishment that produces on the premises the materials or supplies obtained by the Contractor.
33. **Matchmaking.** Outreach events hosted by BART where Prime contractors are paired with potential subcontractors in one-on-one meetings.
34. **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:
  - a. \$10 million for contracts for construction;
  - b. \$6 million for contracts for professional or other services; or
  - c. \$6 million for contracts for procurement of goods.
35. **Native Hawaiian.** Any individual whose ancestors were natives, prior to 1778, of the area, which now comprises the State of Hawaii.
36. **Native Hawaiian Organization.** Any community service organization serving

37. **Non-Compliance.** The condition existing when a contractor has failed to implement or meet the requirements of 49 CFR Part 26, BART's DBE Program, BART's policies and procedures pertaining to DBE participation, or any rules or regulations implementing any of the above.
38. **Notice of decision or NOD.** Refers to determination that denies a firm's application or decertifies a DBE.
39. **Notice of Intent or NOI.** Is BART's letter informing a DBE of suspension or proposed decertification.
40. **Operating Administration or OA.** Is any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The "Administrator" of an operating administration includes his or her designees.
41. **Personal Net Worth or PNW.** Means the net value of an individual's reportable assets and liabilities, per the calculation rules in 49 CFR Part 26.68.
42. **Pre-Bid or Pre-Proposal Conference.** A meeting held by BART, prior to the bid opening or proposal submittal date of a particular contract at which prospective bidders or proposers are advised of BART's DBE Program.
43. **Pre-Construction Conference.** A meeting held by BART 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.
44. **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 Website: <http://www.census.gov/eos/www/naics/>
45. **Prime Construction Contract.** A construction contract between BART and a Prime Contractor.
46. **Prime Construction Contractor.** A firm that has been awarded a Prime Construction Contract by BART
47. **Principal Place of Business.** Means 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. The term does not include construction trailers or other temporary construction sites.
48. **Procurement Contract.** A contract between BART and a Supplier.
49. **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.
50. **Race-Conscious.** A measure or program that is specifically focused on assisting only DBEs, including women-owned DBEs.
51. **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. 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.

52. **SBA.** U.S. Small Business Administration.
53. **Second-Tier Subcontractor.** a firm that has been awarded a Subcontract by a First- Tier Subcontractor.
54. **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) with specific size limits for each assigned North American Industry Classification System (NAICS) code based on the average gross receipts for itself and its affiliates for the previous five years, and whose average annual gross receipts (including those of its affiliates) for the previous three fiscal years does not exceed the statutory cap of \$30.72 million (or as adjusted for inflation by the Secretary of DOT) pursuant to 49 CFR Section 26.65(b).
55. **Small Business Entity (SBE).** A small business defined as follows:
  - a. A small business concern;
  - b. 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 \$2.047 million; and
  - c. Whose management and daily business operations are controlled by one or more of the individuals whose personal net worth is as described in b. above.
  - d. Firms certified as a DBE by the CUCP are presumed to have met requirements of subsections a., b., and c. above.
56. **Socially and Economically Disadvantaged Criteria.** Criteria based on 49 CFR Part 26 ([Appendix E](#)) which BART 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.
57. **Subconsultant.** A firm that has entered into a subcontract with a Consultant.
58. **Subcontract.** A Contract entered into between a Contractor, Supplier, or Consultant with a Subcontractor, Subsupplier, or Subconsultant, respectively.
59. **Subrecipient.** A recipient of DOT or other federal funded assistance which has received these funds from BART.
60. **Subsupplier.** A firm that has entered into a Contract with a Supplier to provide supplies to the Supplier.
61. **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.
62. **Transit Vehicle Manufacturer (TVM).** Means any manufacturer whose primary business purpose is to manufacture vehicles built for mass transportation. Such vehicles include, but are not limited to buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Businesses that perform retrofitting or post-production alterations to vehicles so that such vehicles may be used for

public transportation purposes are also considered TVMs. Businesses that manufacture, mass-produce, or distribute vehicles primarily for personal use are not considered TVMs.

- 63. **Tribally-owned concern.** Means any concern at least 51 percent owned by an Indian tribe as defined in this section.
- 64. **Unsworn declaration.** Means an unsworn statement, dated and in writing, subscribed as true under penalty of perjury.

## 8. 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 BART 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 BART'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 BART'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 BART 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 BART to fully meet its goal for the new fiscal year. Additionally, BART 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 BART's Office of Civil Rights' Standard Operating Procedures Section J.

The DBELO will track and evaluate the Triennial Goal on a quarterly basis. This tracking is to ensure that BART is meeting the largest feasible portion of the Triennial Goal through race-neutral means.

In the event that BART amends its triennial goal it shall be submitted to the appropriate operating authority in a manner consistent with 49 CFR Section 26.45.

BART'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 BART would expect absent the effects of discrimination. BART 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, BART 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 BART'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 DBELO, 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, BART 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.

BART 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, BART expects to use the same data source in establishing the base figure for both all available businesses and available DBE firms.

1. The DBELO, in conjunction with the appropriate District departments, will conduct a thorough analysis of the relevant contracting markets in which BART 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 BART determines to be relevant to defining its contracting markets for the Triennial Period. The DBELO will then determine the total number of available businesses for the relevant contracting markets. The DBELO 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 DBELO 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. BART 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 DBELO 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), BART 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 DBELO will analyze the current capacity of DBEs and evidence from disparity studies conducted anywhere within the market area. The DBELO 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

BART'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 DBELO 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 BART'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.

BART 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 DBELO 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. BART 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, BART will verify compliance with the DBE Program and DBE goal attainment.

As described below in Section E of this Appendix B, the DBELO 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 BART'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 BART'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 DBELO 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.

Pursuant to 49 CFR Section 26.45(g), BART 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 BART will accept public comments to the proposed Triennial Goal and rationale for a period of 30 days from the date of publication and provide instructions for the submission of comments.

BART 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 BART's efforts to establish a level playing field for the participation of DBEs. As part of this consultation, BART will schedule a direct interactive meeting with as many interested stakeholders as possible, focusing of obtaining information relevant to the goal setting process. BART 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 DBELO will prepare a summary report analyzing the public comments received, if any, to the General Manager.

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 BART'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, BART 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 BART 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), BART 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 BART can meet its entire overall annual goal for any given Triennial Period through race-neutral means, BART must implement its Program without setting contract goals during that year.
2. If during the course of the Triennial Period BART is using contract goals and determines that it will exceed its overall Triennial goal, BART 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 BART determines that it will fall short of the Triennial Goal, BART must make appropriate modifications in the use of race-neutral and race-conscious goals in order to meet the overall goal.
3. If BART meets or exceeds its Triennial Goals for two (2) consecutive years, using only race-neutral means, BART will not set contract goals on any contracts in the next Triennial Period. BART 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 BART's DBE participation exceeds the Triennial Goal in two (2) consecutive years using contract goals, BART will reduce the use of contract goals proportionately in the following Triennial Period.
5. BART will monitor and report race-neutral and race-conscious participation separately.
6. BART has implemented standard operating procedures for monitoring the triennial race-conscious goal attainment to allow BART 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 BART 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 BART's Office of Civil Rights' Standard Operating Procedures Section I.



## 9. 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 DBELO. 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. BART 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 BART'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.

Each solicitation for which a DBE contract goal has been established will require the bidders to submit information pursuant to 49 CFR, Part 26.53 (b).

### A. Process for Evaluation of Bids

BART 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 BART'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. BART 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, and such counting will be subject to compliance with reporting requirements and restrictions on substitution without BART consent.
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 DBELO 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 DBELO will review the good faith efforts documentation submitted by the bidder, as required by the Contract Specifications. In accordance with 49 CFR Part 26, the DBELO will determine whether the bidder has made good faith efforts to meet the Contract goal.
6. If the DBELO determines that the bidder has not met the Contract goal and has not demonstrated good faith efforts, the DBELO 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, BART 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.

## **B. Design-Build Contract Bid Evaluations**

In the event that BART sets a DBE goal on a Design-Build contract, with minimal-project details at time of award, the proposer must meet the DBE goal by submitting a DBE Open-Ended DBE Performance Plan (OEPP). To be considered responsive the OEPP must have a commitment to meet or exceed the goal. Once a DBE/SBE subcontractor is listed on an OEPP, the Prime contractor shall utilize the specific firm listed unless the contractor obtains written consent from BART. BART may provide such written consent only if the prime contractor has good cause to substitute or terminate the listed DBE/SBE firm. Good cause circumstances can be found in Section 26.53 of this DBE Program.

## 10. Appendix D: DBE Certification Guidelines

Certification is the process by which all firms seeking to participate in BART'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 has the burden of demonstrating to BART, by a preponderance of the evidence, that it satisfies the requirements in this subpart. In determining whether the firm has met its burden the firm must consider all the information in the record, viewed as a whole.

- 1) Exception 1. In a decertification proceeding the certifier bears the burden of proving, by a preponderance of the evidence, that the firm is no longer eligible for certification under the rules of this part.
- (2) Exception 2. If a certifier has a reasonable basis to believe that an individual who is a member of a group in § 26.67(a) of this section is not, in fact, socially and/or economically disadvantaged, the certifier bears the burden of proving by preponderance of the evidence that the individual is not socially and/or economically disadvantaged.

### B. Group Membership Determinations

Pursuant to 49 CFR Section 26.63, if BART has reason to question whether an individual is a member of a group presumed to be socially and economically disadvantaged, BART 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, BART 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. BART may require the applicant to produce appropriate documentation of group membership. If BART 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. BART'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. BART will consider any relevant evidence in its assessment of this element, and in every case BART 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. BART 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. BART 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, BART 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.

BART 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. BART 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, BART 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. BART 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, BART 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, BART 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, 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, BART 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 \$2.047 million, the individual's presumption of economic disadvantage will be rebutted. BART is not required to have a proceeding in order to rebut the presumption of economic disadvantage in this case.
    - ii. If BART has a reasonable basis to believe that an individual who submits a PNW Statement that is below the currently applicable PNW cap is not economically

disadvantaged, the certifier may rebut the individual's presumption of economic disadvantage.

- iii. If BART 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 BART may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. BART must follow the procedures set forth in 49 CFR Section 26.87. BART 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 2.047 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 BART on a case-by-case basis. BART 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 \$2.047 million will not be determined to be economically disadvantaged. BART 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 a small business as defined by the Small Business Administration (SBA) . BART will apply the SBA business size standards found in [13 CFR Part 121](#) to the applicable primary industry classifications (NAICS codes) of that firm. The firm is ineligible when its affiliated "receipts" (computed on a cash basis), as defined in [13 CFR 121.104\(a\)](#) and averaged over the firm's preceding five fiscal years, exceed the applicable SBA size cap(s). Even if the firm is a SB under paragraph (a) of section 121.04, it is ineligible to perform DBE work on FHWA or FTA assisted contracts if its affiliated annual gross receipts as defined by 13 CFR 121.104, over the firm's previous three fiscal years exceeds \$30.72 million. The U.S. DOT will adjust annually and post the adjusted amount on its website at <https://www.transportation.gov/DBESizestandards>.

#### E. Ownership

1. In accordance with 49 CFR Section 26.69, in determining whether the socially and economically disadvantaged participants in a firm own the firm, BART will consider all the facts in the record, viewed as a whole.
- a. To be an eligible DBE, a SEDO must own 51 percent of each class ownership of the firm. Each SEDO whose ownership is necessary to the firm's eligibility must demonstrate that her ownership satisfies the requirements of this section. If not, the firm is ineligible.

(b) **Overall Requirements.** A SEDO's acquisition and maintenance of an ownership interest meets the requirements of this section only if the SEDO demonstrates the following:

(1) **Acquisition.** The SEDO acquires ownership at fair value and by one or more “investments,” as defined in [paragraph \(c\)](#) of this section.

(2) **Proportion.** No owner derives benefits or bears burdens that are clearly disproportionate to their ownership shares.

(3) **Maintenance.** This section's requirements continue to apply after the SEDO's acquisition and the firm's certification. That is, the SEDO must maintain her investment and its proportion relative to those of other owners.

(i) The SEDO may not withdraw or revoke her investment.

(ii) When an existing co-owner contributes significant, additional, post-acquisition cash or property to the firm, the SEDO must increase her own investment to a level not clearly disproportionate to the non-SEDO's investment.

(A) **Example 1 to paragraph (b)(3)(ii).** SEDO and non-SEDO own DBE 60/40. Their respective investments are approximately \$600,000 and \$400,000. The DBE has operated its business under this ownership and with this capitalization for 2 years. In Year 3, the non-SEDO contributes a \$2 million asset to the business. The SEDO, as a result, owns 60 percent of a \$2 million asset without any additional outlay. Her ownership interest, assuming no other pertinent facts, is worth \$1.2 million more than it was before. Unless the SEDO increases her investment significantly, it is clearly disproportionate to the non-SEDO's investment and to her nominal 60 percent ownership. She has not maintained her investment.

(B) **Example 2 to paragraph (b)(3)(ii).** Same facts except that the DBE purchases the asset with a combination of 30 percent operating income and 70 percent proceeds of a bank loan. The SEDO maintains her investment because it remains in proportion to the non-SEDO's investment and to the value of her 60 percent ownership interest.

(C) **Example 3 to paragraph (b)(3)(ii).** Same facts except that the non-SEDO, not a bank, is the DBE's creditor. The SEDO has not maintained her investment because the benefits and burdens of her ownership are clearly disproportionate to those of the non-SEDO. The transaction may also raise [§ 26.71](#) concerns.

(iii) An organic increase in the value of the business does not affect maintenance because the value of the owners' investments remains proportional. In Example 2 above, the SEDO and the non-SEDO own the new asset at 60 percent and 40 percent of its net value of \$60,000.

(c) **Investments.** A SEDO may acquire ownership by purchase, capital contribution, or gift. Subject to the other requirements of this section, each is considered an “investment” in the firm, as are additional purchases, contributions, and qualifying gifts.

(1) Investments are unconditional and at full risk of loss.

(2) Investments include a significant outlay of the SEDO's own money.

(3) For purposes of this part, title determines ownership of assets used for investments and of ownership interests themselves. This rule applies regardless of contrary community property, equitable distribution, banking, contract, or similar laws, rules, or principles.

(i) The person who has title to the asset owns it in proportion to her share of title.

(ii) However, the title rule is deemed not to apply when it produces a certification result that is manifestly unjust.

(4) If the SEDO jointly (50/50) owns an investment of cash or property, the SEDO may claim at least a 51 percent ownership interest only if the other joint owner formally transfers to the SEDO enough of his ownership in the invested asset(s) to bring the SEDO's investment to at least 51 percent of all investments in the firm. Such transfers may be gifts described in [paragraph \(e\)](#) of this section.

**(d) *Purchases and capital contributions.***

(1) A purchase of an ownership interest is an investment when the consideration is entirely monetary and not a trade of property or services.

(2) Capital that the SEDO contributes directly to the company is an investment when the contribution is all cash or a combination of cash and tangible property and/or realty.

(3) Contributions of time, labor, services, and the like are not investments or components of investments.

(4) Loans are not investments. The proceeds of loans may be investments to the extent that they finance the SEDO's qualifying purchase or capital contribution.

(5) Debt-financed purchases or capital contributions are investments when they comply with the rules in this section and in [§ 26.70](#).

(6) Guarantees are not investments.

(7) The firm's purchases or sales of property, including ownership in itself or other companies, are not the SEDO's investments.

(8) Other persons' or entities' purchases or capital contributions are not the SEDO's investments.

(e) ***Gifts.*** A gift to the SEDO is an investment when it meets the requirements of this section. The gift rules apply to partial gifts, bequests, inheritances, trust distributions, and transfers for inadequate consideration. They apply to gifts of ownership interests and to gifts of cash or property that the SEDO invests. The following requirements apply to gifts on which the SEDO relies for her investment.

(1) The transferor/donor is or immediately becomes uninvolved with the firm in any capacity and in any other business that contracts with the firm other than as a lessor or provider of standard support services;

(2) The transferor does not derive undue benefit; and

(3) A writing documents the gift. When the SEDO cannot reasonably produce better evidence, a receipt, cancelled check, or transfer confirmation suffices, if the writing identifies transferor, transferee, amount or value, and date.

(f) ***Curative measures.*** The rules of this section do not prohibit transactions that further the objectives of, and compliance with, the provisions of this part. A SEDO or firm may enter into legitimate transactions, alter the terms of ownership, make additional investments, or bolster underlying documentation in a good faith effort to remove, surmount, or correct defects in eligibility, as long as the actions are consistent with this part.



(1) The certifier may notify the firm of eligibility concerns and give the firm time, if the firm wishes, to attempt to remedy impediments to certification.

(2) The firm may, of its own volition, take curative action up to the time of the certifier's decision. However, it must present evidence of curation before the certifier's decision.

(3) The certifier may provide general assistance and guidance but not professional (legal, accounting, valuation, etc.) advice or opinions.

(4) While the certifier may not affirmatively impede attempts to cure, it may maintain its decision timeline and make its decision based on available evidence.

(5) The certifier must deny or remove certification when the firm's efforts or submissions violate the rules in [paragraph \(g\)](#) of this section.

(g) ***Anti-abuse rules.***

(1) The substance and not the form of transactions drives the eligibility determination.

(2) The certifier must deny applications based on sham transactions or false representations, and it must decertify DBEs that engage in or make them. Transactions or representations designed to evade or materially mislead subject the firm to the same consequences.

(3) Fraud renders the firm ineligible and subjects it to sanctions, suspension, debarment, criminal prosecution, civil litigation, and any other consequence or recourse not proscribed in this part. SEDO claims an investment consisting of a contribution of equipment and a significant amount of her own cash. She shows that she transferred title to the equipment and wrote a check from an account she alone owns. She does not disclose that her brother-in-law lent her the money and she must repay him. The firm is ineligible under [paragraphs \(g\)\(1\)](#) and [\(2\)](#) of this section.

## F. Control

In accordance with 49 CFR Section 26.71, A) As a general rule, one or more SEDOs of the firm must control it. 2) The control determinations must consider all pertinent facts, viewed together and in context. 3) The firm must have operations in the business for which it seeks certification at the time it applies. Certifiers do not certify plans or intentions, or issue contingent or condition certification.

**SEDO as a final decision maker** must be the ultimate decision maker in fact, regardless of operational, policy, or delegation arrangements.

**Governance** provisions may not require that any SEDO obtain concurrence or consent from a non-SEDO to transact business on behalf of the firm.

1. ***Highest officer position.*** A SEDO must hold the highest officer position in the company (*e.g.*, chief executive officer or president).
2. ***Board of directors.*** Except as detailed in [paragraph \(c\)\(4\)](#) of this section, a SEDO must have present control of the firm's board of directors, or other governing body, through the number of eligible votes.
  1. ***Quorum requirements.*** Provisions for the establishment of a quorum must not block the SEDO from calling a meeting to vote and transact business on behalf of the firm.

2. **Shareholder actions.** A SEDO's authority to change the firm's composition via shareholder action does not prove control within the meaning of [paragraph \(c\)](#) of this section.
3. **Partnerships.** In a partnership, at least one SEDO must serve as a general partner, with control over all partnership decisions.
4. **Exception.** Bylaws or other governing provisions that require non-SEDO consent for extraordinary actions generally do not contravene the rules in [paragraph \(c\)](#) of this section. Non-exclusive examples are a sale of the company or substantially all of its assets, mergers, and a sudden, wholesale change of type of business.

**Expertise.** At least one SEDO must have an overall understanding of the business and its essential operations sufficient to make sound managerial decisions not primarily of an administrative nature. The requirements of this [paragraph \(d\)](#) vary with type of business, degree of technological complexity, and scale.

**SEDO decisions.** The firm must show that the SEDO critically analyzes information provided by non-SEDOs and uses that analysis to make independent decisions.

**Delegation.** A SEDO may delegate administrative activities or operational oversight to a non-SED individual as long as at least one SEDO retains unilateral power to fire the delegate(s), and the chain of command is evident to all participants in the company and to all persons and entities with whom the firm conducts business.

(1) No non-SED participant may have power equal to or greater than that of a SEDO, considering all the circumstances. Aggregate magnitude and significance govern; a numerical tally does not.

(2) Non-SED participants may not make non-routine purchases or disbursements, enter into substantial contracts, or make decisions that affect company viability without the SEDO's consent.

(3) Written provisions or policies that specify the terms under which non-SED participants may sign or act on the SEDO's behalf with respect to recurring matters generally do not violate this [paragraph \(f\)](#), as long as they are consistent with the SEDO having ultimate responsibility for the action.

### ***Independent business.***

(1) If the firm receives from or shares personnel, facilities, equipment, financial support, or other essential resources, with another business (whether a DBE or non-DBE firm) or individual on other than commercially reasonable terms, the firm must prove that it would be viable as a going concern without the arrangement.

(2) The firm must not regularly use another firm's business-critical vehicles, equipment, machinery, or facilities to provide a product or service under contract to the same firm or one in a substantially similar business.

(i) **Exception 1.** [Paragraphs \(g\)\(1\)](#) and [\(2\)](#) of this section do not preclude the firm from providing services to a single customer or to a small number of them, provided that the firm is not merely a

conduit, captive, or unnecessary third party acting on behalf of another firm or individual. Similarly, providing a volume discount to such a customer does not impair viability unless the firm repeatedly provides the service at a significant and unsustainable loss.

(ii) **Exception 2.** A firm may share essential resources and deal exclusively with another firm that a SEDO controls and of which the SEDO owns at least 51 percent ownership.

**Franchise and license agreements.** A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the certifier should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, if the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

# 11. Appendix E: Certification Procedures

## A. Initial Certification Procedures

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

1. Within ninety (90) days of receipt of complete application, BART will take all the following steps in determining whether a DBE firm meets said standards:
  - a. BART will perform an on-site or virtual visit to the offices of the firm and will interview the SEDO and any key personnel(s) of the firm and review their resumes and/or work histories. BART will also perform visits to job sites if there are such sites on which the firm is working in BART's jurisdiction at the time of the eligibility investigation. BART 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, BART 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. BART will determine the work history of the firm, including contracts it has received, and work it has completed;
  - e. BART 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. BART 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. BART will require potential DBEs to complete and submit an appropriate application form. BART will assure that the applicant attests to the accuracy and truthfulness of the information on the application form. This will be done when the Declaration of Eligibility (DOE) form is signed and dated by DBE firm. BART 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 BART has obtained about that firm, BART will promptly make the information available to the other grantee.
3. BART will not impose an application fee for firms to participate in the DBE certification process.
4. BART 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 BART has certified a firm as a DBE, it will remain certified until its certification has been removed, in whole or in part. BART 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 BART 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 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. BART will make decisions on applications for DBE certification within ninety (90) days of receiving a complete application from the applicant firm. BART may extend this time period once, for no more than an additional thirty (30) days, upon written notice to the firm explaining the reasons for the extension. A longer period allowed only with OA approval.

## **B. DBE Certification of Continuing Eligibility**

Every firm certified by BART as a DBE must provide to BART annually on the anniversary of the date of the original DBE certification, a declaration of eligibility (DOE) signed by the firm's owners. The signed Declaration of Eligibility (DOE) 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 BART. The DOE 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. Noncompliance, whether full or partial, is a 49 CFR Part 26.109(c) failure to cooperate.

## **C. Removal Procedures ([Decertification](#))**

1. Any person may file a complaint explaining, with specificity, why the certifier should decertify a DBE. The certifier need not act on a general allegation or an anonymous complaint. BART is not required to accept a general allegation that a firm is ineligible or an anonymous complaint. BART will review all records concerning the firm, any material provided by the firm and the complainant, and other available information. If BART determines based on this review that there is reasonable cause to decertify the DBE, BART will initiate a decertification proceeding by notifying the DBE firm in writing. If BART determines that there is not such reasonable cause, BART will notify the complainant and the DBE in writing of the decision and the reasons for it.

2. If an OA determines that there is reasonable cause to believe that a DBE does not meet the eligibility criteria of this part, the OA may direct BART to initiate a proceeding to remove the DBE's certification. BART's first step in any decertification proceeding must be to email a NOI to the DBE.

The NOI will notify the DBE of its right to respond in writing, at an informal hearing, or both. If the DBE wants a hearing, it must email the certifier saying so within 10 days of the NOI. If the DBE does not do so, it loses its opportunity for a hearing. Hearing procedures will be pursuant to 49 CFR Section 26.87. All parties requesting a hearing shall be responsible for half of the cost of the hearing.

3. All proceedings by BART to remove a firm's eligibility shall be made by an outside independent hearing officer selected in accordance with the appeals process.
4. BART will not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to BART at the time of its certification of the firm. BART 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 BART's determination to certify the firm was clearly erroneous.
5. BART 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 BART's decision and of the availability of an appeal to U.S. DOT. BART will send copies of the notice to the complainant in an ineligibility complaint or to the concerned U.S. DOT agency that directed BART to initiate the proceeding.
6. 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.
7. BART will take the following action upon removing a firm's eligibility:
8. When a Prime Contractor has made a commitment to use the ineligible firm, or BART 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. BART 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.
  - a. 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 BART 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.

- b. If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the Contract, BART will continue to count its participation on that Contract toward the Triennial Goal and Contract Goals.
9. 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.

## **D. Interstate Certifications**

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

### **C Application Procedure**

1. When a firm that is currently certified in its Jurisdiction of Original Certification (JOC) seeks certification by BART, BART will proceed with certifying this firm. The applicant has to provide the following 3 documents for interstate certification:
  - a. A cover letter with its application that specifies that the DBE is applying for interstate certification, identifies all UCPs in which the DBE is certified (including the UCP that originally certified it)
  - b. Electronic Image of the UCP directory of the original UCP that shows the DBE certification
  - c. New Declaration of Eligibility DOE form signed and dated

**D: Confirmation of Eligibility:** Within 10 business day of receiving the documents, the additional UCP must confirm the certification of DBE by reference to UCP directory of JOC. If the DBE fulfills the requirement for 3 documents in paragraph 1 of this section, the District will certify the firm. Upon certification, the District will reach out to the JOC agency for additional supporting documents as needed. ,

### **E Certification**

UCP must certify the DBE immediately without undergoing further procedures and provide DBE with a letter documenting its certification.

### **F Noncompliance**

Failure of the additional UCP to comply with the above paragraphs 1 and 2 is considered non-compliance with this part.

### **G: Post-interstate certification proceedings.**

2. (1) After the additional UCP certifies the DBE, the UCP may request a fully unredacted copy of all, or a portion of, the DBE's certification file from any other UCP in which the DBE is certified.



3. (2) A UCP must provide a complete unredacted copy of the DBE's certification materials to the additional UCP within 30 days of receiving the request. Confidentiality requirements of §§ 26.83(d) and 26.109(b) do not apply.
4. (3) Once the new UCP certifies, then it must treat the DBE as it treats other DBEs, for all purposes.
5. (4) The DBE must provide an annual DOE with documentation of gross receipts, under § 26.83(j), to certifying UCPs on the anniversary date of the DBE's original certification by its JOC.(h)

## **H) Decertification**

(1) If any UCP has reasonable cause to remove a DBE's certification, in whole or in part (i.e., NAICS code removal), it must notify the other UCPs in which the DBE is certified ("other jurisdictions") via email. The notice must explain the UCP's reasons for believing the DBE's certification should be removed.

(2) Within 30 days of receiving the notice, the other jurisdictions must email the UCP contemplating decertification a concurrence or non-concurrence with the proposed action. The other jurisdictions' responses may provide written arguments and evidence and may propose additional reasons to remove certification. A jurisdiction's failure to timely respond to the reasonable cause notice will be deemed to be a concurrence.

(3) After a UCP receives all timely responses, it must make an independent decision whether to issue a NOI and what grounds to include.

(4) Other UCPs may, before the hearing, submit written arguments and evidence concerning whether the firms should remain certified, but may not participate in the hearing.

(5) If the UCP finds the firm ineligible the firm immediately loses certification in all jurisdictions in which it is certified. The NOD must include appeal instructions provided on the Departmental Office of Civil Rights' web page, available at <https://www.transportation.gov/dbeappeal>. The UCP must email a copy of its decision to the other jurisdictions within 3 business days.(6) The rules of this paragraph (h)

(6) do not apply to attempts to decertify based upon a DBE's actions or inactions pertaining to §§ 26.83(j) (Declaration of Eligibility) and 26.87(e)(6) (failure to cooperate).

(7) Decertification under this paragraph (h) must provide due process to DBEs.(i) If a UCP decides not to issue a NOD removing the DBE's certification, no jurisdiction may initiate decertification proceedings, within one year, on the same or similar grounds and underlying facts.(ii) If a DBE believes a UCP unfairly targets it with repeated decertification attempts, the DBE may file a complaint to the appropriate OA.

(8) U.S. DOT appeal decisions are binding on all UCPs unless stated otherwise.

## 12. 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, BART 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. BART will also consider actions listed in CFR Part 26 Appendix A as part of the bidder's good faith efforts to obtain DBE participation. 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 DBE 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.

BART 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 BART 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 BART 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 BART, 21 days are not available, advertisements for a shorter reasonable period of time is acceptable. Such advertisements will refer only to bids for BART's contract and will specify the categories of work for which subcontracting opportunities exist for BART'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 BART, 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 BART'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 BART, 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. BART 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.

### **Good Faith Efforts Assessment**

In addition to determining whether a bidder has taken the actions described above, BART 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. BART 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.

## **I. Hearing On Good Faith Efforts Determination**

If it appears to BART 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 BART 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 BART 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.

# 13. 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 BART'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 Director

If the issue is not resolved, the Alert Notice will be issued to the Group Manager and the Director 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 Director of OCR. Upon receipt of the Ombudsperson's findings, the OID Group Manager and the OCR Department Director 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, OID 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/SBEs 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 BART. Unless BART consent is provided, the contractor shall not be entitled to any payment for work or material for which a DBE/SBE is listed unless that work is performed or supplied by the listed DBE/SBE. BART may provide such written consent only if the prime contractor has good cause to substitute or terminate the listed DBE/SBE firm. Good cause includes the following circumstances:

1. The listed DBE/SBE subcontractor fails or refuses to execute a written contract;
2. The listed DBE/SBE 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/SBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor;
3. The listed DBE/SBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements.
4. The listed DBE/SBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;
5. The listed DBE/SBE 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;
6. BART has determined that the listed DBE/SBE subcontractor is not a responsible contractor;
7. The listed DBE/SBE subcontractor voluntarily withdraws from the project and provides to BART written notice of its withdrawal;
8. The listed DBE/SBE is ineligible to receive DBE/SBE credit for the type of work required;

9. A DBE/SBE owner dies or becomes disabled with the result that the listed DBE/SBE contractor is unable to complete its work on the contract;
10. Other documented good cause that BART determines compels the termination of the DBE/SBE subcontractor. Provided, that good cause does not exist if the prime contractor seeks to terminate a DBE/SBE it relied upon to obtain the contract so that the prime contractor can self- perform the work for which the DBE/SBE contractor was engaged or so that the prime contractor can substitute another DBE/SBE or non-DBE/SBE contractor after contract award.

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

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

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

If a DBE/SBE subcontractor is terminated, substituted, or fails to complete its work on the contract for any reason, BART will require the prime contractor to substitute the terminated DBE/SBE subcontractor for another DBE/SBE subcontractor or make good faith efforts to do so. These good faith efforts shall be directed at finding another DBE/SBE to perform at least the same amount of work under the contract as the DBE/SBE that was terminated, to the extent needed to meet the contract goal established. The good faith efforts shall be documented by the contractor. If BART 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 BART 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/SBE firms put forward by offerors in negotiated procurements.

# 14. Appendix H: Process for Implementing Small Business Elements

The Small Business Elements of the DBE Program, which are part of BART's race neutral efforts to facilitate competition by small business concerns and to further BART's ability to reach its overall DBE goals, meet the requirements outlined in 49 CFR Section 26.39. Two types of firms are eligible to participate in this program:

1. Small Business Entities (SBEs) and
2. Micro Small Business Entities (MSBEs).

The SB Elements include two components:

1. Contract-specific SBE goals and
2. 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 \$2.047 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 BART 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 BART 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 BART, by a preponderance of the evidence, that it meets the requirements related to business size, ownership and control. BART 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 an 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, BART 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. BART 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, BART 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. BART 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. BART 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, BART 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, BART will scrutinize relationships with other firms in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
- 13. BART 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, BART 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 BART 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. BART 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 BART 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, BART will consider whether the firm owns equipment necessary to perform its work. BART 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. BART 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 BART, 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 BART, by a preponderance of the evidence, that it meets the requirements related to business size, ownership and control. BART 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, BART 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, BART will analyze the ownership of stock in the firm as well as all relevant documents;
2. BART will analyze the bonding and financial capacity of the firm;



3. BART will determine the work history of the firm, including contracts it has received, and work it has completed;
4. BART 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. BART will ensure that the applicant firm meets the standards established for personal net worth and business size standards of this program;
6. BART will require potential SBEs to complete and submit an appropriate application form. BART 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 a signed Declaration of Eligibility form provided by the applicant. BART will review all information on the form prior to making a decision about the SBE eligibility of the firm;
7. BART will request any additional documentation needed to ensure to verify the eligibility;
8. BART will determine if an On-site review is necessary and the decision to schedule an virtual on-site visit or phone interview is made at the sole discretion of BART.
9. BART 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, BART will add that firm to its database of SBE and/or MSBE certified firms. BART 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, BART shall notify the firm in writing of the decision. Any certification decisions made by BART for SBE and MSBE certification are administratively final and may not be appealed.

The DBELO 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 BART 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 \$2.047 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 BART, 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 BART 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, BART determines an SBE is no longer eligible to participate as an SBE or MSBE BART shall notify the SBE or MSBE in writing, and BART 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 BART'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 DBELO 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 DBELO will review the good faith efforts documentation submitted by the bidder, as required by the contract

specifications. The DBELO 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 DBELO determines that the bidder has not met the contract-specific SBE goal and has not demonstrated good faith efforts, the DBELO 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, BART 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. A distributor, as defined by 49 CFR Part 26.55, shall receive forty (40) percent credit for the cost of materials or supplies (including transportation costs).
12. 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.
13. Truckers shall be counted in a manner consistent with 49 CFR Part 26.55.
14. BART may count work performed by a SBE prime contractor or SBE joint venture partner towards the SBE goal.
15. 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.
16. Contractor shall file monthly SBE Utilization Reports, and all other requested forms, in the form proscribed by OCR.
17. 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 DBELO in consultation with District staff at the planning stages of all federally funded contracts. The DBELO 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 DBELO 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 DBELO. BART is not required to establish a contract- specific SBE goal for every prime contract with subcontracting opportunities. Initially, BART 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 BART'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 BART'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.

BART 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 BART'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 DBELO 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 BART'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. BART 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 BART 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, BART 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 BART 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, BART 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.

BART 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 BART 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 BART in assessing good faith efforts. As used herein, "appropriate" refers to those firms who have been certified by BART 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 BART, 21 days are not available, advertisements for a shorter reasonable period of time are acceptable. Such advertisements will refer only to bids for BART's contract and will specify the categories of work for which subcontracting opportunities exist for BART'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 BART, 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 BART'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.
1. 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](http://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 BART, 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. BART 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, BART 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. BART 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 BART 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 BART 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 BART 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 DBELO 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. Unless BART's consent is provided, the contractor shall not be entitled to any payment for work or material for which an SBE is listed unless that work is performed or supplied by the listed SBE.

## **K. Termination of SBE Firms**

A contractor must immediately notify the DBELO 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 BART. 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 BART to terminate an MSBE consistent with the terms of the MSBE's contract or agreement with BART.

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.

<b>Maximum Duration Days</b>	<b>Action</b>		<b>Project Representative</b>	<b>Office of Civil Rights Rep</b>
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 Director
5	Resolve – notification to GM	Alert Notice & OMB Report	AGM	DBE Liaison Officer
			General Manager	

## Alert Notice

Office of Civil Rights

Date: \_\_\_\_\_ Notice Number: \_\_\_\_\_ Contract No. \_\_\_\_\_

Prime Contractor: \_\_\_\_\_ M/S/DBE Subcontractor or Supplier: \_\_\_\_\_

Description of Issue (s):

\_\_\_\_\_

<u>Parties Involved:</u>	<u>Name:</u>	<u>Address:</u>	<u>Telephone:</u>
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Contractor/Subcontractor/Supplier: \_\_\_\_\_

M/S/DBE Subcontractor or Supplier: \_\_\_\_\_

Resident Engineer: \_\_\_\_\_

Project Manager: \_\_\_\_\_

OCR Staff: \_\_\_\_\_

Action Recommended:

\_\_\_\_\_

\_\_\_\_\_

<u>Project Manager</u>	<u>Date</u>	<u>Office of Civil Rights</u>	<u>Date</u>
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Follow-up and Close Out:

\_\_\_\_\_

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## 15. Appendix I: Mentor-Protégé Program for Construction

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 before they are proposed for participation in the M-P Program are eligible to participate in the federal portion of the M-P Program. The Protégé being proposed for participation must be a certified DBE firm.
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**

## **Mentor-Protégé Program (Construction)**

Rev. 3/1/2022

FTA Approved 9/23/2021

## Introduction

The San Francisco Bay Area Rapid Transit District (BART) seeks to provide business and technical development services to Disadvantaged Business Enterprises (DBEs). To this end, BART's Mentor-Protégé (M-P) Program will assist DBEs to become more proficient in their respective areas of work. The M-P Program will focus on increasing the technical capacity of DBEs, 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 DBE 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 1<sup>st</sup>-tier subcontractor – and a DBE 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, <https://californiaucp.dbesystem.com/>.

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.

## Definitions

*Mentor:* A Prime Contractor on a BART contract, or a 1<sup>st</sup>-Tier subcontractor of a Prime Contractor, who assists a subcontractor Protégé as part of a Mentor-Protégé 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 1<sup>st</sup>-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 1<sup>st</sup> or 2<sup>nd</sup> 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)

*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.

*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.

*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.

## 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 1<sup>st</sup> or 2<sup>nd</sup> 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.

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## Mentor Responsibilities

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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.

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 practices;
2. Respond to any weaknesses that can be addressed by the M-P Agreement, with the Mentor's own resources; and
3. 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.
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.

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## Protégé Responsibilities

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Protégés also have responsibilities. On USDOT-funded contracts, the Protégé firms will include certified DBEs as listed by the California Unified Certification Program (CUCP)

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](#)).

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## M-P Program Guidelines

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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;
  - 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. 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.

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. A Mentor shall not require a Protégé to have an exclusive bidding agreement contrary to 15 U.S.C. §§ 1, 2, 18, 45.

14. 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.
15. 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.

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

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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 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.

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### Protégé Development Plan (Post-Award)

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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. A PDP is considered a dynamic document that changes as the M-P Agreement progresses. See [Attachment 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. 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.
3. The PDP should describe barriers to reaching each objective and measurable benchmarks for overcoming barriers or for moving toward reaching an objective.
4. 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.
5. 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.
6. 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.
7. The PDP may be modified by the Mentor and Protégé to meet objectives or to create new objectives.

## 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

\_\_\_\_\_  
Protégé

\_\_\_\_\_  
Date

\_\_\_\_\_  
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 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.



## 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 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

## 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
3. Coordinator: \_\_\_\_\_
4. Firm's \_\_\_\_\_ Address: \_\_\_\_\_
5. Phone Number: \_\_\_\_\_ Fax \_\_\_\_\_ Number (opt.): \_\_\_\_\_
6. E-mail \_\_\_\_\_ address: \_\_\_\_\_
7. Firm \_\_\_\_\_ Website \_\_\_\_\_ (if \_\_\_\_\_ any): \_\_\_\_\_
8. Industry/Trade \_\_\_\_\_ of \_\_\_\_\_ Business: \_\_\_\_\_
9. Scope of Work in Subcontract: \_\_\_\_\_
10. Status of Business Certification Check all that may apply.  
( ) DBE ( ) Other

Needs Assessment, check the categories where you need assistance: \_\_\_\_\_

- ☐ Business Plan
- ☐ Strategic Action Plan
- ☐ Market Research
- ☐ Marketing Plan
- ☐ Marketing Materials
- ☐ Website Development
- ☐ Organizational Development
- ☐ Operations Assessment
- ☐ Office computer software
- ☐ Technical computer software
- ☐ Banking Services
- ☐ Payroll Administration
- ☐ Personnel Management
- ☐ Prevailing Wage Requirements

- ☐ Cost Accounting
- ☐ Prompt Payment Procedures
- ☐ Bonding & Insurance
- ☐ Obtaining Permits/Subcontracts
- ☐ Scheduling & Purchasing
- ☐ Project Planning & Scheduling
- ☐ Construction Equipment & Materials
- ☐ Pre Award & Bid Assessment
- ☐ Blueprint Reading
- ☐ Job Cost & Work In Progress
- ☐ Preparing Job Orders & Changes
- ☐ Information Systems Consulting
- ☐ Records & Contract Management
- ☐ Technical work related

Other

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

Name1 \_\_\_\_\_ Title1 \_\_\_\_\_ in \_\_\_\_\_ Protégé \_\_\_\_\_ firm

\_\_\_\_\_

Name2 \_\_\_\_\_ Title2 in Protégé firm

\_\_\_\_\_

11. 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:

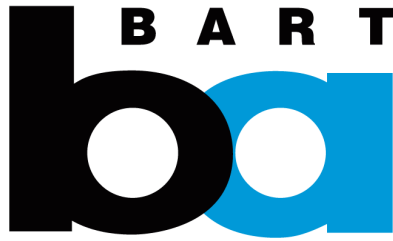
Barriers:

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.)			

## 16. Appendix J: Mentor-Protégé Program for Professional Services



# **San Francisco Bay Area Rapid Transit District**

## **Mentor-Protégé Program**

### **Professional Services**

Rev.3/1/2022

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## I. Introduction: Professional Services Mentor-Protégé

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BART is pursuing a Professional Services Mentor-Protégé (M-P) Program to increase the capacity of Disadvantaged Business Enterprises (DBEs) working or trying to work on BART Agreements. M-P Agreements can occur on specific FTA-funded Professional Services Agreements or outside of a BART Agreement. M-P Agreements should last for at least 18 months.

To incentivize prime participation in the M-P Program, on FTA-funded Professional Services Agreements with DBE Goals, BART may provide a credit towards the DBE goal for the successful completion of the M-P Program. Generally, the amount of DBE credit will be between 1% and 3%. The M-P Agreement is executed after the award of the professional services Agreement. During the proposal process, the Prime Consultant may commit to entering into an M-P Agreement and must commit to meeting the entire DBE Goal or demonstrate good faith efforts to do so. The Prime Consultant may receive DBE credit on no more than one occasion during a specific Agreement for completing the M-P Program.

M-P Agreements may occur independent of a BART Professional Services Agreement. In such an instance, a Mentor may be a firm not currently proposing or working on a BART Professional Services Agreement with Mentor-Protégé provisions. For M-P Agreements that are established independent of a Professional Services Agreement with Mentor-Protégé provisions, the Mentor and Protégé shall meet of their own accord and complete an independent M-P Agreement. The Mentor shall notify BART regarding its participation in such an independent M-P Agreement and forward to BART a copy of the relevant independent M-P Agreement documents.

BART will review the independent M-P Agreement documents to evaluate their conformance with the terms of the M-P Program. Mentor shall cooperate with BART to undertake any revisions that may be needed to the M-P Agreement to better conform with BART's M-P program. These include, among other things, the requirements in Section II, Definitions, Professional Services Mentor-Protégé.

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## II. Definitions, Professional Services Mentor-Protégé

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*Mentor:* On BART professional services Agreements with DBE Goals, the Mentor shall be the Prime Consultant. All Mentors shall have experience on BART Agreements valued at least \$3 million.

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

*Mentor-Protégé Agreement:* An executed document between a Mentor and Protégé reflecting the terms and conditions of the Mentor-Protégé relationship. The written M-P Agreement is submitted to BART's Office of Civil Rights (OCR) with the Protégé Development Plan.

*Mentor-Protégé Coordinator:* Person that acts as the point of contact for the M-P Agreement and coordinates participation in the M-P Agreement. The Mentor and the Protégé should each have a Mentor-Protégé Coordinator, who may be a sub-consultant.

*Protégé:* A Protégé is a small business that is a consultant or subconsultant on a BART Agreement or who desires to work on a BART Agreement. A Protégé must be certified as a Disadvantaged Business Enterprise (DBE) certified by the California Unified Certification Program

*Protégé Development Plan (PDP):* A written guide for an M-P Agreement, which will be completed at the first meeting of the Mentor and Protégé. A PDP contains the objectives of the M-P Agreement and may be updated during the course of the M-P Agreement.

*Protégé Initial Form:* A form that the Protégé fills out to guide the development of a PDP. The Protégé Initial Form shall be completed at or before the first meeting of the Mentor and Protégé, 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.

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### III. Mentor Responsibilities

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

The Mentor and Protégé should meet 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, submitting Quarterly Reports, and serving as the main contact for BART and the Protégé. The Mentor should attend BART-organized networking or professional development meetings.

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

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



Below are two examples of the type of assistance a Mentor can provide. The examples discussed below are not meant to be exhaustive.

1. **Technical Assistance** - The Mentor may provide guidance on technical on-the-job skills, where topics may include BART's work plan process, specific engineering or construction management issues, and proposing and managing an agreement as a prime consultant.
2. **Management Assistance** - The Mentor may provide guidance on business planning, project management, cost record accounting, how to recruit the right personnel, networking, and how to develop a new market niche.

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## IV. Protégé Responsibilities

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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 with the Mentor and to participate in creating the agenda for those meetings. Depending on the circumstances, the Protégé may:

Attend seminars and/or other educational programs;

Implement specific changes in the management or operation of its business; and

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 information about BART long-range planning or initiatives and opportunities for networking with the other Mentors and Protégés in the Program.

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## V. M-P Program Guidelines: Professional Services

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

1. For FTA-funded agreements with DBE goals, DBE Protégés that are not joint venture partners or Primes may count towards meeting the Prime Consultant's DBE goal, based on the cumulative commitments of the Work Plans, but not for more than half of the Consultant's DBE goal. In addition, the Mentor will receive credit towards its SBE goal for a satisfactorily completed M-P Agreement.
2. BART's M-P Program will be implemented in accordance with the regulations set forth in 49 CFR Section 26.35. For FTA-funded agreements with DBE, BART will "not award DBE credit to a non-DBE Mentor firm for using its own DBE 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."
3. BART may carry out Mentor-Protégé networking during the pre-proposal stage of a Request for Proposal (RFP) with potential M-P Agreements. BART shall provide proposers with information to guide them on selection of Protégés using certain criteria, including: firms new to working on BART

Agreements, firms proposed to conduct work where it is generally hard to find DBE firms, such as systems engineering, or firms seeking to become prime consultants on BART's MSBE Set-Aside Agreements.

4. The Mentor and Protégé should complete and sign an M-P Agreement prior to carrying out any of the planned M-P activities. A sample M-P Agreement is included in Appendix A. A Protégé is not guaranteed any future work to come out of the M-P Agreement.
5. Following execution of the M-P Agreement, the Mentor shall submit a Protégé Initial Form and a Protégé Development Plan (PDP) to BART for its review and approval. For M-P Agreements related to DBE Goal credit, OCR will provide guidance to potential Mentors on what constitutes a satisfactory PDP. BART will independently determine whether a PDP contains sufficient objectives and activities in order to receive DBE credit, if completed. If BART determines that the M-P Program's requirements or the federal guidelines are not being followed, BART may terminate the M-P Agreement or request that the PDP be updated.
6. M-P Agreements that are part of on-call Professional Services Agreements should last a minimum of 18 months. Such an M-P Agreement, if terminated prior to the completion of 18 months by either of the parties, will not result in DBE credit to the Mentor. The Mentor may initiate another M-P Agreement in order to gain DBE credit.
7. The Mentor and Protégé should meet regularly for training, discussion, and other activities which will help the Protégé 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 and plan activities that help towards reaching an objective or benchmark or to overcome a barrier;
  - d. Set new specific objectives for further improvement, and identify benchmarks that measure reaching the new 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 performance or decisions and the Protégé's overall business plan.
8. The Mentor is responsible for preparing a Quarterly Report, with input from the Protégé, that is submitted to OCR. A Quarterly Report form will be provided by BART. Quarterly Reports are intended to help participants and BART assess the results of the M-P Program. The Quarterly Reports shall address the following:
  - a. Technical and/or management assistance provided by the Mentor;
  - b. An explanation of how the Protégé firm has progressed, such as an update of progress on the PDP (objectives met, benchmarks met, new objectives set, new barriers identified, etc.), and any other summary of work accomplished during the monthly meetings; and
  - c. Any public or private contract or agreement awarded to the Mentor where the Protégé is utilized as a subconsultant, 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.

9. During the course of the M-P Agreement, OCR may issue a corrective action plan if the Quarterly Reports, and/or any other evidence, indicate that the M-P relationship is not moving towards completion of the objectives in the PDP.
10. For an M-P Agreement on a Professional Services Agreement with DBE Goals, OCR will utilize Quarterly Reports, discussions with the Mentor and the Protégé, and an evaluation form filled out by the Mentor and the Protégé, to evaluate satisfactory completion of the PDP in order to determine whether DBE credit shall be granted.
11. A Mentor 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.
12. 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 do not conflict.
13. Personnel – Any loan of skilled personnel by the Mentor shall not exceed 10% of the value of the subcontract.
14. BART's OCR may arrange periodic meetings of all Mentor and Protégé firms. These meetings are expected to have components of training, information, networking, and program feedback. Mentor and Protégé firms should attend.
15. A Mentor shall not require a Protégé to have an exclusive bidding agreement contrary to 15 U.S.C. §§ 1, 2, 18, 45.
16. Generally Unacceptable Practices – Protégé subconsultants 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 subconsultant 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 or affect the ability of the Protégé to perform a commercially useful function.

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## VI. Mentor-Protégé Agreement

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An M-P Agreement, signed by both the Mentor and the Protégé, is the official basis of the Mentor-Protégé relationship. The M-P Agreement is the agreement between the Mentor and Protégé to build a professional relationship for the purpose of strengthening the business capacity of the Protégé and to commit to meeting monthly for at least 18 months in order to fulfill the objectives in the PDP.

The M-P Agreement should include the name and email address for the Mentor's M-P Coordinator. A copy of the executed M-P Agreement shall be provided to OCR along with a copy of the Protégé Initial Form and the PDP within 15 days of signing the Agreement.

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)).

## VII. Protégé Development Plan

A Protégé Development Plan (PDP) is the primary guiding document of the M-P Agreement, defining the objectives of the Agreement and the strategies to meet those objectives. A PDP is considered a dynamic document that changes as the M-P Agreement progresses. [See Appendix B](#) for an example. OCR staff may be available to help guide the creation of the PDP. The PDP shall be developed at the first meeting of the Mentor and Protégé. The following guidelines should be considered in the development of the PDP:

1. The Protégé firm should complete a Protégé Initial Form at or before the first meeting. The form shall be sent 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, using the Protégé Initial Form as a resource.
2. The PDP should clearly set forth the objectives of the M-P Agreement. For those M-P Agreements where the Mentor is seeking DBE credit, OCR has guidelines related to what constitutes sufficient objectives for an M-P Agreement, as contained in the PDP.] Objectives for successive stages of the PDP may be subsequently identified prior to each successive stage.
3. The PDP should describe barriers to reaching each objective. It should also describe measurable benchmarks for overcoming barriers or for moving toward reaching an objective.
4. Objectives and benchmarks could be generated by an examination of the Protégé's business plan, if any. If the Protégé firm does not have a business plan, the development of a business plan may be one of the objectives.
5. The PDP may include training to be provided by the Mentor to the Protégé. Such training could include business planning, how to propose on BART agreements, resume writing for a proposal, BART's paperwork procedures, understanding BART's cost practices, and BART's design, specification, and safety standards.
6. If other resources are to be provided by the Mentor, they should be identified in the PDP, including identifying the specific objective to be met by the provision of these resources.
7. During the course of the M-P Agreement, the PDP may be modified by the Mentor and Protégé to meet objectives or to create new objectives.

## Mentor-Protégé Agreement

\_\_\_\_\_ (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.

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 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.

The parties agree that this Agreement should continue for 18 months, or longer if mutually agreeable, with BART's 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

Name of M-P Coordinator of Mentor Firm: \_\_\_\_\_

Email of Mentor's M-P Coordinator: \_\_\_\_\_

## Protégé Initial Form (Professional Services)

### 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 of M-P Coordinator: \_\_\_\_\_
6. Firm Website (if any): \_\_\_\_\_
7. Industry/Trade of Business: \_\_\_\_\_
8. Status of Business Certification Check all that may apply.

( ) DBE

DBE Certification #: \_\_\_\_\_

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

- |  |  |
|--|--|
| <input type="checkbox"/> Business Plan                     | <input type="checkbox"/> Cost Accounting/BART's cost practices |
| <input type="checkbox"/> Strategic Action Plan             | <input type="checkbox"/> Prompt Payment Procedures             |
| <input type="checkbox"/> Market Research                   | <input type="checkbox"/> BART's Insurance Requirements         |
| <input type="checkbox"/> Marketing Plan                    | <input type="checkbox"/> How to write a proposal               |
| <input type="checkbox"/> Marketing Materials               | <input type="checkbox"/> Resumé writing for a proposal         |
| <input type="checkbox"/> Website Development               | <input type="checkbox"/> How to get SSI Security clearance     |
| <input type="checkbox"/> Organizational Development        | <input type="checkbox"/> Project Planning & Scheduling         |
| <input type="checkbox"/> Operations Assessment             | <input type="checkbox"/> Responding to BART Work Plans         |
| <input type="checkbox"/> Office computer software          | <input type="checkbox"/> Information Systems                   |
| <input type="checkbox"/> Technical software/Primavera      | <input type="checkbox"/> Records & Contract Management         |
| <input type="checkbox"/> Banking Services                  | <input type="checkbox"/> Technical work related                |
| <input type="checkbox"/> Payroll Administration            | <input type="checkbox"/> BART/Industry Networking              |
| <input type="checkbox"/> Personnel Management/Training     | <input type="checkbox"/> Proposing and Working as a Prime      |
| <input type="checkbox"/> How to research upcoming projects | <input type="checkbox"/> BART's Specification & Design Process |

Other \_\_\_\_\_

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

Name 1 \_\_\_\_\_ Title 1 in Protégé firm \_\_\_\_\_

Name 2 \_\_\_\_\_ Title 2 in Protégé firm \_\_\_\_\_

11. 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.)			