

BART'S NON-DISCRIMINATION PROGRAM FOR SUBCONTRACTING ON NON-FEDERALLY FUNDED CONTRACTS

Updated March 2014

I. Purpose

The purpose of the Non-Discrimination Program for Subcontracting on Non Federally Funded Contracts (the "Program") is to ensure that contractors who contract with BART do not discriminate or give a preference in the award of subcontracts on the basis of race, national origin, color, ethnicity (hereinafter "ethnicity"), or gender. This program applies only to BART's non-federally funded contracts.

II. Findings

1. BART awards contracts to private prime contractors for goods and services in three areas: construction, procurement and professional services.
2. Some of the contracts in each of these areas are financed with funds received by BART from non-federal sources, e. g., fare revenue.
3. In many instances where the BART contract contains subcontracting opportunities, the Bidder/prime contractor, in making its bid for a BART contract, subcontracts portions of the work to be performed under the contract. In these situations, BART, provides the funds, through the prime contract, to pay the subcontractors.
4. Studies performed for the District, including research by the National Economic Research Associates and Mason Tillman Associates show that prime contractors in the private sector, in BART's geographic market, subcontract with minority and women-owned subcontractors ("MBE" and "WBE") at a rate that is substantially below the availability of qualified MBEs and WBEs to perform the work being subcontracted. The studies show that this underutilization of MBE and WBE subcontractors exist in all three areas in which BART contracts.
5. Among other things the studies show that the difference between the availability and the utilization of MBE and WBE subcontractors by prime contractors is generally statistically significant, i. e. , the level of underutilization is not attributable to chance, but instead indicates that a factor, other than chance, is responsible for the difference. The statistical data support a finding that discrimination based on the race, national origin, and gender is a significant factor that accounts for the underutilization of MBE and WBE subcontractors by private sector prime contractors.
6. BART has a legal obligation to ensure that funds paid by BART to a Bidder/prime contractor are not, in turn, spent by the Bidder/prime contractor in a discriminatory manner in its selection of subcontractors. If BART fails to take steps to prevent such discrimination, BART becomes a passive participant in that race and/or gender discrimination.
7. In a subcontracting market which operated in a non-discriminatory manner, it would be expected that the distribution of subcontracts among subcontractors owned by members of various ethnic groups and women would generally reflect the availability of qualified and available subcontractors in each group to perform the work. Accordingly, if a Bidder subcontracts a portion of the work and if a Bidder lists subcontracts in such a manner that there is a significant difference between the percentage of subcontracting dollars awarded to MBEs and WBEs and the availability of MBEs and WBEs, then the conclusion is warranted that ethnicity and/or gender discrimination may account for the difference.
8. If a Bidder subcontracts a portion of the work and where a bid shows a difference between a Bidder's utilization of MBE and/or WBE subcontractors and the availability of such subcontractors, BART will require information from the Bidder from which it can be determined whether the Bidder discriminated on the basis of ethnicity and/or gender in subcontracting. If the Bidder either fails to cooperate with the investigation or is found to have discriminated in subcontracting, the Bidder will be found non-responsive and will not be awarded the contract, even though the Bidder is otherwise the lowest Bidder.

III. Definitions

1. **Agreement.** An Agreement between BART and a Consultant for professionalservices which is funded solely with non-federal funds.
2. **Availability Percentage.** MBE and WBE availability which shall be equal to the percentage of MBEs and the percentage of WBEs in the pool of all Subcontractors within the relevant marker area that are available to bid on Subcontract work in the absence of discrimination or preference.
3. **Bid.** A bid or proposal submitted by a firm that seeks to obtain Contracts or Agreements with BART.
4. **Bidder.** A private sector business entity, regardless of the ethnicity or gender of the owner, which submits bids, proposals or otherwise seeks to obtain Contacts or Agreements with BART.
5. **Broker.** A firm that arranges or expedites transactions and does not maintain a store, warehouse or other establishment in which the materials, supplies articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock and regularly sold or leased to the public in the usual course of business.
6. **Contract.** A contract between BART and a Prime Contractor or Prime Supplier which is funded solely with non-federal funds.
7. **Manufacturers' Representative.** A firm that arranges or expedites transactions and does not maintain a store, warehouse or other establishment in which the materials, supplies articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock and regularly sold or leased to the public in the usual course of business.
8. **Minority-owned business enterprise (MBE).** A business enterprise that is at least 51% owned and controlled by a minority person(s).
9. **Women-owned business enterprise (WBE).** A business enterprise that is at least 51% owned and controlled by a woman or women.
10. **Minority person(s).** African Americans (i. e. persons having origins in any of the Black African racial groups), Hispanics (i. e. , Cuban, Mexican, Puerto Rican, Latin American, European Spanish (but not Portuguese), and other Hispanic origins and cultures), Asians and other minorities (i. e. , Asian and Pacific Islander, ancestral groups of Asian Indians, Chinese, Japanese, Filipino, Hawaiian, and other Asian or Pacific Islander), and Native American ancestral groups of Aleut, Eskimo and American Indian.
11. **Office of Civil Rights ("OCR").** The San Francisco Bay Area Rapid Transit District Office of Civil Rights.
12. **Subcontract.** A contract between a Prime Contractor/Prime Supplier/Prime Consultant and a first tier subcontractor.
13. **Subcontractor.** A firm that has entered into a contract with a Prime Contractor/Prime Supplier/Prime Consultant.

IV. Presumption of Non-Discrimination

1. For each BART contract for the procurement of goods or services in an amount of \$100,000 or more, which is funded solely by non-federal funds, the BART Office of Civil Rights ("OCR") shall determine, based on applicable studies or other reliable information, the availability of MBE subcontractors and the availability of WBE subcontractors to perform work likely to be subcontracted under the contract. MBE availability and WBE availability shall be equal to the percentage of MBEs and the percentage of WBEs in the pool of all subcontractors available to perform the subcontracted work ("availability percentage"). Separate availability percentages shall be determined for MBEs and WBEs.
2. For each BART construction contract in an amount of \$50,000 or more, which is funded solely by non-federal funds, the BART Office of Civil Rights shall determine, based on applicable studies or other reliable information, availability of MBE subcontractors and the availability of WBE subcontractors to perform work likely to be subcontracted under the contract. MBE availability and WBE availability shall be equal to

the percentage of MBEs and the percentage of WBEs in the pool of all subcontractors available to perform the subcontracted work ("availability percentage"). Separate availability percentages shall be determined for MBEs and WBEs.

3. A Bidder is not required to subcontract any portion of the work. If the Bidder does not subcontract any of the work, the Program shall not apply.
4. If the Bidder does subcontract a portion of the work and if the dollar amount of subcontracts listed for MBEs and WBEs by the Bidder reflects the availability percentage of MBEs and the availability percentage WBEs, it shall be presumed that the Bidder did not discriminate on the basis of ethnicity and/or gender in the selection of subcontractors.
5. If the Bidder does not list subcontracts to MBEs and WBEs in dollar amounts which reflect the MBE and/or the WBE availability percentages, no presumption of non-discrimination exists and OCR shall undertake an investigation, as provided herein, to determine if the Bidder discriminated on the basis of ethnicity and/or gender in the selection of subcontractors. OCR shall notify the Bidder that there is no presumption of non-discrimination and that the Bidder is required to provide the information in Section V. below. The notice to the Bidder shall include a summary of the calculations made by OCR.
6. In making the calculations under Sections IV. 4 or IV.5 above, firms that are owned and controlled by minority women may be counted as both a WBE firm and as an MBE firm.
7. No Bidder shall be found in non-compliance or non-responsive based on a Bidder's failure to list subcontracts to MBEs and WBEs in dollar amounts which reflect the availability percentages for MBEs and WBEs. A finding of non-compliance or non-responsiveness may be based only on a finding, made after the Bidder is afforded an opportunity for a hearing, that the Bidder discriminated on the basis of ethnicity and/or gender in the selection of subcontractors; or on a finding that the Bidder did not provide the information or did not otherwise cooperate, as required herein, in the investigation of possible discrimination. At a hearing on the issue of discrimination, the hearing officer may consider, where deemed relevant, a Bidder's failure to list MBE and/or WBE subcontractors in dollar amounts which reflect applicable availability percentages.

V. Information Required From Bidder Regarding Non-Discrimination

1. If the Bidder contends it has listed subcontracts to MBEs and WBEs in dollar amounts reflective of the respective MBE and WBE availability percentages, the Bidder shall provide the following information to BART at the time it submits its bid or, where applicable, within the time permitted by the contract provisions:
 - a. The dollar amount of each subcontract and a statement of the scope of work to be performed under the subcontract;
 - b. The identification of each subcontract awarded to a MBE or a WBE, including the name, address and telephone number of the MBE or WBE subcontractor and;
 - c. Proof that the subcontractor is an MBE or WBE. If a Bidder lists a proposed MBE or WBE firm that is not currently certified as such by the District, the Bidder must provide a completed Application for MBE and/or WBE Certification for those businesses which are claimed to be MBEs or WBEs, but which are not currently certified as such by the District. Firms owned and controlled by minority persons or women currently certified as a Disadvantaged Business Enterprise ("DBE") by the California Unified Certification Program ("CUCP") are presumed to be qualified as MBEs and/or WBEs under the Program.
2. If the Bidder has not listed subcontracts for MBEs and/or WBEs in dollar amounts reflective of their respective availability percentages, OCR shall notify the Bidder, pursuant to Section IV.5, that it is required to provide the information required by Sections V.1 and V.2. The Bidder shall provide the information

required by Sections V.2 not later than five (5) calendar days ("Days") after the date of the notice from OCR pursuant to Section IV.5. If the Bidder has listed subcontracts in dollar amounts reflective of MBE, but not WBE availability percentages, or vice versa, the Bidder is required to submit the information listed below only as it relates to the availability percentage which was not achieved.

- a. Separately for each subcontract, the name, address, telephone number, ethnicity and gender of the owner of each business entity that was listed as a subcontractor;
- b. Separately for each subcontract, the name, address, telephone number, ethnicity and gender of the owner of each business entity that submitted a bid, but was not selected as a subcontractor;
- c. Separately for each subcontract, the name, address, telephone number, ethnicity and gender of the owner of each business entity that expressed an interest, on the telephone or in writing, in bidding for the subcontract, but did not do so;
- d. For each subcontract where a MBE or WBE was not selected, copies of the bids submitted by the non-MBE/WBE, who was selected, and the bids or proposals submitted by each MBE and WBE. The bid or proposal documents covered by this Section shall contain at least the following information: the bid or proposal amount and a description of the scope of work. If no written bids or proposals were submitted by some or all of the subcontractors who bid the job, the Bidder shall provide a written statement containing the amount of each oral bid or proposal;
- e. Separately for each subcontract where the listed subcontractor is a non-MBE/WBE, a full and complete statement of the reason(s) that the non-MBE/WBE was selected as the subcontractor, and a MBE or WBE was not selected. If the reason is based on relative qualifications, the statement must address the particular qualifications at issue. If the reason is the respective dollar amounts bid, the statement must state the amounts and describe the similarities and/or dissimilarities in the scope of work covered by the bids or proposals;
- f. A statement describing any efforts the Bidder may have made to ensure non-discrimination in subcontracting, including a description of any advertising and other outreach efforts and;
- g. Such other information as may be requested by the District which is relevant to the issue of possible discrimination by the Bidder in subcontracting. This information may include the Bidder's record with respect to MBE and WBE subcontractor participation on other general contracts awarded to the Bidder in the previous 12 months.

VI. Enforcement/Hearing Procedures

1. If at any time during the bidding process, a Bidder fails to timely provide the information required by Sections V.1 or V.2, or if the information provided by the Bidder is incomplete OCR shall issue a written Finding of Non-Compliance that sets forth the deficiencies in the Bidder's response. The Finding of Non-Compliance shall be transmitted to the Bidder in a manner that provides verification of receipt. If the Bidder does not contest the Finding of Non-Compliance within five (5) Days of the date of issuance of the Finding of Non-Compliance, OCR shall issue a Final Determination of Non-Compliance and the District will issue a Finding of Non-Responsiveness.
2. If the Bidder disagrees with OCR's Finding of Non-Compliance, it may, within five (5) Days of the issuance of the Final Determination of Non-Compliance, request, in writing, a hearing before a hearing officer appointed by the District. Unless otherwise agreed by the District and the Bidder, the hearing shall be held within fourteen (14) Days of the request. The hearing shall be conducted consistent with Sections VI.10 and VI.11 below. If the hearing officer finds that the Bidder did timely provide the required information, OCR's funding of Non-Compliance shall be withdrawn. If the hearing officer finds that the required information was not timely provided, OCR shall issue a Final Determination of Non-Compliance and the District will issue a Finding of Non-Responsiveness.

3. Where a Bidder submits information which it contends shows that it awarded subcontracts in dollar amounts which reflect the Availability Percentages for MBEs and WBEs, OCR shall determine if the Bidder is correct. If the Bidder is correct, OCR shall issue a Finding of Non-Discrimination. If OCR decides that the Bidder is incorrect, OCR shall notify the Bidder in writing that the Bidder must provide the information set forth in Sections V.1 and V.2 within five (5) Days from the date of the notice.
4. A Bidder, given notice pursuant to Section IV.6 to provide the information required by Sections V.1 and V.2, shall provide the information in a timely manner, even if the Bidder disputes OCR's decision that the Bidder did not award subcontracts in dollar amounts which reflect the MBE and WBE Availability Percentages. A failure of a Bidder to timely provide this information will result in a Finding of Non-Compliance pursuant to Section VI.1.
5. Where a Bidder submits, in a timely manner, the information required by Sections V.1 and V.2, OCR shall review the information and any other information OCR considers pertinent. In this regard, the Bidder shall not unreasonably refuse to provide additional information requested by OCR. Based on this review and investigation, OCR shall make a determination, within fifteen (15) Days of the receipt of information provided by the Bidder, either that the Bidder did not discriminate on the basis of ethnicity and/or gender in its selection of subcontractors, or that a hearing is needed to determine if the Bidder discriminated. If OCR decides there was no discrimination, OCR shall issue a Finding of Non-Discrimination, which shall be final and not subject to challenge or appeal by any Bidder.
6. If OCR decides that a hearing is needed on the issue of discrimination, OCR shall notify the Bidder of this decision within five (5) Days of the date the decision is made. This written notice shall include the following: the date, time and location of the hearing; the name and address of the hearing officer; and a statement of the reasons OCR has decided that a hearing is necessary.
7. Unless otherwise agreed in writing by the District and the Bidder, the hearing shall begin not later than fourteen (14) Days after the date of the notice given pursuant to Section VI.6.
8. The hearing officer shall be selected by OCR.
9. The only issue to be resolved by the hearing officer is whether the Bidder discriminated in its selection of one or more subcontractors. If contested by the Bidder, resolution of this issue shall include a determination whether the Bidder's selection of subcontractors reflected the Availability Percentages of MBEs and/or WBEs, and/or whether the Availability Percentages stated in the contract are accurate.
10. At the hearing, the Bidder and the District may be represented by counsel and may present relevant witnesses and documents. The rules of evidence need not be observed. The hearing officer shall exercise all powers relating to the conduct of the hearing. Regardless of the outcome, the Bidder and BART shall bear their own costs and attorneys' fees. The District shall pay the hearing officer's fees.
11. The hearing officer shall issue a written recommendation to the District within ten (10) Days following completion of the hearing.
12. Following receipt of the hearing officer's recommendation, the District shall issue a final determination and, if appropriate, a Finding of Non-Responsiveness.

VII. Protest of Award of Contract

If applicable, award of a contract is subject to BART's protest procedures. For contracts not subject to BART's protest procedures, all findings, including the findings of the hearing officer, shall be final.

VIII. Severability

Each clause, sentence, paragraph, subdivision, Section or portion of this Program is separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, Section or portion, or the invalidity of the application thereof to any person or circumstance shall not affect the validity of the remainder of the Program, or the validity of their application to other persons or circumstances.

THIS APPENDIX IMPLEMENTS THE NON-DISCRIMINATION PROGRAM FOR SUBCONTRACTING ON NON-FEDERAL CONTRACTS (THE “PROGRAM”). THE APPENDIX MAY BE SUBJECT TO REVISION, SUBSTITUTION, DELETION OR ADDITION BY THE OFFICE OF CIVIL RIGHTS CONSISTENT WITH THE TERMS OF THE PROGRAM WITHOUT REQUIRING BOARD APPROVAL OF THE REVISION OR CHANGES TO THE PROGRAM.

Appendix – Certification of MBE and WBE Firms

Certification is the process by which all firms seeking to participate as Minority-Owned Business Enterprises (“MBE”s) and/or Women-Owned Business Enterprises (“WBE”s) in the Program are determined to have met the eligibility requirements of the Program. This Appendix provides guidance for certifying firms as MBEs and WBEs.

I. Application Requirements

All applicants for MBE or WBE certification will be required to complete an application for MBE or WBE certification. Firms who are currently certified by the California Unified Certification Program (“CUCP”) as a DBE shall be presumed to meet all requirements for qualifying as an MBE or WBE, provided they are a member of a presumptive group as defined by 49 Code of Federal Regulations Part 26.

Once a completed application has been received by the District the applicant shall be notified in writing that their application has been received and is complete for review. The District shall not review incomplete applications. A failure of an applicant to timely provide information required in the application or any additional information that OCR requires to review an application will result in an administrative denial of the application. Any firm denied certification may reapply for certification six (6) months after the date of denial.

II. Burdens of Proof

Any firm seeking certification has the burden of proof of demonstrating to the District that it meets the requirements concerning group membership as either a minority or woman. The District will make determinations concerning whether individuals and firms have met the burden of demonstrating group membership by considering all the facts in the record, viewed as a whole.

III. Group Membership Determinations

If the District has reason to question whether an individual is a member of a minority group or a woman, the District will require the individual to demonstrate, by a preponderance of the evidence, that he or she is a member of such group. The District may require the applicant to produce appropriate documentation of group membership.

IV. Ownership Determination

1. To be an eligible MBE, a firm must be at least 51 percent owned by one or more minority individuals. In the case of a corporation, such individuals must own at least 51 percent of each class of voting stock outstanding and at least 51 percent of the aggregate of all stock outstanding. In the case of a partnership, at least 51 percent of each class of partnership interest must be owned by minority individuals and must be reflected in the firm's partnership agreement. In the case of a limited liability company at least 51 percent of each member interest must be owned by minority individuals.
2. To be an eligible WBE, a firm must be at least 51 percent owned by one or more women. In the case of a corporation, such individuals must own at least 51 percent of each class of voting stock outstanding and at least 51 percent of the aggregate of all stock outstanding. In the case of a partnership, at least 51 percent of each class of partnership interest must be owned by women and must be reflected in the firm's partnership agreement. In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by women.
3. The firm's ownership by minorities and/or women must be real, substantial and continuing, going beyond pro forma ownership of the firm as reflected in the ownership documents. The minority and/or women owners must enjoy the customary incidents of ownership and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.

4. All securities that constitute ownership will be held directly by minorities or women. No securities or assets held in trust, or by any guardian for a minor, are considered as held by minorities or women in determining ownership of a firm.
5. The contributions of capital or expertise by the minority and women owners to acquire their ownership interests must be real and substantial.
6. The District will presume as not being held by a minority or woman, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-minority or non-woman individual or non-minority or non-woman owned firm which is:
 - a. Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;
 - b. Involved in the same or a similar line of business;
 - c. An immediate family member. An immediate family member is defined as a father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law or father-in-law or;
 - d. Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.
7. To overcome the foregoing presumption and permit the interests or assets to be counted, minorities or women must demonstrate by clear and convincing evidence that:
 - a. The gift or transfer was made for reasons other than obtaining certification as a MBE or WBE or;
 - b. The assets were transferred as the result of a final property settlement or court order in a divorce or legal separation or;
 - c. The assets were transferred through inheritance or otherwise because of the death of the former owner.
8. The District will apply the following rules in situations in which marital assets form a basis for ownership of a firm:
 - a. When marital assets held jointly or as community property by both spouses, are used to acquire the ownership interests asserted by one spouse, the District will deem ownership interest in the firm to have been acquired by that spouse with his/her individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled.
 - b. A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for MBE or WBE certification. This renunciation must be contemporaneous with the acquisition of the ownership interest in question.

V. Control Determination

1. All firms seeking certification as an MBE and/or WBE must be controlled by the minority or women owners respectively. In order for minority and/or women owner(s) to be found to control a firm the customary discretion of the minority or women owner must not be limited in any way, by any formal or informal agreement or any other restriction which would impede or limit the customary discretion of the minority or women owners to control and direct the day to day and long term operations of the firm.

VI. Other Considerations

1. OCR will provide written notification to the firm that it has been certified and add it to the list of certified MBE and/or WBE firms. A list of currently certified MBE and WBE firms will be made available on the BART website. Only firms on this list, or listed in the CUCP database, will be eligible for calculating the attainment of availability percentages.
2. Once a firm has been certified, the firm will be assigned one or more North American Industry Classification System ("NAICS") codes. The assignment of an NACIS code is only for informational purposes to assist potential Bidders in identifying MBE and/or WBE firms capable of performing the work to be subcontracted.

3. The District expects all participants in the Program to cooperate fully with requests for information relevant to the certification process and other requests for information. Failure or refusal to provide such information is a ground for denial or removal of MBE or WBE certification.
4. From time to time, the District may request additional information to ensure that a firm certified as an MBE or WBE remains eligible for certification. Failure to timely comply with a request for additional information shall constitute a failure of an MBE or WBE to cooperate with requests for information relevant to the certification process and is a ground for removal of MBE or WBE certification.
5. Only firms organized for profit may be eligible MBEs or WBEs. Not-for-profit organizations, even though controlled by minorities or women, are not eligible to be certified as MBEs or WBEs.
6. A Broker or Manufacturer's representative shall not be eligible for certification as an MBE or WBE as a part of the Program.
7. Applicants have no right of appeal of a certification decision. If a certification is denied and an objection is filed by the applicant, an Administrative Review may be conducted at the request of the Manager of the Office of Civil Rights. In order to conduct the Administrative Review, OCR shall convene an Administrative Review Committee which shall consist of the certification officer's manager, the Department Manager of the Office of Civil Rights and any other persons the Department Manager of the Office of Civil Rights deems necessary to conduct the Administrative Review. The Administrative Review Committee shall either confirm the decision issued by the certification officer or reverse the decision of the certification officer. Once a determination is made by the Administrative Review Committee, this decision will be communicated in writing to the applicant. All determinations made after an Administrative Review are considered final.