

SMALL BUSINESS PROGRAM

Policy Description (V09-01-11)

Amendment 1 (V11-16-12)

Amendment 2 (05-11-17)

1. SMALL BUSINESS PROGRAM POLICY

It is the Policy of the San Francisco Bay Area Rapid Transit District (“BART”) to encourage the participation of Small Businesses in BART contracts. Accordingly, BART hereby adopts this Small Business (“SB”) Program pursuant to California Public Contract Code Section 2002. The purpose of the SB Program is to encourage and facilitate full and equitable participation by Small Businesses in BART construction, procurement, and services contracts and agreements that are awarded through a competitive process and are financed solely with local and state funds (“non-federal contracts”). As appropriate, the SB Program seeks to achieve these objectives on three levels: (1) BART’s award of Contracts and Agreements to SBs, (2) the award of First Tier Subcontracts to SBs by Prime Contractors, Suppliers, and Consultants, and (3) the award to Lower Tier SB Subcontractors by First or Other Tier Subcontractors.

2. FINDINGS

- **BART** enters into non-federal contracts and agreements for construction, procurement, and services. Many of the contracts and agreements in each of these areas afford opportunities for SBs to perform work as Contractors, Suppliers, Consultants, and as Subcontractors, Subsuppliers, and Subconsultants.

- *SBs* generate jobs, provide economic opportunity, and boost economic output throughout California and, in particular, in the counties in which BART operates and does business – Alameda County, Contra Costa County, City and County of San Francisco, and San Mateo County.
- *BART* desires to contribute to the growth and stability of the small business community.
- *BART* recognizes, and through the SB Program, works to address and mitigate, the difficulties SBs may encounter when competing against larger more established businesses for BART contracts and agreements.
- *BART* recognizes that this SB Program is only applicable to non-federal construction, procurement, and services contracts, agreements such as repair services, technical support services, real estate support services, professional services agreements, and design-build contracts issued pursuant to Public Contract Code Section 20209.5, to be awarded through a competitive process where price and other factors are considered in the award.
- *BART* recognizes that Disabled Veteran Business Enterprises (“DVBES”) should be utilized to the extent possible in BART’s construction, procurement, and services contracts and agreements as part of the Small Business Program.

3. DEFINITIONS

- *“Agreement”* means an agreement between BART and a Consultant for services.
- *“Bid”* means the proposal or offer of the Bidder for the Construction or Procurement Contract when completed and submitted on the prescribed Bid Form.
- *“Bidder”* or “Proposer” means 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.

- **“Consultant”** means a firm that has entered into an Agreement with BART.
- **“Contract”** refers collectively to Prime Construction Contracts, First Tier Subcontracts, and Procurement Contracts.
- **“Contractor”** means a Prime Construction Contractor awarded a construction contract by BART.
- **“Disabled Veteran Business Enterprise” or “DVBE”** means a firm that is certified as a Disabled Veteran Business Enterprise by the State of California, Department of General Services and in its database for SBs found at www.dgs.ca.gov.
- **“First Tier Subcontract”** means a contract between a Prime Contractor and First Tier Subcontractor or Subsupplier.
- **“First Tier Subcontractor”, “Subcontractor”, or “Subsupplier”** means a firm that has been awarded a First Tier Contract by a Prime Contractor or a Supplier.
- **“Local Disabled Veteran Business Enterprise” or “Local DVBE”** means a firm that is certified as a DVBE by the State of California, Department of General Services, found in the DGS database for SBs at www.dgs.ca.gov, and whose principal place of business is located in one of the three counties of Alameda, Contra Costa, or San Francisco.
- **“Local Small Business” or “LSB”** means a firm that is certified as an SB by the State of California, Department of General Services, found in the DGS database for SBs at www.dgs.ca.gov, and whose principal place of business is within one of the three Measure RR Bond counties of Alameda, Contra Costa, or San Francisco.
- **“Prime Construction Contract”** means a construction contract between BART and a Prime Contractor.

- **“Prime Construction Contractor” or “Contractor”** means a firm that has been awarded a Prime Construction Contract by BART.
- **“Principal Place of Business”** means the fixed office or location where the business conducts, on a regular basis, all the services for which Local SB verification is sought, other than work required to be performed at the job site. None of the following constitute a principal place of business: a satellite or regional office, a post office box, a temporary location, a movable property, or a location that was established to oversee a project, such as a construction project office.
- **“Procurement Contract”** means a contract between BART and a Supplier.
- **“Proposal”** means the offer of the Proposer for the Services Agreement, in response to BART’s request when completed and submitted on the prescribed Proposal Form.
- **“Second Tier Subcontractor”** means a firm that has been awarded a Subcontract by a First Tier Subcontractor.
- **“Small Business Enterprise” or “SB”** means a firm (including SB Micros and DVBEs) certified as an SB by the State of California, Department of General Services and found in its database for SBs at www.dgs.ca.gov.
- **“Subconsultant”** means a firm that has entered into a subcontract with a Consultant.
- **“Subcontract”** means a Contract entered into between a Contractor, Supplier, or Consultant with a Subcontractor, Subsupplier, or Subconsultant, respectively.
- **“Subsupplier”** means a firm that has entered into a Contract with a Supplier or Contractor.
- **“Supplier”** means a firm that has been awarded a Procurement Contract by BART.

4. RESPONSIBILITIES AND DUTIES OF THE OFFICE OF CIVIL RIGHTS

(a) BART's General Manager has designated the Department Manager of the Office of Civil Rights as the SB Liaison Officer. As SB Liaison Officer, the Department Manager is responsible for implementing and monitoring the SB Program, coordinating with the District staff in implementing the SB Program, establishing participation goals in Contracts and Agreements where there are subcontracting opportunities for SBs, and making amendments to the SB Program, including alternative SB certification requirements, as needed, with the approval of the Deputy General Manager.

(b) Where Prime Construction Contractors, Suppliers, Consultants, or First Tier Subcontractors, where applicable, commit in their Bid or Proposal to utilize SB First or Second Tier Subcontractors in order to meet the applicable SB goal, the Office of Civil Rights shall monitor their performance to confirm that the SB utilization level presented in the Bid or Proposal is met throughout the life of the Contract or Agreement, including the substitution of SB Subcontractors and change orders, where appropriate.

5. QUALIFICATION AS AN SB, LSB AND DVBE

(a) A Bidder or Proposer seeking an SB preference Contract or Agreement with BART, or a firm seeking to be recognized as an SB Subcontractor, Subsupplier, or Subconsultant, shall be certified as an SB or DVBE and be listed in the State of California, Department of General Services ("DGS") database for SBs, including Micro SBs and DVBEs, at www.dgs.ca.gov prior to the submission of the Bid or Proposal.

(b) A firm seeking to be recognized as a Local Small Business (LSB) as a bidder or as an LSB Subcontractor, Subsupplier, or Subconsultant, shall be a certified SB or DVBE in the DGS database for SBs at www.dgs.ca.gov prior to the submission of the Bid or Proposal and shall have its principal place of business in Alameda, Contra Costa, or San Francisco counties, as verified by BART staff prior to Award. (See Appendix – Verification of LSB Firms.)

(c) Independence and Affiliation: Small Businesses, Local Small Businesses, and DVBEs must be independent businesses. SBs, LSBs, and DVBEs may not be dependent upon other firms for resources, management, or other aspects of its business. The District may take into consideration the affiliation of other businesses that may or may not be SBs, LSBs, or DVBEs. The District, in considering affiliation, will consider identities of interest; the sharing of facilities, employees, ownership, or equipment; contractual relationships between the businesses; or other key factors.

(d) Commercially Useful Function: SBs, DVBEs, and LSBs must perform a commercially useful function. A business performs a commercially useful function when it is responsible for the execution of the work of the contract and is carrying out its responsibilities by performing, managing, and supervising the work involved. To perform a commercially useful function, the business must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. Generally, if the SB or LSB does not perform or exercise responsibility for at least 30 percent of its contract or subcontract with its own workforce, or the portion of work that would be expected to be self-performed on the basis of normal industry practice for the type of work involved, then the District will presume that it is not performing a commercially useful function.

6. SB PROGRAM ANNUAL LIMIT

An annual limit of \$3,000,000 will be available for the total dollar preferences allowed under the SB Program for each fiscal year for Contracts up to a maximum value of \$10,000,000. For Contracts over \$10,000,000, BART's Office of Civil Rights, in conjunction with the project sponsor, will determine on a Contract-by-Contract basis whether the Program will apply and if so, any applicable limits to the total dollar preference.

7. PRIME CONTRACTS AND AGREEMENTS ELIGIBLE FOR SB PREFERENCE

BART, may, at its sole discretion, designate specific Prime Construction Contracts, Procurement Contracts or Agreements with a maximum value of \$10,000,000, as eligible for an SB Bidder or Proposer preference (including LSBs, DVBEs, and Local DVBEs) of up to 5% of the lowest responsible Bidder's or Proposer's Bid or Proposal price, with the exact percentage applicable to a particular Contract or Agreement determined by BART. The maximum bid preference is \$250,000 on contracts not funded by the Measure RR Bond and \$500,000 on contracts that are funded by the BART Measure RR Bond (Measure RR). SB Prime Construction Contractors, Suppliers, or Consultants who bid on such Contracts or Agreements will be granted the percentage preference set by BART on their Bid or Proposal price only during evaluation for determining the award of the Contract or Agreement. However, the actual Contract or Agreement awarded will be for the amount of the original bid or proposal. The amount of the preference will be based on the following:

- If the contract is projected to be for less than \$5 million, and the funding for the

contract does *not* include Measure RR money, the SB preference will be 5% of the lowest responsible bid for SBs and DVBEs.

- If the contract is projected to be for less than \$5 million and the funding for the contract *does* include Measure RR money, the SB preference will be 5% of the lowest responsible bid for LSBs and Local DVBEs.

For contracts between that are at least \$5 million and less than \$10 million, BART staff will decide if the contract will have a SB prime preference or a preference based on meeting the SB Subcontractor Participation Goal, but not both. The amount of the preference for contracts with a SB prime preference will be based on the following:

- If the contract has a value of between \$5 million and \$10 million and the funding for the contract does *not* include Measure RR money, the SB preference will be \$250,000 for SBs and DVBEs.
- If the contract has a value of between \$5 million and \$10 million and the funding for the contract *does* include Measure RR money, the SB preference will be 5% of the lowest responsible bid for LSBs and Local DVBEs, with a maximum dollar amount of \$500,000.

8. CONTRACT-SPECIFIC SB SUBCONTRACTOR PARTICIPATION GOALS

BART, in its sole discretion, may establish, for a particular Construction or Procurement Contract or Services Agreement, with a value at or above \$5,000,000, an SB Subcontractor Participation Goal. For contracts that are at least \$5 million and less than \$10 million, BART staff will decide if the contract will have a SB prime preference or a preference based on meeting the SB Subcontractor Participation Goal,

but not both. The SB Subcontractor Participation Goal shall be expressed as a percentage of the total Bid or Proposal price for a Contract or Agreement, less allowances and options. The Bidder or Proposer that meets the SB Subcontractor Participation Goal will be eligible for a preference of up to 5% of the lowest responsible Bidder's or Proposer's Bid or Proposal price, only during evaluation for determining the award of the Contract or Agreement, based on the following funding:

- If *not* funded by BART Measure RR Bond (Measure RR), a preference of up to 5% for meeting the SB Subcontractor Participation Goal with SBs or DVBEs. The dollar limit cap on the Subcontractor Participation Goal on contracts not funded by Measure RR is \$1,000,000.
- If funded in whole or in part by Measure RR, a preference of 5% for meeting the Local SB Subcontractor Participation Goal completely with LSBs and/or Local DVBEs. The dollar limit cap on the Subcontractor Participation Goal on Measure RR funded contracts is \$1,500,000.

For a SB or LSB subsupplier, a prime bidder shall receive 60% credit towards an SB or LSB Subcontractor Participation Goal. Any work that an SB or LSB subcontractor subcontracts to a non-SB or non-LSB, respectively, shall not be counted toward the SB or LSB Subcontractor Participation Goal. For a SB or LSB broker, a prime bidder shall receive 8% credit towards an SB or LSB Subcontractor Participation Goal.

Regardless of the preference, the actual Contract or Agreement awarded will be for the original Bid or Proposal. Bidders that do not meet the SB Subcontractor Participation Goal are not eligible for the preference.

9. CONTRACT-SPECIFIC SB LOWER TIER SUBCONTRACTOR PARTICIPATION

BART, in its sole discretion, may recognize Lower Tier SB firms towards meeting the Contract SB Subcontractor Participation Goal on designated prime construction contracts subject to subsections (a) through (c), below. On Measure RR funded contracts, a Lower Tier LSB firm shall count towards meeting a LSB Subcontractor Participation Goal with LSB Subcontractors. The Prime Contractor shall include provisions in its First Tier Subcontracts providing for the following:

- (a) A provision requiring that the First or Lower Tier Subcontractor provide copies of the SB Lower Tier subcontracts to BART, and provide other documentation deemed needed by BART to confirm the SB participation.
- (b) A provision requiring that the Subcontractor at any tier provide BART with the information designated by BART which BART deems necessary for determining whether the SB Lower Tier Subcontractor is performing work on the Contract, including reports on payments made to SB Lower Tier Subcontractors.
- (c) A provision requiring the First or Lower Tier Subcontractor to make good faith efforts to replace an SB Lower Tier Subcontractor with another SB firm if a substitution is deemed necessary.

10. SB SUBCONTRACTOR PARTICIPATION GOALS IN DESIGN-BUILD CONTRACTS

For design-build contracts issued pursuant to Public Contract Code Section 22160, BART may establish three SB Subcontractor Participation Goals for services,

procurement, and construction respectively.

The Proposers for the design-build contracts may be required to meet the SB Subcontractor Participation Goal for services and commit to meeting the SB Subcontractor Participation Goals for procurement and construction in order to be eligible for a preference of up to 5%, which will be credited in the price portion of the Proposal, subject to following the provisions of Section 8. BART staff will monitor the Contractor's performance of the Contract following award to ensure that the Contractor meets the SB Subcontractor Participation Goals for services, procurement and construction.

11. THE CONTRACTOR'S SB OBLIGATIONS AFTER THE AWARD OF THE CONTRACT

In Contracts and Agreements with an SB Subcontractor Participation Goal, the Contractor shall take all reasonable steps to ensure that its SB Subcontractors or Subconsultants are able to successfully perform their subcontract responsibilities.

12. SUBSTITUTION OF SBs

Should the Contractor, Supplier, Consultant or Other Tier Subcontractor, where applicable, establish that the substitution of any SB or LSB Subcontractor (inclusive of DVBEs and Local DVBEs, throughout), Subsupplier, Subconsultant or, where applicable, Lower Tier SB or LSB Subcontractor, is necessary, the Contractor, Supplier, Consultant or Other Tier Subcontractor, shall, subject to the approval of BART, replace the affected SB or LSB Subcontractor, Subsupplier or Subconsultant with another SB or LSB, as applicable, Subcontractor, Subsupplier or Subconsultant or

demonstrate that it made good faith efforts to do so consistent with the following terms:

- ***In determining whether*** good faith efforts have been made, BART will consider the steps taken by the Contractor, Supplier, Consultant, or Other Tier Subcontractor, where applicable, on the actions listed below. These steps are reflective of good faith efforts taken by a Contractor, Supplier, Consultant, or Other Tier Subcontractor seeking to replace an SB with another SB in order to maintain its commitment to meet the SB Subcontractor Participation Goal.
- ***Identify and select*** specific subcontracting areas of the Contract or Agreement to be performed by SB Subcontractors, Subsuppliers or Subconsultants.
- ***Advertise*** the subcontracting opportunity in one or more daily or weekly newspapers, small business association publications, trade-oriented journals or other media specified by BART. Advertise in publications, newspapers, and other media likely to be available to DVBEs. The required advertising shall be completed sufficiently in advance of the selection decision to allow potential SB Subcontractors, Subsuppliers or Subconsultants a reasonable time in which to bid for or otherwise seek the Subcontract.
- ***Provide*** written solicitation notice of subcontracting opportunities to a reasonable number of SB Subcontractors, Subsuppliers or Subconsultants with enough time prior to the selection decision to allow the SBs to offer a proposal.
- ***Follow up*** initial solicitations to SB Subcontractors, Subsuppliers or Subconsultants to confirm whether the potential SB Subcontractors are interested in performing the Subcontracts.
- ***Provide*** interested SB Subcontractors, Subsuppliers or Subconsultants with information about the proposal, plans, specifications, and/or requirements for the subcontracting work to be performed.

- **Request** assistance in identifying potential SB Subcontractors, Subsuppliers, or Subconsultants from community organizations, contractor groups, DVBE organizations, or BART's Office of Civil Rights.
- **Offer** assistance with regard to bond or insurance requirements for SBs.
- **Negotiate** in good faith with SB Subcontractors, Subsuppliers or Subconsultants who express an interest in subcontracting, as appropriate.

13. SB PARTICIPATION REPORTS

Contractors, Suppliers and Consultants shall submit on a form provided by BART a monthly SB or LSB Subcontractor Utilization Report to the Office of Civil Rights (OCR) showing the total amount paid to date to each SB. Prime contractors, suppliers or consultants must submit all reports requested by OCR related to the participation of subcontractors, sub-suppliers or subconsultants on BART contracts.

14. FAILURE TO ADHERE TO SB REQUIREMENTS

The failure of a Contractor, Supplier, or Consultant, or First-Tier Subcontractor, where applicable, to adhere to any of the requirements of the SB Program 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 First-Tier Subcontractors, to comply with the SB participation requirements. Such payments withheld will be released once the Contractor, Supplier, or Consultant or its First-Tier Subcontractors, conform with the SB participation requirements.

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: VERIFICATION OF THE LOCAL STATUS OF SMALL BUSINESSES

Verification is the process by which all firms seeking to participate as Local Small Businesses (LSBs) are determined to have met the eligibility requirements to participate as LSBs on Measure RR contracts. This appendix provides guidance for verifying firms as LSBs.

1. Declaration of Eligibility for Local Small Business Preference

DGS certified Small Businesses bidding on a BART contract must declare their Small Business eligibility including DGS certification number in the Declaration of Eligibility for Local Small Business Preference. On Measure RR funded contracts, the Declaration of Eligibility for Local Small Business Preference will also include a Local status declaration, including the address of the principal place of business.

2. Verifying information on the California Department of General Services Website

Upon receiving a Declaration of Eligibility for Local Small Business Preference or Local Verification Request form, OCR will verify whether the address and city listed on the DGS Small Business database is located within the three Measure RR counties: Alameda, Contra Costa, or San Francisco. If not, the request is denied and the firm is not considered to be Local for BART. The firm may re-request verification of local status if its address has changed on the DGS website to one of the Measure RR counties.

3. Verifying Local Status of a Small Business within Alameda, Contra Costa, or San Francisco Counties

- a) After verifying the location listed on the DGS website, OCR will check to see if the firm is already certified as local by one of the following agencies:
- Alameda County (Small and Local Business or Emerging and Local Business)
 - City/County of San Francisco (Local Business Enterprise)
 - City of Oakland (Local Business Enterprise)
- b) For firms not certified as local by a neighboring county or city, BART will request that the Small Business owner(s) provide documentation to demonstrate that the business qualifies as Local:
- A copy of their business license in the city where their business is based (or county if in an unincorporated area);
 - A copy of a real estate property tax assessment or lease in the name of the firm or owner;
 - A copy of the firm's (or owner's, if applicable) most recent federal tax return
- c) These documents must be provided and examined prior to the award of the contract to gain the Local Small Business preference. If any of the documents show an address other than the one in the DGS database, it is grounds for rejection of local status, although the business owner may be given an opportunity to explain.
- d) In some cases, a range of factors may be considered to determine the firm's principal place of business. These factors include:
- Location where the firm's owner(s) and CEO work on a regular basis,
 - Where the headquarters facility is located, which may be indicated by signage, reception, and administrative and project records,

- Where employees in quality and quantity report regularly to work,
 - Where the firm's primary operations take place,
 - Where resources such as major equipment or supplies are kept,
 - The address listed for the firm on any other certification, including Disadvantaged Business Enterprise (CUCP), Micro/Small Business Entity (BART), Minority and Women Business Enterprise (BART), and Local Business Enterprise (Contra Costa County).
 - Analysis of google map images – or similar – of the address listed as the principal place of business.
- e) The District expects all SBs seeking Local status to cooperate fully with requests for information relevant to the verification process and other requests for information. Failure or refusal to provide such information is cause for denial or removal of status as Local to BART (Local Small Business).

4. Declaration of Eligibility for Local Small Business Subcontractors

On contracts with a SB Preference for Bidders meeting a Local SB Subcontractor Participation Goal, any Bidder wishing to meet the Goal must declare Local SB subcontractors on the Designation of Subcontractors, M/WBE, and SB Participation Form. After the bids are submitted, OCR will confirm that the address listed in the DGS database for each designated Local SB Subcontractor is Local and will ask any Bidder appearing to meet to Local SB Subcontractor Participation Goal to gather and submit Local status documentation for each of their Local SB Subcontractors including a Local Verification Request form and the three items listed in paragraph #3. OCR will evaluate the documentation to verify Local status of each SB Subcontractor.

5. Already Verified Local SBs

Once a SB has been verified as Local they will be added to a database maintained by BART. A Small Business bidder previously verified as Local by BART will still need to submit a Declaration of Eligibility for Local Small Business Preference as part of its bid. But its Local status does not need to be verified as described in paragraph #3.

6. Requesting Verification of Local Status Outside of the Bid Process

A DGS certified Small Business may request that OCR verify their Local status outside of any contract bid process. This can be done by completing a Local Verification Request form available on the OCR website. OCR staff will follow the steps in Paragraphs #2 and #3 to verify the Local status of the SB.

7. List of Verified Local Firms

OCR will provide notification to the firm that it has been verified as Local and will add it to the list of verified LSB or Local DVBE firms. This list is a supplement to the DGS list of certified SBs and potential LSBs but is not meant to replace it for outreach purposes. The list of currently verified LSBs will be made available on the BART website. If an SB or DVBE is removed from the DGS website, they are effectively removed from BART's LSB list as well.

- OCR will use the industry codes – North American Industry Classification System (NAICS) – listed on the DGS website for the firm and add them to the list of verified LSBs. The assignment of a NAICS code is only for informational purposes to assist potential Bidders in identifying LSBs capable of performing work to be subcontracted.

8. Possible Site Visits

From time to time the District may request additional information or conduct site visits to ensure that a SB verified as Local remains eligible for Local status. Failure to timely cooperate or comply with a request for a site visit is a ground for denial or removal of status as a BART LSB.

9. Renewal of Local Status

Each year on or near the anniversary of the SB's verification as Local, OCR will ask the Local Small Business to complete a Declaration of No Change in Address, in order to keep its Local Small Business status current. If an SB has changed address but still remains within Alameda, Contra Costa, or San Francisco Counties, it must submit a lease, utility bill, or property tax assessment as verification of its new address as Local. If a Local SB moves outside of Alameda, Contra Costa, and San Francisco Counties it loses its Local status with BART. Every three years in order to renew its Local status, all verified Local SBs must re-submit the documentation listed in paragraph #3.