

Workplan Selection Process Gives Appearance that Favored Firms Could Receive an Unfair Advantage

Office of the Inspector General



Investigation Results

BART's selection process for awarding workplans under on-call contracts is subjective, which creates the risk that favored firms could receive more work than others, thus leading to the work being more costly than if a firm with lower overhead rates had been selected. At a minimum, a lack of transparency with the selection process leads to the perception that some firm's relationships with District members allows them to receive more work as was the case

with the allegations made against the firm subject to our investigation. We received an allegation against a firm claiming that its overhead rates were excessively high and another that alleged that the firm received more work under its on-call construction management contracts than did other firms. We found the overhead allegation to be partially substantiated because the firm's rates are the second highest among other firms, but they are supported by allowable costs and based on fairly stated values. The firm did receive more work under its on-call contracts than most others, but this did not confirm that it was inappropriate for them to be selected for the projects. There was no documentation available to support the rationale for the selection and no written guidance regarding how to determine which firm to request a workplan proposal from.

In total, we received eleven allegations against a single firm. We found only one of those eleven allegations to be substantiated. We uncovered that the firm did not comply with the District's Contractor Code of Conduct because it failed to disclose that the BART manager who provided oversight on one of the firm's contracts was a former employee of the firm. However, the BART manager has retired from District service. Further, we provided BART management recommendations in a [previous report](#) to address the weaknesses that allowed for the discrepancy to take place. BART management agreed to those actions and initiated corrective actions.

Recommendation

Implement written workplan selection guidelines that create more transparency and support accountability in how firms are chosen to perform work under their on-call contracts. Some options include a rotational basis that results in firms receiving work in a sequence, or having all firms with on-call contracts submit workplan proposals for evaluation. Regardless of the option chosen, the process should minimize the risk that favoritism is the driver or gives the appearance of being the driver behind the selection. The guidelines should include a requirement to consider overhead rates in the selection decision and to document the rationale for the selection for future reference.

Management agreed to implement our recommendation. See Appendix I on page nine for details.

Allegations

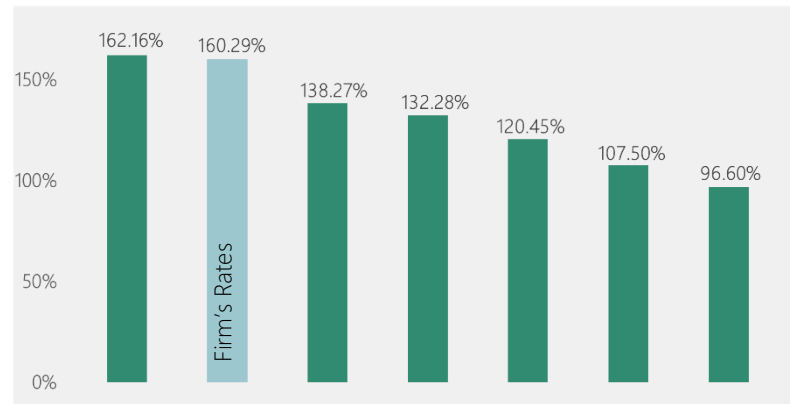
We received eleven allegations against a firm contracting with BART to provide a variety of services. To avoid the inappropriate public disclosure of this organization, we are not naming it in this report and refer to it as only “the firm.” The eleven allegations dealt primarily with noncompliance with conflicts-of-interest policies and contract requirements. To simplify reporting, we grouped the investigations by the allegation type.

Findings

Significantly High Overhead Rates Allegation: Partially Substantiated

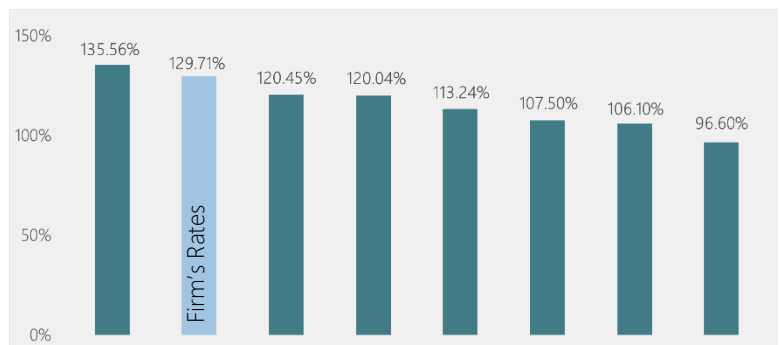
The first allegation claimed that the firm’s overhead rates were significantly high as compared to other firms. We found the allegation to be partially substantiated in the sense that the firm’s rates are higher than most other firms, but not the highest. The firm had the second highest overhead rates for both their home office and field office labor in comparison to the other firms awarded a construction management contract under the same competitive procurement process. However, we found no applicable federal or state law or regulation restricting rate limits for the contract in question. In fact, some laws prohibit placing limits on costs under the theory that certain critical services, e.g., engineering, should not be influenced by cost.¹ Further, BART’s Performance and Audit Department determined that the firm’s rates were reasonable and based on allowable costs, and an independent auditor, external to both BART and the firm, opined that the values used to support the firm’s rates were fairly stated.

Home Office Overhead Rates
Firm 2nd Highest of Seven Construction Management Contractors



Home office rates are applied to labor hours for those who provide support for the contract while working at the firm’s headquarters.

Field Office Overhead Rates
Firm 2nd Highest of Eight Construction Management Contractors



Field office rates are applied to labor hours for those who provide support for the contract while working at project sites or BART offices.

¹ Prohibition applies during evaluation of proposals in response to a request for proposal and not at the work plan stage.

Disproportionate Allocation of Work Allegation: Inconclusive

The second allegation claimed that the firm received more work under its on-call construction management contracts as compared to other firms also awarded on-call contracts. There is no BART policy stipulating that projects must be distributed proportionately among firms, though the terms of the on-call contracts do say that BART will consider “rational distribution” in selecting a firm. In receiving work under on-call contracts, firms are to respond to BART’s request for a workplan proposal. The work needed is based on the list of capital projects identified in the contract scope of services. BART initiates the proposal process by requesting a written workplan proposal for the work from its chosen firm. Only the firm selected by the project team receives the request. BART then evaluates the proposal, considering such things as the breakdown of how the firm will complete the work, work schedule, cost estimate, capacity, and disadvantage business participation. BART will then notify the firm if BART accepted the workplan proposal.



We determined the allegation to be inconclusive. We analyzed workplans under three separate on-call construction management award series and found that the firm was first among other firms in being awarded workplans one time, and second among other firms in being awarded workplans two times. There was no documentation available explaining the rationale for selecting the firm to perform the work and BART does not have formal written

guidance on how to select which firm it will ask to submit a workplan proposal. The discretion in doing so is left to the BART project teams. We were told that BART project teams do consider whether a firm is underused in selecting a firm to submit a workplan proposal but that they must balance that against whether the firm has the capacity needed for the particular project. We were also told that chemistry is a factor as some project teams work better with some firms versus others, which could be perceived as favoritism.

BART’s selection process limits transparency and creates the risk that certain firms may receive favoritism leading to them getting more work than their peers. Further, the informal process removes BART’s ability to defend itself for its selection choice because it could be seen as based on the firm’s connections with BART leadership, which was the perception presented to us by some employees during our investigation.

We reached out to other government jurisdictions that also use on-call contracts to identify how they protect themselves against perceptions that certain firms are favored and to identify a process that provides a more even playing field for all the firms that have an active on-call construction management contract. We identified two potential alternatives BART could use in its workplan award selection.

Alternative One

- ◆ Tasks Assigned in Rotational Sequence
- ◆ Project Teams Do Not Select Firm
- ◆ Firms May Pass On Work & Move to End of List
- ➕ Pro: Removes Favoritism & More Transparent
- ⚠ Con: Firm with Best Experience Might Not Get Task

Alternative Two

- ◆ All On Calls Submit Proposals
- ◆ Project Team Selects from Scored Proposals
- ◆ Meetings to Discuss Upcoming Requests
- ➕ Pro: Encourages Competition
- ⚠ Con: Favoritism Still Possible to Some Degree

The officials we spoke with acknowledged that there is no perfect solution, but implementing their processes did create a more systematic approach for awarding workplans. Regardless of which option is used, any process could be made more transparent through better documentation of the rationale for the selection choice backed by written guidance on the process. Additionally, as shown in our discussion of the prior allegation, overhead rates can vary significantly, thus making it much more expensive to work with one firm versus another. Therefore, overhead rates should be part of the decision process.

Conflict-of-Interest Allegations: One Substantiated, Two Unsubstantiated



The third, fourth, and fifth allegations dealt with conflicts of interest. The third alleged an undisclosed prior employment of a BART manager with the firm, the fourth alleged an undisclosed family relationship between a firm employee and a different BART manager, and the fifth alleged that the services provided by the firm under one of its contracts conflicted with BART's best interests. The District's Contractor Code of Conduct is the applicable policy for the third and fourth allegation as it includes a "Duty to Disclose Conflicts of Interest" section that requires bidders, proposers, and consultants seeking to do or doing business with BART to "promptly disclose in writing" to BART's Procurement manager any

potential conflicts of interest. Family and prior employment relationships create potential conflicts due to actual or perceived allegiances that could unfairly favor the firm. While there is no specific policy regarding the fifth allegation, all services procured for BART should be for the District's best interest and should not bring harm upon the District.

We determined the third allegation to be substantiated. The BART manager named in this instance did work for the firm before gaining employment with BART, which we confirmed through the manager's employment application with BART. The firm did not disclose this relationship as required on its submitted conflict-of-interest disclosure in its contract proposal package. However, the BART manager named in the allegation is no longer employed with BART. Also, in our report issued on [April 8, 2022](#), we made several recommendations to improve the understanding of conflicts of interest and the

requirement to disclose those conflicts.² Therefore, while a conflict did exist, the manager's departure from BART means no remedial action is required and we have no recommendations associated with this allegation.

We determined the fourth allegation to be unsubstantiated. The BART manager named in the allegation did not have a family relationship with any persons working for the firm. Therefore, there was no violation of BART's Contractor Code of Conduct. To make our determination, we conducted genealogical research, which revealed no such relationship, and interviewed the BART manager who denied any such relationship.

We determined that the fifth allegation was also unsubstantiated. The allegation stated that firm's scope of services under one of its contracts required the firm to teach small businesses how to file performance claims against BART. We learned, however, that the purpose of the contract was to provide a variety of services to assist small businesses in navigating BART's complex contracting requirements and being able to compete with larger firms. This included information on what infringements would provide them the right to file a claim and the appropriate process for doing so. The purpose of this information was to reduce the number of filed claims that lack merit and to reduce the administrative work associated with those claims. Further, District Counsel has published video presentations on this identical subject matter for firms and the public to review online in support of the District's goals to reduce claims that lack merit and are filed incorrectly, and to provide transparency in processes.

Favoritism Allegation: Unsubstantiated



The sixth allegation we received alleged that the firm hired a personal friend of a BART manager to gain favor with the District. The BART manager in this instance is not the same manager identified in either of the prior allegations. The applicable policy for this allegation is BART's Contractor Code of Conduct, which includes the section "Prohibition Regarding Gifts" that says, "No Contractor shall offer, give, or promise to offer or give... directly or indirectly, any gift or favor of any value to any District Official."

We determined that this allegation was unsubstantiated. The BART manager did suggest that the firm hire the person named as the friend to work on a District project. However, this person (worker) was not a friend of the BART manager but rather someone who had previously provided similar services for the District and, in the opinion of the BART manager, had done a good job in doing so. The type of service the worker provided was not anticipated in the firm's contract, but during the course of the project, the District identified an immediate need for the work to serve its interests. Therefore, the BART manager

² Potential Conflict of Interest May Require Voiding a \$40 Million Construction Management Contract and Not Paying \$5.4 Million of Invoices (4/8/22) bit.ly/3LKMOWO

provided the firm with the worker's information and suggested the firm could hire the person for the work. To address the allegation, we reviewed the worker's prior work history to confirm they had provided similar services under a different contract, interviewed the BART manager who denied having a personal relationship with the worker and explained the circumstances requiring the firm's unplanned hire, and observed the worker doing the job to verify it was a legitimate District business need and being done as required.

Unable to Perform Contracted Services Allegations: Unsubstantiated

The seventh and eighth allegations dealt with the firm's ability to provide its contracted services. Specifically, the seventh allegation claimed that the firm lacked the financial stability necessary for the size of one of its contracts, and the eighth claimed the firm lacked the staffing capacity necessary for that same contract's scope of service. The contract itself defines the applicable legal terms and conditions, and describes the scope of services. Financial instability and a lack of staffing capacity could lead a firm to be noncompliant with those requirements.



We determined the allegations to be unsubstantiated. We conducted an analysis of the firm's financial statements using the current ratio, cash ratio, equity ratio, and debt ratio calculations. Our analysis confirmed that the firm is not at risk of financial insolvency, as each of those ratios met or exceeded that necessary to be considered financially stable. Further, we conducted a staffing analysis and determined that the firm employed a sufficient number of qualified employees to provide the services stated in the contract scope of work.

Unqualified Personnel Allegation – Unsubstantiated

The ninth and tenth allegations claimed that the firm used unqualified personnel to perform work under its contract. The ninth allegation specifically claimed that a resident engineer listed as key personnel lacked the required licensure and education. The tenth allegation specifically claimed that the firm replaced a highly experienced inspector listed as key personnel with an inspector lacking sufficient experience.

BART evaluates the experience of key personnel in its scoring and ranking of firms during its contract selection process. Resumés for key personnel are included with contract proposals for the evaluation panel's consideration. BART contracts stipulate that key personnel included with the contract are not to be replaced without the BART Agreement Manager's consent. In addition to key personnel, firms may provide with their proposals a list of supplemental personnel who may potentially assist in performing work under the contract in addition to and apart from the key personnel. Supplemental personnel are not considered in the evaluation process for contract award selection, and replacement of supplemental personnel does not require the Agreement Manager's consent.



We determined both allegations to be unsubstantiated. In regard to the unqualified resident engineer, they had 27 years of work experience and a suitable college education. As for licensure, BART made no such requirement in its request for proposals. Further, the title resident engineer is not a regulated title in California, and an individual is not required to be licensed to use it so long as the services they provide remain within the category of construction management services, not civil engineering. Based on the contract scope of services, the firm's resident engineers are not expected to provide civil engineering services. It is important to note that the complainant did not allege that the firm's resident engineers were providing civil engineering services, only that there was a lack of perceived licensure requirements for resident engineers. As such, our investigation focused on whether licensure requirements were applicable to the title of resident engineer.

The firm also did not replace an inspector listed as key personnel with an unqualified inspector. The firm did replace an inspector named on the supplemental staff list with another inspector also on that list. This means that those inspectors were not included in the scoring for the contract award selection and it was at the firm's discretion to replace them as it deemed necessary. Based on our review of the firm's proposal, the first inspector had 20 years of experience and a suitable education and the second inspector had five years of experience and a suitable education.

Misrepresentation of DBE Services Allegation – Unsubstantiated



The eleventh allegation claimed that the firm misrepresented its use of a Disadvantaged Business Enterprise (DBE) by using it as a pass through so that the firm could meet its DBE participation goals. According to the allegation, the firm performed the work it claimed the DBE conducted. BART follows federal guidelines in requiring firms to include DBEs in its list of subconsultants who may provide work under their contract. Firms then identify DBE participation goals, which the BART Office of Civil Rights (OCR) holds them to achieving. The objective is to remedy ongoing discrimination and the continuing effects of past discrimination by

leveling the playing field for small businesses that are 51 percent owned and controlled by socially- and economically disadvantaged individuals. According to the [Code of Federal Regulations 49 CFR 26.55\(c\)\(2\)](#), a DBE cannot be used as a pass through to obtain the appearance of DBE participation.³ The DBE must participate in the delivery of the services.

³ Official FAQs on DBE Program Regulations (49 CFR 26) | US Department of Transportation: bit.ly/3lscBMw



We determined the allegation to be unsubstantiated. Although the firm did include the named DBE in its list of subconsultants, we reviewed official records from OCR and confirmed that the firm did not assign any work to the DBE. We also reviewed the firm’s invoices to confirm that it did not falsify that it had made payments to the DBE for services that the firm actually provided.

The eleventh allegation also claimed that the DBE was not eligible for participation in the national DBE program. BART was not responsible for determining whether this DBE met those program requirements since the California Department of Transportation (CalTrans) issued the DBE certification. Therefore, we forwarded that portion of the allegation to CalTrans for investigation. We will follow up on their investigation at a later time.

Contacts for more information:



Claudette Biemeret
Jeffrey Dubsick



cbiemer@bart.gov
jeffrey.dubsick@bart.gov



510-464-6141
510-817-5937

Providing independent oversight of the District’s use of revenue.



Appendix I – Management Response to Recommendations

BART OFFICE OF THE GENERAL MANAGER RESPONSE TO OIG FINDINGS & RECOMMENDATIONS	
Report Title: Workplan Selection Process Gives Appearance that Favored Firms Could Receive an Unfair Advantage	
1	<p>Recommendation:</p> <p>Implement written workplan selection guidelines that create more transparency and support accountability in how firms are chosen to perform work under their on-call contracts. Some options include a rotational basis that results in firms receiving work in a sequence, or having all firms with on-call contracts submit workplan proposals for evaluation. Regardless of the option chosen, the process should minimize the risk that favoritism is the driver or gives the appearance of being the driver behind the selection. The guidelines should include a requirement to consider overhead rates in the selection decision and to document the rationale for the selection for future reference.</p>
	<p>Responsible Department: Agreement Management, Performance & Audit</p>
	<p>Implementation Date:</p> <p>Process Documentation: August 2022 Process Modifications: TBD</p>
	<p>Corrective Action Plan:</p> <p>BART advertises for on-call agreements through a federally compliant, competitive, qualifications-based process that is transparent and proactive. Solicitations are clear on BART requirements, Disadvantaged Business Enterprise (DBE) and Small Business Entity (SBE) participation, and required skills; and BART is definitive that each proposing consultant team must be capable of performing any task that BART assigns to it (i.e., they must have all the skills sets to deliver any project within the defined solicitation scope). In this way, BART can maximize the use of the on-calls through awarding work plans to the teams that have resource capacity at the time the work is needed.</p> <p>Upon award of the agreements, work is issued on an as-needed basis through the District’s Work Plan process. To ensure transparency and avoid favoritism, this is a two-step process that entails oversight and approvals by the Agreement Manager, Office of Civil Rights, project teams and department leadership during the scoping stage (part 1) and when a firm is selected for each scope (part 2). Every Work Plan is uploaded to BART’s website under the Office of Civil Rights page and can be found at www.bart.gov/about/business/ocr/plans.</p> <p>BART has a proven track record of awarding work plans so that each project team gets a similar dollar value of work over the term (e.g., 5 years) of the contract, although this balance may not be evident at a particular point of the contract term due to timing and resource availability (e.g., at any time, some consultant teams may be on high-value long term work plans while others may be on numerous lower-value short-term work plans, or a consultant may not have resources to perform the scope in a timely manner so the work is assigned to a different</p>



BART OFFICE OF THE GENERAL MANAGER RESPONSE TO OIG FINDINGS & RECOMMENDATIONS

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	<p>consultant). Consultant teams are not guaranteed a specific amount of work, but it is in BART’s best interest (and practice) to maximize the use of all teams over the course of the contract to minimize the need for additional on-call procurements, which are expensive endeavors.</p> <p>BART’s Internal Audit division determines “reasonableness” of overhead (indirect costs) based on compliance with Federal Acquisition Regulations (FAR) 31 and other guidelines at the selection stage (provisional), post-award, and annually thereafter over the life of the agreement. Internal Audit does not evaluate the numerical value of the overhead rates as the consultant selection committee takes value into account when the firms are selected for contract award.</p> <p>While BART’s workplan selection process is designed to ensure maximum transparency, support accountability, and provide financial value to BART, management will review and document the process by which workplan recipients are selected. The documented process will be reviewed by the District’s Performance & Audit and Agreement Management teams, which will assess if opportunities for favoritism currently exist, identify where improvements to transparency can be made, and determine if other methods (including those identified by the OIG) are advantageous and appropriate for BART. In addition, the District will also commence posting a chart quarterly on its website summarizing the remaining capacity available on all on-call contracts.</p>
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