



SONOMA-MARIN AREA RAIL TRANSIT DISTRICT  
DISADVANTAGED BUSINESS ENTERPRISE  
(DBE) PROGRAM

Submitted To:

FEDERAL TRANSIT ADMINISTRATION  
REGION NINE  
211 MAIN STREET, ROOM 1122  
SAN FRANCISCO, CA 94111

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## I. Statement of Policy

It is the policy of the Sonoma-Marín Area Rail Transit District ("SMART") 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 SMART to create a level playing field on which a Disadvantaged Business Enterprise ("DBE") or Small Business ("SB") 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, SMART is committed to carrying out all requirements of 49 CFR Part 26, establishing and maintaining SMART's DBE Program (the "DBE Program" or "Program"). SMART 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.

SMART has disseminated this policy statement to the SMART Board of Directors and all of the components of our organization. We have distributed this statement to DBE and non-DBE business communities that perform work for us on DOT-assisted contracts and is posted on our website: [www.sonomamarintrain.org](http://www.sonomamarintrain.org).

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 SMART's DBE Program and the terms of 49 CFR Part 26 as amended, the latter shall prevail.

## II. Objectives

The objectives of this DBE Program are to:

1. Ensure nondiscrimination in the award and administration of federally funded contracts;
2. Create a level playing field on which DBEs and SBs can compete fairly for federally funded contracts;
3. Help remove barriers to DBE and SB participation in the bidding, award and administration of District contracts;
4. Assist in the development of DBE and SB firms that can compete successfully in the market place outside of the DBE Program;
5. Ensure that only firms that fully meet the eligibility standards of 49 CFR Part 26 are permitted to participate as DBEs;
6. Ensure that the DBE Program is narrowly tailored in accordance with applicable law.
7. Identify business enterprises that are qualified as DBEs or SBs and are qualified to provide SMART with materials, equipment, supplies and services; and to develop a good rapport with the owners and management of those enterprises;

## III. Applicability

Pursuant to 49 CFR Sections 26.3 and 26.21, SMART, as a recipient of federal

financial assistance from the Federal Transit Administration ("FTA") of the United States Department of Transportation ("DOT"), is required to implement a DBE Program in accordance with 49 CFR Part 26. The DBE Program outlined herein applies to all SMART contracts that are funded, in whole or in part, by the DOT.

Subrecipients are responsible for adhering to SMART's DBE Program and to 49 CFR Part 26 in its entirety.

In the administration of the DBE Program, SMART will not directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing the accomplishment of the objectives of this DBE Program with respect to individuals of a particular race, color, sex or national origin.

#### IV. Responsibility for DBE Program Implementation and Administration

##### A. Board of Directors

The Board of Directors is responsible for establishing DBE policy.

##### B. General Manager

SMART's General Manager is responsible for adherence to this DBE Program and has overall responsibility for directing development and implementation of this Program.

##### C. Liaison Officer

The General Manager shall designate the Liaison Officer as referenced in 49 CFR Part 26.25. The Liaison Officer shall be responsible for overseeing the DBE Program, recommending DBE policy, developing and implementing a written DBE program and internal and external communication procedures. Pursuant to 49 CFR Part 26.25, the Liaison Officer shall have adequate staff to administer SMART's DBE Program and shall have direct and independent access to the General Manager.

The Liaison Officer shall be responsible for all aspects of the DBE Program as outlined in this document, and he or she will work closely with operating divisions and other departments and consultants of SMART, including the Office of the General Counsel, the Contracts/Procurement Coordinator and Engineering, and other departments which are responsible for making decisions relative to SMART's agreements, contracts and subcontracts, including but not limited to construction, procurement and proposal contracts, professional and technical services agreements and purchase orders.

The specific duties and responsibilities of the Liaison Officer or his/her designee(s) shall 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 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-neutral SB participation;
5. Analyzing and assessing the available resources and evidence for the establishment and achievement of an overall DBE participation goal;
6. Analyzing SMART's 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 SMART, the Board and FTA as needed;
8. Participating in the contract bid and award process including establishing contract-specific DBE goals where appropriate, reviewing contract specifications, attending pre-bid, pre-proposal and pre-construction meetings to explain the DBE Program, to respond to questions from contractors and proposers and evaluating bids for contractor responsiveness, responsibility and good faith efforts;
9. Advising the General Manager and Board of Directors on DBE matters;
10. Maintaining and updating the DBE Directory in accordance with 49 CFR Section 26.31;
11. Maintaining and updating the Bidders List in accordance with 49 CFR Section 26.11;
12. Providing outreach to DBEs and community organizations with advice on DBE Program issues and contract opportunities;
13. Determining all initial certification actions for DBE and small businesses elements, including certifications, annual updates, denials and removals;
14. Participating in the implementation of a statewide Unified Certification Program in accordance with 49 CFR Section 26.81;
15. Maintaining all necessary records and documentation of the DBE Program.

D. Office of the General Counsel

The Office of the General Counsel is responsible for advising the Board of Directors, the General Manager, and the DBE Liaison Officer in the implementation of the DBE Program.

V. Administrative Requirements

A. DBE Financial Institutions

Pursuant to 49 CFR Section 26.27, the Liaison Officer will identify and explore the range of services offered by banks and other financial institutions that qualify as DBEs in the Counties of Marin and Sonoma and determine areas in which SMART may reasonably utilize their services. SMART will also encourage its prime contractors to use the services of DBE financial institutions.

B. CUCP DBE Directory

SMART is a member of the California Unified Certification Program (CUCP),

which maintains the DBE directory pursuant to 49CFR 26.81 that identifies all firms that are eligible to participate as DBEs in this Program. SMART 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 SBs.

#### C. Overconcentration

Pursuant to 49 CFR Section 26.33, if the Liaison Officer determines that DBE participation is so over-concentrated in certain types of work or contracting opportunities that it unduly burdens the participation of non-DBEs in that type of work, the Liaison Officer will develop appropriate measures to address the overconcentration. The Liaison Officer will seek approval from the FTA. Once approved, the measures will become part of this Program. Measures to address DBE overconcentration in a particular field may include, but are not limited to the following:

1. Developing ways to assist DBEs to move into nontraditional areas of work;
2. Varying the use of contract-specific DBE goals;
3. Working with prime contractors to find and use DBEs in other industry areas;

#### D. Race & Gender Neutral Efforts to Attain DBE Goals

Pursuant to 49 CFR Section 26.51, SMART 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 small businesses 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. Ensuring distribution of SMART's DBE data base through print and electronic means to the widest feasible range of potential prime contractors;
6. Conducting internal training seminars to facilitate better understanding among project managers and engineers regarding the DBE Program objectives;
7. Maintain a website containing information on DBE certification, DBE Program, DBE procedures and a database of DBE firms;
8. Ensuring that SMART's SB Elements are open and available to all small businesses, including DBEs.

#### E. Small Business DBE Program Elements

In accordance with 49 CFR Section 26.39, SMART will establish Small Business

DBE Program Elements ("SB Elements") as part of its DBE Program. DBEs are SBs and thus having an active and effective SB element to its DBE Program will assist SMART in achieving as large a portion of its overall goal as possible through race-neutral means. The SB Elements will include all reasonable steps to eliminate obstacles to small business participation on SMART's contracts. This includes, but is not limited to:

1. Race neutral SB goals on DOT funded contracts;
2. Contract set asides for SBs on DOT funded contracts;

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

The Liaison Officer will ensure that the SB Elements integrate with and complement the District's other race-neutral DBE Program efforts. The Liaison Officer shall work in conjunction with all projects at the earliest stages of project development to ensure that the projects have, to the fullest extent feasible, been developed in a way that encourages DBE or SB participation.

#### F. DBE Outreach

One method of providing race-neutral efforts for DBE and SB participation will be through SMART's DBE Outreach Program (the "Outreach Program"). The Liaison Officer shall be responsible for identifying the most effective type(s) of outreach and implementing outreach. Outreach includes but is not limited to contract-specific outreach, general outreach and outreach to community based organizations (CBOs) and contractor or business groups.

#### G. Hearing Officer

In accordance with 49 CFR Sections 26.53(d)(2) and 26.87(e) and as described more fully in appendices E and F, all proceedings by SMART in connection with the removal of certification or reconsideration of a determination that a bidder has not met the DBE goal or used good faith efforts will be heard by an outside independent hearing officer selected in accordance with SMART's procedures. The party or individual requesting the reconsideration or hearing shall equally bear the burden of payment of any fees or costs associated with the independent hearing officer with SMART.

#### H. Unified Certification Program

A Memorandum of Agreement (the "MOA") for a Statewide Unified Certification Program has been developed by California transportation agencies that are recipients of federal funds in accordance with 49 CFR Part 26. The MOA was accepted by the Secretary of the U.S.

Department of Transportation and is effective as of January 1, 2002. There are

two certifying clusters in California: Northern and Southern. SMART is among the certifying agencies within the Northern California cluster.

#### I. Transit Vehicle Manufacturer Certification

Each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, must certify that it has complied with the requirements of 49 CFR Section 26.49, including the establishment of an annual overall DBE participation goal that has been submitted to the FT A and either approved, or not disapproved, by that agency. SMART shall not include the amount of FTA assistance used in transit vehicle procurements in the base amount from which SMART's overall annual goal is established. Alternatively, SMART may establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of complying with the remaining sections of 49 CFR Section 26.49, subject to approval from the FTA.

#### VI. Triennial DBE Goals

Pursuant to 49 CFR Section 26.45, the Liaison Officer will establish a triennial overall DBE goal ("Triennial Goal") according to the procedures expressed in Appendix B, subject to the approval of the Board of Directors, for the participation of DBEs in all projected contracts utilizing DOT financial assistance for a period covering three fiscal years. The Triennial Goal will be expressed as a percentage of the total amount of DOT funds the District anticipates expending in three year period covered by the triennial goal. A report outlining the steps and calculations used to establish SMART's Triennial Goal ("Triennial Goal Report") will be submitted to the appropriate operating administration for review no later than October 31 for each three fiscal year period to be covered by the Triennial Goal.

The Liaison Officer will track and evaluate its goal on a quarterly basis. This tracking is for informational purposes only and to ensure that SMART is meeting the largest feasible portion of the Triennial Goal through race neutral means. In the event that SMART amends its Triennial Goal, it shall be submitted to the appropriate operating authority in a manner consistent with 49 CFR Section 26.45.

SMART'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 SMART would expect absent the effects of discrimination. SMART 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, SMART 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 disparity study ("Disparity Study"), or any subsequent updates to the Disparity Study.

Overall project goals may be set for design-build, turnkey and/or multi-year



projects consistent with the requirements of 49 CFR Part 26, as outlined in Section XIV.

VII. Contract-Specific DBE Goals

In accordance with the procedures expressed in Appendix C, SMART will establish contract-specific DBE goals on construction contracts with subcontracting opportunities to the extent that SMART cannot achieve its annual overall DBE goal with race-neutral measures. Where a contract-specific DBE goal has been established, the bidder or proposer must meet the contract-specific goal or demonstrate that it made good faith efforts to do so. The bidder shall be entitled to a hearing if the bidder fails to show either that it met the goal or that it made good faith efforts to meet the goal. All proceedings by SMART 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 good faith efforts. Contract specifications will provide that contract award is conditioned on meeting these requirements.

A contract specific goal shall only be established where supported by the findings of SMART's Availability and Utilization Study or an update to that study.

VIII. DBE Eligibility

A. Disadvantaged Business Enterprise

A Disadvantaged Business Enterprise (DBE) is a for-profit, small business concern: 1) that is at least fifty-one percent (51 %) owned by one or more individuals who are socially and economically disadvantaged or, in the case of a corporation, in which at least fifty-one percent (51%) of the stock is owned by one or more socially and economically disadvantaged individuals; and 2) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

B. Small Business Concern

A small business concern is an existing small business, as defined by Section 3 of the Small Business Act and the Small Business Administration regulations implementing it (13 CFR Part 121), whose average annual gross receipts for the previous three years does not exceed \$22.41 million (or as adjusted for inflation by the Secretary of DOT) pursuant to 49 CFR Section 26.65(b).

C. Socially and Economically Disadvantaged Individuals

There is an assumption that an individual is both socially and economically disadvantaged if he or she is a citizen or lawfully admitted permanent resident of the United States and is:

1. Black American (including persons having origins in any of the Black racial groups of Africa);
2. Hispanic American (including persons of Central or South American, Cuban, Dominican, Mexican, Puerto Rican, or other Spanish or Portuguese culture or origin, regardless of race);
3. Native American (including persons who are Aleuts, American Indians, Eskimos, or Native Hawaiians);
4. Asian-Pacific American (including persons whose origins are from Brunei, Burma (Myanmar), Cambodia (Kampuchea), China, the Commonwealth of the Northern Marianas Islands, the Federated States of Micronesia, Fiji, Guam, Hong Kong, Indonesia, Japan, Juvalu, Kiribati, Korea, Laos, Macao, Malaysia, Nauru, the Philippines, Samoa, Taiwan, Thailand, Tonga, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), or Vietnam);
5. Subcontinent Asian American (including persons whose origins are from Bangladesh, Bhutan, India, the Maldives Islands, Nepal, Pakistan, or Sri Lanka); A Woman; or
6. A member of any additional group that is designated as socially and economically disadvantaged by the Small Business Administration.

SMART 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. SMART will also require each individual owner of a firm applying to participate as a DBE and whose ownership interest is relied upon for DBE certification to submit a sign, notarized statement of personal net worth with appropriate supporting documentation. Additionally, any individual may demonstrate, by a preponderance of evidence on a case-by-case basis, that he or she is socially and economically disadvantaged. SMART will follow governmental requirements, including 49 CFR Section 26.67 and the guidelines in 49 CFR Part 26, Appendix E, for determining social and economic disadvantage.

#### D. Personal Net Worth

Personal Net Worth (PNW) means the value of the assets of an individual remaining after total liabilities are deducted. As defined more specifically and limited in 49 CFR Part 26, an individual's personal net worth does not include:

1. The individual's ownership interest in an applicant or participating DBE firm;
2. The individual's equity in his or her primary place of residence;

An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse. An individual owner of a firm whose ownership and control are relied on for DBE certification cannot be determined to be economically disadvantaged if he or she has a personal net worth exceeding \$1.32 million.

#### E. Non-Residence Certification

SMART's market area consists of Marin, Sonoma and Solano counties (the "Market Area"). In order for a firm with a principal place of business located outside of the Market Area to be eligible to benefit from the race and gender conscious program, the firm must show that it has attempted to do business in the three-county area. All firms whose primary place of business is located in or is domiciled within the Market Area are presumptively assumed to meet the following requirements. The requirements may include but are not be limited to:

1. Currently or previously a party to a construction contract to do work in one of the three counties.
2. Attendance at a SMART sponsored outreach meeting, including pre-bid meetings, town hall meetings and/or Board of Directors' meetings.
3. Any form of communication with SMART, including purchasing contract documents, requesting information from SMART and attending or registering to attend SMART sponsored outreach events.

#### IX. Procedures to Ascertain Eligibility and Utilization of DBEs

In order to ensure that the DBE Program benefits firms actually owned and controlled by socially and economically disadvantaged individuals, SMART has established certification procedures for DBEs and joint ventures involving DBEs and will abide by the procedures contained in Appendix E.

##### A. DBE Certification

The California Unified Certification Program (CUCP), 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.

SMART adopts the CUCP Procedures. Prospective DBE firms may obtain the requisite DBE application forms from SMART's web site at [www.sonomamarintrain.org](http://www.sonomamarintrain.org) or by contacting the Liaison Officer directly.

DBE firms certified pursuant to the Unified Certification Program (UCP) 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 the other state.

When processing an application from a firm that has been certified by the SBA as a small business, SMART has two choices. It may either accept the SBA certification decision, subject to SMART's own on-site review, or it may use the firm's SBA application package in lieu of requiring completion of SMART's own

application form (in which case the District will still have to complete an on-site review, but will make its own decision). Certification procedures, including those applicable to initial certification, removal (decertification), and certification appeals, are set forth in Appendix E.

#### B. Termination

Termination of DBE firms shall only be for good cause, as determined by SMART in accordance with 49 CFR Section 26.53 (f). Any termination of a DBE must be essential to the contract and not merely discretionary, advantageous or for the convenience of the contractor. A contractor must immediately notify the Liaison Officer of a DBE's inability to perform, and must provide documentation to substantiate any claim of non-performance. In order to terminate a DBE firm, the contractor must receive prior, written approval from SMART.

In the event that SMART 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.

#### C. Remedies for Non-Compliance

Non-compliance consists of failure or refusal to implement, meet or satisfy the applicable governmental requirements related to DBE participation, including but not limited to 49 CFR Part 26 and related federal guidelines or the applicable requirements of SMART's DBE Program and/or District contracts related to DBE participation.

SMART may impose any remedies for non-compliance authorized by the federal, state and local regulations and District contract specifications, including withholding of progress payments, liquidated damages and termination of the contract in whole or in part.

#### D. Counting and Tracking DBE Participation

Only the work actually performed by a DBE will be counted towards the DBE goal. The cost of supplies and materials obtained by the DBE or equipment leased (except from the prime contractor or its affiliate) may also be counted.

DBE participation will not be counted toward the prime contractors achievements or the overall goal until the DBE has been paid. In accordance with 49 CFR Section 26.51(g), The Liaison Officer will track the participation of DBEs in contract-specific goal contracts separately from the participation of DBEs in contracts without contract goals. The Liaison Officer will not count towards the overall goal that portion of a DBEs participation that is achieved after the certification of the DBE has been removed during the performance of a contract. If the DBE's ineligibility is caused solely by its having exceeded the applicable size standard during the performance of the contract, SMART will continue to count its participation on that contract toward overall and contract goals.

1. Expenditures may only be counted if the DBE is performing a commercially useful function on the contract. A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved.

To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating prices, determining quality and quantity, ordering the material, and installing and paying for the material itself. To determine whether a DBE is performing a commercially useful function, the

District will evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, as well as other relevant factors.

A DBE does not perform a commercially useful function if its role in the contract is limited to that of an extra participant through which funds are passed in order to obtain the appearance of DBE participation. If the DBE does not perform or exercise responsibility for at least 51 % of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, the DBE is presumed not to be performing a commercially useful function

2. If materials or supplies are obtained from a DBE manufacturer, 100 percent of the cost will be counted. If the materials and supplies are purchased from a DBE regular dealer, 60 percent of the cost will be counted. If the materials and supplies are purchased from a DBE broker or a manufacturer's representative, the entire amount of the fees or commissions charged for assistance in the procurement of the materials or supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site will be counted towards the DBE goal provided that the fees are reasonable and not excessive as compared with fees customarily allowed for similar services.
3. Trucking will be counted in accordance with the provisions of 49 CFR Section 26.55

#### X. Required Contract Provisions

SMART will include the following provisions in federally funded contracts, where appropriate.

##### A. Nondiscrimination Assurance

Each federally funded contract SMART signs with a contractor, and each subcontract the prime contractor signs with a subcontractor, will include the following statement:

"The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin or sex in the performance of this contract. The

contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as SMART deems appropriate as specified in the contract."

#### B. Prompt Payment Policy and Provisions

Each federally funded contract SMART signs with a contractor will include the following provisions:

"The contractor shall promptly pay any and all subcontractors by an instrument that guarantees availability of funds immediately upon deposit of said instrument. The contractor shall include, in its monthly invoice submission to SMART, amounts to pay for all subcontractors' acceptable invoices, no later than 30 days after receipt of such invoices. Unless otherwise approved in writing by SMART, the contractor shall, within ten (10) days after receipt of the payment made by SMART, pay to each of its immediate subcontractors 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. Any delay or postponement of such payment may take place only for good cause and with SMART's prior written approval. If the contractor determines the work of the subcontractors to be unsatisfactory, the contractor must immediately notify in writing SMART (with a separate notice to the Liaison Officer if the subcontractor is a DBE) 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."

"Should SMART make incremental inspections and, upon approval of the contractor's work at various stages of the contract, pay a portion of the retainage, the contractor shall promptly, within 30 days after SMART has made such payment, pay to the subcontractor who has satisfactorily completed all of its work and whose work is covered by SMART's inspection and approval, all retainage owed to the subcontractor. SMART's incremental inspections, approval or release of a portion of the retainage under this section shall not constitute acceptance."

For the purposes of this section, a subcontractor's work is satisfactorily completed when the prime contractor certifies to SMART that all the tasks called for in the subcontract have been accomplished.

### XI. Contract Compliance and Reporting

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

#### A. Bidders List

Pursuant to 49 CFR Section 26.11(c), SMART will create and maintain a bidders list consisting of all firms bidding on prime contracts and bidding or quoting

subcontracts on federally funded projects. For every firm, the following information will be included: firm name, firm address and firm's status as a DBE or non-DBE. SMART may also request additional information from bidders such as the age of the firm, the annual gross receipts of the firm and the ethnicity and gender of the owners, although this information is not required to be provided by any bidders.

#### B. Reporting to the US Department of Transportation

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

#### C. Other Reporting Requirements

SMART will track the amount awarded the DBE, the amount paid to the DBE as stated by the prime contractor, and the amount paid to the DBE as verified by the DBE. Pursuant to 49 CFR section 26.37 (b), SMART will certify in writing that any work committed to DBE firms is performed by the DBE firm to which the work has been committed.

The Liaison Officer will report the actual amount paid to DBEs to FTA. Contractors performing work on SMART's DOT assisted contracts are required to separately report the DBE participation of their contracts achieved through race-neutral and through race-conscious means.

### XII. Miscellaneous

#### A. Program Review

The DBE Program will be reviewed by the Liaison Officer every five (5) fiscal years, or more frequently as necessary at the sole discretion of the Board, to ensure that elements of the DBE Program are tailored to address any discrimination that may exist in the industries relevant to SMART's contracting activities and to ensure that the DBE Program does not disproportionately impact any particular group.

#### B. Severability

Should any part, term, provision or element of this DBE Program be decided by the courts to be illegal or in conflict with any law of the United States or of the State of California or otherwise rendered unenforceable or ineffective, the validity of the remaining parts, terms, provisions, or elements shall not be affected.

### XIII. Special Requirements for Design/Build Contracts Under Public Contract Code

In addition to the terms, conditions and provisions described above in Sections I through XIII, the following terms, conditions and provisions are applicable to design-build contracts awarded by SMART under the authority of Public Contract Code Sections 20209.5 et seq.:

#### A. Category of Work Goals

On any Design-Build contract with subcontracting opportunities, SMART shall establish Category-of-Work goals of a type and level appropriate to meet either the contract goal or the race-conscious portion of the project overall goal. The Category-of-Work goals will address contracting activities in various areas of work throughout the life of the contract. As more fully described in Section XIV.E, below, a bidder must commit to meet each of the Category-of-Work DBE goal(s) or demonstrate that it could not meet said Category-of-Work DBE goal(s) despite its good faith efforts.

#### B. DBE Participation Credit for Second Tier Subcontractors

DBE participation by second-tier subcontractors will be counted toward the DBE goal subject to ensuring that record keeping and enforcement provisions for DBE participation are passed down to the second-tier subcontractor.

#### C. Bonding Waiver for Subcontracts

SMART, in its discretion and on a contract-by-contract basis, may require a prime contractor to eliminate bonding requirements for subcontracts under a certain size or which meet a specific criteria.

#### D. DBE Cost-Loaded Schedule

SMART, in its discretion and on a contract-by-contract basis, may require a prime Contractor to provide a DBE Cost-Loaded Schedule.

#### E. Phased Goals

Where a Category-of-Work goal has been set that is applicable to an initial project phase (e.g., design and professional services), a bidder shall identify at bid all DBE firms, their participation level and type of work to meet the initial Category-of-Work goal(s) or shall demonstrate good faith efforts to meet such goal(s). In addition, where Category-of-Work goals have been set that are applicable to subsequent project phases (e.g., construction), a bidder at bid shall commit to meet each subsequent Category-of-Work goal identified in the Design-Build documents or shall demonstrate good faith efforts to meet such goal(s). Notwithstanding a bidder's commitment at bid to meet a specific level of DBE participation for Category-of-Work goals applicable to later project phases, a bidder shall not be required to identify at bid the DBE firms it will use for this work. Rather, the bidder's commitment will be monitored during performance of the contract in a number of ways, including but not limited to the following:

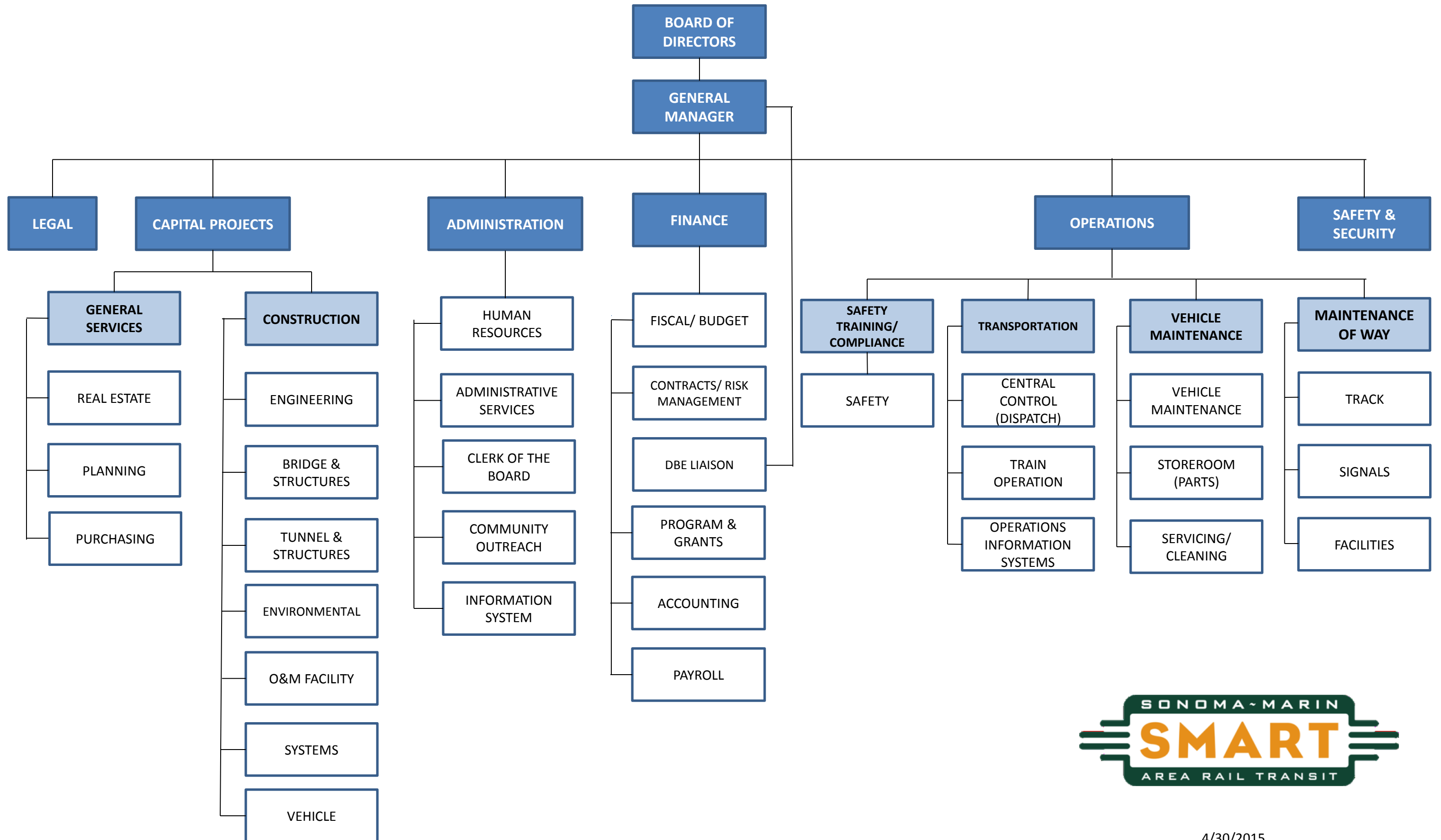
1. Prior to commencement of work by the DBE, the contractor shall submit a monthly DBE Participation Form identifying the DBE firm, its participation level and type of work to be performed, along with a copy of the subcontract with the DBE. No credit shall be given the contractor for participation by any DBE that has not been approved by the District.
2. The contractor shall file monthly DBE Utilization Reports.



3. If required, the contractor shall periodically submit a DBE cost-loaded schedule.
4. SMART shall undertake regular evaluation of the contractor's progress regarding DBE participation and may request corrective action plans as appropriate.
5. In accordance with current regulations, all DBEs that are to participate on the project must be certified prior to bid. Moreover, subcontracts with DBEs are governed by the requirements of Public Contract Code Section 20209.10 (c).

# SONOMA-MARIN AREA RAIL TRANSIT DISTRICT

Attachment 1



**Attachment 2**  
**DBE Directory**

See the CUCP directory, found at: [http://www.dot.ca.gov/hq/bep/find\\_certified.htm](http://www.dot.ca.gov/hq/bep/find_certified.htm)

SMART encourages prime contract bidders to search this directory when seeking subcontractors that are certified as a DBE. SMART will provide a hard copy of such directory upon request.

**Attachment 3**  
**Monitoring and Enforcement Mechanisms**

SMART has available several remedies to enforce the DBE requirements contained in its contracts, including, but not limited to, the following:

1. Breach of contract action, pursuant to the terms of the contract;
2. Breach of contract action, pursuant to California Civil Code §3300, et seq.;
3. Any other enforcement mechanism in law or equity allowable in California.

In addition, the federal government has available several enforcement mechanisms that it may apply to firms participating in the DBE problem, including, but not limited to, the following:

1. Suspension or debarment proceedings pursuant to 49 CFR Part 26
2. Enforcement action pursuant to 49 CFR part 31
3. Prosecution pursuant to 18 USC 1001.

## Attachment 4

### Section 26.45 - Overall Goal Calculation

#### Amount of Goal

SMART's overall DBE goal for FY 2014-2017 is to expend 3.99% of the federal financial assistance in DOT-assisted contracts on DBE participation, exclusive of FTA funds to be used for the purchase of transit vehicles.

#### Methodology used to Calculate Overall Goal

##### **Step 1: Base Figure for Relative Availability of DBEs:**

Section 26.45(c)(3) states that determining a base figure for the relative availability of DBEs may be accomplished by using data from a disparity study. In addition, guidance offered by the General Counsel of the United States Department of Transportation indicated that individual recipients may rely upon statewide disparity studies conducted in cooperation with transit recipients rather than conducting their own study, in order to reduce the costs that would be involved if each recipient conducted its own separate study. See United States Department of Transportation Official Questions and Answers (Q&A's) DBE Program Regulation (49 CFR 26), available at: <http://www.dot.gov/osdbu/disadvantaged-business-enterprise/state-dot-and-dbe-program-websites>

Given the thoroughness and well-reasoned methodology of the Availability and Disparity Study, issued by the California Department of Transportation on December 5, 2014 (the "Study"), and its specific applicability to transit-related DBEs in California, SMART finds it reasonable and prudent to adopt 10.7% as the Base Relative Availability Figure for Step 1.

See Chapter 4, Page 11 of the Study, available at <http://www.dot.ca.gov/hq/MassTrans/Docs-Pdfs/DBE/disparity.study.for.ftacontracts.2014.pdf>. While SMART acknowledges that this Study was performed with respect to Federal Highway Administration projects, SMART considers such projects substantially similar to projects SMART may have with the Department of Transportation.

This base figure of 10.7% from the Study is an aggregate, dollar-weighted availability statistic, adjusted for net worth limits and anecdotal information. The dollar weighting took into account the type of work, contract role, location and size of work involved in federally funded projects that would go to minority- and women-owned firms, if such firms received the same amount of work as similarly-situated majority-owned firms available for such work.

To test this figure for SMART's local area, SMART reviewed U.S. Census Bureau data for 2012 County Business Patterns (NAICS), <http://www.census.gov/econ/cbp/>, and compared it against the CUCP data for DBEs. This figure is considered informative, but not reliable, as will be discussed below.

The market area for the purposes of this study is the area in which a substantial majority of the contractors and subcontractors with which SMART expects to do business are located. SMART considers its market area for these purposes to include the three county regions of 1) Marin County, 2) Sonoma County, and 3) Solano County.

SMART finds that the 10.7% base DBE figure from the California DOT Study is the most refined raw data available to SMART at this time; however, for the following reasons SMART also takes into account data that provide necessary adjustments to the base DBE figure:

- (1) The calculation compares recent data with 2012 data. The year 2012 is the most recent data available for 2012 County Business Patterns (at the time of this study), but CUCP data is updated daily. Thus, the comparisons are not concurrent in time, and businesses that enter or exit the market may be captured in one report but not the other.
- (2) The results fail to take into account anecdotal information, which is significant. As shown in the Study's "Other Interviews (Appendix J, Page 194) non-certified minority- or women-owned firms said they did not have time to wade through all of the requirements and certification genres or said the certification process was overly difficult. See Appendix J, Page 194 of the Study, "Other interviewees reported challenges and barriers in connection with DBE certification process. This caused some firms to forego certification."
- (3) The raw data provided by the U.S. Census Bureau and the CUCP does not weight the firms for expected contract dollars spent.

Though the Study pertains to a much wider region than the SMART market area, SMART finds that the difference in DBE results would be negligible. First, the General Counsel of the United States Department of Transportation indicated that individual recipients may rely upon statewide disparity studies conducted in cooperation with transit recipients (such as Caltrans). Second, the Study specifically found that "[b]ecause most firms that reported qualifications and interest in local government also indicated qualifications and interest in Caltrans work, there are no material differences in results for these segments of the market." See Section II, Page 5 of the Study.

In sum, SMART finds that the 10.7% base DBE relative availability figure is likely the most accurate data available and adopts this figure as its baseline.

## **Step 2: Adjustments to the Base DBE Relative Availability Figure**

After establishing the base DBE relative availability level in Step 1, SMART reviewed and assessed other known relevant evidence to determine what additional adjustments, if any, were needed to more narrowly tailor the base goal to SMART's market area and contract program. SMART has had two FHWA-funded projects: ISTEAs Grade Crossing Signals Project and Black Point Bridge Automation Project. When they were awarded, UDBE goals were required for DBE participation. DBE goals for those projects were calculated pursuant to Caltrans Local Assistance Manual, and do not provide sufficient information to refine SMART's FTA-assisted DBE goal.

<b>PROJECT TITLE</b>	<b>2011 - UD BE GOAL</b>
ISTEA Grade Crossing Signals Upgrade Project Federal Aid No. ISTDEML-6411(001)	Overall DBE goal of 3.94% and UDBE goal of 2.43%
ISTEA Black Point Bridge Automation Project Federal Aid No. ISTDEML-6411(002)	UDBE goal of 5.9%

The Design/Build construction contracts for SMART have not been federally funded in which case Local Business and Local Participation goals were adopted. Therefore, those goals do not provide additional information to refine SMART's DBE goal.

**TABLE 1 – SMART'S ANTICIPATED FEDERALLY-ASSISTED CONTRACTS**

<b>Anticipated Federal Assisted Contracts for FY 2014-2017</b>	<b>Cost Estimate Amount</b>	<b>Percentage of Cost Estimate Federally Funded</b>	<b>Federal Fund Amount</b>	<b>Federal Funds Scope</b>	<b>Percentage of FTA-Assisted Contracts</b>
FTA Small Starts for Larkspur Rail Extension	\$42,530,000	52.97%	*\$22,530,000	Design/Build (further scope details available)	99.73%
Stations' Bicycle Parking Investment Plan (FTA via Caltrans)	\$115,000	87%	\$100,000	Planning / Professional Services	0.27%
	\$42,645,000		\$22,630,000		100%

\*Larkspur Rail Extension existing funding in the amount of \$2.5 Million (Grant #CA-03-0817) is being passed through by the City of Petaluma and combined in this FTA funded total.

Examining the three county regions of 1) Marin, 2) Sonoma and 3) Solano Counties resulted in the following DBE availability for engineering, construction, and architectural services from the 2012 County Business Patterns survey (<http://censtats.census.gov/cgi-bin/cbpnaic/cbpdetl.pl>).

**TABLE 2 – RELATIVE AVAILABILITY OF DBEs FOR ANTICIPATED CONTRACTS**

Anticipated Federal assisted contracts for FY 2014/15 – 2016/17	NAICS Code	3 County Business Census	3 County DBEs California UCP	Percent DBE of Total
FTA Small Starts for Larkspur Rail Extension Design/Build Contract	541330 Engineering	251	5	1.99%
	237990 Heavy Construction	15	3	20%
	541310 Architectural Services	133	0	0%
Average DBE Percentage:				7.33%
Stations' Bicycle Parking Investment Plan (FTA via Caltrans)	Professional Services Transit Planning 541614	13	0	0%
<p>Results for Professional Services Transit Planning, NAICS 541614, for the three counties show 13 total establishments. However, DBEs shown for that NAICS category in the CUCP database show zero DBEs. Because of the uncharacteristic number of DBE availability, it is impossible to achieve a percentage that can be used in calculating a DBE percentage. Also the Stations' Bicycle Parking Investment Plan contract is only 0.27% of the total FTA dollars.</p>				



## Step 2: Adjust Base Figure

Per 49 CFR 26.45(d), following calculation of a base figure, all available evidence must be examined to determine what adjustment, if any, is needed to the base figure to arrive at the overall DBE goal. The primary form of evidence available is past participation of DBEs in SMART's contracting. The available evidence and information on DBE capacity did not provide a rational basis for a numerical adjustment to the base figure computed in Step 1.

Results for NAICS 237990, Heavy Construction, considers a Design-Build (D/B) contract under which category there are only 15 Heavy Construction businesses in the three-county area. The three DBEs in that category may not have the resources, experience or financial capacity to successfully prequalify in a Design/Build Team under the California State Department of Industrial Relations design/build prequalification process. Therefore, the 20% DBE subtotal for NAICS 237990 Heavy Construction may not be an accurate number upon which to compute the average FTA assisted contract DBE Percentage. Prequalification requirements and prevailing wage requirements as stated in the Availability and Disparity Study evidence barriers in DBE participation.

- Some interviewees perceived working with unions to pay a prevailing wage as a barrier to pursuing business opportunities. The study team discussed whether the prevailing wage and union membership presented a barrier for firms doing business, especially in the public sector. Many firm owners indicated that working with unions to pay a prevailing wage did present a barrier and often discussed difficulty paying these wages.
- The male Hispanic president of an MBE-certified environmental engineering firm said that prequalification requirements can be a barrier. [SDI#29]
- The Asian-American owner of a DBE-certified engineering company said that his firm has been turned down for contracting opportunities, because it did not meet prequalification requirements. [SDI#3]
- When asked if prequalification requirements can be a barrier, the vice-president of a certified Black American engineering firm said, "it's just too much paperwork." [SDI#19]

SMART proposes the 20% DBE subtotal for NAICS 237990 Heavy Construction is more realistically 10% based on the Availability and Disparity Study. SMART proposes an overall DBE participation goal of 3.99% of FTA funds that will be expended in FTA-assisted contracts in Fiscal Years 2014-2017, exclusive of funds for the purchase of transit vehicles.

Anticipated Federal assisted contracts for FY 2014/15 – 2016/17	NAICS Code	3 County Business Census	3 County DBEs California UCP	Percent DBE of Total	Proposed Adjustment Percent DBE of Total
FTA Small Starts for Larkspur Rail Extension Design/Build Contract	541330 Engineering	251	5	1.99%	1.99%
	237990 Heavy Construction	15	3	20%	10%
	541310 Architectural Services	133	0	0%	0%
Average DBE Percentage:				7.33%	3.99%

**Attachment 5**  
**Breakout of Estimated**  
**Race-Neutral & Race Conscious Participation**

SMART will meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating DBE participation, as required by Section 26.51(a).

SMART uses the following race-neutral means to increase DBE participation:

- (1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses, participation (e.g., unbundling large contracts to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces);
- (2) Providing technical assistance and other services;
- (3) Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);
- (4) Providing access to services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency; and
- (5) Ensuring distribution of the DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors.

We estimate that, in meeting our overall goal of 3.99%, we will obtain 3.99% from race-neutral participation. Given the fact that SMART does not have sufficient data to narrowly tailor a program with race-conscious participation, SMART opts to use only race-neutral participation at this time.

In order to ensure that our DBE Program will be narrowly tailored to overcome the effects of discrimination in the future, if we use contract goals we will adjust the estimated breakout of race-neutral and race-conscious participation as needed to reflect actual DBE participation (see 26.51(f)) and we will track and report race-neutral and race conscious participation separately. For reporting purposes, race-neutral DBE participation includes, but is not necessarily limited to, the following: DBE participation through a prime contract a DBE obtains through customary competitive procurement procedures; DBE participation through a subcontract on a prime contract that does not carry DBE goal; DBE participation on a prime contract exceeding a contract goal; and DBE participation through a subcontract from a prime contractor that did not consider a firm's DBE status in making the award.

We will maintain data separately on DBE achievements in those contracts with and without contract goals, respectively.

**Attachment 6**

**Forms 1 & 2 for Demonstration of Good Faith Efforts**

[Forms 1 and 2 should be provided as part of the solicitation documents.]

**FORM 1: DISADVANTAGED BUSINESS ENTERPRISE (DBE) UTILIZATION**

The undersigned bidder/offeror has satisfied the requirements of the bid specification in the following manner (please check the appropriate space):

\_\_\_\_\_ The bidder/offeror is committed to a minimum of \_\_\_\_\_ % DBE utilization on this contract.

\_\_\_\_\_ The bidder/offeror (if unable to meet the DBE goal of \_\_\_\_\_%) is committed to a minimum of \_\_\_\_\_% DBE utilization on this contract and submits documentation demonstrating good faith efforts.

Name of bidder/offeror's firm: \_\_\_\_\_

State Registration No. \_\_\_\_\_

By \_\_\_\_\_

Title \_\_\_\_\_

**FORM 2: LETTER OF INTENT**

Name of bidder/offeror's firm: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Name of DBE firm: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Telephone: \_\_\_\_\_

Description of work to be performed by DBE firm:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The bidder/offeror is committed to utilizing the above-named DBE firm for the work described above. The estimated dollar value of this work is \$ \_\_\_\_\_.

**Affirmation**

The above-named DBE firm affirms that it will perform the portion of the contract for the estimated dollar value as stated above.

By \_\_\_\_\_

Title \_\_\_\_\_

**If the bidder/offeror does not receive award of the prime contract, any and all representations in this Letter of Intent and Affirmation shall be null and void.**

(Submit this page for each DBE subcontractor.)

**Attachment 7**  
**Certification Application Forms**

The certification application forms for the CUCP are found at:

[http://www.caltrans.ca.gov/hq/bep/downloads/pdf/UCP\\_Application\\_Package\\_Rev\\_06\\_2009.pdf](http://www.caltrans.ca.gov/hq/bep/downloads/pdf/UCP_Application_Package_Rev_06_2009.pdf)

This application package includes an affidavit of personal net worth.

## **Attachment 8**

### **Procedures for Removal of DBE's Eligibility**

SMART will follow the procedures set forth in Section 26.87 for the removal of a DBE's eligibility, as set forth below. At this time, SMART is not a certifying agency under the CUCP.

#### Ineligibility Complaints

Any person may file a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. SMART is not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainants' identities must be protected as provided in §26.109(b).

SMART will review its records concerning the firm, any material provided by the firm and the complainant, and other available information. SMART may request additional information from the firm or conduct any other investigation that SMART deems necessary.

If SMART determines, based on this review, that there is reasonable cause to believe that the firm is ineligible, SMART will provide written notice to the firm that SMART proposes to find the firm ineligible, setting forth the reasons for the proposed determination. If SMART determines that such reasonable cause does not exist, SMART will notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

#### Recipient-Initiated Proceedings

If, based on notification by the firm of a change in its circumstances or other information that comes to SMART's attention, SMART determines that there is reasonable cause to believe that a currently certified firm is ineligible, SMART will provide written notice to the firm that SMART proposes to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

#### DOT Directive to Initiate Proceeding

If the concerned operating administration determines that information in SMART's certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm SMART certified does not meet the eligibility criteria of this part, the concerned operating administration may direct SMART to initiate a proceeding to remove the firm's certification.

The concerned operating administration must provide SMART and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

In such an event, SMART will immediately commence and prosecute a proceeding to remove eligibility as provided below.

#### Hearing

When SMART notifies a firm that there is reasonable cause to remove its eligibility, as provided in paragraph herein, SMART will give the firm an opportunity for an informal hearing, at which

the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

In such a proceeding, SMART bears the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

SMART will maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under §26.89, SMART will provide a transcript of the hearing to DOT and, on request, to the firm. SMART will retain the original record of the hearing. SMART may charge the firm for the cost of copying the record.

The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, SMART bears the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as SMART would during a hearing.

#### Separation of Functions

SMART will ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

The decision maker must be an individual who is knowledgeable about the certification requirements of the DBE Program and this part.

#### Grounds for Decision

SMART will not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the recipient at the time of its certification of the firm. SMART may base such a decision only on one or more of the following:

- Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;
- Information or evidence not available to SMART at the time the firm was certified;
- Information that was concealed or misrepresented by the firm in previous certification actions by a recipient;
- A change in the certification standards or requirements of the DOT since SMART certified the firm; or
- A documented finding that SMART's determination to certify the firm was factually erroneous.

#### Notice of Decision

Following SMART's decision, SMART must 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 must inform the firm of the consequences of the decision and of the availability of an appeal to the Department of Transportation under §26.89. SMART must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed SMART to initiate the proceeding.

#### Status of Firm During Proceeding

A firm remains an eligible DBE during the pendency of SMART's proceeding to remove its eligibility. The firm does not become ineligible until the issuance of the notice provided for in this section.

#### Effects of Removal of Eligibility

When SMART removes a firm's eligibility, SMART must take the following action:

When a prime contractor has made a commitment to using the ineligible firm, or SMART has made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before SMART issues the decertification notice provided for herein, the ineligible firm does not count toward the contract goal or overall goal. SMART must direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to SMART that it has made a good faith effort to do so.

If a prime contractor has executed a subcontract with the firm before SMART has notified the firm of its ineligibility, 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. In this case, or in a case where SMART has let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after SMART issued the notice of its ineligibility shall not count toward SMART's overall goal, but may count toward the contract goal.

*Exception:* If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, SMART may continue to count its participation on that contract toward overall and contract goals.

#### Availability of appeal

When SMART makes an administratively final removal of a firm's eligibility, the firm may appeal the removal to the DOT under §26.89.



**Attachment 9**  
**Regulations: 49 CFR Part 26**

Please refer to: [http://www.ecfr.gov/cgi-bin/text-dx?tpl=/ecfrbrowse/Title49/49cfr26\\_main\\_02.tpl](http://www.ecfr.gov/cgi-bin/text-dx?tpl=/ecfrbrowse/Title49/49cfr26_main_02.tpl)