



# **Bay Area Toll Authority**

## **Construction Project Small Business Enterprise (SBE) Program**

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## OBJECTIVES/POLICY STATEMENT

In order to provide economic opportunity for the residents and businesses, and stimulate economic development in the San Francisco Bay Area Region, the Bay Area Toll Authority (BATA) has established a Construction Project Small Business Enterprise (SBE) Program (“Program”) for its construction contracts to assist SBE firms in participating in BATA’s construction contracts. This Program is aimed at using the power of the public purse to stimulate economic development.

The objectives of the Program include:

1. To increase the number of certified SBEs participating in non-federally funded construction contracts;
2. To increase overall competition on non-federally-funded construction contracts potentially allowing for the completion of projects at a lower overall cost;
3. To create a level playing field on which SBEs can compete fairly on non-federally funded construction contracts;
4. To confirm that only firms (prime or subcontractor) certified by the State of California as SBEs per the requirements listed at <http://www.dgs.ca.gov/pd/Programs/OSDS/SBEEligibilityBenefits.aspx> are eligible for the bid preference allowed under the Program; and
5. To help remove barriers to the participation of SBEs in non-federally funded construction contracts.

Mamie Lai, Director of Administrative Services Section (ADS), has been designated as the SBE Liaison Officer (SBELO). In that capacity, Mamie Lai is responsible for implementing all aspects of the Program.

## **SUBPART A – GENERAL REQUIREMENTS**

### **A.1 Objectives**

The objectives are found in the policy statement on the first page of this Program.

### **A.2 Applicability**

BATA is a recipient of state and local funds. As a condition of this assistance, and in compliance with Proposition 209, BATA shall implement this Program without consideration of race, sex, or ethnicity. This Program sets forth the policies and procedures to be implemented by BATA to confirm that all small businesses have the maximum opportunity to participate in BATA non-federally funded construction contracts.

When a non-federally funded construction contract is awarded to a Contractor based on the bid preference described in C.1 of this Program, the Contractor must adhere to all the requirements included in this Program.

This Program applies solely to non-federally funded construction contracts with a budget in excess of \$25,000. This Program does not apply to construction contracts with a budget of \$25,000 or less or to contracts with federal funding.

### **A.3 Definitions**

BATA adopts the following definitions listed below for this Program:

1st Tier Subcontractor – A subcontractor to a Contractor.

ADS – Administrative Services Section.

BATA – Bay Area Toll Authority.

Bid – The offer of the bidder for the construction project when completed and submitted in response to an IFB on the prescribed bid form.

Bid Preference – The application of a percentage discount to the total amount of a bid submitted by a Bidder for a Contract solely for the purpose of bid comparisons when determining the lowest and best bid, or lowest responsible bid. The use of a bid preference for bid comparison does not alter the total amount of the bid submitted by a bidder or the contract executed based on a bid.

Business Suppliers – An individual or business entity that makes available a certain commodity for meeting demand or for purchase at a given price.

Commercially Useful Function (CUF) – A SBE 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 actually performing, managing, and supervising the work involved. A SBE does not perform a CUF if it does not perform or exercise responsibility for at least 60 percent of the total cost of its contract than would be expected on the basis of normal industry practice for the type of work involved. If, in BATA's judgment, the SBE does not perform a CUF in the transaction, no bid preference will be awarded.

Community Based Organization (CBO) – A non-government agency created to provide training, employment or community assistance.

Contractor/Vendor – The individual, partnership, corporation, joint venture or other legal entity entering into a contractual agreement with BATA.

Invitation for Bid (IFB) – Invitation for Bid issued by BATA for construction services.

Manufacturer – A firm that operates or maintains a factory or establishment that produces on the premises the materials or supplies purchased.

Monitoring – The system established to measure compliance with the Program.

Post Award – The meeting held between BATA and Contractors after the award of a construction project and before the issuance of a notice to proceed. Post award meetings occur at the request of either BATA or Contractor.

Program – The BATA Construction Project SBE Program.

Public works contract – As further defined in California Public Contract Code Section 22002, public works generally includes such work as construction, reconstruction, erection, alteration, renovation, improvement, and repair including painting and repainting of publicly-owned property. It does not include maintenance work such as routine or recurring work for protection or preservation, minor painting, or landscape maintenance.

Small Business Enterprise (SBE) – Firms certified by the State of California as SBEs per the requirements listed at <http://www.dgs.ca.gov/pd/Programs/OSDS/SBEligibilityBenefits.aspx>.

SBE Directory – The list of firms certified by the State of California which is used by BATA and its Contractors to identify SBE potential contractors and subcontractors and suppliers. The SBE directory can be accessed at the website link at <http://www.bidsync.com/DPXBisCASB>.

SBELO – Small Business Enterprise Liaison Officer.

Subcontractor - The individual, partnership, corporation or other legal entity that contracts to perform part of or all of the obligations of another's contract.

Subrecipient – Any agency that receives funds from BATA via statute, an interagency,

cooperative or funding agreement.

Web-based Diversity Tracking System - The diversity software provided by BATA to Contractors accessible from any internet browser on any platform or operating system.

## **SUBPART B - ADMINISTRATIVE REQUIREMENTS**

### **B.1 Program Updates**

The SBELO or designee will provide the BATA Oversight Committee with updates representing significant changes in the Program.

### **B.2 SBELO and Program Implementation**

BATA has designated the following individual as its SBE Liaison Officer (SBELO):

Mamie Lai, Director of Administrative Services Section  
Metropolitan Transportation Commission  
101 8<sup>th</sup> Street, Oakland, CA 94607  
Phone: (510) 817-5860, Email: [mlai@mtc.ca.gov](mailto:mlai@mtc.ca.gov)

In that capacity, the SBELO is responsible for implementing all aspects of the Program and ensuring that BATA complies with all provisions of the Program. The SBELO has direct, independent access to the Executive Director concerning Program matters.

The SBELO is responsible for developing, implementing and monitoring the SBE program, in coordination with other appropriate officials. The SBELO has staff to assist in the administration of the Program. The duties and responsibilities include the following:

1. Gathers and reports statistical data and other information as required.
2. Reviews third party contracts and purchase requisitions for compliance with the Program.
3. Works with ADS staff to determine if a Contractor has achieved the requirements for the bid preference.
4. Confirms that bid notices and Invitation for Bid are available to SBEs in a timely manner.
5. Identifies contracts and procurements so that SBE preferences are included in construction projects.
6. Analyzes BATA's progress toward SBE attainment and identifies ways to improve progress.
7. Participates in pre-bid meetings.
8. Advise the Executive Director and/or BATA Commissioners on SBE matters and achievement.
9. Provides outreach to SBEs and community based organizations to advise them of opportunities and technical assistance to SBEs to assist in bid preparation and obtaining bonding and insurance.

### **B.3 Certification Standards and SBE Directory**

BATA does not administer a SBE certification program. Only firms (prime or subcontractor) that are certified by the State of California as SBEs per the requirements listed at <http://www.dgs.ca.gov/pd/Programs/OSDS/SBEEligibilityBenefits.aspx> are eligible

for the bid preference allowed under the Program.

The State of California SBE Directory can be accessed at <http://www.bidsync.com/DPXBisCASB>.

#### **B.4 Record Keeping Requirements**

When a non-federally funded construction contract is awarded to a Contractor based on the bid preference listed in Subpart C, Section C.1 of this Program, ADS will monitor the contract as per Subpart D, to confirm that the Contractors are in compliance with the requirements of the Program. ADS staff will report SBE participation to the BATA Oversight Committee via reports generated from the web-based diversity tracking system.

BATA will require Contractors to maintain records and documents of payments to all subcontractors (SBEs and non-SBEs) for four years following the completion of the contract. BATA will perform interim reviews of contract payments to SBEs. Payments to SBE subcontractors will be reviewed to verify that the actual amount paid to SBE subcontractors equals or exceeds the dollar amounts stated in the schedule of SBE participation included in the contract.

#### **B.5 Public Outreach**

BATA will participate in outreach events with other San Francisco Bay Area transportation agencies and community based organizations to leverage its efforts to assist SBE firms. BATA will also participate in Caltrans' CalMentor Protégé Program for small business development.



## **SUBPART C – BID PREFERENCE AND SBE PARTICIPATION**

### **C.1 Bid Preference**

BATA will allow a bid preference applied as a percentage discount to the total amount of a bid submitted by a Bidder for a contract solely for the purpose of bid comparisons when determining the lowest and best bid, or lowest responsible bid. The use of a bid preference for bid comparison does not alter the total amount of the bid submitted by a bidder or the contract executed based on a bid. The bid preference will be applied to all locally-funded construction contracts with a budget in excess of \$25,000, based on the level of participation proposed prior to the award of a contract. Bid preferences will be applied as follows after BATA verifies responsiveness requirements have been met:

- A discount of five percent (5%) to the total amount bid, when the bidder meeting specifications is a certified SBE and is performing at least forty percent (40%) of the work, **or**
- A discount of five percent (5%) to the total amount bid, when the bidder is a non-SBE prime Contractor that commits to subcontract with SBE firms for at least forty percent (40%) of the work in its bid submittal.

ADS staff will monitor BATA's Program to confirm that the Contractors are in compliance with the requirements the Program. The report of SBE awards, commitments and payments will be generated from the web-based diversity tracking system.

### **C.2 Maintaining Participation**

Once a project begins, it is important to achieve and maintain the participation that allowed the bid preference. Prime Contractors must maintain the SBE percentages indicated in the bid documents at the time of bid submittal throughout the term of the contract.

If BATA modifies the original scope of work, the Contractor must make reasonable efforts to maintain the SBE participation for the bid preference. In the event of change orders, ADS staff may use their discretion to allow adjustments to SBE percentages for the change order portion of the work. Upon request, BATA staff will help firms to determine methods of maintaining percentages.

Should the prime Contractor fail to maintain the SBE participation listed at the time of bid submittal, BATA reserves the right to enforce Contractors' compliance with this Program through one or more of the remedies included in Section D.3 of this Program.

### **C.3 Substitution of Listed Subcontractors**

Substitution of listed subcontractors shall be in accordance with Public Contracts Code Section 4107. In addition, the SBELO must concur in any decision to permit substitution of a SBE subcontractor(s) when the award was made on the basis of the bid preference listed in Section C.1 above.

## **C.4 Joint Venture Agreements**

A business that is bidding or competing for BATA contracts may associate with a certified SBE business to compete for contracts as a joint venture. A joint venture should be between two entities with the same discipline or license as required by BATA. Joint ventures receive a bid preference depending upon the SBE percentage of participation as set forth in Section C.1 of Subpart C, Bid Preference and SBE Participation. The parties must agree to enter into the relationship for at least the term of the project.

### Basic Elements of the Joint Venture Agreement

A Joint Venture must submit a Joint Venture Management Plan and/or a Joint Venture Agreement in their bid. Each agreement or management plan must include, but is not limited to the following:

- Detailed explanation of the financial contribution of each partner;
- List of the personnel and equipment used by each partner;
- Detailed breakdown of the responsibilities of each partner;
- Explanation of how the profits and losses will be distributed;
- Description of the bonding capacity of each partner; and
- Management or incentive fees available for any one of the partners (if any).

### Commercially Useful Functions (CUF) Performed by Joint Venture Partners

Each JV partner must perform a “commercially useful function” as that term is defined herein. A SBE that relies on the resources and personnel of a non-SBE firm will not be deemed to perform a CUF.

### Joint Venture License Requirements

Each joint venture partner must possess licenses appropriate for the discipline for which a bid is being submitted. If a joint venture is bidding on a single trade project, at the time of bid submittal, each of the joint venture partners must hold a Joint Venture License and possess the requisite specialty license for that trade bid.

### Delineation of Joint Venture Work

The SBE partner must clearly define the portion of the work to be performed during the project. This work must be of the similar type of work the SBE partner performs in the normal course of its business. The Joint Venture Participation Form must specify the project bid items to be performed by each individual joint venture partner. Lump sum joint venture participation is not acceptable.

### Responsibilities of the SBE Joint Venture Partners

The SBE partner must share in the ownership, control, management responsibilities, risks, and profits of the joint venture in proportion with level of participation in the project; the SBE partner must perform work that is commensurate with its experience. The SBE partner

must use its own employees and equipment to perform its portion of the project. Only the portion of the total dollar value of the contract equal to the distinct, clearly-defined portion of the work of the contract that the SBE performs with its own forces will be counted toward SBE participation

#### Application of Bid Discounts for Joint Venture Agreements

To be eligible for a bid discount, at the time of bid submittal, each joint venture partner must each have the license that is appropriate for the project as required in the contract document of the contract award authority. Unless permission is granted by the SBELO or designee for good cause shown, based on sudden and unexpected necessity, the following actions are not permitted: i) the non-SBE partner performing work for the SBE partner; ii) leasing of equipment or property by the SBE partner from the non-SBE partner; and iii) the hiring of the non-SBE partner's employees by the SBE partner.

#### Other Joint Venture Conditions

The SBELO or a designee must first approve the SBE Joint Venture Agreement/Management Plan before the joint venture is eligible for a bid preference. Any changes must also receive the prior approval of the SBELO or designee. In addition to any other information required by conditions specified herein, each SBE joint venture must provide upon request, cancelled checks and any other financial records to BATA.

### **C.5 Counting SBE Participation**

SBEs may perform as Contractors, or 1st tier subcontractors. Only the value of the work to be performed by the SBE, including materials and supplies, will be counted toward SBE participation.

A SBE must perform a commercially useful function, i.e., must be responsible for the execution of a distinct element of the work and must carry out its responsibility by actually performing, managing and supervising the work. If a SBE 1<sup>st</sup> Tier Subcontractor does not perform or exercise responsibility for at least sixty percent (60%) of the total cost of its contract with its own work force, or if the SBE subcontracts a greater portion of work of a contract than would be expected on the basis of normal industry practice, then it will be presumed that the SBE is not performing a CUF.

Credit for a SBE vendor of materials or supplies is limited to sixty percent (60%) of the amount to be paid to the vendor for the materials or supplies unless the vendor manufactures or substantially alters the goods. Credit for SBE brokers is limited to only the fees and commissions portion of the amount paid. All other firms receive 100% credit, less work subcontracted by the SBE to non-SBE firms.

During the term of a contract, work performed by SBE firms whose certification has expired will continue to be counted toward the SBE participation.

## **SUBPART D – COMPLIANCE AND ENFORCEMENT**

### **D.1 Monitoring**

When a contract is awarded to a Contractor based on the bid preference listed in Subpart C, Section C.1 of this Program, ADS will monitor the contract as per Subpart D, to confirm that the Contractors are in compliance with the requirements of the Program. ADS staff will report SBE participation to the appropriate BATA Oversight Committee via reports generated from the web-based diversity tracking system.

BATA will require Contractors to maintain records and documents of payments to all subcontractors (SBEs and non-SBEs) for four years following the performance of the contract. BATA will perform interim reviews of contract payments to SBEs. Payments to SBE subcontractors will be reviewed to verify that the actual amount paid to SBE subcontractors equals or exceeds the dollar amounts stated in the schedule of SBE participation included in the contract.

Subrecipients may be required to submit verification of the SBE Program adopted for non-federal funds allocated construction projects and provide annual reports of SBE utilization on construction projects achieved under the adopted program.

BATA has implemented the following monitoring mechanisms to monitor Contractor compliance with Program requirements:

1. The SBELO or designee will verify that work committed to SBEs at contract award is actually performed by the SBEs.
2. The SBELO or designee will keep a running tally of actual payments to SBE firms for work committed to them at the time of contract award with the use of BATA's web-based diversity tracking system.

For public works projects valued over \$1,000.00, the State's Labor Code requires Contractors to pay their employees in accordance with general prevailing wages. The prime Contractor and all subcontractors including truckers and owner/operators are required to submit certified payroll records in accordance with Labor Code section 1776 upon request from BATA. Failure to submit certified payroll records could result in withholding of progress payment(s).

Upon request, Contractors will provide BATA with executed copies of its subcontractor agreements to verify dollar amounts stated for all SBEs.

### **D.2 SBE Utilization Report**

Contractors are required to submit monthly SBE Utilization Reports electronically to BATA ADS. These monthly reports shall be submitted electronically and the Contractor will document the dollar value of payments to SBE firms and the percentage of the contract completed. BATA will monitor the contract for compliance with SBE requirements.

This system is web-based, accessible from any computer via the internet. Each Contractor and subcontractor will receive an email providing them with Log On identification, and a temporary password and instructions on how to use the system. Training will also be provided upon request. Contractor will include this requirement in all of its subcontracts and purchase orders when required to provide or verify SBE utilization documentation.

If the SBE Utilization Reports indicate potential problems, such as a failure to comply with the contract SBE participation, the Contractor shall meet with the BATA SBELo or designee to address any deficiencies and discuss appropriate corrective actions. When the Contract completion reaches 50% and the SBE participation completed is less than 50%, a detailed report of the reasons why must be submitted to BATA stating a plan to reach the SBE participation by Contract completion.

Prior to final payment, Contractor will be required to submit a final SBE Utilization Report by selecting the "Final Audit" reporting designation within the web-based diversity tracking system. In addition to payments to the SBEs, the final report must include payments to and other information about all other businesses, including non-SBE subcontractors, suppliers of materials and others.

### **D.3 Program Enforcement**

BATA has available several remedies to enforce compliance of the Program requirements contained in its contracts, including, but not limited to, the following:

1. Breach of contract action, pursuant to the terms of the IFB and contract.
2. Assessment of a penalty of up to one and one half times the amount that should have been awarded to SBE(s).
3. Termination of Contractor's performance of work under the contract.
4. Any other remedy available to BATA in the contract or the relevant IFB.