



## **Board Policy No. 466**

### **Small and Small Local Business Enterprise Policy**

**ADOPTED:** 11/2007

**RECENT AMENDMENT:** 11/13/19

**SEE ALSO:** 460, 465, 468

**SUBJECT CATEGORY:** SECTION 400, OPERATIONS

**SUBSECTION:** PROCUREMENT AND MATERIALS

**CONTROL DEPARTMENT:** COMPLIANCE & DIVERSITY

#### **I. PURPOSE**

It is the policy of AC Transit to ensure that Small Business Enterprises (SBE), as defined in federal regulations 13 CFR Part 121, and Small Local Business Enterprises (SLBE) located within the District's service region have equitable opportunity to participate in federally and non-federally funded District procurements of goods, materials and services, including construction projects.

In order to provide economic opportunity for small local business enterprises, and to stimulate economic development in communities served by the District, the District will develop and implement procedures designed to maximize contract award opportunities for these companies. Procedures shall include set asides, preferences, and small-business goals as further defined in this Policy.

Title VI of the Civil Rights Act of 1964 bars discrimination on the basis of race, color or national origin with regard to the participation in, or the denial of benefits for any program or activity receiving federal funds. As a recipient of federal funding, the District is subject to the mandates of Title VI.

California's Proposition 209, passed by voters in 1996 amended the state constitution to prohibit discrimination by the state or other public entities in state or locally funded contracts. As a result, District procurement activities are governed by federal laws, state laws and guidelines, as set forth in the District's procurement Policy, Board Policy No.465, adopted April 1992 and last amended October, 2016.

To ensure its legality, effectiveness and integrity, this Policy is neutral as to race, religion, color, ethnicity, national origin, age, sex, physical handicap, sexual orientation, and any other characteristic protected by law. Any small and small-local business seeking inclusion in the pool is encouraged to participate, including Certified Small, Small-Local, and Small-Disabled Veterans Enterprises.

To the extent that it is a condition of a federal, state or other funding source that the District comply with Small Business Enterprise, Disadvantaged Business Enterprise, Minority and Women Business Enterprise and/or Disabled Veteran Business Enterprise requirements, the District will make this Policy consistent with external laws or regulations to the extent permissible by law.

This policy is intended to align with, and be consistent with the District's Disadvantaged Business Enterprise (DBE) Policy (BP 460), Procurement Policy (BP 465), and Protest Policy (BP 468).

## II. PERSONS AFFECTED

Certified Small, Small-Local, and Small-Disabled Veterans Enterprises.

## III. DEFINITIONS

The definitions below are in accordance with 49 CFR Part 26 or defined elsewhere in other federal regulations or nationally recognized programs.

**"Availability"** means the number of small and small local business enterprises ready and willing to compete for work with AC Transit.

**"Bidder"** means a person or business submitting a bid or proposal to the District.

**"Board"** means the AC Transit Board of Directors.

**"Contractor"** means a person or business awarded a contract with the District.

**"Commercially Useful Function"** means a role performed within contracted work that requires the DBE be responsible for execution of the work and carrying out its responsibilities by actually performing, managing, and supervising the work involved. This work should include at least thirty percent (30%) of the total cost of the DBEs contract be performed with its own workforce or the portion of work that would be expected to be self-performed on the basis of normal industry practice for the type of work involved.

**"District" or "Service Area"** means the Alameda Contra-Costa Transit District (AC Transit), a special district created under California law comprised geographically of 13 cities and adjacent unincorporated areas, including the cities of Alameda, Albany, Berkeley, El Cerrito, Emeryville, Fremont, Hayward, Newark, Oakland, Piedmont, Richmond, San Leandro, and San Pablo; and the unincorporated areas of Ashland, Castro Valley, Cherryland, El Sobrante, Fairview, Kensington, North Richmond, and San Lorenzo as further described in AC Transit Resolution No. 11-048.

**"Disadvantaged Business Enterprise (DBE)"** means a for-profit, small business concern that is 1) at least fifty-one percent (51%) owned by one or more individuals who are both socially and economically disadvantaged, or, in the case of a corporation, in which 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; and 3) certified through a statewide Unified Certification Program.

**“Federally Funded Contracts” (DOT Assisted)** means any contract between a recipient and a contractor, at any tier, funded in whole or in part with DOT funding.

**“Good Faith Effort (GFE)”** means the steps set forth by this Policy that are to be undertaken by a bidder to document that it has or has not obtained enough participation to meet the specific contract goal(s) required by the District for use of DBE, SBE, SLBE, DVBE, and MWBE Firms.

**“Market Area”** means the cities and unincorporated areas served by AC Transit (see “District”).

**“Micro-Small Business Enterprise (MBE)”** means a small business enterprise whose average annual gross receipts for the previous three (3) years do not exceed \$10 million for construction firms or \$6 million for non-construction firms and is certified by an authorized agency located in Alameda or Contra Costa County.

**“Minority Small Business Enterprise (MSBE)”** means a for-profit, small business concern that is 1) at least fifty-one percent (51%) minority-owned, operated and controlled. Ownership, in the case of a corporation, entails at least fifty-one percent (51%) of the stock is owned by one or more minority group members; and 2) whose physical location is in the United States or its trust territories; and 3) certified through a statewide Unified Certification Program; and 4) management and daily operations must be exercised by the minority ownership member(s) who are United States citizens. An individual who is at least 25% Asian, Black, Hispanic, or Native American is considered a minority.

**“Race-Neutral”** means a program component that is used to assist all small businesses. For the purposes of this Policy, race-neutral includes ethnic and gender neutrality.

**“Race-Conscious”** means a program component that is specifically focused on assisting only DBEs, including women-owned DBEs.

**“Set-asides”** means a reservation of an acquisition exclusively for participation by small business concerns. A small business set-aside will be open to all small businesses and may be a in part or a total, single acquisition or a class of acquisitions.

**“Small Business Element”** means a component of the DBE program applied to encourage the utilization and participation of small business enterprises.

**“Small Business Enterprise (SBE)”** means a small business enterprise, as defined by Section 3 of the Small Business Act and Small Business Administration regulations (13 CFR Part 121), whose three-year average gross receipts, number of employees, and North American Industry Classification System (NAICS) codes meet the guidelines referenced in the Regulations. The firm must be certified small, at the time of bid, by the State of California, Department of General Services or by an authorized agency located in California.

**“Small Local Business Enterprise (SLBE)”** means a business located within the District and certified as a small business enterprise by an authorized agency located in Alameda or Contra Costa County.

**“Small Disabled Veteran Enterprise (SDVE)”** means a firm that is certified as a Disabled Veteran business Enterprise by the State of California, Department of General Services and as a Small Business by an authorized agency.

#### IV. POLICY

##### A. Objectives

1. Increase SBE utilization and participation by performing up to and including the following:
2. Increase opportunities for contract awards to small businesses participating in District contract and procurement activities by establishing contracting goals or set-asides.
3. Promote the development of the small business community through participation in outreach events, attending local and regional events that champion SBE firms.
4. Continuously research and make available to DBEs any resources and/or tools that may increase the possibility of participation, such as bonding or insurance assistance programs, technological tools, education resources, and contractor match-making opportunities.
5. Consider similar or related certifications of small firms administered by other regional, Bay Area or related government agency programs upon conducting procurement and outreach activities.

##### B. Program Administration

1. Roles and Responsibilities
  - a. The General Manager maintains overall responsibility for adherence to the SBE Program. (S)he has delegated the responsibility for the development, implementation and monitoring of the program to the DBE Liaison Officer, the Contract Compliance Administrator.
  - b. The Board of Directors is responsible for establishing and authorizing the SBE Program.
  - c. The Contract Compliance Administrator is responsible for developing, implementing, and monitoring the daily operations of the SBE Program. He or she will participate in events for small businesses which may be coordinated with other U.S. DOT grantees, federal agencies, or local organizations, providing the opportunity to promote SBE programs. He or she will work in coordination with the General Manager, the Directors of Procurement, Legislative Affairs, Capital Projects and others to ensure the successful implementation of and adherence to this program as well as the consideration of SBE firms in the procurement and monitoring of District let contracts.
2. Program Requirements

- a. The District will assign appropriate and sufficient staff to oversee and administer all components of the SBE/SLBE program.
- b. The District will provide ongoing training to procurement and District staff to assure adherence to this Policy.
- c. The provisions of this Policy are declared to be separate and severable. The invalidity of any portion or the invalidity or its application to any person or circumstance shall not affect the validity of the remainder of this Policy or the validity or its application to other persons or circumstances.

### 3. Prompt Payment

- a. The District's Contracts Compliance Office will ensure timely or prompt payment to small businesses upon receipt of properly documented invoices or other contract billings. Prompt payment provisions shall be incorporated into each District solicitation and resulting contract.

### 4. Collection of Vendor Data

- a. The District's online vendor registration form allows businesses to identify their name and address, small business status, and other relative information. This information will facilitate sorting of the computerized vendor listing to identify small, small-local, and micro small businesses for use by procurement and contract staff, and for award, payment tracking and reporting purposes.

### 5. Record Keeping Requirements

- a. Contract awards and bidders' lists will be maintained on bids received from, and awards and/or payments made to small and small local businesses; and semi-annual reports of the results will be made to the Board.

## C. Program Implementation

### 1. Goal Methodology

- a. The SBE contract specific goals are determined using the relative availability of SBEs within the District's market area, similar to the methodology used in the 2-step process as specified in 49 CFR Section 26.45. The first step is to determine the relative availability of SBEs in the market area, "base figure." Using the Census Bureau's County Business Pattern (CBP) data base, determine the number of all ready, willing and able businesses available in the market area that perform work in the same NAICS codes. Divide the number of SBEs by the number of all businesses to derive a base figure for the relative availability of SBEs in the market area. The second step is to adjust the "base figure" percentage from Step I so that it reflects as accurately as

possible in the SBE participation the recipient would expect in the absence of discrimination based on past participation of SBEs on projects.

## 2. Small Business Enterprise Goals

- a. The District will establish race and gender neutral, per-contract SBE utilization goals on federally and non-federally funded projects when practicable. The goal shall be established based on demonstrable evidence of the availability of ready, willing and able SBEs relative to all businesses ready, willing and able to participate on District contracts and expressed as a percentage of the anticipated value of the contract. The District's Contracts Compliance Department will evaluate each procurement for SBE opportunities and a determination will be made regarding the availability of small businesses. The District will require all bidders to provide a list of the SBE subcontractors to be utilized to meet the SBE goal and will require good faith efforts documentation for bidders not meeting the SBE subcontract goal at the bid submission due date. The District will require the successful prime contractor to provide reports of payments to SBE subcontractors.

## 3. Small Business Set Asides

- a. The District shall set-aside selected federally and non-federally funded procurements with anticipated dollar values up to \$300,000 for small business participation only. Small business set-asides shall be determined by the District's Contracts Compliance Department when the availability of SBEs is empirically demonstrated relative to the applicable North American Industry Classification System (NAICS) Code and in such numbers to satisfy public procurement competition requirements.

## 4. Micro-business Set Asides

- a. The District shall set-aside federally and non-federally funded procurements with anticipated dollar values up to \$150,000 for construction projects and up to \$60,000 for non-construction projects to certified MBEs provided that it is determined by the District's Contracts Compliance Department that availability of MBEs is empirically demonstrated relative to the applicable NAICS Code and in such numbers to satisfy public procurement competition requirements.

## 5. Small, Small-Local, and Small-Disabled Veteran Preferences

- a. The District shall provide for a small business preference, on non-federally funded procurements up to \$150,000, in construction and/or the procurement of goods where responsibility and responsiveness criteria are satisfied as follows:
  - i. The preference allotted to a Small Business is 5 percent of the lowest responsible bidder.

- ii. The preference allotted to a Small Disabled Veteran Business is 6 percent of the lowest responsible bidder, and
    - iii. The preference allotted to a Small Local Business will be up to 10 percent.
  - b. Where there is demographic overlap, the higher of the applicable percentages will be implemented.
- 6. Small-Local Business Enterprise Goals
  - a. Non-federally funded contracts (including Construction and Service contracts) for goods, material and services greater than \$10,000 will be reviewed, and SLBE subcontracting goals will be included provided that it is determined by the District's Contracts Compliance Office that availability of SLBEs is abundant relative to the applicable NAICS Code and in such numbers to satisfy public procurement competition requirements.
- 7. Micro Purchases
  - a. Procurement purchases of goods, materials, and services below the bid limits, and not subject to competitive bidding, are required to be issued according to the District's non-discrimination and non-preferential treatment policies. District staff will be expected to select and utilize bidders and contractors according to this policy.
- 8. Discretionary Spending and Prioritization
  - a. Discretionary spending for purchases of goods, material and supplies up to \$10,000 shall be formally conducted using the District's SBE & SLBE policy when a reasonable expectation exists that at least two responsible small business concerns can offer the goods, services or material at fair market prices.
    - i. For federally funded purchases, the District will target SBEs.
    - ii. For non-federally funded purchases, the District will target SLBEs first, and then target SBEs second.
  - b. SBEs and SLBEs will be given first priority in the performance of work in a public exigency or emergency.
- 9. Outreach
  - a. The District will participate in a program of outreach activities, including procurement networking sessions, roundtables and workshops, to encourage small, small-local, and micro small business owners to meet key contracting and other District personnel, and facilitate successful procurement and contract processes. The District

will maintain engagement with community groups and attend meetings to provide information and guidance on this small local business policy.

#### D. Good Faith Efforts (GFE)

1. These Good Faith Effort (GFE) guidelines are applicable to both federally and non-federally funded opportunities that have established small business participation goals.
2. Guidance from FTA: In any situation in which you have established a contract goal, 49 CFR Part 26 requires you to use the good faith efforts mechanism of this part. As a recipient of U.S. DOT assistance, you have the responsibility to make a fair and reasonable judgment whether a bidder that did not meet a contract goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain participation sufficient to meet the contract goal. Mere pro forma efforts are not good faith efforts to meet the contract goal requirements. We emphasize, however, that your determination concerning the sufficiency of the bidder's good faith efforts is a fair, reasonable, and informed decision based upon the information submitted and any additional information gathered during the evaluation process. Determinations should not be made using quantitative formulas.
3. It is the District's intent and policy to fulfill its small business (DBE, SBE, SLBE, DVBE, and MWBE) participation goals. If a bidder fails to meet established contract goal(s), the District must determine whether the bidder made good faith efforts (GFE) to meet the goals. Efforts that are merely pro forma shall not be deemed as made in "good faith". Documentation of the bidder's good faith effort activities, which must have been **completed prior to the bid due date and time**, shall be reviewed and considered part of the bid submission that does not meet the established small business participation goal. If submitting GFE, all documentation shall be made available to the District for evaluation up to but not later than seventy-two (72) hours after the designated bid due date and time. The bidder's efforts to reach out to small, local, and disadvantaged firms shall be evaluated based upon the level of effort put into achieving the factors outlined below. Failure to meet the small business participation goals will not by itself be the basis for disqualification or determination of non-compliance with the DBE Program. However, failure to meet the goal, coupled with failure to submit supporting documentation of GFE undertaken, will render the bid non-responsive. A bidder shall certify, via the Certificate of GFE by Contractor form and all backup documentation, which actions it took in order to establish that it made reasonable GFE to meet an established contract small business participation goal.
4. Good Faith Effort (GFE) Factors: if an established contract small business participation goal cannot be met, and a bidder includes GFE documentation as part of its bid submission, the following factors will be evaluated by the District to determine if sufficient GFE was undertaken to meet established contract small business participation goals.



**Factor 1: Attendance at Pre-Bid Meeting/Job Walk**

*Effort:* Attendance at pre-bid conference and/or job walk, if held by the Agency (and deemed mandatory) to meet potential SBEs and DBEs who can perform the contracted work.

*Evidence:* Name and date of person(s) attended to be verified by sign-in sheet.

**Factor 2: Identify Specific Items of Work**

*Effort:* Select portion(s) of work to be performed by DBEs, SBEs or MBEs in order to increase the likelihood of meeting the goals. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate utilization even when the Prime Bidder/Proposer might otherwise prefer to perform these work items with its own forces.

*Evidence:* Identified scope(s) of work the Prime Bidder intends to offer to or be performed by the subcontractor to meet the goal. (See Prime Proposer & SubProposer/Supplier Report Worksheet)

**Factor 3: Advertisement of Subcontracting Opportunities**

*Effort:* Advertise, not less than fifteen (15) calendar days before bid submittal due date, in appropriate print or electronic media including, weekly or daily newspapers, trade association publications, trade journals, trade social media platforms, or other media to solicit DBE, SBE, or MBE firms interested in the project.

*Evidence:* Proof of advertisements placed, and /or proof of publication containing at minimum the information specific in Factor 2.

**Factor 4: Written Notification of Contracting Opportunity and Request for Bids/Proposals**

*Effort:* Issue written notice of Prime Bidder's interest in soliciting DBE, SBE, and MBE firms. Notices should be sent at least fifteen (15) calendar days prior to bid submittal due date; and must be sent to a minimum of ten percent (10%) of certified, "ready, willing, and able" firms listed under the applicable subcontracting scope of work and corresponding NAICS code(s). If ten percent (10%) of certified firms is less than ten (10) total firms, then all certified firms shall be notified.

*Evidence:* Copy of the solicitation notification, list of recipients grouped by each identified subcontracting area and NAICS code – including pertinent contact information, such as firm name, email address, physical address, phone number, and date contacted for all firms per subcontracting area.

**Factor 5: Solicitation Follow-Up**

*Effort:* Follow up on initial solicitation to those firms that did not respond to bidder's original solicitation notice. Follow-up may be by same means as initial solicitation, however, bidder should consider other methods not already attempted. Efforts should be within all available subcontracting areas and occur within a reasonable time (not less than 72 hours) of initial solicitation.

*Evidence:* Copies of all solicitation notifications, and list of recipients grouped by each identified subcontracting area and NAICS code – including pertinent contact information, such as firm name, email address, physical address, phone number, and date contacted for

*all firms per subcontracting area. Bidder must identify all methods utilized for follow-up solicitation.*

**Factor 6: Make Project Plans, Specifications, Requirements Available**

***Effort:** Make plans, specifications and requirements for specified work items or material supply work available for review by interested firms.*

***Evidence:** Provide in solicitation notifications (Factor 4 & Factor 5) a link to the appropriate project plans, specifications and requirements.*

**Factor 7: Provision of Assistance in Obtaining Bonding, Lines of Credit or Insurance (Only Applicable to Projects Greater than \$5 Million)**

***Effort:** Provide and/or make efforts to assist interested firms, as applicable and/or needed, in obtaining lines of credit, bonding, or required insurance.*

***Evidence:** Brief description of the type of assistance (i.e. referrals, recommendations, co-signing, or “additional insured coverage”) provided by the Prime Bidder to interested firms in obtaining bonding, lines of credit, and insurance (if applicable).*

**Factor 8: Utilization of Outreach Services**

***Effort:** Utilize outreach services available within the DBE, SBE or MBE community, including construction/consultant groups, State and Federal SBE/DBE offices, AC Transit Contracts Compliance Department and other organizations that provide assistance in recruiting SBE and DBE firms.*

***Evidence:** Bidder must provide copies of all methods used to contact organizations for outreach to the DBE, SBE, and MBE community. Bidder must document outreach to a minimum of ten percent (10%) of certified, “ready, willing, and able” firms listed under the applicable subcontracting scope of work and corresponding NAICS code(s). If ten percent (10%) of certified firms is less than ten (10) total firms, then all certified firms shall be notified. **Note: AC Transit posts the complete list of firms contacted in its own small business outreach on the project solicitation website.***

**Factor 9: Negotiate in Good Faith**

***Effort:** Negotiate in good faith with interested subcontractors utilizing a sound basis for selection or rejection of sub-bids/proposals.*

***Evidence:** Documentation with names and contact information of firms that responded to solicitation notification, and reasons for accepting or rejecting the sub-bids/proposals.*

***Note:** Barring lack of qualifications to perform work (including inability to meet project schedule), only significant, excessive, and unreasonable price differences between the selected non-DBE firm and rejected DBE firm’s proposed costs would be considered as valid cause for rejecting DBE sub-bids.*

**Factor 10: Goal Performance of Other Proposers**

***Effort:** AC Transit will take into account the performance and success of other Prime Bidders in meeting established small business participation contract goals.*

***Evidence:** The District will evaluate whether or not a successful bidder made all reasonable efforts toward meeting the established small business participation goal, in lieu of submitting GFE, as compared to that of any non-successful bidders.*

5. Good Faith Effort (GFE) Review and Evaluation: if GFE documentation is included (or expected) as part of the bidder's submission package, the review and evaluation process will be completed within three (3) business days of receipt by the Contracts Compliance Administrator. The GFE factors will be evaluated independently, and as a whole.
  - a. Initial Review – the Contracts Compliance Administrator has the primary responsibility for reviewing GFE documentation and determining whether such documentation constitutes a good faith effort in achieving established small business participation goals. A written summary of the review will be provided for inclusion in the procurement file.
  - b. Administrative Appeal – if the Contracts Compliance Administrator (CCA), after review of the GFE documentation, determines that insufficient good faith efforts have been undertaken, the bidder has the right to request an Administrative Review by submitting a bid protest (see Board Policy 468: Procurement Protest Procedures).
    - i. Administrative Review Committee (ARC) – the Administrative Review Committee (ARC), shall render its review based upon the procedures established in Board Policy 468: Procurement Protests and Procedures, and shall be composed of at least three (3) members to include one (1) from each of the following:
      - a) AC Transit: Contracts Compliance Department
      - b) AC Transit: Project's Department of Origin
      - c) External Member: a staff member of a local agency, other than AC Transit, that provides public transit services; and has expertise in relevant project delivery or contract compliance monitoring

## V. AUTHORITY

The Board of Directors has the authority to amend the policy as it deems appropriate or otherwise required by law.