



## MANAGEMENT MEMO

NUMBER:  
POLI-SB-01-15-01

SUBJECT:  
REVISIONS TO SMALL AND DISADVANTAGED BUSINESS  
ENTERPRISE PROGRAM PLAN REVISED AUGUST 2012

DATE ISSUED:  
March 16, 2015

REFERENCES:  
SUBPART A AND SUBPART D OF THE CALIFORNIA HIGH-SPEED  
RAIL AUTHORITY'S SMALL AND DISADVANTAGED BUSINESS  
ENTERPRISE PROGRAM PLAN REVISED AUGUST 2012 (ATTACHED)

EXPIRES:  
UNTIL RESCINDED

### PURPOSE

This Management Memo serves as notification of revisions to Subpart A and Subpart D of the California High-Speed Rail Authority's (Authority) Small and Disadvantaged Business Enterprise Program Plan Revised August 2012 (SB Program Plan). These revisions to Subpart A and Subpart D do not reflect significant modifications—they provide clarification and consistency to existing provisions defined in the SB Program Plan.

### POLICY

The Authority's Small Business Policy Directive (POLI-SB-01) ensures Small Businesses (SB), inclusive of Small Businesses, Disabled Veteran Business Enterprises, Disadvantaged Business Enterprises and Microbusinesses, are afforded every practicable opportunity to participate in the Authority's contracting and procurement program. The Small Business Policy Directive ensures the SB Program is flexible, attainable, efficient and credible. The SB Program promotes a level playing field and equitable opportunities for all small businesses to participate in the high-speed rail project.

### INTRODUCTION

Revisions to the Authority's SB Program Plan under Subpart A affect the definition of 'Commercially Useful Function' (CUF) standards for Contractors and Consultants on the high-speed rail project. The CUF definition has been consolidated in collective consideration of CUF standards set forth by Government Code 14837, California Code of Regulations § 1896.4(h), Military and Veteran Code 999 (b) (5) and 49 CFR Parts 26.53 (b) and 26.55 (1). The Authority's uniform application of its CUF standards promotes the SB Policy's objective of promoting a level playing field and equitable opportunities for all SBs regardless of certification classification. This revision to the Authority's CUF standards affects the eligibility criteria of SBs on the project, as well as the counting and crediting of small business utilization as delineated under Subpart D. Correspondingly, the SB crediting standards under Subpart D have been consolidated to be applied uniformly.

Further revisions were made to Subpart A and Subpart D to include additional definitions (e.g. Business Advisory Council, Department of General Services, Director of Contracts and Compliance and Small Business Advocate) and language to provide clarifications and enhancements to the SB Program Plan.

Attached are the revised Subpart A and Subpart D.

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WHO IS AFFECTED

All applicable Contractors performing work on the high-speed rail project with small business utilization contract requirements, inclusive of Small Businesses, Disabled Veteran Business Enterprises, Disadvantaged Business Enterprises and Microbusinesses subject to requirements in the California High-Speed Rail Authority's SB Program Plan.

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BACKGROUND

Prior to the issuance of this Management Memo, under Subpart A of the SB Program Plan, the Authority's CUF definition recognized three (3) separate CUF standards, in respective accordance to Government Code 14837, California Code of Regulations § 1896.4(h), Military and Veteran Code 999 (b) (5) and 49 CFR Parts 26.53 (b) and 26.55 (1). The Authority's CUF standards have been updated in order to be applied uniformly in collective consideration of the aforementioned codes and regulations, the Authority deemed it necessary to administer a uniform application to its methodology for counting and crediting of small business utilization. Previously under Subpart D of the SB Program Plan, small business utilization was counted and credited under three (3) separate categories, classified by a firm's verified certification as a Small Business/Microbusiness, Disabled Veteran Business Enterprise or a Disadvantaged Business Enterprise in accordance to Government Code 14837, California Code of Regulations § 1896.4(h), Military and Veteran Code 999 (b) (5) and the best practices of 49 CFR Parts 26.53 (b) and 26.55 (1).

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REVISED  
LANGUAGE

Effective upon issuance of Management Memo POLI-SB-01-15-01, the attached revised Subpart A will replace the referenced Subpart A language. Under the Authority's SB Program Plan Subpart A, the Authority's CUF standards are defined as:

*Commercially Useful Function (CUF): In collective consideration of CUF standards set forth by Government Code 14837, California Code of Regulations § 1896.4(h), Military and Veteran Code 999(b) (5) and 49 CFR Parts 26.53(b) and 26.55 (1), the Authority will uniformly apply CUF Best Practices standards. A small, disadvantaged business, disabled veteran business and microbusiness is deemed to perform a commercially useful function if the business meets the following CUF standards:*

- 1. Performs a commercially useful function when a SB is responsible for the execution of a distinct element of work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved.*
- 2. Performs work that is normal for its business services and functions.*
- 3. Be responsible, with respect, to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material and installing and paying for the material itself.*
- 4. A SB does not perform a CUF if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of SB participation.*
- 5. A SB does not perform a CUF if it does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the SB 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.*

Effective upon issuance of Management Memo POLI-SB-01-15-01, the attached revised Subpart D will replace the referenced Subpart D language. Under the Authority's SB Program Plan Subpart D, the following SB crediting standards apply:

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*The following guidelines apply in calculating SB utilization toward meeting the goal in collective consideration of Government Code 14837, California Code of Regulations § 1896.4(h), Military and Veteran Code 999(b) (5) and the best practices of 49 CFR Part 26.53 and 26.55, as applicable:*

- a) Only work proposed to be performed by a SB's own work forces (including cost of supplies, materials and equipment leases) obtained by the SB for the work of the contract, except supplies and equipment the subcontractor purchases and/or leases from the Contractor or its affiliate. To count DBE participation toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;*
  - b) When a SB subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward SB goals only if the SB subcontractor is itself a certified SB. Work that a SB subcontracts to a non- SB firm does not count toward SB goals. A SB should perform at least 30 percent of the total cost of its contract with its own workforce.*
  - c) In instances of joint venture, the joint venture may only count toward its SB goal the portion of work proposed to be performed by the SB partnering firm, which meets certification, ownership and control standards.*
  - d) A Contractor may count toward its SB goal, only expenditures to firms that are proposed to perform a commercially useful function on that contract. A SB 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.*
  - e) A Contractor may count toward its SB goal, 100 percent of its expenditures for materials and supplies required under the contract and obtained from a SB regular dealer or a SB manufacturer. For purposes of this section, a manufacturer is a firm that operates or maintains a factory or establishment that produces on the premises the materials and supplies obtained by the Contractor. A regular dealer is a firm that owns, operates or maintains a store, warehouse or other establishment in which the materials or supplies required for performance of the contract are bought, kept in stock and regularly sold to the public in the usual course of business.*
  - f) A Contractor may count towards its SB goal, fees and commissions paid to SB firms that are not manufacturers or regular dealers, provided that the fees or commissions are determined to be reasonable and not excessive, as compared to fees customarily allowed for similar services.*
  - g) Special Provisions for Trucking – The Contractor may count towards its goal, all transportation services provided by SB trucking firms, who can demonstrate control of trucking operations for which it seeks credit and it owns, insures and operates, using drivers it employs in the performance of the contract. The SB must itself own and operate at least one fully licensed, insured and operational truck used on the contract. The SB trucking firm may lease trucks from another SB firm, including an owner-operator who is certified as a SB. The SB who leases trucks from another SB receives credit for the total value of the transportation services the lessee SB provides on the*
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*contract. The SB may also lease trucks from a non- SB firm, including an owner-operator. The SB who leases trucks from a non- SB is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The SB does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a SB.*

- h) In cases where the SB certification has ceased during the performance period of the contract, the Contractor will continue to report the dollar value of the worked performed to the Authority on the monthly SB Utilization report.*

*Failure to Demonstrate Performance of a CUF*

*A SB who fails to demonstrate performance of a CUF when bidding as a Prime Contractor or subcontract will result in not counting as a SB towards the goal.*

*In collective consideration of Government Code 14842, Public Contract Code § 10115.10 (a) (j), Military and Veteran Code 999 and the best practices of 49 CFR Part 26.107(a), the following may be imposed on a business that obtains SB certification by having given incorrect, incomplete or fraudulent information and has been awarded a contract because of its affiliation as a certified SB to which it would not have been awarded otherwise:*

- 1. Pay to the State any difference between the contract amount and what the State's costs would have been if the contract had been properly awarded.*
- 2. Pay to the awarding State agency and the department an amount that is equal to the costs incurred to investigate the small business certification.*
- 3. Be assessed a penalty in an amount of not more than ten (10) percent of the amount of the contract involved.*
- 4. The SB will be suspended from business with the State for a period of not less than 3 years and not more than 10 years.*
- 5. Initiate suspension or debarment proceedings against the SB under 2 CFR Parts 180 and 1200.*
- 6. Material breach of contract which may result in termination of the contract or other remedy that the Authority deems appropriate.*

Further revisions were made to Subpart A and Subpart D, as necessary, to include additional clarifications and enhancements to the SB Program Plan. In the attached revised Subpart A and Subpart D, adjacent lines on the left of the document delineate where revisions were made.

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SIGNATURE

Signed: Jeff Morales, Chief Executive Officer  
California High-Speed Rail Authority

Date

*March 16, 2015*



# California High Speed Rail Authority



*Edmund G. Brown Jr.  
Governor  
State of California*



## MANAGEMENT MEMO TO SMALL AND DISADVANTAGED BUSINESS ENTERPRISE PROGRAM PLAN

The Management Memo No. POLI-SB-01-15-01 is to address refinements to the California High-Speed Rail Authority Small and Disadvantaged Business Enterprise

Program Plan, in particular to Subpart A and Subpart D.

## **I. SUBPART A: GENERAL REQUIREMENTS**

### **I.A. Program Authority and Applicability**

Pursuant to the Authority's project funding assurances, the SB Program is authorized by Executive Order S-02-06; and by Title VI of the Civil Rights Act of 1964 and related statutes.

This SB Program is applicable to the Authority's State financially assisted and federal USDOT-- Federal Railroad Administration (FRA) financially assisted projects. The Authority will require strict compliance in meeting the program objectives and corresponding requirements by Authority staff, its Consultants, Contractors and subcontractors, regardless of tier.

The SB Program:

1. Complies with State laws and federal regulations and financial assistance agreements;
2. Meets legal standards of application;
3. Ensures non-discrimination in the award of State and USDOT-assisted contracts; and
4. Reaffirms the Authority's commitment to fairness and the principles of equal opportunity.

In the event of any conflicts or inconsistencies between the federal regulations and the SB Program with respect to DOT-assisted contracts, the federal regulations shall prevail.

### **Contracts**

The Authority recognizes that certain modifications are necessary to adapt the SB Program for use in connection with the construction of the high-speed rail system. The SB Program plan provisions will be modified for construction, professional services, and supplier and manufacturer procurements.

### **I.B. Definitions**

Some of the most common terms, as used in the SB Program, are defined as:

**Business Advisory Council (BAC):** The BAC serves as a forum to provide essential input and advisement to the Authority in implementing its policies and practices that affect and/or impact Small Business utilization and participation in the Authority's contracting programs.

**Business Registry:** A list of all contractors, SBs and non-SBs that have expressed an interest in bidding on the Authority's prime contracts and subcontracts. The purpose of this list is to provide as accurate data as possible about the availability of SBs and non-SBs who seek to work on Authority contracts.

**California Unified Certification Program (CUCP):** One-stop certification clearinghouse, enabling applicants to apply once for DBE certification, which will be honored by all USDOT recipients in the state of California.

**Commercially Useful Function (CUF):** In collective consideration of CUF standards set forth by Government Code 14837, California Code of Regulations § 1896.4(h), Military and Veteran Code

999(b) (5) and 49 CFR Parts 26.53(b) and 26.55 (1), the Authority will uniformly apply CUF Best Practices standards. A small, disadvantaged business, disabled veteran business and microbusiness is deemed to perform a commercially useful function if the business meets the following CUF standards:

1. Performs a commercially useful function when a SB is responsible for the execution of a distinct element of work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved.
2. Performs work that is normal for its business services and functions.
3. Be responsible, with respect, to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material and installing and paying for the material itself.
4. A SB does not perform a CUF if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of SB participation.
5. A SB does not perform a CUF if it does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the SB 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.

**Compliance:** A Contractor has correctly implemented the requirements of the SB Program.

**Contract:** A legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to construction and professional services) and the buyer to pay for them.

**Contractor:** One who participates, through a prime contract, in the Authority's Design-Build program. In this SB Program, Contractor shall also mean--Design-Builder, Master Contractor, Prime Contractor and Prime Consultant.

**Department of General Services (DGS):** The California Department of General Services.

**Department of Transportation or USDOT:** The U.S. Department of Transportation, including the Office of the Secretary, the Federal Railroad Administration, Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA). U.S. Department of Transportation is also synonymous with Operating Administration.

**DBE Certification:** A certification issued to a firm by a certifying member agency of the California Unified Certification Program (CUCP) which has been determined to meet all the requirements in accordance with 49 CFR Part 26. All certification determinations are evidenced by a letter of DBE certification issued by the certifying CUCP member. Refer to the DBE Directory for a listing of DBE firms.

**Director of Contract Compliance:** The Director of Contract Compliance is responsible for the Authority's Contract Compliance division to ensure that Contractors are compliant with the Authority's SB Program, Labor Compliance, Community Benefits Agreement and National Targeted Hiring Initiative programs and policies.

**DOT-Assisted Contract:** A contract funded in whole or in part with USDOT financial assistance, including letters of credit, grants or loan guarantees.

**Goal:** A numerically expressed objective, which the Authority or its Contractors are required to make Good Faith Efforts to achieve.

**Good Faith Efforts:** Efforts to achieve the established SB goal or other requirements which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the Authority's SB Program requirement.

**North American Industrial Classification System (NAICS):** The five to six digit classification number which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is available at the U.S. Census Bureau website: [www.census.gov/eos/www/naics](http://www.census.gov/eos/www/naics)

**Non-Compliance:** A Contractor who has not correctly implemented the requirements of the SB Program.

**Professional Services:** Professional services that are infrequent, technical or unique functions performed by independent Contractors or consultants whose occupation is the rendering of such services.

**Race-Conscious Measure:** A program or portion thereof that focuses specifically on assisting only DBEs, including women-owned DBEs, by the development and inclusion of a numeric participation goal.

**Race-Neutral Measure:** A program or portion thereof that, assists all small businesses regardless of ownership through community outreach and awareness programs to participate successfully in the Authority's procurement program. For the purposes of the SB Program, "race neutral" includes gender neutrality.

**Small Business Administration (SBA):** The United States Small Business Administration.

**Small Business Advocate:** The Small Business Advocate shall be responsible for the development and implementation of a statewide Small Business outreach program to achieve the Authority's policies and goals for Small Business participation and utilization in the high-speed rail program.

**Small Business Concern:** In order to be as inclusive as possible to small businesses for the purpose of a federal aid project, the Authority recognizes a Small Business Concern to include certified Small Businesses (SB), Disadvantaged Business Enterprises (DBE), Disabled Veteran Business Enterprises (DVBE) and Microbusinesses. With respect to firms seeking to participate as SB or DBE in DOT-assisted contracts, a business which meets the definition contained in Section 3 of the Small Business Act and the U.S. Small Business Administration regulations implementing it (13 CFR Part 121) that also does not exceed the cap on average annual gross receipts specified in 49 CFR Part 26.65 (b), as set forth below:

**Disadvantaged Business Enterprise (DBE) –** A for-profit small business concern that is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged. In the case of a corporation, 51 percent of the stock is owned by one or more such individuals; and, whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it and has been certified as a Disadvantaged in accordance with 49 C.F.R. Part 26. The Authority recognizes DBE certifications issued by the California Unified Certification Program (CUCP).

**Disabled Veteran Business Enterprise (DVBE)** – A for-profit small business concern that is at least 51 percent owned by a veteran of the United States Military who has at least a 10 percent service-connected disability. To qualify as a Disabled Veteran Business Enterprise, the business must have received the appropriate certification issued by the California Department of General Services.

**Microbusiness (MB)** – A for-profit small business concern with gross annual receipts of less than \$3,500,000; or, if the small business is a manufacturer, with 25 or fewer employees. The Authority recognizes Microbusiness certifications issued by the California Department of General Services.

**Small Business (SB)** – A for-profit small business that meets the requirements and eligibility criteria set forth by the U.S. Small Business Administration 8(a) program or California Department of General Services for certification as a Small Business.

Under the California Department of General Services definition, a Small Business is independently owned and operated, with its principal office located in California, and with owners living in California, has grossed \$14 million or less over the previous three (3) tax years, and is not dominant in its field of operations. This certification is issued by the California Department of General Services. The Small Business participation will be counted toward the Authority's overall Small Business utilization goal.

**Socially and Economically Disadvantaged Individual:** Any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identify as a member of groups and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.

- (1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case by case basis. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group if you require it.
- (2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
  - (i) "Black Americans" which includes persons having origins in any of the Black racial groups of Africa;
  - (ii) "Hispanic Americans" which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
  - (iii) "Native Americans" which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives or Native Hawaiians;
  - (iv) "Asian Pacific Americans" which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kirbati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;
  - (v) "Subcontinent Asian Americans" which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;(vi) Women;

- (vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

Being born in a particular country does not, standing alone, mean that a person is necessarily a member of one of the groups listed in this definition.

**Subcontractor:** (a) Prior to contract award, any person with whom the Offeror proposed to enter into a subcontract for any part of the work, or that will enter into a sub-subcontract for any part of the work, at any tier; or (b) after contract award, any person with whom the Contractor has entered into a subcontract for any part of the work, or with whom the Contractor has entered into a subcontract for any part of the work, or with whom any subcontractor has further subcontracted any part of the work, at all tiers. In this SB Program, Subcontractor shall also mean—Supplier, Vendor, and Services, to include general and professional services, regardless of tier.

### **I.C. Non-discrimination Requirements**

The Authority will not exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract.

In administering its SB Program, the Authority 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 the SB Program with respect to individuals of a particular race, color, sex, disability or national origin.

In accordance with Title VI of the 1964 Civil Rights Act and related statutes, Contractors and Consultants, regardless of tier, shall comply with the following non-discrimination requirements:

**A. Compliance with regulations:** The Contractor shall comply with regulations relative to Title VI (non-discrimination in federally-assisted programs of the U.S. Department of Transportation - Title 49 CFR Part 21 and Part 26.7 - Effectuation of Title VI of the 1964 Civil Rights Act). Title VI provides that the recipients of federal assistance will implement and maintain a policy of non-discrimination in which no person shall, on the basis of race, color, sex or national origin, be excluded from participation in, denied the benefits of or subject to discrimination under any program or activity by the recipients of federal assistance or their assignees and successors in interest.

**B. Non-discrimination:** The Contractor, with regard to the work performed by it during the Agreement shall act in accordance with Title VI. Specifically, the Contractor shall not discriminate on the basis of race, color, sex or national origin in the selection and retention of subcontractors, including procurement of materials and leases of equipment. The Contractor shall not participate either directly or indirectly in the discrimination prohibited by 49 CFR Part 21.5 et. seq. of the USDOT's regulations, including employment practices.

**C. Solicitations for Subcontracts, Including Procurements of Services, Materials and Equipment:** In all solicitations, either by competitive bidding or negotiation made by the Contractor for work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential subcontractor or supplier shall be notified by the Contractor of the Contractor's obligations under this Agreement and the regulations relative to non-discrimination on the grounds of race, color sex or national origin.

**D. Information and Reports:** The Contractor shall provide all information and reports required by the Regulations, or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information, and facilities as may be determined by the Authority or any duly authorized representative of the federal government to be pertinent to ascertain compliance with such regulations or directives. Where any information required of a Contractor is in the exclusive possession of another who fails or refuses to furnish this information, the Contractor shall so certify to the Authority, or any duly authorized Federal Agency as appropriate, and shall set forth what efforts it has made to obtain the information.

**E. Sanctions for Non-compliance:** In the event of the Contractor's non-compliance with the non-discrimination provisions of this Agreement, the Authority shall impose such Agreement sanctions as it or any federal funding agency may determine to be appropriate, including, but not limited to:

- 1) Withholding of payments to the Contractor under the Agreement until the Contractor complies, and/or
- 2) Cancellation, termination or suspension of the Agreement, in whole or in part.

**Incorporation of Provisions:** The Contractor shall include the provisions of paragraphs (A) through (E) in every subcontract, including procurements of materials and leases of equipment, unless exempt by the regulations or directives issued pursuant thereto. The Contractor will take such action with respect to any subcontractor or procurement as the Authority or any federal funding agency may direct as a means of enforcing such provisions including sanctions for non-compliance.

The following clause should be placed, in USDOT-assisted contract and in subcontract language, regardless of tier:

*The Contractor, subrecipient, or subcontractor shall not discriminate on the basis of race, color, or 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 the Authority deems appropriate, which may include, but is not limited to (1) withholding monthly progress payments, (2) assessing sanctions, (3) liquidated damages, and/or (4) disqualifying the Contractor from future bidding as non-responsible*

#### For Solely State Funded Contracts

In accordance with State non-discrimination program requirements as set forth in Government Code Section 12990 et seq and Title 2, California Code of Regulations, Division 4, Chapter 5, Sections 8103, 8104, 8108 and 8113 (unless exempted pursuant to Section 8115) Contractors or subcontractor firms with 50 or more employees shall provide a description of the firm's non-discrimination plan designed to eliminate discrimination based on race, color, religion, age, sex, sexual orientation, disability or national origin.

Each firm (Contractor or subcontractor) with fewer than 50 employees must provide a statement indicating that the firm has fewer than 50 employees and is therefore exempt from the Non-discrimination Plan requirement.

Refer to Subpart C: Administrative Requirements, Section F. Contract Monitoring and Compliance for information on administrative sanctions.

I.D. Federal Financial Assistance Agreements

Pursuant to Public Utilities Code 185036(d) the Authority may enter into a cooperative or joint development agreement with local governments or private entities (collectively Subrecipient). As a condition of receiving federal financial assistance funds, the Subrecipient must adhere to non-discrimination program requirements and may develop and implement a SB Program in accordance with the best practices of 49 CFR Part 26, where applicable. The Subrecipient may implement an existing SB or DBE Program, with the concurrence from the Authority.

Pursuant to federal provisions, the Authority shall require the Subrecipient to provide assurances of their compliance with 49 CFR Part 26.13(a), and will include the below language in agreements with Subrecipients.

Assurance: 49 CFR Part 26.13(a)

*The (INSERT SUBRECIPIENT NAME) shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any USDOT assisted contract or in the administration of its SB Program or the best practices of 49 CFR Part 26. The SUBRECIPIENT (INSERT NAME) shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure non-discrimination in the award and administration of USDOT assisted contracts. The Authority's SB Program, as approved by FRA, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the Authority of the SUBRECIPIENT (INSERT NAME) failure to carry out its approved program, the FRA may impose sanction as provided for under 49 Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).*

The Authority shall maintain program oversight to ensure the Subrecipient entity complies with the best practices of 49 CFR Part 26, where applicable, under the cooperative or joint partnership agreement.

## **IV. SUBPART D: GOALS, GOOD FAITH EFFORTS, AND COUNTING SB PARTICIPATION**

### **IV.A. Overall Goal**

The Authority has established an overall SB goal of 30 percent to be achieved through the utilization of small business concerns, in any combination and at any tier level. In order to be as inclusive as possible to small businesses, the Authority recognizes small business concerns to include certified:

- Small Businesses (SB)
- Disadvantaged Business Enterprises (DBE)
- Disabled Veteran Business Enterprises (DVBE)
- ▶ Microbusinesses (MB)

The SB Program has incorporated the best practices of 49 CFR Part 26, Section 26.41. On federally assisted contracts, the Authority established a 10 percent DBE goal, within the overall 30 percent SB goal. The 10 percent DBE goal is wholly race-neutral.

The SB Program has incorporated California Executive Order D-43-01; Public Contract Code 10115(c), and Military and Veterans Code 999 et. seq, as applicable. On federal assisted contracts, the Authority established a three (3) percent DVBE goal, within the overall 30 percent SB goal. On 100 percent State funded contracts; the Authority established a three (3) DVBE goal or an incentive as authorized by Military and Veterans Code 999 et. seq.

#### **Business Industry Consultation**

The Authority will provide its overall goal recommendation to the Authority Board, SBs, contracting industry and small business organizations for review, comment and consultation. Following this consultation, the Authority will post a notice of the proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at its principal office for a 30 day comment period. The notice shall include the address to which comments may be sent and business location where the proposed goal may be reviewed.

The Authority will exercise good faith efforts to meet the overall SB Program goals and objectives, in partnership with its Contractors and resource partners.

### **IV.B. Federal and State Financial Assisted Contract Goal**

#### **Federal**

For contracts with USDOT financial assistance that are received from an Operating Administration with Congressional regulatory authority to impose 49 CFR Part 26 in its entirety, the Authority shall establish an appropriate DBE goal for the individual projects and/or contracts in accordance with 49 CFR Part 26.

In the event the Authority is directed by the Operating Administration to operate in a race-conscious environment, the Authority will use DBE contract goals to meet any portion of the overall goal the Authority does not foresee being able to meet using race-neutral measures. Contract goals are established to cumulatively result in meeting any portion of the Authority's overall goal that is not projected to be met through the use of race and gender neutral measures over the period to which the overall goal applies.

## State

For 100 percent State funded contracts, the Authority has established a three (3) percent DVBE goal requirement as authorized by Military and Veterans Code 999 et. seq. Contractors are required to meet the DVBE goal requirement and are encouraged to make efforts to retain SB and DBEs participation as well.

### **IV.C. Good Faith Efforts (Pre and Post Award)**

The Authority and its Contractors, as good business stewards, will exercise good faith efforts to meet the Authority's overall SB goal as outlined in this SB Program, including developing innovative contracting strategies and providing necessary supportive services to promote and ensure the success of SBs in all aspects and phases of the Authority's contracting program. At this time, the Authority will administer the SB Program in a race and gender neutral environment.

The Authority and its Contractors are to employ good faith effort strategies towards ensuring that SBs have the maximum practicable opportunity to participate in the Authority's State and federally-assisted contract opportunities. The following good faith effort strategies are not inclusive of all the efforts expected to ensure SB Program goals and objectives are met:

Select sufficient portions of the work to be performed by SBs, in order to increase the likelihood that the SB goal will be achieved . This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate SB utilization, even when the Contractor might otherwise prefer to perform these work items with its own forces. This may include where possible, establishing flexible timeframes for performance and delivery schedules in a manner that encourages and facilitates SB participation.

Advertise and solicit subcontracting opportunities through all reasonable and available means, including written correspondence, fax, emails and telephone, to all SBs. Provide interested SBs with information about the contract scope in a timely manner and assist them in responding to the solicitation. Provide sufficient time for the SB to respond to the solicitation and take appropriate steps to follow up on the initial solicitation to the SBs. Host pre-bid conference or "Open House" to meet and greet with potential SBs who are interested in subcontracting opportunities.

Select sufficient portions of the work to be performed by SBs, in order to increase the likelihood that the SB goal will be achieved.

Provide interested SBs with information about the contract scope, construction plans, contract specifications and requirements of the contract in a timely manner to assists the SBs in responding to the solicitation with their offers.

Negotiate in good faith with interested SBs. Seriously consider all SB sub bids, quotes, and proposals. Use good business judgment to consider a number of factors in negotiating with SBs. However, the fact that there may be some additional costs involved in finding and using SBs is not in itself sufficient reason to fail to meet the SB goals, as long as such costs are reasonable. An insufficient good faith effort is the rejection of the SB because its quotation for the work was not the lowest received. However, nothing in this section shall be construed to require the Contract to accept unreasonable quotes.

Offer to assist SBs in obtaining bonding, lines of credit, equipment, supplies, materials or related assistance or services.

Use available resources, i.e., Chambers of Commerce, minority, women business, disabled veteran business organizations, government agencies or other groups to identify SBs.

Conduct outreach and networking forums and related activities on an ongoing basis to inform SBs of viable subcontract opportunities.

The Contractor's pre-award good faith efforts documentation shall be presented and included in the Contractor's Small Business Performance Plan.

#### Good Faith Efforts Towards SB Participation (Post Award)

As good business stewards to ensure SB utilization during the term of the contract, the selected Contractors shall continue to make good faith efforts to ensure SBs have an opportunity to successfully perform on the contract and that the Contractor meets its SB goal. These post award efforts include but are not limited to:

1. Negotiate in good faith in attempt to finalize and execute a subcontract agreement with the SB committed to in the bid/proposal.
2. Seek out and utilize additional SB suppliers and subcontractors when the Contractor is below participation levels to meet the overall goals and objectives.
3. Continue to provide assistance to SB subcontractors or suppliers in obtaining bonding, lines of credit, etc.
4. Notify a SB in writing of any potential problem and attempt to resolve the problem prior to formally requesting the Authority's approval to substitute the SB.
5. Ensure timely payment of all monies due and owed to SBs, subcontractors and suppliers in strict conformance with prompt payment and retainage provisions, as set forth in the SB Program, State statutes and federal regulations.
6. Not terminate an approved SB for convenience to perform the work with the Contractor's own work forces or those of an affiliate, without the prior written consent from the Authority.
7. Make good faith efforts to find another SB subcontractor to substitute for the original SB if the SB was terminated for cause and approved by the Authority, or fails to complete its designated scope of work on the contract for any reason. Refer to Section IV, Subpart D: Item F for steps to comply with the substitution and or termination of a listed SB.
8. Commensurately add or subtract from the respective total subcontract amount the dollar amount of Change Orders or any other contract modifications that increase or decrease the work area in which SB utilization has been committed. Revised total contract dollar values shall be reflected in the month SB Utilization report submitted to the Authority with supporting evidence of an approved change.
9. Encourage major subcontractors to meet the SB goal on their lower tier agreements and report attainments to the Contractor for the monthly SB utilization report. Encourage major subcontractors to demonstrate compliance with the post-award good faith efforts to assist the Contractor achieve the SB goal.

## State Funded Contracts

On 100 percent State funded contracts, the good faith efforts procedures are not applicable when a DVBE goal is established. The DVBE contract requirements under Military and Veterans Code 999 et. seq. will prevail in the application of an appropriate DVBE goal or incentive where applicable, on a 100 percent State funded contract.

The Authority may elect to apply State statutory Small Business Options to encourage SB participation and therefore provide appropriate small business preferences.

## Federal Financial Assisted Contract Good Faith Efforts

For federal financial assisted contracts with Congressional regulatory authority to apply 49 CFR Part 26 in its entirety, the Authority will instruct prospective Bidders and Offerors to enlist the following Good Faith Effort steps to demonstrate responsiveness to the objectives set forth in 49 CFR Part 26. The Authority reserves the right to employ the following minimum standards in evaluating the Bidders or Offerors demonstration of good faith efforts under the Authority's SB Program:

<b>1</b>	<b>ATTENDANCE AT PRE-BID CONFERENCE/JOB WALK</b>
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**Effort:** Attendance at pre-bid proposal conference and job walk, if held by the Authority (or the Bidder/Offeror for subsequent subcontract bid packages it lets), to solicit the interest of certified SB/DBEs who have the capability to perform the work on the contract.

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

<b>2</b>	<b>IDENTIFICATION OF SCOPE OF WORK FOR SUBCONTRACTS IN ORDER TO MEET THE PROJECT GOAL</b>
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**Effort:** Selecting portions of the work that can be subcontracted to SB/DBEs in order to increase the likelihood that the overall SB/DBE goal will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate SB/DBE utilization, even when the Bidder/Proposer might otherwise prefer to perform these work items with its own forces.

**Evidence:** Identifying the scope of work the Bidder/Offeror intends to perform with its own workforce and identifying the subcontracting items the Bidder/Offeror made available to SB/DBEs to meet the established SB/DBE goal.

<b>3</b>	<b>ADVERTISEMENT OF SUBCONTRACTING OPPORTUNITIES</b>
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**Effort:** Advertisements in trade association publications and disadvantaged/minority and women business focused media. Advertisements must identify specific subcontracting opportunities being solicited, project name and location, Bidder/Offeror contact person including name, address, phone, fax, e-mail and bid solicitation submittal due date. Advertisements should appear a minimum of 14 days prior to bid due date.

**Evidence:** As verification of publication, Bidder/Offeror must provide a listing of advertisements placed, including copies of advertisement tear sheets and/or proof of publication containing at minimum the information specified above.

<b>4</b>	<b>WRITTEN REQUESTS FOR BIDS/PROPOSALS</b>
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**Effort:** Provision of written notices to the maximum number of SB/DBE firms to solicit interest *for each subcontracting area identified sufficient to meet the established goal*. Notices should be issued at least 14 days prior to bid submittal due date.

**Evidence:** Copy of the solicitation letter, list of recipients grouped by each identified subcontracting area, including name, address, and phone number, date contacted for all SB/DBE firms *for each subcontracting area identified* and identification of mode of communication (letter or fax), including corresponding copies of letters and/or fax confirmations.

<b>5</b>	<b>SOLICITATION FOLLOW-UP</b>
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**Effort:** Subsequent efforts to solicit SB/DBEs within all available *subcontracting areas*. The follow-up solicitation should occur within a reasonable time of the initial solicitation, in order to allow the Bidder/Offeror to solicit additional SB/DBEs and identify additional subcontractable items to draw greater interest and subbids.

**Evidence:** Bidder/Offeror must determine with certainty if the SB/DBEs initially solicited are interested by taking appropriate steps to follow up on initial solicitations. Documentation should include:

- (a) Names, addresses and telephone numbers of SB/DBEs contacted by each subcontracting area identified/solicited;
- (b) Description of information timely provided to SB/DBEs regarding plans and specifications for portions of the scope of work to assist SB/DBEs in responding to the solicitation; and
- (c) Statement of justification re: unsuccessful solicitation of SB/DBEs.
- (d) Description of additional efforts the Bidder/Offeror made to encourage greater interest from SB/DBEs to submit subbids.

<b>6</b>	<b>NEGOTIATION IN GOOD FAITH</b>
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**Effort:** Negotiating in good faith with interested SB/DBEs to facilitate SB/DBE utilization. Utilize a sound basis for selection and/or rejection of SB/DBE subbids/proposals.

**Evidence:** Evidence of such negotiation includes the names, addresses, and phone numbers of all subcontractors (SB/DBEs and non-SB/DBEs) who submitted bids; copies of subbids for each portion of work solicited; and stated reasons for choice of subcontractor. (Barring lack of qualifications to perform work, only significant price differences of 10 percent (an applicable regulatory guideline) between the selected firm and rejected SB/DBE firms' proposed costs would be considered as valid cause for rejecting subbids.

<b>7</b>	<b>PERFORMANCE OF OTHER BIDDERS/PROPOSERS IN MEETING THE SB/DBE GOAL</b>
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**Effort:** In determining whether the low Bidder/Offeror has made adequate efforts to meet the SB/DBE goal, the Authority, as appropriate, will take into account the performance of other level Bidders/Proposers in meeting the established contract-specific goal requirements.

**Evidence:** The individual Bidder/Offeror must meet or exceed the average SB/DBE utilization obtained by the three (3) low responsive Bidders/Offerors to adequately demonstrate that the apparent successful Bidder/Offeror has taken all reasonable efforts towards meeting the contract-specific goal.

<b>8</b>	<b>PROVISION OF ASSISTANCE TO DBEs TO OBTAIN BONDING, LINES OF CREDIT AND/OR INSURANCE</b>
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**Effort:** Provision of assistance to interested SB/DBEs in obtaining bonding, lines of credit, and/or insurance as required by the Bidder/Offeror.

**Evidence:** Brief description of the type of assistance provided by the Bidder/Offeror to interested SB/DBEs in obtaining bonding, lines of credit and/or insurance.

<b>9</b>	<b>UTILIZATION OF COMMUNITY OUTREACH SERVICES</b>
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**Effort:** Utilization of outreach services available within the DBE community, including construction/consultant groups, local, State and federal SB/DBE offices and other organizations that provide assistance in the recruitment and placement of SB/DBEs.

**Evidence:** Copies of letters, faxes, telephone logs, etc., used to contact organizations, which include the names of organizations/groups, dates, names of contacts, and telephone numbers; and copies of correspondence received from these entities acknowledging contact. The Bidder/Offeror must document outreach to a minimum of ten (10) organizations/groups.

Verification of Good Faith Efforts.

Only those efforts made prior to bid/offer will be considered in evaluating adequate efforts to meet the goal. Failure to submit the required documentation by the time specified may be grounds for finding the bid/proposal to be non-responsive.

#### **IV.D. Counting SB Participation**

The standards of crediting SB utilization will be in conformance with meeting the Commercially Useful Function (CUF) standards as defined under Subpart A: General Requirements, Section B. Definitions. The Authority and its Contractors shall only count firms who are certified by a recognized Certifying Agency and when the SB is also performing a CUF. The Authority will follow the best practices in 49 CFR Part 26.53 to count DBE participation toward meeting a goal. Each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;

While the Authority is not a SB/DVBE/DBE certifying agency, the Authority recognizes the SB certifications from the California Unified Certification Program, California DGS and the Small Business Administration 8(a) program. Refer to SB/DVBE/DBE Directories in Subpart C: Administrative Requirements for the Certifying Agencies webpages.

In order for the Authority to count and verify the Contractor's SB participation, the Contractor shall submit the following information along with the SB Performance Plan and SB Utilization Report:

1. The names and addresses of each SB that will participate in the contract;
2. A description of the work that each SB will perform;
3. The NAICS code for the work to be performed by a DBE
4. The dollar amount of the utilization of each SB; and
5. Written and signed documentation of confirmation from the SB that it is participating in the contract and whose utilization will count towards the contract goal.

The Authority will use the SBs' information to determine the SBs' certification and conformance with performing a CUF.

### Small Business Counting and CUF

The Authority shall only count SB utilization towards the goals, where applicable, when the SB provides evidence of its certification and is performing a commercially useful function, as defined under Subpart A: General Requirements, Section B: Definitions.

The following guidelines apply in calculating SB utilization toward meeting the goal in collective consideration of Government Code 14837, California Code of Regulations § 1896.4(h), Military and Veteran Code 999(b) (5) and the best practices of 49 CFR Part 26.53 and 26.55, as applicable:

- a) Only work proposed to be performed by a SB's own work forces (including cost of supplies, materials and equipment leases) obtained by the SB for the work of the contract, except supplies and equipment the subcontractor purchases and/or leases from the Contractor or its affiliate. To count DBE participation toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;
- b) When a SB subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward SB goals only if the SB subcontractor is itself a certified SB. Work that a SB subcontracts to a non- SB firm does not count toward SB goals. A SB should perform at least 30 percent of the total cost of its contract with its own workforce.
- c) In instances of joint venture, the joint venture may only count toward its SB goal the portion of work proposed to be performed by the SB partnering firm, which meets certification, ownership and control standards.
- d) A Contractor may count toward its SB goal, only expenditures to firms that are proposed to perform a commercially useful function on that contract. A SB 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.
- e) A Contractor may count toward its SB goal, 100 percent of its expenditures for materials and supplies required under the contract and obtained from a SB regular dealer or a SB manufacturer. For purposes of this section, a manufacturer is a firm that operates or

maintains a factory or establishment that produces on the premises the materials and supplies obtained by the Contractor. A regular dealer is a firm that owns, operates or maintains a store, warehouse or other establishment in which the materials or supplies required for performance of the contract are bought, kept in stock and regularly sold to the public in the usual course of business.

- f) A Contractor may count towards its SB goal, fees and commissions paid to SB firms that are not manufacturers or regular dealers, provided that the fees or commissions are determined to be reasonable and not excessive, as compared to fees customarily allowed for similar services.
- g) Special Provisions for Trucking – The Contractor may count towards its goal, all transportation services provided by SB trucking firms, who can demonstrate control of trucking operations for which it seeks credit and it owns, insures and operates, using drivers it employs in the performance of the contract. The SB must itself own and operate at least one fully licensed, insured and operational truck used on the contract. The SB trucking firm may lease trucks from another SB firm, including an owner-operator who is certified as a SB. The SB who leases trucks from another SB receives credit for the total value of the transportation services the lessee SB provides on the contract. The SB may also lease trucks from a non- SB firm, including an owner-operator. The SB who leases trucks from a non- SB is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The SB does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a SB.
- h) In cases where the SB certification has ceased during the performance period of the contract, the Contractor will continue to report the dollar value of the worked performed to the Authority on the monthly SB Utilization report.

#### Failure to Demonstrate Performance of a CUF

A SB who fails to demonstrate performance of a CUF when bidding as a Prime Contractor or subcontract will result in not counting as a SB towards the goal.

In collective consideration of Government Code 14842, Public Contract Code § 10115.10 (a) (1), Military and Veteran Code 999 and the best practices of 49 CFR Part 26.107(a), the following may be imposed on a business that obtains SB certification by having given incorrect, incomplete or fraudulent information and has been awarded a contract because of its affiliation as a certified SB to which it would not have been awarded otherwise:

1. Pay to the State any difference between the contract amount and what the State's costs would have been if the contract had been properly awarded.
2. Pay to the awarding State agency and the department an amount that is equal to the costs incurred to investigate the small business certification.
3. Be assessed a penalty in an amount of not more than ten (10) percent of the amount of the contract involved.
4. The SB will be suspended from business with the State for a period of not less than 3 years and not more than 10 years.
5. Initiate suspension or debarment proceedings against the SB under 2 CFR Parts 180 and 1200.

6. Material breach of contract which may result in termination of the contract or other remedy that the Authority deems appropriate.

#### **IV.E. Substitution or Termination of a SB on a Contract**

The Authority requires that a Contractor, or its subcontractors, not substitute or terminate a SB without the Authority's prior written consent. This includes, but is not limited to, instances in which a Contractor or its subcontractors seek to perform work originally designated for a SB with its own forces or those of an affiliate, a non-SB, or with another SB not originally listed on the award.

The Authority shall enforce the provisions of Public Contract Code § 4107 Subletting and Subcontracting et seq., where applicable, and the provisions in Military and Veterans Code § 999.5 for proposed substitution of a DVBE where a DVBE goal is established.

The Authority will provide written consent only if it agrees, for reasons stated in the written justification for substitution/termination request, that the Contractor and its subcontractor has good cause to substitute or terminate the subcontractor. For purposes of this section, good cause includes the following circumstances:

- The listed subcontractor, after having had a reasonable opportunity to do so, fails or refuses to execute a written contract for the scope of work specified in the subcontract's bid and at the price specified in the subcontractor's bid; when that written contract, based upon the general terms, conditions, plans and specifications for the project involved or the terms of that subcontractor's written bid, is presented to the subcontractor by the Contractor.
- The listed subcontractor becomes insolvent or the subject of an order for relief in bankruptcy.
- The listed subcontractor fails or refuses to perform the work of its subcontract.
- The listed subcontractor fails or refuses to meet the Contractor's bond requirements, as set forth in Public Contract Code § 4108.
- The Contractor demonstrates to the Authority, subject to the further provisions set forth in Section 4107.5, that the name of the subcontractor was listed as a result of an inadvertent clerical error.
- The listed subcontractor is not licensed pursuant to the Contractor's License laws.
- The Authority determines that the work performed by the listed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications, or the subcontractor is substantially delaying or disrupting the progress of the work.
- The listed subcontractor is ineligible to work on public works projects pursuant to Section 1777.1 or 1777.7 of the Labor Code.
- The Authority determines that a listed subcontractor is not a responsible contractor.
- The listed subcontractor voluntarily withdraws from the project and provides written notice of its withdrawal.
- Other documented good cause that compels the substitution or termination of the subcontractor. Provided that good cause does not exist, if the Contractor seeks to substitute or to terminate a subcontractor it relied upon to obtain the contract so that the Contractor can self-perform the work for which the subcontractor was engaged or so that the Contractor can substitute another subcontractor after contract award.

Prior to approval of the Contractor's request for the substitution, the Authority shall give notice in writing to the subcontractor of the Contractor's request to substitute and of the reasons for the request. The notice shall be served by certified or registered mail to the last known address of the subcontractor. The listed subcontractor who has been so notified has five (5) working days within which to submit

written objections to the substitution to the Authority. Failure to file these written objections constitutes the listed subcontractor's consent to the substitution.

If written objections are filed, the Authority shall give notice in writing at least five (5) working days to the listed subcontractor of a hearing by the Authority on the Contractor's request for substitution.

On 100 percent State funded contracts, a Contractor may, subject to the approval of the DGS, to replace a DVBE identified by the Contractor in its bid or offer, pursuant to subdivision (a) of Military and Veterans § 999.5, with another DVBE. As an added step to ensure that Contractors honor their commitments to use DVBE subcontractors and meet the commitment levels identified in the contract award, the following, or similar, language is to be included into the solicitations and resulting subcontract documents:

*"After award of a contract, the successful Contractor must use the DVBE subcontractor(s) and/or supplier(s) proposed in their bid or offer to the State unless a substitution is requested and is approved by the awarding department and the Department of General Services. The California Code of Regulations Title II section 1896.64(c) and Public Contract Code § 4107 (for Public Works) provide the current requirements for awarding departments to approve the substitution of a DVBE subcontractor."*

*"Contractor understands and agrees that should award of this contract be based in part on their commitment to use the Disabled Veteran Business Enterprise (DVBE) subcontractor(s) identified in their bid or offer, per Military and Veterans Code § 999.5 (e), a DVBE subcontractor may only be replaced by another DVBE subcontractor and must be approved by the DGS. Changes to the scope of work that impact the DVBE subcontractor(s) identified in the bid or offer and approved DVBE substitutions will be documented by contract amendment. Failure of Contractor to seek substitution and adhere to the DVBE utilization level identified in the bid or offer may be cause for contract termination, recovery of damages under rights and remedies due to the State, and penalties as outlined in Military and Veterans Code § 999.9; Public Contract Code (PCC) § 10115.10, or PCC § 4110 (applies to public works only)."*

The Authority shall follow the processes set forth in 2 CCR § 1894.64(c) and Public Contract Code § 4107 when a Contractor requests the substitution of a DVBE subcontractor with the added provisions that: 1) only another DVBE subcontractor shall be considered to replace a DVBE subcontractor, and 2) the awarding department shall obtain final approval to replace a DVBE subcontractor from the DGS.

Requests to replace a DVBE subcontractor must be amply documented to show that the replacement meets the criteria, as previously specified. Documentation may include, but is not limited to the request, confirmation of receipt of the request, the subcontractor's objection and request for hearing and the final Statement of Decision. Requests and resulting amendments generated by the DVBE subcontractor substitution should be timely so as not to unreasonably delay the Contractor's performance of the contract, resulting in potential claims against the Authority for delay damages. Requests are to be sent electronically to [osdshelp@dgs.ca.gov](mailto:osdshelp@dgs.ca.gov).

#### Substitution or Termination of a Listed DBE on Federal Financial Assisted Contracts

For federal financial assisted contracts with Congressional regulatory authority to apply 49 CFR Part 26 in its entirety, the Authority will require a Contractor to make good faith efforts to replace a

DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the same extent needed to meet the overall or individual contract specific DBE goal as established. The Authority will require the Contractor to notify the Authority's SBLO immediately of the DBE's inability or unwillingness to perform and provide reasonable documentation.

The Contractor must first obtain the written consent of the Authority before any Contractor can act on the substitution of the DBE. The Authority will require the Contractor to provide copies of the new or amended subcontracts. If the candidate subcontractor to be substituted is not a DBE, the Authority also requires the Contractor to submit documentation of their good faith efforts to replace the DBE with another DBE of equivalent percentage in another work item.

A DBE subcontractor listed in the Contractor's commitment [as required by 49 CFR Part § 26.53] may be substituted or terminated only with the Authority's prior written consent for good cause should the DBE:

- fails or refuses to execute a written contract;
- fails or refuses to perform the work of its subcontract consistent with normal industry standards; good cause does not exist where failure or refusal to perform the work of the subcontract results from bad faith or discriminatory action of the Contractor;
- fails or refuses to meet reasonable, nondiscriminatory bond requirements;
- becomes bankrupt, insolvent or exhibits credit unworthiness;
- is ineligible to work because of suspension and debarment proceedings;
- is not a responsible subcontractor;
- voluntarily withdraws from the project and provides written notice of its withdrawal;
- is ineligible to receive DBE credit for the type of work required;
- owner dies or becomes disabled and is unable to complete its work; or
- other documented good cause that compels termination.

Before requesting the Authority's consent for the proposed termination or substitution, the Contractor must give written notice of the proposal, including the reason for the request, to the DBE with a copy to the Authority. The DBE must be given five (5) days to respond. The notice period may be reduced if required by public necessity (e.g., safety).

In addition to post-award terminations, these provisions apply to pre-award deletions of or substitutions of SB firms put forward by Offerors in negotiated procurements.

When a SB or DBE subcontractor is terminated as provided in this subsection, or fails to complete its work on the contract for any reason, the Contractor will make good faith efforts to find another SB/DBE to substitute for the original SB/DBE. These good faith efforts shall be directed at finding another SB/DBE to perform at least the same amount of work under the contract as the SB/DBE that was terminated, to the extent needed to meet the original contract goal. The good faith efforts shall be documented and submitted within 7 days, which may be extended for an additional 7 days if necessary. The Authority will provide written confirmation to the Contractor stating whether or not good faith efforts have been demonstrated.

#### **IV.F. Addition or Amendment of a SB on a Contract**

The Authority requires that a Contractor, or its subcontractors, obtain the Authority's prior written consent to add a new SB or amend the subcontract of a current SB. The addition of a new SB or

amendments to a current SB subcontract may not decrease the subcontract value, commitment, or scope of an existing SB on the contract.

Contractors seeking to add a new SB or amend the contract of a current SB must complete and submit the "SB/DBE/DVBE Request to Add/Amend" Form to the Authority for its review and approval. The Authority reserves the right to amend these forms at any time during the life of the contract to require additional information, as deemed necessary. The Contractor shall provide the Authority with the information requested upon identification of any SB/DVBE/DBE subcontractor/supplier firm not previously listed to perform under the contract.