

CURRENT ISSUES IN CONTRACTING DIVERSITY PROGRAMS: Proposition 16 & Legal Trends



BOC Member Agency Contact List

Alameda Contra Costa Transit District (AC Transit) www.actransit.org **Contracts Compliance Administrator:** Phillip Halley; phalley@actransit.org; 510-891-7164; **Associate Management Analyst, Contracts Compliance:** Brooklyn Moore-Green; bmggreen@actransit.org; 510-891-7231

Alameda County Transportation Commission (Alameda CTC)

www.alamedactc.org

Senior Administrative Analyst: E.W. Cheng; echeng@alamedactc.org; 510-208-7420

Bay Area Rapid Transit District (BART) www.bart.gov

Principal Administrative Analyst: Alma Basurto; abasurto@bart.gov; 510-464-6388

California Department of Transportation (CALTRANS) www.dot.ca.gov **Branch Chief Small Business and Property Control:** Ayanna Nobles; Avanna.nobles@dot.ca.gov; 510-286-7030

California High Speed Rail Authority (HSR) www.hsr.ca.gov **Small Business Advocate:** Catrina Blair; Catrina.Blair@hsr.ca.gov; 916-669-6560

Central Contra Costa Transit Authority (County Connection)

www.countyconnection.com

Director of Recruitment & Employee Development: Kristina Martinez; kmartinez@countyconnection.com; 925-680-2031

Procurement: Kevin Finn; finn@countyconnection.com;

925-680-2087; Scott Pevahouse; pevahouse@countyconnection.com; 925-680-2092

City of Rio Vista www.riovistacity.com/transit

Community Development Director:

City of Santa Rosa www.srcity.org/reimagining

Transit Planner: Yuri Koslen; ykoslen@srcity.org; 707-543-3335

Golden Gate Bridge, Highway & Transportation District (GGBHTD)

www.goldengate.org

DBE Program Administrator: Artemise Davenport; adavenport@goldengate.org; 415-257-4581; **Procurement:**

Bridge/Bus: Nicole Gilardi; 415-923-2317 **Ferry:** Javier Peraza; 415-923-2255 **Administration:** Vincent Moy; 415-923-2316

Livermore Amador Valley Transit Authority (LAVTA)

www.wheelsbus.com

Director of Finance: Tamara Edwards; tedwards@lavta.org; 925-455-7566

Marin Transit www.marintransit.org

Director of Policy & Legislative Programs: Amy Van Doren; avandoren@marintransit.org; 415-226-0859

Metropolitan Transportation Commission (MTC) www.mtc.ca.gov **Contract Compliance Manager:**

Michael Brinton; mbrinton@bayareametro.gov; 510-778-6727; **Purchasing:** Luz Campos; lcampos@bayareametro.gov; 510-778-5390

Napa Valley Transportation Authority (NVTA) www.nvta.ca.gov **Manager of Finance:** Antonio Onorato; aonorato@nvta.ca.gov; 707-259-8779

San Francisco Bay Ferry, a service of the Water Emergency Transportation Authority (WETA)

www.watertransit.org **Program Manager/Analyst:** Lauren Duran Gualarte; gualarte@watertransit.org; 415-364-3188

Planning Manager: Terminals: Kevin Connolly, 415-291-3377

San Francisco County Transportation Authority (SFCTA)

www.sfcta.org

Principle Management Analyst: Lily Yu; lily.yu@sfcta.org; 415-522-4811

San Francisco Municipal Transportation Agency (SFMTA)

www.sfmta.gov

Senior Contract Compliance Office: Sheila Evans-Peguese; Sheila.Evans-Peguese@sfmta.com; 415-701-4436

San Mateo County Transit District (SamTrans) and

Peninsula Joint Powers Board (Caltrain) www.smctd.com/bidscontracts **DBE Administrator:** Kamal Hubbard,

Hubbardk@samtrans.com; 650-508-7939

Santa Clara Valley Transportation Authority (VTA) www.vta.org **Office of Business Diversity Programs Manager:**

Olga Medina; olga.medina@vta.org; 408-321-5962

Santa Cruz Metropolitan Transit District (Santa Cruz Metro)

www.scmttd.com

Purchasing Manager: Greg Willis; gwillis@scmttd.com; 831-420-2570

Solano County Transit (SolTrans) www.soltransride.com

DBE Liaison Officer: Dennis Ybarra; dennis@soltransride.com; 707-736-6986

Sonoma-Marin Area Rail Transit (SMART) www.sonomamarintrain.org **Chief Financial Officer:** Erin McGrath;

emcgrath@sonomamarintrain.org; 707-794-3320

Transbay Joint Powers Authority (TJPA) www.tjpa.org

Chief Financial Officer: Erin Roseman; eroseman@tjpa.org; 415-597-4617

Tri Delta Transit (ECCTA) www.trideltatransit.com **DBE Liaison Officer:** Tania Babcock; tbabcock@eccta.org; 925-754-6622 ext. 223

Western Contra Costa Transit Authority (WestCAT) www.westcat.org **Grants & Compliance Manager:** Mike Furnary;

Mike@westcat.org; 510-724-3331

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Colette Holt
Attorney at Law
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Proposition 16

- “Allows diversity as a factor in public employment, education and contracting decisions.”
 - Permits government decision-making policies to consider race, sex, color, ethnicity, or national origin to address diversity by repealing article I, section 31, of the California Constitution, which was added by Proposition 209 in 1996.

Proposition 16

- Proposition 209 generally prohibits state and local governments from discriminating against, or granting preferential treatment to, individuals or groups on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, education, or contracting.
- Does not alter other state and federal laws guaranteeing equal protection and prohibiting unlawful discrimination.
- For more information, see www.ejs.org.

How to Respond to Proposition 16

- Educate policy makers about the strict scrutiny standards governing race- and gender-conscious programs
 - Agency must independently establish its “compelling interest” in remedying identified discrimination
 - New remedies must be “narrowly tailored” to that evidence
- Generate community enthusiasm and involvement

How to Respond to Proposition 16

- Short term
 - Review current procurement and contracting policies
 - Experience, bonding and insurance requirements
 - Payment turnaround times
 - Access to information about specific opportunities and overall procurement forecast
 - Outreach efforts to M/W/DBEs and other small firms
 - Review current contract data collection protocols
 - Prime contractors
 - Subcontractors

How to Respond to Proposition 16

- Medium term

- Begin to fill in missing contract data for ALL firms, primes and subs
 - Race and gender
 - NAICS codes and work descriptions
 - Contact info
 - Payments, including change orders
- If you don't have a system, get one
 - Monitoring is crucial regardless of whether you are setting M/W/DBE contract goals
 - Saves time and money for the disparity study
- Develop disparity study RFP

How to Respond to Proposition 16

- Long term
 - Conduct disparity study
 - Draft new program based on study results
 - Training agency staff and vendors

Disparity Study Elements: Utilization

- Determine utilization of M/W/DBEs as % of total dollars in the agency's geographic & product marketplaces
 - Use highest level of detail (NAICS not “construction”)
 - Do not set a ceiling (e.g., \$500K); set a floor (e.g., informal threshold)
 - Fill in missing non-M/W/DBE subcontractor data
 - Obtain large majority of contracts & contract dollars (e.g., 85%)

Disparity Study Elements: Availability

- Determine M/W/DBE availability as a % of all firms
 - Create database of relevant agency projects
 - Identify the geographic & product markets empirically
 - Count, identify & verify all businesses in relevant markets, not just those either known to the agency or responding to surveys
 - Produce dollar-weighted availability estimates to set overall, annual M/W/DBE goals
 - Produce detailed availability estimates to set M/W/DBE contract goals

Disparity Study Elements: Availability

- Do not use broad categories (“construction,” professional services”, etc.)
 - Arbitrary
 - Construction is NAICS code sector 23 but landscaping is NAICS code sector 56
 - Not narrowly tailored
 - Temptation of lazy goal setting
- Do not require year-by-year analyses
 - Impossible
 - Unhelpful

Disparity Study Elements: Availability

- Do not use the “Bidders List” Approach
 - Existing discrimination may lead to under-representation
 - Popularity of program may lead to over-representation
 - “Apples to oranges” if lists are combined
 - Separate prime & sub calculations are unrealistic, too simplistic & maintain barriers
 - **Remedial aspect of the Program is lost by looking only at current results without regard to the current effects of past & present discrimination**

Disparity Study Elements: Availability

- Do not use Census Bureau data
 - County Business Pattern data are too broad
 - Cannot be weighted
 - Counts all establishments, not only individual firms
- Do not use the survey approach
 - Voluntary surveys have low response rates
 - May exclude firms actually working for the agency
 - Fails to explore why there might be a lack of interest in doing agency work
 - Not the broad net required by the courts

Disparity Study Elements: Availability

- Do not conduct a “capacity” analysis
 - Ignores the elasticity of supply
 - What about subcontracts?
 - Disparities persist even when variables are controlled for
 - Variables (revenues, years in business, bonding limits, etc.) are impacted by discrimination
 - **Ignores the program’s remedial nature by locking in the results of past discrimination**
 - “Capacity” argument rejected by courts

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Disparity Study Elements: Disparity Testing

- Conduct an agency contracts disparity analysis for local programs & DBE programs in the 9th Circuit
 - Necessary but not sufficient for current programs because of the effect of remedial market intervention
 - A finding of no disparity isn't the end of the analysis; consider
 - Effects of the existing program
 - Continuing impact of discrimination

Disparity Study Elements: Economy-Wide Analyses

- Conduct economy-wide disparity analyses
 - Sometimes erroneously called “private sector” analysis
 - Look outside agency’s own contracting activities
 - Census Bureau’s Survey of Business Owners
 - Disparity data about firms’ receipts
 - Census Bureau’s American Community Survey
 - Minority and women entrepreneurs vs. non- Minority and women entrepreneur's business formation rates & earnings
 - Critical element of legal defense for existing programs

Disparity Study Elements: Qualitative Data

- Include anecdotal evidence
 - Necessary but not sufficient
 - Explore current effects of past biases & exclusion
 - Examine denials of full & fair access to government contracts & subcontracts
 - Evaluate existing programs for effectiveness in remedying discrimination, including through race-neutral measures
 - **Critical element for M/W/DBEs' participation**

Disparity Study Elements: Procurement Policies Review

- Interview M/W/DBEs, primes and agency staff
- Evaluate the effectiveness of race-neutral measures
 - Utilization on no-goals contracts
 - Small business elements
 - Size standards & personal net worth criteria
 - Setasides
 - Contract goals
 - Supportive services efforts
 - Business development programs

Disparity Study Data Requirements

- Internally review your data before issuing a RFP
- Minimum requirements
 - Contract description/type of work
 - Unique contract identification number
 - Prime vendor payment data
 - Prime vendor address, including zip code

Disparity Study Data Requirements

- Beneficial information
 - Prime vendor contact information
 - 6-digit NAICS or other detailed industry codes
 - Race & gender of the majority owner
 - Subcontractor information
 - Subcontractor payment data
 - Subcontractor contact information
 - 6-digit NAICS or other detailed industry codes
 - Race & gender of the majority owner

Disparity Study Results

- What if a group's utilization does not show large statistical disparities?
 - Role of large contracts?
 - Role of large awards to a small number of firms?
 - Cause vs. effect? Utilization on no goals contracts?
 - Anecdotal data?
 - Utilization on other local agencies contracts?
 - Disparities in economy-wide utilization?

Disparity Study Limitations

- Statistics don't "prove" discrimination
- Goals mostly determine utilization
 - Entrenched systems?
 - Poor contract goal setting?
 - Unprepared M/W/DBEs?
- Political power determines program outcomes
 - Study recommendations aren't self-executing

Recent Disparity Study Mistakes

- Small number of contracts dollars analyzed
- Failure to interview non-M/W/DBEs
- Failure to account for the impact of pandemic on surveys
- Inclusion of workforce
- Irrelevant or unnecessary RFP elements
 - Preliminary outlines and midterm reports
 - Small purchases
 - Criminal background checks
 - Local counsel
 - Two statisticians
 - “Data validation”
 - Separate analyses of certified and non-certified firms

Recent Disparity Study Mistakes

- “Impact” of change orders
- Information not included in the final report
- Bidding success rates
- Subcontractor versus prime contractor availability estimates and disparity analysis
- Broad category utilization and availability
- Impossible requirements
 - “Verification” of anecdotal data
 - “Business creation analysis” looking at marital status, number of children, spouses income, etc.
 - Determination of other agencies’ markets
 - Comparing the growth of M/W/DBE to non-M/W/BEs at local level

Recent Disparity Study Mistakes

■ DO

- Pay attention to the questions
- Describe your contract data in detail
 - Number of contracts
 - Approximate spend
 - Subcontractor records
- Keep it simple
 - Who are you?
 - What are you going to do?
 - Do not mandate methodology other than demonstrated legal acceptance
 - How long will it take?
 - How much will it cost?

Comcast v. National Assoc. of African American-Owned Media

- Unanimous US Supreme Court held in March 2020 that plaintiffs under §1981 must show that racial discrimination was the “but for” cause of the challenged decision, not just that it was a “factor” in decision-making
 - Test is “solely because of race”
- Case remanded to 9th Circuit Court of Appeals

Students for Fair Admissions, Inc. v. Harvard University

- Plaintiffs alleged Harvard intentionally discriminates against Asian-Americans in admissions in violation of Title VI
 - Used race as a predominant factor in admissions decisions
 - Used racial balancing
 - Considered race of applicants without first exhausting race-neutral alternatives
- Defendant argued policies are narrowly tailored to promote the educational benefits of diversity

Students for Fair Admissions, Inc. v. Harvard University

- Court upheld Harvard's program
 - No individual applicant presented who had been denied admission
 - Program was not formulaic or a quota ("whole person" approach)
 - Academic excellence, extracurricular activities & personal qualities are scrutinized
- Lessons for M/W/DBE programs
 - Strict scrutiny framework continues to apply
 - Affirms the need for high quality statistical support from qualified experts
 - Attacks on affirmative action continue

Weed Cases

- *Pharmacann Ohio v Ohio Dept. of Commerce and Pure Ohio Wellness v. Ohio Board of Pharmacy*
 - 15% of new medical marijuana licenses were to be issued to “economically disadvantaged groups defined as Blacks, Native Americans, Hispanics and Asians”
 - Court held the statute failed strict scrutiny
 - No history of discrimination in the medical marijuana industry
 - Legislature failed to evaluate or employ race-neutral measures
 - Inflexible and unlimited nature of the statute
 - No relationship between 15% and relevant market
 - Heavy burden on other applicants
 - Appeals are pending

Bostock v. Clayton County, GA

- US Supreme Court held that Title VII's prohibition of discrimination "on the basis of sex" includes sexual orientation and gender identity
 - Even if multiple reasons, if "sex" is one reason the employment action violates Title VII
 - Homosexuality and transgender status are inextricably bound up with "sex"
 - Understanding in 1964 doesn't override the "ordinary public meaning" of "sex"
 - Whether a specific application was anticipated is irrelevant

Bostock v. Clayton County, GA

■ Warning signs

- Majority opinion doesn't use the term "gay"; instead insists on "homosexual"
- States that Title VII protects individual employees, not groups
 - What does this mean for class action Title VII cases?
 - What does this mean for disparate impact theory, which looks to patterns affecting groups?
 - Dissents
 - Alito argues the Court is taking a complex issues and making policy
 - Kavanaugh argues this should be left to Congress

USDOT DBE COVID Guidance

- Extended until 12/31/2020
- DBE and ACDBE certifications
 - On site visits
 - Mobile devices can be used to conduct site visits
 - Photos are OK if virtual methods are not available
 - Interstate certifications
 - Mobile devices can be used if applicant requests a meeting
 - If virtual meeting is not possible, 30-day period is tolled
 - Decertification hearings
 - Mobile devices can be used
 - Recipient must maintain complete record and original recording
 - Summary suspension
 - May use email

USDOT DBE COVID Guidance

- Appeal instructions and recipient records
 - Provides email address
 - If the appeal was within the last 90 days (9/24/2020), firms need to refile at the email address
- Program requirements
 - DBE overall goal methodology public participation can be virtual
 - Extends goal submissions to 11/30/2020
 - CUF reviews can be virtual
 - Virtual reconsideration meetings are permitted
 - Termination/substitution documents can be submitted electronically

USDOT DBE COVID Guidance

- Certification documents
 - Email is OK
 - Extends deadline for decisions to 90 days
 - Material changes and annual affidavits extended to 60 days
- Notarization
 - Online notarization OK if permitted under state law
 - Signing in the presence of a witness then before notary OK is can social distance

USDOT DBE Question & Answer

- Non-binding guidance 9/1/2020
 - DBE and ACDBE certification should be limited to firms that intend to perform as primes or subs on DOT-assisted contracts or airport concession contracts
 - Recipients may recommend a firm not pursue certification
- Many local agencies rely on DBE certifications
- Was there a hue and cry?

DBE Program Reauthorization

- “Invest in America Act”
 - H.R. 2
 - House Committee on Transportation and Infrastructure hearing held on 9/23/2020
 - Reauthorizes the DBE program
 - Eliminates the absolute size cap that is below the SBA limits
 - Still seeking letters of support
 - Matt.Leasure@mail.house.gov

OMB Memo on Training

- M-20-34, 9/4/2020
- “It has come to the President's attention [through press reports] that Executive Branch agencies have spent millions of taxpayer dollars to date "training" government workers to believe divisive, anti-American propaganda.... The divisive, false, and demeaning propaganda of the critical race theory movement is contrary to all we stand for as Americans and should have no place in the Federal government.”

OMB Memo on Training

- Federal agencies must
 - “Cease and desist” such training
 - Identify training related to “critical race theory,” “white privilege” or that suggest the US is or any race is “inherently racist or evil”
 - Cancel all such contracts

Where Are We Going?

- Effects of uncertainty

- What we know

- So far, local budgets have declined approximately 13%
 - D/M/WBEs especially vulnerable
 - M/WBEs are smaller and less well capitalized
 - Black firms are failing at twice the rate of White firms
 - MBEs are disproportionately in the sectors that have declined
 - M/WBEs are disproportionately reliant on government contracts
 - There will be winners and losers

- What we don't know

- How long this will last
 - What assistance the federal government will provide to state and local governments and individuals
 - How spending patterns will change

“Never Let a Good Crisis Go To Waste”

- Increased competition for government contracts
- Examine your current policies and practices
 - Review restrictive specifications
 - Get rid of
 - Paper
 - Bureaucratic redundancy (e.g., number of signatures)
 - Unnecessary requirements (e.g., notarization)
 - Reduce payment turnaround times through all ACH payments
 - View “emergency” purchases with skepticism
 - Increase virtual outreach events & pre-bid conferences
 - Reaffirm your commitment

Dangers Ahead

- M/W/DBE programs politically expendable in hard times?
- Effects on availability
 - Minority firms likely to suffer more, especially Black firms
 - BUT: if you reduce your numerator for contract goal setting, reduce your denominator
- Intragroup conflicts
 - Stressed minority and women coalitions?
 - Pressure for race-specific goals?
- “Remedial” focus or “diversity”?



16 Carriage Hills • San Antonio, Texas 78257
433 West Briar Place #11C • Chicago, Illinois 60657
773.255.6844 • colette.holt@mwbelaw.com
www.mwbelaw.com • Twitter: @mwbelaw