

## **EXHIBIT C: Small Business Enterprise Element (Section 26.39)**

The District has established a Small Business Enterprise (SBE) element as one of its race-neutral methods of achieving small business participation, including disadvantaged business participation, on particular contracts with subcontracting opportunities. This SBE element applies to all District contracts, regardless of funding source, where race-neutral and gender-neutral methods are employed. The District will take all reasonable steps to eliminate obstacles to SBE prime contractor or subcontractor participation in District procurement activities.

On August 2, 2013, the District received approval from the Federal Transit Administration to implement the SBE Element as part of the District's DBE Program.

### **A. Definition of Small Business Enterprise**

1. To participate as an eligible small business in programs administered by the District, a firm must meet both of the following requirements:

a. A firm (including affiliates) must be an existing small business as defined by Small Business Administration (SBA) regulations, 13 C.F.R. Part 121, for the appropriate type(s) of work that a firm performs. The firm must hold one of the acceptable certifications listed in Section B below.

b. Even if a firm meets the above requirement, the firm's (including affiliates') average annual gross receipts over the previous three years cannot exceed a maximum cap of \$26.29 million (or as adjusted for inflation by the Secretary of U.S. DOT). SBA size standards vary by industry, and for certain industries may be higher than the \$26.29 million cap. For example, the SBA size standard for a general construction contractor is \$39.5 million. If a general construction contractor's average annual gross receipts over the previous three years is \$25 million, while it is below \$39.5 million and meets the SBA size standard, it would be ineligible to participate as a small business for District purposes as it exceeds \$26.29 million.

For information on SBA size standards, visit: <http://www.sba.gov/content/determining-size-standards>. Affiliates are defined in SBA regulations 13 C.F.R. Part 121.103.

### **B. Acceptable Comparable Small Business Enterprise Certifications**

*The District will accept the small business enterprise certifications performed by other agencies, provided that the size standards described in Section A1a and A1b above are met.* If a firm is certified in one or more of the following programs, and meets District size standards, the firm is automatically deemed a small business for District purposes. The term "SBE" will be used collectively for all DBEs and qualified SBEs, WBEs, MBEs and other approved certifications. As indicated below, the District requires an affidavit of size for each SBE prime contractor or subcontractor that is not certified as a DBE. Certifications from self-certification programs are not acceptable. District may request and review financial data provided by SBE firms on a case-by-case basis to confirm eligibility.

Firms must be certified as of the time of bid submittal.

**1. Disadvantaged Business Enterprise (DBE) certification** pursuant to U.S. Department of Transportation regulations, 49 C.F.R. Part 26. This includes DBE certifications performed by the California Unified Certification Program or by the Unified Certification Program (UCP) of any other state.

**2. State Minority Business Enterprise (SMBE) and State Women Business Enterprise (SWBE) certification by the State of California** or by any other state provided that their certification complies with Section A1a and A1b above. In addition to copies of SMBE/SWBE certifications, bidders certified out-of-state must submit an affidavit of size for each SMBE/SWBE prime contractor or SMBE/SWBE subcontractor at the specified time in the bid solicitation.

**3. Small Business (SB) certification by the California Department of General Services (DGS)** provided that their certification complies with Section A1a and A1b above. In addition to copies of SB certifications, bidders must submit an affidavit of size for each SB prime contractor or subcontractor at the specified time in the bid solicitation.

**4. Microbusiness (SB (Micro)) certification by the California Department of General Services** for ALL industries, provided that their certification complies with Section A1a and A1b above. In addition to copies of SB Micro certifications, bidders must submit an affidavit of size for each Micro prime contractor or subcontractor at the specified time in the bid solicitation.

**5. Small Business for the Purpose of Public Works (SB-PW) certification by the California Department of General Services** provided that their certification complies with Section A1a and A1b above. In addition to copies of SB-PW certifications, bidders must submit an affidavit of size for each SB-PW prime or subcontractor at the specified time in the bid solicitation.

**6. SBA 8(a) by the Small Business Administration** provided that their certification complies with Section A1a and A1b above. In addition to copies of SBA 8(a) certifications, bidders must submit an affidavit of size for each SBA 8(a) prime contractor or subcontractor at the specified time of the bid solicitation.

**7. SBE/MBE/WBE certification from other state, county, or local government-certifying agency** provided that their certification complies with Section A1a and A1b above. In addition to copies of certifications, bidders must submit an affidavit of size for each certified prime contractor or subcontractor at the specified time in the bid solicitation.

**C. Race-Neutral SBE Measures**

The District will continue its efforts to enhance small business participation through outreach and other community programs, training and business development programs, restructuring contracting opportunities, simplifying bonding, surety and insurance requirements or

other race-neutral means. In addition, the District may take any of the following race-neutral SBE measures:

1. Endeavor to unbundle large contracts to ensure that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform. During the project planning stage, project managers and engineering staff will evaluate the potential for a large project to be split into smaller contract opportunities.

2. In multi-year design-build contracts or other large contracts (e.g., for “megaprojects”), require bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform.

3. On prime contracts not having DBE contract goals, establish contract-specific SBE goals where appropriate. Contract-specific SBE goals may be established on particular prime contracts with subcontracting opportunities as a means of increasing small business, including DBE participation. Availability of subcontracting opportunities will be evaluated on a contract-by-contract basis by project managers and the Administrator. Where a contract-specific SBE goal has been established, the bidder or proposer must meet the contract-specific goal or demonstrate that it made sufficient good faith efforts to do so. A bidder shall be ineligible for contract award if it does not meet the goal or demonstrate sufficient good faith efforts.

**D. Determining SBE Goals** (Referencing C.3. above)

The SBE goal shall be determined by the Administrator in cooperation with project managers and with the concurrence of the General Manager. The contract-specific goal shall apply to the percentage of SBE participation in the total contract work and be set forth in the Special Provisions of the contract specifications.

For each contract involving subcontracting opportunities, the factors outlined below will be considered to determine whether a contract-specific goal should be established for the particular contract and, if so, what the percentage goal shall be:

1. The full range of activities in the proposed contract;
2. The availability of SBEs as prime contractors or subcontractors in the types of work involved in the performance of the proposed contract;
3. The unique conditions of the project that might affect the ability of the prime contractor to coordinate, utilize, or incorporate subcontractors or suppliers into the project. (Projects consisting of only one or two sub-trades may not be appropriate for a contract-specific goal due to the fact that establishing a goal could result in restrictive bidding.);
4. The effect that the contract-specific goal might have on the time of completion;

5. Any other relevant criteria.

E. **Awarding Contracts with Contract-Specific SBE Goals**

The District shall award contracts to the lowest responsible bidder as required by the California Public Contracts Code Sections 20914 and 20916, where applicable. For such contracts, as well as for contracts awarded pursuant to a Request for Proposals procedure where the lowest responsible bidder standard does not apply, a bidder that fails to demonstrate that it achieved the contract-specific SBE goal and fails to demonstrate that it made sufficient good faith efforts to do so shall not be deemed “responsive” and, therefore, shall be ineligible for award of the contract. The bidder or proposer will include in its bid or proposal a *SBE Goal Declaration* in a form designated by the District notifying the District of its SBE goal attainment.

1. **Evaluation of Bids**

**Invitation for Bid.** The following procedures apply to contracts that are awarded to the lowest responsible bidder. No later than five (5) business days after bid opening as a matter of responsiveness, the Administrator shall evaluate all bids to determine whether the bidders submitted all of the information required by 49 C.F.R. § 26.53(b). The responsible bidder with the lowest apparent bid price who also meets the contract-specific SBE goal, or demonstrates sufficient good faith efforts to meet the contract-specific SBE goal, shall be recommended for the contract award. In the event that the bidder with the lowest monetary bid price fails to meet the contract-specific goal or fails to demonstrate sufficient good faith efforts, or is otherwise unresponsive or not responsible, the Administrator shall evaluate the bidder with the next lowest bid price. Should the Administrator determine that additional information is needed to evaluate a bidder’s submission with regard to the SBE requirements, the Administrator shall request said bidder to submit the required information, or may contact the listed SBEs directly.

The District shall require that any SBEs listed by bidders for participation in the contract be certified SBEs as of the time of bid opening. Acceptable comparable Small Business Enterprise certifications are listed in this document. Some certifications require completion of a *Small Business Enterprise Affidavit of Size* in a form designated by the District and submitted at the time specified in the bid solicitation.

The Administrator shall review the *SBE Goal Declaration* form and the *Prime Contractor and Subcontractor/Subconsultant/Supplier Report* and will confirm each SBE firm’s certification status. The Administrator will review the total dollar value of the work to be performed by SBEs and the total contract bid price for accuracy and comparison with the contract-specific SBE goal established for the contract.

**Request for Proposals.** This procedure applies to contracts that are awarded pursuant to a Request for Proposals procedure, in which the lowest responsible bidder standard does not apply and contract award is based upon a qualitative evaluation of multiple factors, including costs. After the submission deadline, the Administrator shall evaluate all proposals to determine whether the proposers submitted all of the information required by 49 C.F.R. § 26.53(b). The highest ranked responsible proposer who also meets the contract-specific SBE goal, or demonstrates sufficient good faith efforts to meet the contract-specific SBE goal, shall be recommended for the contract

award. In the event that the highest ranked proposer fails to meet the contract-specific goal or fails to demonstrate sufficient good faith efforts, or is otherwise unresponsive or not responsible, the Administrator shall evaluate the next highest ranked proposer. Should the Administrator determine that additional information is needed to evaluate a proposer's submission with regard to the SBE requirements, the Administrator shall request said proposer to submit the required information, or may contact the listed SBEs directly.

The District shall require that any SBEs listed by proposers for participation in the contract be certified SBEs at the proposal submission deadline. Acceptable comparable Small Business Enterprise certifications are listed in this document. Some certifications require completion of a *Small Business Enterprise Affidavit of Size* in a form designated by the District and submitted at the time specified in the solicitation.

The Administrator shall review the *SBE Goal Declaration* form for the proposer's SBE commitment and shall compare it to the contract-specific goal established for the contract. The Administrator shall review the list of SBEs submitted by the proposer and confirm each SBE firm's certification status.

**The following applies to both Invitation for Bid and Request for Proposals.**

2. **Determination of Good Faith Efforts.** Bidder/proposer is obligated to make good faith efforts. Bidder/proposer can demonstrate that it has made good faith efforts by either meeting the contract-specific goal or documenting good faith effort to meet the contract-specific goal. If the amount of SBE participation does not meet the contract-specific goal, the Administrator shall review the good faith efforts documentation submitted by the bidder/proposer. The Administrator shall determine whether the bidder/proposer has performed the quality, quantity and intensity of efforts that demonstrates a reasonably active and aggressive attempt to meet the contract-specific goal in accordance with 49 C.F.R. Part 26, Appendix A. All bidders/proposers must submit Good Faith Efforts documentation in accordance with the solicitation documents.

3. **Bidder's Right to Administrative Reconsideration.** In the event that the Administrator determines that the apparent low responsible bidder, or highest ranked proposer, is not responsive to the solicitation because it has not met the contract-specific goal and has not demonstrated sufficient good faith efforts to meet the contract-specific goal, the Administrator will notify the bidder/proposer in writing. The notification shall include the reasons for the determination and inform the bidder/proposer of its right to request administrative reconsideration of the determination. The bidder's/proposer's request for administrative reconsideration must be in writing and sent to the designated staff person within the time period specified in the notice of determination. As part of the administrative reconsideration, the bidder/proposer may submit written documentation for the Review Committee's consideration and may appear before the Review Committee. The Review Committee will only consider documentation of good faith efforts made prior to the bid/proposal due date. Any written documentation the bidder/proposer wishes the Review Committee to consider must be submitted to the designated staff person within the timeframe specified in the notice of administrative reconsideration. The Review Committee will convene for the administrative reconsideration prior to the time that a recommendation for

award of the contract is presented to the appropriate committee and then to the Board of Directors or to the General Manager, as applicable.

The Review Committee will consider the bidder's/proposer's good faith efforts documentation submitted with its bid/proposal, the Administrator's original good faith efforts determination, and any other written materials the bidder/proposer has submitted to the Review Committee, in accordance with this section, to determine whether the bidder/proposer has performed the quality, quantity and intensity of efforts that demonstrates a reasonably active and aggressive attempt to meet the contract-specific goal in accordance with 49 C.F.R. Part 26, Appendix A.

The Review Committee shall provide the bidder /proposer with a written decision on reconsideration, explaining the basis for its determination. In the event that the Review Committee finds that the bidder/proposer has not met the contract-specific goal or has not demonstrated sufficient good faith efforts to meet the contract-specific goal, the Administrator will deem said bidder not responsive and evaluate the responsible bidder submitting the next lowest bid, or the next highest ranking proposer. The result of the reconsideration process is not administratively appealable to the U.S. Department of Transportation or Federal Transit Administration.

4. **Recommendation for Award.** Following the determination of the lowest responsive and responsible bidder/highest ranked proposer, the Administrator shall prepare a report on the firm's compliance with the SBE requirements for review by the General Manager. The determination will be included in a report for presentation to the appropriate committee and then to the Board of Directors, if applicable, at the time the contract award is considered. If the appropriate committee, the Board of Directors or the General Manager disagrees with the recommendation, it shall reject all bids or refer the matter back to staff for further evaluation and recommendation. The decision of the Board of Directors or the General Manager on the award of contract, if such a decision is made, shall be final and binding on all parties, subject to compliance with the District's bid protest procedures.