

# Overlooked Opportunity to Help Develop DBEs

## Office of the Inspector General



### Investigation Results

Allowing prime contractors to award work to subconsultants added to their on-call contracts without working to develop their existing Disadvantaged Business Enterprises (DBE) goes against the goals, intent, and spirit of the DBE program. We investigated allegations that prime contractors were diverting work from their DBEs by adding new subconsultants to their project team post contract award. We found no technical violation of federal DBE regulations, the District's contract provisions, or Office of Civil Rights (OCR) DBE policies.

However, we did find a lack of transparency as to whether DBEs are afforded the ability to compete for work before a prime adds a new subconsultant. Additionally, BART's process for allowing primes to add subconsultants because they have "specialized skills or resources" puts the District at a risk of noncompliance with federal DBE regulations. The term "specialized" is vague, making it difficult to determine whether an existing DBE could have performed the work requiring those skills. The addition process also bypasses an opportunity to assist DBEs in developing their skills and experience so they may be more competitive in obtaining contract work and transitioning from the DBE program. At the crux of the allegations is the terminology of "addition" versus "substitution." The latter triggers federal requirements that the former does not. In each allegation, the primes "added" not "substituted" DBEs, which avoids federal DBE regulations. While looking into BART's addition process, we learned that a BART Group Manager requested that two prime contractors add a specific subconsultant to their contracts. Although not explicitly discussed in BART's Procurement Manual, interviews with BART officials confirmed this was inappropriate because prime contractors assume the project risk.

### Recommendations

1. Create a standardized form that prime contractors must complete and submit to the OCR that justifies their proposed subconsultant addition by clearly identifying the special skills or resources requiring the addition and confirms that:
  - a. There was no practical solution to assist their existing DBEs in obtaining the specialty skills or resources necessary for the addition and be given the opportunity to object because they have those skills or resources.
  - b. Their existing subconsultants were given written notification of a subconsultant addition with a clear explanation of the specialized skill or resource needed.
  - c. The addition is not at the direction, request, or suggestion of BART or its employees.
2. Update the Procurement Manual to prohibit BART staff from directing, requesting, or suggesting that a prime contractor add a specific subconsultant to their contracts.

*Management agreed to our recommendations. See page six for details.*

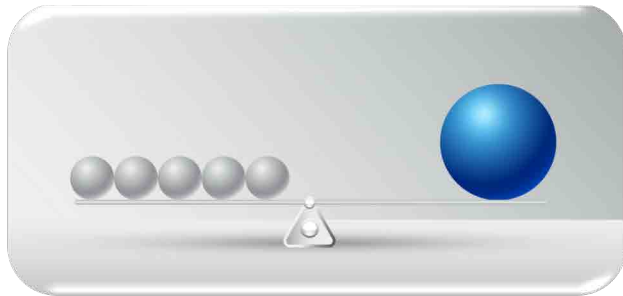


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Providing independent oversight of the District's use of revenue.

## Background

The District regularly awards on-call construction management and general engineering contracts to assist and advise on development, modification, and renovation projects for BART facilities. The award amount for each of those contracts can vary but is generally in the tens of millions. Prime contractors identify their subconsultants, including Disadvantaged Business Enterprises (DBEs), that have the knowledge, skills, and abilities to perform work under their contract. BART's Office of Civil Rights (OCR) sets DBE participation goals for District contracts and, for on-call agreements, a prime contractor offers the District a level of DBE participation they commit to as a part of their contract with BART. DBEs are for-profit small business concerns where socially and economically



**DBE programs create balance for disadvantaged businesses competing for BART contracts.**

disadvantaged individuals own at least a 51-percent interest and also control management and daily business operations. DBE programs are intended to remedy past and current discrimination against disadvantaged businesses by ensuring a level playing field and fostering equal opportunity. Prime contractors using DBEs must adhere to the Federal Transit Administration's (FTA) DBE program regulations ([49 CFR Part 26](#)), as those regulations are incorporated into the contracts due to the potential of federal funds. The OCR oversees compliance with FTA's regulations.

The OCR requires prime contractors to use the specific DBEs listed with their contracts to perform work under their on-call contracts. Consistent with the FTA regulations, the OCR requires prime contractors to have good cause for substituting a DBE, such as an existing DBE refusing to perform the work to industry standards. For any substitution, the prime contractor must notify the DBE subconsultant in writing of their intent to terminate them from the contract and substitute in a new subconsultant. The DBE has five days to object to the substitution in writing. The OCR must approve the substitution and the prime contractor must substitute in another DBE.

The FTA has no regulations regarding a prime's "addition" of a subconsultant to a contract. However, BART contracts allow prime contractors to add subconsultants in "the event specialty skills or resources are required that are not available within the approved subconsultants." The primes must provide a written request for the addition and receive approval from BART's Contract Administrator. The OCR must concur with the Contract Administrator that the addition is needed and routinely asks questions about why the addition is needed and why an existing DBE is unable to do the work before approving the addition.

## Allegations & Investigation

We investigated four allegations that prime contractors were funneling work away from their listed DBEs by adding new subconsultants to their project teams, claiming that these subconsultants had special skills not available within the project team approved with the contract. Project team refers to the prime's personnel and subconsultants, including DBEs, listed and approved with the contract award. The subconsultant additions raised the concern that BART and its primes were failing to adhere to the FTA's DBE regulations.

We evaluated the documentation supporting the additions and discussed them with District officials, including staff from the OCR who are charged with monitoring the DBE program and ensuring primes meet or make a

good-faith effort to meet their DBE goals. This confirmed that the new subconsultants, which were not DBEs, were added to the project team, not substituted. This bypassed the federal DBE regulations because there was no termination or substitution of a DBE and no change to the DBEs listed and approved with the contract. Those DBEs remained eligible to receive work under the contract and the primes were still held to meet or attempt to meet their DBE participation goals.

We discussed with the OCR their process for determining if additions were necessary and the OCR said that given the technical nature of the contract work, they rely on the prime's assertion that "specialized" skills are needed and that their existing DBEs do not have those skills. However, prime contractors are not required to confirm in writing that they communicated with their existing DBEs about the work to ensure they were unable to provide it or determine whether they could obtain the skill or resource necessary to perform the work. This overlooks opportunities to develop existing DBEs so they are better able to compete for contracts in the future and transition from the DBE program.



In general, the documentation for the additions said that the subconsultants had specialized skills that set them apart from the existing DBEs or other subconsultants. It did not clarify why those skills or resources were not identified with the contract scope, or how those skills were so unique as to not already be available from the existing project team. In their proposals, primes assert that their project teams, including DBEs and other subconsultants, have the requisite skills and experience to perform work under the contract scope of services.

The documentation for the additions consisted of a letter from the prime contractor requesting the addition and a thread of emails between the OCR and the BART Contract Administrator who said the needed skills were specialized. There is no official form for the process that could better document that the prime contractor made a valid attempt to use an existing DBE before adding a subconsultant. For example, the Arizona Department of Transportation (DOT) uses a form that prime contractors must complete to document a DBE termination, substitution, or reduction. This creates a formal process for the change and improves transparency. It also strengthens the Arizona DOT's ability to demonstrate that they followed FTA regulations. See Appendix I on page 5 for details.

We reviewed the workplans for the added subconsultants and noted that one workplan was for resident engineering and one was for pre-construction management services. These services are consistent with the scope of work of the prime contracts, making it unclear as to why the skills were not already available from one of the existing project team DBEs or other subconsultants. In those two cases, the work was awarded to a former BART



employee who had left District service and started their own firm.<sup>1</sup> We also noted that in two other instances, the BART Group Manager who oversees the prime contracts requested the addition of a specific subconsultant that had done work for BART before. This removed the prime contractors' discretion in making decisions regarding their project teams. Although BART's Procurement Manual does not explicitly prohibit BART officials from requesting that a prime contractor add a specific subconsultant, multiple BART officials said it is inappropriate to do so because prime contractors assume the risk associated with the subconsultant's work under their contract.

We reached out to the FTA to better understand their DBE program and the concept of adding versus substituting DBEs. The FTA official we spoke to raised concerns about adding subconsultants because they have "specialized" skills saying that was too "opaque" and opens up BART to being noncompliant with federal DBE regulations. The FTA official said that, typically, specialized experience is articulated through licensures, in which case the specific licensure should be named to justify the addition and clearly demonstrate why an existing DBE is unable to perform the work. The FTA official also said that adding subconsultants to contracts does not make use of BART's ability to help DBEs "develop" their skills and experience, which is a key component of the DBE program.

Ultimately, BART and its prime contractors did not violate federal DBE regulations and followed the OCR's DBE enforcement policies and contract terms to add the subconsultants.<sup>2</sup> Additionally, adding the subconsultants did not change the primes' DBE participation goals. But the process of adding subconsultants creates another disadvantage for DBEs and is the antithesis of the DBE program, which is to support DBEs and help them develop their skills and experience so that they may overcome barriers to competition.

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<sup>1</sup> Please see our [report](#), "*Caution is Needed to Avoid Conflict of Interest Violations*," which discusses BART contracting with former employees and recommends placing limitations on that practice.

<sup>2</sup> We contracted with TAP International Inc. for a compliance audit to assist in our investigation. Our findings are based largely on their work and conclusions regarding compliance with Subcontract Listing Laws under 49 CFR § 26.53 and California Public Contracting Code § 4107.



# Appendix I: Arizona DOT DBE Termination/Substitution/Reduction Form<sup>3</sup>



## ARIZONA DEPARTMENT OF TRANSPORTATION DISADVANTAGE BUSINESS ENTERPRISE (DBE) TERMINATION/ SUBSTITUTION/ REDUCTION (TSR) REQUEST

Clear

Contract/TRACS No.: \_\_\_\_\_ Change Order: \_\_\_\_\_ Task Order: \_\_\_\_\_

Prime: \_\_\_\_\_ DBE Firm: \_\_\_\_\_

Requestor: \_\_\_\_\_ Email: \_\_\_\_\_ Phone Number: \_\_\_\_\_

Type of request:  Termination  Substitution  Reduction

**1. Is this request due to an ADOT Change Order/Scope?**

- Yes, explain below the Change Order/Scope impact on DBE participation.
- No, select below the fact(s) and the reason(s) for the request (see attached instructions).

**DBE:**

- Fails or refuses to execute written contract
- Fails or refuses to perform work in accordance with normal industry standards
- Fails or refuses to meet prime contractor's reasonable, nondiscriminatory bond requirements
- Becomes bankrupt, insolvent or exhibits credit unworthiness
- Is ineligible to work because of suspension or debarment proceedings
- Is not a responsible contractor
- Voluntarily withdraws from the project and provides to the Department written notice of its withdrawal
- Is ineligible to receive DBE credit for the type of work required
- Owner dies or becomes disabled resulting in inability to complete its work on the contract
- Other documented good cause (attach documentation)

Attach a brief statement of facts describing the situation and any documentation to substantiate statement above.

**2. Date determined the DBE is unwilling, unable or ineligible to perform:** \_\_\_\_\_

**3. Date of Written Notice to DBE:** \_\_\_\_\_ Attach notice with this request, along with the DBE response.

**4. a. Original DBE award amount:** \_\_\_\_\_ **b. Amount of work completed to date:** \_\_\_\_\_

**c. Remaining DBE amount:** \_\_\_\_\_

*For DBE substitutions only, answer questions 5 thru 7:*

**5. Proposed DBE Name(s):** \_\_\_\_\_

**6. Proposed DBE dollar amount to be substituted:** \_\_\_\_\_

**7. Projected date for substitute DBE to commence work:** \_\_\_\_\_

*Good faith Effort Documentation to be submitted with this request within 7 calendar days from approval of this request.*

- DBE Affidavits and/or
- Other documentation to substantiate efforts made to replace the same amount of DBE work

All signatures must be obtained before request is submitted.

\_\_\_\_\_  
**Original DBE Subcontractor Signature**                      **Date:**

\_\_\_\_\_  
**Prime Contractor Signature**                                      **Date:**

\_\_\_\_\_  
**ADOT Resident Engineer Signature**                              **Date:**

|   |  |
|---|--|
| <b>FOR BECO USE ONLY</b>  |  |
| Request is: Approved <input type="checkbox"/> Not Approved <input type="checkbox"/> |  |
| BECO Representative: _____  |  |
| Signature: _____  |  |
| Date: _____   |  |

<sup>3</sup> This form is an example and not intended to be exactly what BART might use to address recommendations associated with this report.



## BART OFFICE OF THE GENERAL MANAGER RESPONSE TO OIG FINDING & RECOMMENDATIONS

### Report Title: Overlooked Opportunity to Help Develop DBEs

|   |                                |   |
|---|--------------------------------|---|
| 1 | <b>Recommendation:</b>         | <p>Create a standardized form that prime contractors must complete and submit to the OCR that justifies their proposed subconsultant addition by clearly identifying the special skills or resources requiring the addition and confirms that:</p> <ol style="list-style-type: none"> <li>a. There was no practical solution to assist their existing DBEs in obtaining the specialty skills or resources necessary for the addition and be given the opportunity to object because they have those skills or resources.</li> <li>b. Their existing subconsultants were given written notification of a subconsultant addition with a clear explanation of the specialized skill or resource needed.</li> <li>c. The addition is not at the direction, request, or suggestion of BART or its employees.</li> </ol>  |
|   | <b>Responsible Department:</b> | Procurement, Office of Civil Rights   |
|   | <b>Implementation Date:</b>    | July 2023   |
|   | <b>Corrective Action Plan:</b> | <p>BART's Office of Civil Rights (OCR) provides a variety of services to help develop skills for small and disadvantaged business enterprises (SBEs/DBEs), and to ensure that BART complies with state and federal regulations and its own policies. OCR administers a broad range of programs, including managing contract and labor compliance programs, economic opportunity policies and programs, workforce and policy compliance, and agreement compliance programs. OCR monitors agreements and related work plans to ensure that contractors are in compliance with the programs it administers. OCR encourages prime contractors to take advantage of programs that assist with development of SBE/DBE skills and experience, including BART's Mentor-Protégé Program that provides business and technical development services to DBEs.</p> <p>The need for additional subconsultant resources is at many times the result of a change in project scope, new regulations, or identification of needed specialized skills to address an unforeseen highly technical or complex situation. In these cases, a timely addition of subconsultant skills is required to address the specialized needs while keeping project delays to a minimum.</p> <p>Management will review, update, and enhance as necessary and practical its policies and processes for adding subconsultants to on-call contracts. Management will develop a standard justification form for requesting to add subconsultants to on-call contracts that will be routed to, reviewed by, and require approval of the Project Manager, Contract Administrator, Procurement department and OCR, plus additional departments/offices as necessary. Final approval will be required from the General Manager's office.</p> <p>A request for additional subconsultants will be initiated by the prime contractor. The request will be required to justify the needed "specialized skills" and resources,</p> |



**BART OFFICE OF THE GENERAL MANAGER RESPONSE TO OIG FINDING & RECOMMENDATIONS**

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|---|--|---|
|   |  | <p>including clearly noting why the skills and resources are required and any licenses or certifications required to perform the work, if applicable. The prime contractor, with concurrence from BART’s Contract Administrator, will need to provide a reasonable nexus to the existing contract scope and clearly specify the change in scope or project complexity that results in the need for specialized skills and resources.</p> <p>The prime consultant will be required to certify that existing approved subconsultants do not possess the skills and resources to perform the specialized work in a timely manner so as not to delay capital project and agreement work.</p> <p>The review process will be designed to ensure that additional subconsultant work will not substitute for work that potentially could be performed by approved subconsultants, many of which are SBEs/DBEs. Prime consultants will still need to meet the DBE/SBE goals of the contract even if additional subconsultants are added.</p> <p>It should be noted that BART’s on-call agreement contracts are with the prime consultant. The prime consultant enters into agreements with subconsultants. Therefore, BART generally does not engage directly with subconsultant firms with respect to their contract terms, except in specific situations (e.g., auditing of confidential financial information).</p> |
| 2 | <p><b>Recommendation:</b></p> <p><b>Responsible Department:</b></p> <p><b>Implementation Date:</b></p> <p><b>Corrective Action Plan:</b></p> | <p>Update the Procurement Manual to prohibit BART staff from directing, requesting, or suggesting that a prime contractor add a specific subconsultant to their contracts.</p> <p>Procurement</p> <p>May 2023</p> <p>BART’s Procurement Manual and contracting guidelines will be updated to explicitly state that BART officials shall not direct or request a prime contractor to add a specific subcontractor to an on-call contract. BART staff will be prohibited from initiating a recommendation or suggestion of a specific additional subconsultant unless a prime contractor makes such a request from BART staff in writing. Prime consultants will be encouraged to identify potential additional subconsultants possessing specialized skills from OCR’s list of certified SBEs/DBEs and will not be precluded from soliciting suggestions or advice from BART staff.</p>  |