

Do race-neutral measures have a positive effect on Disadvantaged Business Enterprise (DBE) utilization in the number of BART federally funded professional services agreements and has there been an increase in the number of agreements and total dollar amounts received by DBEs during Fiscal Years 2012 - 2015?

The San Francisco Bay Area Rapid Transit District

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ACRONYMS

A&E	Architect and Engineering
BAC	Business Advisory Council
BART	The San Francisco Bay Area Rapid Transit District
BART Board	The San Francisco Bay Area Rapid Transit District Board of Directors
BBC	BBC Research & Consulting
Caltrans	California State Department of Transportation
Caltrans Small Business Council	Council
CFR	Code of Federal Regulations
CM	Construction Management
CRA	Charles River Associates International
DISTRICT	The San Francisco Bay Area Rapid Transit District
DBE	Disadvantaged Business Enterprise
DOT	Department of Transportation
FTA	Federal Transit Administration
FY	Fiscal Year
GEC	General Engineering Consultant
MBE	Minority Business Enterprise
MSBEs	Micro Small Business Entities
ND Program	Non-Discrimination for Subcontracting Program
OBIEE	Oracle Business Intelligence Enterprise Edition
OCR	Office of Civil Rights
PCJPB	Peninsula Corridor Joint Powers Board
SB	Small Business (Term used for Non-Federal Program)
SBBAP	Small Business Bonding Assistance Program
SBE	Small Business Entity (Term used for FTA Program)
SB Elements	Small Business Elements
SM&PC	San Mateo Peninsula Corridor
UDBE	Uniform Disadvantaged Business Enterprise
USDOT	United States Department of Transportation
VPT	Vendor Payment Tracking System
VTA	Santa Clara Valley Transportation Authority
WBE	Women-Owned Business Enterprise

1. EXECUTIVE SUMMARY

As a recipient of federal funds from the United States Department of Transportation (USDOT), The San Francisco Bay Area Rapid Transit District (“BART” or the “District”) is required to comply with the Federal Transit Administration (FTA) regulations associated with Disadvantaged Business Enterprise participation Title 49 Code Federal Regulations (CFR) Part 26 by establishing and maintaining the District’s Disadvantaged Business Enterprise (DBE) Program.¹ The DBE Program assures that all federally funded District contracts are administered without discrimination on the basis of race, color, sex or national origin, and that Disadvantaged Business Enterprises (DBEs) and Small Business Enterprises (SBEs) have an equal opportunity to compete for and participate in the performance of federal contracts awarded by the District.²

Revised in February 2012, the District’s DBE Program continues to be a vital tool for increasing DBE and SBE participation in BART contracts. The DBE Program’s statement policy, objectives, administration, goals, Market Area, certification criteria and other requisite provisions are available on the District’s website at www.bart.gov.

Most DBE firms are Minority Business Enterprises and Women-Owned Business Enterprises (M/WBEs). There are a number of M/WBE firms that have graduated from the DBE Program because they are either too large to be DBEs in sales or are over the personal net worth or for one reason or another are not certified as DBEs. However, references defined under Title 49 CFR, Part 26 Appendix E “Individual Determinations of Social and Economic Disadvantage” identifying M/WBEs should not be confused with the M/WBE references defined in the District’s Non-Discrimination for Subcontracting Program (ND Program). Please note that BART’s ND Program is designed to prevent discrimination against or in favor of MBEs and WBEs.

It is not designed (not part of a strategy) to increase the participation of MBEs or WBEs due to Proposition 209 restrictions.

Although BART has used many proactive approaches to increase the pool of DBEs and SBs in its bidding opportunities, the purpose of this capstone paper is to identify if race-neutral measures have been effective in increasing DBE utilization in BART's professional services agreements and to determine if there has been an increase in the number of agreements and total dollar amounts (i.e., prime and sub awards) received by this group between fiscal years (FYs) 2012 – 2015 (the "Study Period").

2. INTRODUCTION

Problem Statement

After further research, it was found that there is a considerable lack of historical data on DBE participation in BART contracts that show the impacts of the District's DBE Program's implementation. The available reports submitted to the FTA and archived data, within the last decade, were used to identify any race-neutral measures that have had a positive effect on DBE utilization in BART's professional services agreements, and in the number of agreements and total dollar amounts received by this group during the Study Period.

In FYs 2012, 2013 and 2015, BART did not meet its Triennial goal due to insufficient DBE participation and to the various challenges identified at BART outreach forums and roundtable discussions with prime contractors and subcontractors. Also for this study, it was necessary to identify any additional factors impacting DBE participation and measuring the effectiveness of the current race-neutral efforts used for DBE outreach.

Purpose

The purpose of this report is to understand if race-neutral measures have increased the number and value of BART professional services agreements to DBEs during the Study Period. Although BART has used many proactive approaches to increase the pool of DBEs and SBs in its bidding opportunities, it is necessary to identify which measures have been the most effective in increasing DBE utilization in BART's professional services industry. In this paper, race-neutral measures and race-neutral efforts will be used interchangeably.

Additionally, the research generated for this study will consist of valuable information (i.e., data sources, statistical analysis, and recommendations) that may be used by various stakeholders, public and private sectors, Small Businesses, and USDOT recipients who must also comply with similar federal regulations and who are having difficulty attaining their Annual DBE Goal and/or Triennial goal.³ The suggested sources include, but are not limited to, the following:

- Document Review and Analysis;
- Secondary Sources:
 - BART's Availability and Utilization Study Final Report dated April 9, 2009;
 - BART's DBE Shortfall Analysis Reports dated December 2013 & 2015;
 - BART's Uniform DBE Semi-Annual Reports for fiscal years 2012 - 2015;
 - Public Transit Agencies' Availability and Disparity Study Reports;
- Survey Data:
 - On-line survey/questionnaire from owners of professional services firms; and
 - Primary and Telephone Interviews.

3. HISTORY

In 1964, President Lyndon Johnson created the Urban Mass Transportation Administration, which was responsible with providing federal assistance for mass transit projects.⁴ Since 1964, the FTA has partnered with state and local governments to create and enhance public transportation systems, investing more than \$10 billion annually to support and expand public rail, bus, trolley, ferry and other transit services.⁵ For half a century, the FTA has broadened its services by providing alternative transportation options for residents in small cities and rural communities that previously lacked transit and it has made public transportation a viable option throughout the United States.⁶

In 1983 Congress authorized the USDOT to implement and establish the statues for the Disadvantaged Business Enterprise Program, a nationwide federally-funded program, that creates a level playing field for which a DBE or SBE can compete fairly on federally funded agreements, contracts and subcontracts.⁷ However, in 1989 and 1995 respectively, two United States Supreme Court decisions (i.e., *The City of Richmond v. J.A. Croson Co. and Adarand Constructors, Inc. v. Pena*) raised the standard by which federal courts review both local and federal government minority business enterprise and disadvantaged business enterprise contracting programs.⁸ As a result, race-conscious and race-neutral efforts became a part of the Disadvantaged Business Enterprise Program to attain DBE participation in federal contracts. Then in 1997, Proposition 209 was approved by the voters in California and it amended the State Constitution to prohibit the State, local governments, districts, public universities, colleges, schools, and other governmental institutions from discriminating against or giving preferential treatment on the basis of race, sex, color, ethnicity, or national origin to any individual or group in public employment, public education, or public contracting.⁹ Moreover,

Section (e) in Proposition 209 exempts actions, which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State.¹⁰

Pursuant to the USDOT, Title 49 CFR Part 26, recipients of federal financial assistance from USDOT (“Recipient(s)”) must comply with these regulations and periodically submit various reports to one of the three USDOT operating administrations (i.e., Federal Transit Administration, Federal Highway Administration or Federal Aviation Administration).¹¹ As a Recipient, BART is committed to executing all requirements of Title 49 CFR Part 26 by establishing and maintaining its DBE Program and attaining its Triennial goal of 23 percent for DBE participation.

Furthermore, the FTA requires Recipients to meet the maximum feasible portion of their Annual and Triennial goals by using race neutral measures to facilitate DBE and SBE participation.¹² Recipients are advised that race-neutral measures should address the concerns of the Recipient’s specific Small Business Community and there is no “one size fits all” solution.¹³ Therefore, Title 49 CFR Part 26 requires Recipients to set DBE goals based on the availability of willing, able and qualified DBE firms and to meet the maximum feasible portion of any specified DBE goal through race-neutral measures.¹⁴ Also, Recipients should use race-neutral measures as much as possible and their goal methodology must clearly identify which race-neutral efforts will be used during or throughout the fiscal year.¹⁵

In 1983, BART implemented its Disadvantaged Business Enterprise Program (“DBE Program”), which was most recently revised in February 2012. The DBE Program will expire on August 31, 2022; unless prior to that date the BART Board of Directors (“BART Board”) finds it necessary to offset the effects of prior discrimination in the industries relevant to the District’s

contracting activities.¹⁶ Nonetheless, the DBE Program continues to be a vital tool to increase DBE and SBE participation in BART contracts. The DBE Program's statement policy, objectives, implementation, administration, goals (i.e., annual, contract-specific and triennial), certification, and other requisite provisions are available on the District's website. Appendix A defines the FTA's definition of a DBE, its average annual income, and the ethnic groups considered socially and economically disadvantaged.

In early 2013, the Small Business Elements (SB Elements) a subpart of the DBE Program was approved by the BART Board and incorporated into District federal contracts. The DBE and SB Elements Programs' overall objective is to assure that all federally funded District contracts and procurements are administered without discrimination on the basis of race, color, sex or national origin, and that DBEs and SBEs have an equal opportunity to compete for and participate in the performance of federal contracts awarded by the District.¹⁷

According to the DBE Program, the following District stakeholders are responsible for its implementation, administration and success:

- The BART Board is responsible for establishing DBE policy;
- The District's General Manager is responsible for adherence to the DBE Program and she has the overall responsibility for directing development and implementation of this program;
- The Office of Civil Rights Department Manager is designated as the Liaison Officer responsible for overseeing the DBE Program, recommending DBE policy, developing and implementing a written DBE program, and internal and external communication procedures; and

- The Business Advisory Council (“BAC”), created in 2009, serves as a forum for communication between the Small Business contracting communities and the District. Among other things, the BAC also makes general recommendations on DBE and SBE policies and practices that impact the utilization and participation of DBEs and SBEs in District contracts. The BAC meets every other month with District staff to discuss and provide valuable feedback on BART policies, programs, strategies, and it promotes Small Business participation in BART’s construction, professional services, and procurement contracts.

The Office of Civil Rights (OCR) is responsible for monitoring the DBE Program by promoting and increasing the pool of DBE and SBE participation in BART’s upcoming bidding opportunities. The OCR is also accountable for submitting various reports to the FTA such as the District’s Uniform DBE (UDBE) Report or Semi-Annual Report, Shortfall Analysis Report and the Triennial Report. Semi-annually, Recipients are required to submit a UDBE Report describing its DBE awards, commitments and payments. A Shortfall Analysis Report is submitted if the awards and commitments shown on the UDBE Report at the end of any fiscal year are less than the overall goal applicable to that fiscal year. The Triennial Report is comprised of the first and second semi-annual periods in the fiscal year (i.e., October 1st – September 30th).

In FY12 the District’s DBE goal was 22 percent, but during FY13, FY14, and FY15, the goal slightly increased to 23 percent for DBE participation.¹⁸ In FY12, FY13 and FY15, BART did not attain its DBE goal, but achieved 11.2 percent, 16.5 percent and 21.5 percent DBE participation, respectively.¹⁹ Consequently, it had to submit to the FTA a Shortfall Analysis Report justifying the low percentage of DBE participation.²⁰ Also, the District proposed several corrective actions

(e.g., Lessons Learned, Small Business Opportunity Plan I, and Construction Management Training Program) to improve the implementation of its DBE program.²¹ Some of the reasons for the DBE goal shortfall can be attributed to past challenges, which include: 1) FTA funding is primarily allocated for construction contracts, instead, larger volumes of FTA funding is for procurement contracts which do not have DBE goals; 2) DBEs not having the necessary resources (i.e., financing, bonding, and employees) and capacity to bid on BART contracts; 3) substitution of DBE firms in construction contracts; and 4) insufficient DBE work listed in the scope of work for construction contracts and professional services agreements.²² Conversely, in FY14, BART met its DBE goal by 33.3 percent with \$5.6 million in DBE awards and commitments on \$16.8 million in FTA awards.²³

DBE Program's Race-Neutral Measures

BART utilizes both race-conscious and race-neutral efforts to attain DBE participation. The race-conscious method sets DBE contract specific goals on construction projects, but not on procurement contracts or professional services agreements.²⁴ Race-neutral efforts include utilizing set aside contracts at the prime level for Micro Small Business Entities (MSBEs), who are certified by BART under the SB Elements Program, on selected small construction contracts and professional services agreements.²⁵ While race and gender are not deciding factors in professional services agreements, there has been a high level of DBE participation on the professional services consultant teams because of: 1) the availability of DBEs; 2) BART's proactive approach of conducting outreach and networking sessions; 3) unbundling of MSBE contracts; and 4) opportunities for DBEs and SBEs to gain experience via awarded agreements.²⁶

The OCR is ultimately responsible for implementing race-neutral efforts in BART's construction and professional services agreements with the goal of increasing DBE participation; therefore, OCR is actively assuring that these measures are applied. Construction includes public work projects for more than \$1,000 and it involves new construction, remodeling, renovation, maintenance, demolition and repair of any public structure or building, and other public improvements.²⁷ Professional services include architecture, engineering, and other professional services of an architectural and engineering nature; consulting and personal, professional, and technical services; research planning; development; surveying and mapping; construction management; and comprehensive planning.²⁸ The difference between the public works contracts and the professional services agreements is that the latter is not awarded based on the lowest bid or the price proposal submitted, rather consultants are selected by evaluation points according to a firm's qualifications and the project team's interview.

Effects of Race-Neutral Measures

The District has a long history of working with and supporting the Small Business Community in the San Francisco Bay Area including DBEs who have worked for BART as prime contractors/consultants or as subcontractors/subconsultants gaining valuable experience on BART projects.²⁹ From January 1, 2010 through December 31, 2014, BART awarded \$1.75B in contracting of which \$272M was to DBEs.³⁰ Thus, the District continues to increase the availability of DBEs and SBEs by implementing initiatives and executing race-neutral efforts like: 1) certification; 2) outreach and matchmaking meetings; 3) MSBE set-aside contracts; 4) unbundling of contracts; 5) bonding assistance; 6) Small Business technical and supportive assistance; and 7) issuance of professional services agreements.³¹

- Certification. BART is one of nine public agencies authorized to process DBE certifications and under its SB Elements Program, it has the authority to certify firms as a Small Business Entity (SBE) and/or an MSBE. Currently, more than 800 DBEs are certified by BART and are listed in the California Unified Certification Program database.³² Approximately 260 firms have been certified as an SBE and/or an MSBE since the SB Elements Program's implementation in February 9, 2012.³³ Certified firms benefit by: 1) being recognized by 800 local agencies in California and other states and private companies; 2) expanding opportunities to participate in federally-funded projects; and 3) being accessible to prime contractors needing to fulfill DBE participation goal requirements.³⁴
- Outreach and Matchmaking/Networking Sessions. BART has participated in more than seventeen (17) annual outreach meetings with public or transit agencies, which have been very effective in increasing DBE participation on BART contracts.³⁵ These meetings have provided the Small Business Community the opportunity to obtain the necessary information on how to do business with BART, and how to access BART project updates and future bidding opportunities. The matchmaking/networking sessions are crucial for prime contractors/consultants and subcontractors/subconsultants to initiate and continue a working relationship between each other since it allows them an opportunity to individually meet for 15 minutes to discuss their experience and capacity in performing the contract's or agreement's scope of work.
- MSBE set-asides. Since the SB Elements was incorporated in BART contracts in early 2013, BART has awarded eight (8) MSBE set-aside contracts at the prime level for certified MSBEs.³⁶ This allows SBEs who are usually subcontractors in large projects to bid as prime contractors on federally-funded construction and professional service projects of a small

size (i.e., construction projects up to \$2 million and professional services up to \$3 million dollars).³⁷

- Unbundling. This is an initiative that allows the unbundling of large construction contracts and professional services agreements into smaller projects based on six different criteria identified in a project's early phase.³⁸ Unbundling allows SBs the opportunity to bid on these contracts, rather than the same large companies awarded BART contracts.
- Bonding Assistance. In 2013, BART's Small Business Bonding Assistance Program (SBBAP) was implemented, but it has had limited success in expanding the pool of available DBEs and MSBEs.³⁹ The SBBAP assists small businesses obtain bid, payment and performance bonds by providing one-on-one assessments, consultation and connection to team professionals.⁴⁰
- Small Business Assistance. BART has provided Small Business Assistance on its Earthquake Safety Program and for the Warm Springs Project. The Districtwide Small Business Supportive Services Request for Proposal's due date was on February 23, 2016; however, it was cancelled in mid-May 2016, and it will be re-issued and awarded by early October 2016. The selected consultant and its project team will provide pre and post award workshops to improve Small Business skills in the areas of construction management, bid estimating, invoicing, scheduling and other related tasks.⁴¹
- Professional Services. While race and gender are not deciding factors, there has been a high level of DBE participation on the professional services consultant teams due to the availability of SBEs and BART's proactive approaches.⁴² The race-neutral process for selecting professional services consultants and subconsultants has been the most successful of BART's measures.⁴³

Mason Tillman Associates, Ltd. (“Mason Tillman”) was commissioned by BART to conduct an Availability and Utilization Study (“Availability Study”), for the period between 2002–2006, to determine the effectiveness of BART’s DBE Program in the areas of construction, procurement, and professional services.⁴⁴ The purpose of the Availability Study was to determine if underutilization of ethnic groups existed and to determine DBE capacity as measured by participation in BART contracts in prior years and any statistically significant underutilization by ethnic group and gender.⁴⁵ Additionally, the Availability Study contains statistical information on District awards, commitments, and payments during FY2002 – FY2006. Although BART archives revealed that comprehensive data and records had not been maintained for this period, the Availability Study was completed in 2009 after the race-neutral measures were integrated in all federal, state and local agencies’ DBE Program.⁴⁶ However, according to Mason Tillman, staff’s cooperation and payment records were the most reliable sources to retrieve available data and the most accurate depiction of BART’s expenditures during the period of FY2002 - FY2006.⁴⁷ Payment records provided evidence of M/WBE utilization in subcontracting compared to their rate of availability in BART’s Market Area, which consists of Alameda, Contra Costa, San Francisco and San Mateo Counties and in the near future Santa Clara County will be included.⁴⁸ Also, according to Mason Tillman, BART documents (i.e., reports and records) were also essential in providing comprehensive background information on the race-neutral measures and their impact on DBEs. Since the Availability Study’s completion no other study reports have been conducted until December 2015 when BART hired the services of Miller 3 Consulting, Inc. to complete a new disparity study report, which is targeted for BART Board approval in October 2016. The new disparity

study will determine if BART has engaged in past or is currently using exclusionary practices in solicitation of contract awards to DBEs.⁴⁹

Table 1 contains statistical data derived from the UDBE Reports illustrating the effectiveness of the DBE Program in BART awards, commitments, and payments to DBE firms in the construction, procurement and professional services areas during FY12 – FY15.

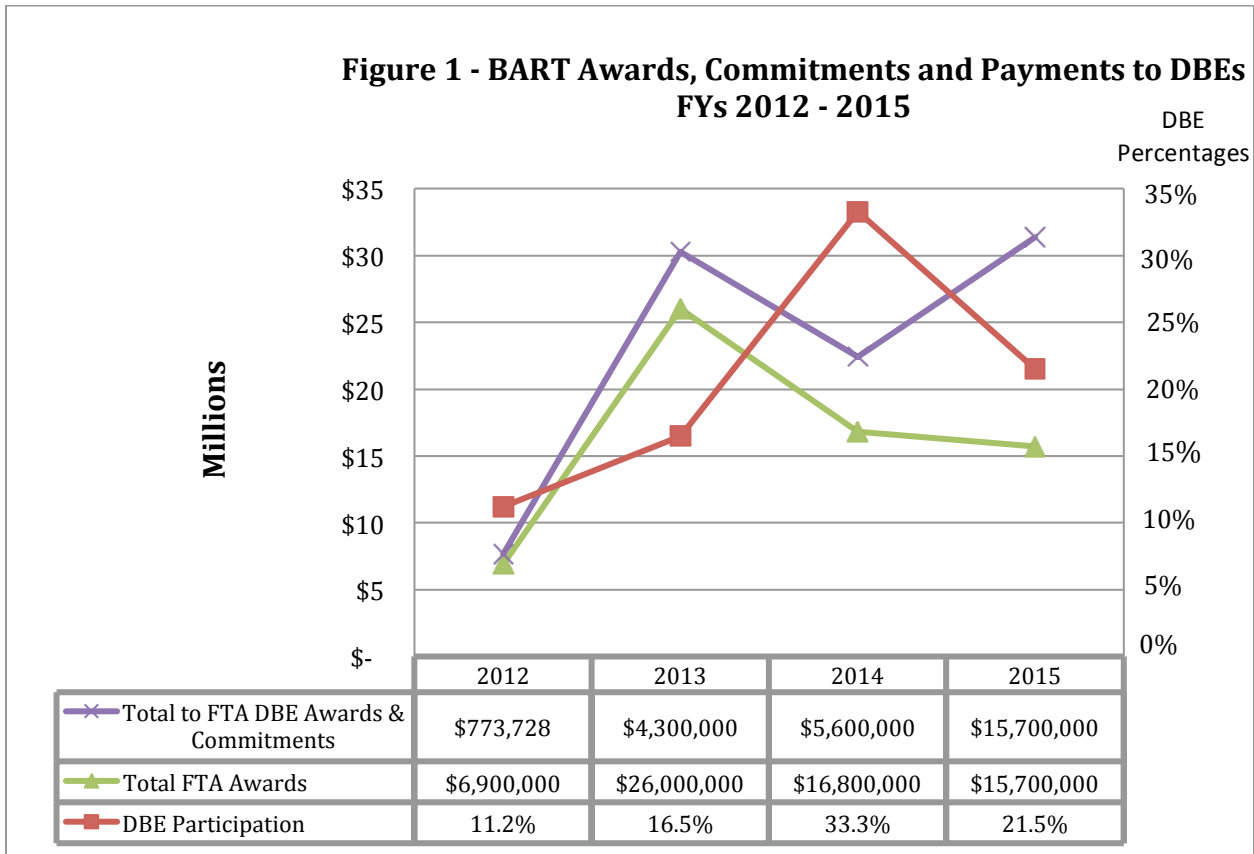
**Table 1 – BART’s DBE Program Effectiveness
FY2012 – FY2015**

FY	DBE Goal	Total FTA Awards	Total to FTA DBE Awards & Commitment	DBE Participation
2012	22 percent	\$6.9 million	\$773,728	11.2 percent
2013	23 percent	\$26 million	\$4.3 million	16.5 percent
2014	23 percent	\$16.8 million	\$5.6 million	33.3 percent
2015	23 percent	\$72.8 million	\$15.7 million	21.5 percent

As illustrated above, during the Study Period, the DBE goal slightly increased by one percent from 22 to 23 percent. The FTA contract awards and commitments for each fiscal year significantly fluctuated as well as the DBE participation for each year. The low percentage of DBE participation can be attributed to the fact that there were few or no FTA contracts awarded and committed to DBE primes during FY12 –FY13. Also, in FY12, FY13 and FY15, BART fell short of attaining its DBE goal by 11.8 percent, 6.5 percent and 1.5 percent; however, in FY14 BART did exceptionally well in exceeding the DBE goal by 10.3 percent.

Figure 1 below illustrates that during FY12 and FY15 there was a significant large amount of FTA Awards and Commitments to DBE firms in the construction, procurement and professional services area, but from FY13 and on the total FTA Awards began to decrease; however, the DBE participation continued to increase as of FY12. The reasons for this trend may be due to the substantial number of professional services agreements being on-call and

on-going, and it being extremely difficult to gauge how well each DBE was being utilized until the contracts were completed. Consequently, in FY14 many professional services agreements were completed and that may be reason for the significant DBE participation attainment of 97.2 percent.



Several reason(s) why BART did not attain its DBE goal in FY12, FY13 and FY15 was because few or no FTA contracts were awarded, committed, and paid to DBE primes and subcontractors/subconsultants. Also, it can be attributed to the following challenges identified in the Availability Study and at various BART outreach forums, which included, but are not limited to:

- 1) Difficulty breaking into the contracting community;
- 2) “Good Old Boys” Network;

- 3) FTA funding is not sufficiently allocated for construction contracts instead a larger volume of procurement contracts are federally funded;
- 4) Insufficient DBE work in the construction contracts' and professional services agreements' scope of work.
- 5) DBEs not having the resources (i.e., financially, bonding, and employees) and capacity to bid on BART contracts;
- 6) Substitution of DBE firms in construction contracts;
- 7) Not fully utilizing the professional services firms listed on the designation of subconsultants form at time of bid;
- 8) Existing working relationships between prime contractors and subcontractors.

Many Small Business owners complained it was difficult to break into the contracting community because they were excluded from the business networks with prime contractors and the development of possible subcontracting opportunities was minimal.⁵⁰ SBs considered the "Good Old Boys" Network a barrier for seeking public sector work because a lot of public agencies preferred working with the same contractors due to existing working relationships.⁵¹ Another barrier is that BART's FTA funding is used on numerous procurement contracts rather than construction contracts, which have contract specific goals that can be applied to the District's overall goal.⁵² SBs were concerned that the scope of work in federal construction contracts did not have enough DBE work and as a result DBE participation was marginal.⁵³ A critical barrier for many DBEs and SBs has been the inability to secure financing and obtain bonding prior to bidding on BART contracts resulting in larger firms bidding on these contracts.⁵⁴ The SBs that have been awarded BART contracts have more work than they can handle and they are constantly faced with the lack of resources (i.e., capital, financing, and

employees) to complete these projects.⁵⁵ Also, when a construction contract has been awarded, there is substitution of DBE firms by non-DBEs without BART's approval and the contract specific goal set is not attained.⁵⁶ Another barrier is that many professional services firms are listed in service agreements, but in reality these firms are not often used because: 1) contracts tend to be for a longer period of time and on-call; 2) the prime consultant self performs the work; and 3) and the work expected to be performed by the subconsultants is not required that often.⁵⁷ And the long term working relationships between prime consultants and subconsultants have reduced the opportunities and participation of new and/or existing DBE firms.⁵⁸

4. LITERATURE REVIEW

The following review reflects a comprehensive analysis of relevant literature pertaining to the proposed research topic "Do race-neutral measures have a positive effect on DBE utilization in the number of BART federally funded professional services agreements and has there been an increase in the number of agreements and total dollar amounts received by DBEs? Moreover, this research project highlights case studies of a state and two local public transit agencies' activities that include: 1) DBE utilization in federally funded professional services agreements; 2) total contract dollars awarded under professional services agreements; 3) challenges encountered by DBEs; and 4) the recommended race-neutral efforts. The research consisted of quantitative data retrieved from availability and disparity reports, and statistical analysis within the last decade.

In 1989 and 1995 respectively, two landmark United States Supreme Court decisions (i.e, *The City of Richmond v. J.A. Croson Co.* and *Adarand Constructors, Inc. v. Peña*) raised the standard by which federal courts reviewed both local and federal government minority

business enterprise and disadvantaged business enterprise contracting programs.⁵⁹ In the *City of Richmond v. J.A. Croson Co. (1989)*, the general issue before the Supreme Court was whether the use of race-conscious classifications to overcome the effects of past discrimination on the opportunities available to members of minority groups violates the fourteenth amendment's guarantee of equal treatment to all citizens.⁶⁰ More specifically, the issue was whether the minority set-aside provision of the Richmond City ordinance violated the equal protection clause of the Fourteenth Amendment of the United States Constitution.⁶¹ Although the City of Richmond prevailed, many years thereafter, significant appeals against the Supreme Court's decision were overruled.⁶²

Furthermore, in *Adarand Constructors Inc. v. Peña (1995)*, Adarand challenged the USDOT's DBE Program.⁶³ The Supreme Court found a compelling interest for the DBE Program and held that all governmental action based on race should be subject to detailed judicial scrutiny to ensure that the personal right to equal protection has not been infringed and in order to not violate the Constitution, there must be a compelling government interest.⁶⁴ In response, the USDOT amended its DBE regulations in 1999 to include goals, which could be met by race-neutral and race-specific means.⁶⁵ Some jurisdictions, attempting to comply with the rule but fearing litigation, had responded by eliminating their race-conscious DBE goals and replacing them with race-neutral goals.⁶⁶

Another leading case that affected the DBE regulations was *Western States Paving v. Washington State DOT (2005)*, in which the Ninth Circuit held that race and gender conscious contracting programs required by the USDOT must be narrowly tailored to evidence race and gender discrimination not only on the national level, as they traditionally have been, but also in the geographic region of the agencies receiving USDOT funding.⁶⁷

Accordingly, Minority Business Enterprise (MBE) Set-Aside Programs proliferated nationwide to include some 36 states and 190 localities by the late 1980s.⁶⁸ In total, the federal government reported \$4.4 billion in contract awards to minority and disadvantaged firms in Fiscal Year 1986.⁶⁹ The purpose of these set-aside programs was to develop minority enterprise, counter the effects of past discrimination, and reduce the high unemployment rates among urban minorities during the 1980s.⁷⁰ MBE set-asides represented a multi-billion dollar annual governmental expenditure and were very controversial both politically (e.g., Proposition 209 in California) and judicially (e.g., *City of Richmond vs. J.A. Croson* and the 1995 *Adarand Constructors, Inc. v. Peña*).⁷¹ In their study of federal and state transportation contracting, Blanchflower and Wainwright found that set-aside programs increased the value of contracts awarded to minority owned businesses.⁷² Although there has been significant controversy and funding spent on MBE Set-Aside Programs little is known about their actual effectiveness and only a handful of studies have attempted to analyze whether these programs have met their goals.⁷³

As a result of the two landmark Supreme Decisions mentioned earlier, the Courts required that public agencies met a rigorous set of standards when adopting a minority preference contracting program.⁷⁴ Hence, after the proliferation of the MBE Set-Aside Programs in the late 1980s, many public agencies, especially at the local level, were not prepared to address the data requirements demanded by these programs.⁷⁵ In support of the constitutionality of MBE Programs, the Courts noted that “where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.”⁷⁶ This

statement spawned a market for consultants to assist with the documentation of minority contractor availability compared with the government agency's patterns in awarding contracts to minority businesses.⁷⁷ As a result, disparity studies or statistical analyses, combined with anecdotal and other evidence of discrimination, have been used almost universally as the legal support for minority contracting programs at the state and local level.⁷⁸ However, the legal justification for the programs focuses on data.⁷⁹

Seeking evidence of current and past discrimination to help justify MBE Programs, a number of jurisdictions hired outside experts to analyze local and regional disparities in the awarding of government contracts.⁸⁰ Additional evidence on the "first-stage" relationship between set-aside programs and contract awards is provided in a recent review of 58 disparity studies conducted in response to the *Richmond v. J.A. Croson Co.* decision by the Urban Institute.⁸¹ The study finds evidence of greater disparity in contract awards relative to predicted levels in jurisdictions without affirmative action programs, suggesting that such programs positively affect the amount of government contracts received by minority-owned firms.⁸² However, opponents such as Dr. George R. LaNoue, professor in the University of Maryland, Baltimore County, asserts that disparity studies: (1) are based on obsolete or incomplete data; (2) report results in ways that exaggerate disparities; (3) fail to test for nondiscriminatory explanations for the differences; and (4) make findings of discrimination without identifying any specific instances or general sources of biased behavior.⁸³

The MBE Set-Aside Program's main policy goal was to overcome the continuing effects of past discrimination by increasing the share of contracts awarded to M/WBEs.⁸⁴ Therefore, in order to document the existence and extent of those effects, the "disparity study" was a mechanism developed to evaluate whether a particular jurisdiction had a documentable

pattern of underutilizing minority contractors, and if so, what level of effort is justified to remedy the imbalance.⁸⁵ It was also used to determine whether or how much of the overall annual DBE goal can be achieved through race-and-gender neutral measures.⁸⁶

Consequently, the California State Department of Transportation sets DBE goals based on demonstrable evidence of the availability of “ready, willing and able” DBEs.⁸⁷ Also, the FTA regulations state that a disparity study can be used to demonstrate availability, but does not require its use.⁸⁸ However, a ruling in the Ninth Circuit Court of Appeals made the use of a valid disparity study a legal requirement to justify race-conscious elements of a USDOT DBE program in response to constitutional challenges.⁸⁹

Case Studies

Although academic literature included many case studies on public transit agencies’ DBE participation in the professional services industry, the following describes the activities of a state and two public transit agencies located in the San Francisco Bay Area. These case studies were used to identify any similarities with BART’s DBE utilization, challenges encountered by DBE firms, and race-neutral efforts used by the District. The activities originated from each agency’s Availability and Disparity Study Reports and included, but were not limited to the: 1) utilization and total contract dollars awarded to DBEs in federally-funded professional services agreements; 2) challenges encountered by DBEs; and 3) recommended race-neutral efforts.

On June 29, 2007, BBC Research & Consulting (BBC) from Denver CO conducted an Availability and Disparity Study, for the period of 2002-2006, to assist the State of California Department of Transportation (Caltrans) in the implementation of its DBE Program.⁹⁰ BBC examined the transportation construction and engineering industry in California and related contracts awarded by Caltrans or with funds administered by Caltrans.⁹¹ This study concluded

that the California marketplace indicated: 1) barriers to entry for DBEs into the California construction and engineering industries; 2) low rates of business ownership for certain groups working in the industries; 3) lower business earnings for DBE firms, and 4) other barriers such as access to capital. Also, it was reported that Caltrans favored large engineering firms with substantial Caltrans experience for its engineering work.

During this period, 437 federally-funded engineering contracts were awarded to DBEs at an estimated dollar amount of \$239,072 of which MBEs received \$213,803 and WBEs received \$25,269, respectively.⁹² BBC grouped minority female-owned firms with the relevant minority group hence WBEs only represented white women-owned firms.⁹³ Also, some FTA race-neutral measures were in place in some districts or regions of the state, but not in others.⁹⁴

Consequently, Caltrans' Availability and Disparity Study Report, based on extensive input from DBEs, recommended the following measures: 1) the advertisement of smaller contracts; 2) better outreach and communication; 3) additional technical assistance to SBs and DBEs; 4) redesigning contractor and consultant selection practices to provide more opportunities for SBs seeking construction and engineering prime contracts; 5) survey bonding programs; and 6) other supporting and technical assistance to SBs and DBEs.⁹⁵ These findings were based on: 1) more than 10,000 construction and engineering contracts for both Caltrans and local agencies; 2) interviews from more than 18,000 California business establishments; 3) in-depth interviews with nearly 100 firm owners and trade association representatives; and 4) testimony from public hearings held across the state.⁹⁶

In 2007 and 2008, the Charles River Associates International (CRA International), a consulting firm from Boston, MA, was commissioned by two local San Francisco Bay Area public transit agencies to prepare an availability study to analyze their use of M/WBE firms on their

construction, professional services, and procurement contracts.⁹⁷ The methodological approaches (i.e., surveys, telephone interviews, and review of anecdotal evidence) used by CRA appeared to be similar in these two case studies.

On December 14, 2007, CRA International completed the Santa Clara Valley Transportation Authority (VTA) Availability and Utilization Report.⁹⁸ This report showed that during 2001-2006, the utilization of MBEs and WBEs in federally-funded professional services agreements was 25.1 percent and 5.7 percent respectively. The contract dollars awarded were \$112 million for MBEs and \$6.8 million for WBEs.⁹⁹ CRA International's analysis concluded that M/WBE firms reported several impediments (i.e., projects were too large, prime contractors were not given enough time to bid, the high cost of supplies or materials, etc..) to contracting that were nearly three times and twice as often as white male-owned firms.¹⁰⁰ To remedy these challenges, some of the race-neutral measures proposed were: 1) changes to the vendor selection process to reduce the weight given to prior experience; 2) improve education to DBE firms regarding access to capital; and 3) efforts to incubate new firms through mentor-protégé, joint venture, and similar programs.¹⁰¹ These findings were based on a telephone survey of 626 construction and professional services firms and interviews with a subset of surveyed firms operating within the San Jose-San Francisco-Oakland Combined Statistical Area, which included counties such as: Alameda, Contra Costa, Marin, San Francisco, San Mateo, Santa Clara, Santa Cruz, Sonoma, Napa, San Benito and Solano.¹⁰² Additionally, the survey sample included firms that had bid on VTA contracts as well as those that had not and firms owned by all minority and gender groups considered in the availability study.¹⁰³

Subsequently, on April 14, 2008, CRA International also prepared an Availability and Utilization Report for the San Mateo County Transit District and the Peninsula Corridor Joint

Powers Board (PCJPB) (collectively “SM&PC”).¹⁰⁴ This report showed that during 2002, the utilization of MBEs and WBEs in federally-funded professional services agreements was 43.9 percent and 27.7 percent, respectively. And the contract dollars awarded were \$6.8 million for MBEs and \$30 million for WBEs.¹⁰⁵ Some of the impediments reported by M/WBEs were that the: 1) projects were too large; 2) prime contractors did not give enough time to bid; 3) bid or proposal costs were among other concerns.¹⁰⁶ In this study the critical obstacle identified differed among the MBEs and WBEs instead of “not being able to get sufficient sources of funding” the main issue was that projects were too large.¹⁰⁷ However, these groups agreed that bid or proposal costs were insignificant compared to other reported impediments.¹⁰⁸ Consequently, the race-neutral measures proposed were: 1) reducing the size of prime contracts; 2) changing the vendor selection process to reduce the weight given to prior experience; 3) improved education to DBE firms regarding access to capital; and 4) efforts to incubate new firms through mentor-protégé, joint venture, and similar programs.¹⁰⁹ These findings were based on a telephone survey of 594 construction and professional services firms operating in the San Francisco Combined Statistical Area, which included the following: Alameda, Contra Costa, Marin, San Francisco, San Mateo, Santa Clara, Santa Cruz, Sonoma, Napa, San Benito and Solano.¹¹⁰ Also, the survey sample included firms that had bid on SamTrans-PCJPB contracts as well as those that had not and firms owned by all minority and gender groups were considered in this study.¹¹¹

According to BBC and CRA International, anecdotal evidence and qualitative information were the most reliable and accurate sources to retrieve available data and depict expenditures from Caltrans, VTA, and SM&PC. Also, these methodological strengths were pivotal in

describing the race-neutral efforts and their impact on DBE participation in state and local public contracting.

Conversely, the methodological weaknesses in these case studies included obsolete or incomplete data for DBE utilization in the professional services area. Caltrans Availability and Disparity Study differed from that of VTA's and SM&PC's because: 1) Caltrans data sets were much larger; 2) testimonials from public hearings were used; 3) the lack of surveys conducted; 4) Caltrans' WBE definition differed from VTA's and SM&PC's; and 5) most importantly both, VTA and SM&PC Disparity Studies had not yet been conducted to demonstrate if there were any disparities between DBE utilization and availability.¹¹²

As described above, the Availability and Disparity Studies for Caltrans, VTA, and SM&PC were not based on a standardized process, but rather utilized various methodology tools, data, and resources to collect the required information and complete these reports. However, similar to BART's Availability and Disparity Study anecdotal evidence and qualitative information were the most reliable and accurate sources to retrieve available data and depict each agency's expenditures.

5. RESEARCH METHODOLOGY

This report's general topic and research questions were answered through extensive qualitative and quantitative data collected by various methods. Data analysis was comprised of information, techniques and sources that included: 1) document review and analysis; 2) in-person interviews; 3) telephone interviews; and 4) cross-sectional on-line survey data. By using these methods, a more conclusive outcome determined whether race-neutral efforts have had a positive effect on DBE participation in BART's federally funded professional services agreements and if there was an increase in the total number of contracts and dollar amounts

received by DBEs. The results were analyzed during the Study Period to identify trends that showed any successful or unsuccessful measures. The proposed methodology and specific steps used to implement this research design will be explained in the following sections.

Due to the lack of comprehensive data, BART's available data sources from early 2000 to the present were used to complete this research design. Access to secondary data (i.e., electronic and hard copy) was directly obtained from BART's OCR department, which includes: 1) the Availability Study Report dated April 2009; 2) Semi-Annual Reports or Uniform Reports of DBE Commitments, Awards and Payments from FY12 – FY15; 3) DBE Goal Accountability Reports for FY12 – FY13; 4) DBE Shortfall Analysis Reports for FY13 and FY15, and 5) OBIEE System Reports, from BART's Information Technology department, for calendar years 2012 - 2015. The purpose of the Availability Study was to determine if underutilization of ethnic groups existed and to determine DBE capacity as measured by participation in BART contracts in prior years and any statistically significant underutilization by ethnic groups and gender.¹¹³ As a Recipient, the District is committed to executing all requirements of Title 49 CFR Part 26 by establishing and maintaining its DBE Program and attaining its Triennial goal of 23 percent for DBE participation.¹¹⁴ Specifically, Title 49 CFR Part 26.47 requires BART to submit various reports based on its Annual and Triennial goal attainment.¹¹⁵ This information is used to monitor DBE participation in the District's federal construction, procurement and professional services agreements.

Due to time constraints and limited resources, three public employees from a local and state agency participated in personal and telephone interviews. These individuals have extensive knowledge in the DBE area and they were very helpful in providing the answers to the questions described in Appendices B and C.

Although in-person interviews are costly modes of administration, they yield the highest cooperation and lowest refusal rates.¹¹⁶ The following individuals participated in an hour long personal interview:

- Mr. Wayne Wong, BART's OCR Department Manager and DBE Liaison Officer; and
- Mr. Hayden Lee, Contract & Labor Compliance Programs Manager in BART's OCR department.

These interviews were conducted in mid-April 2016 at the BART offices located at 300 Lakeside Drive, 16th Floor, in Oakland, CA 94612.

Mr. Wong joined BART's OCR Department eight years ago and he has been responsible for, among other things, overseeing the District's DBE Program, recommending DBE policy, developing and implementing a written DBE program and managing internal and external communication procedures related to the DBE Program. Mr. Lee has been a consultant for, among other things, the DBE Programs of various public and transit agencies (i.e., Santa Clara Valley Transportation Authority, San Francisco Municipal Transportation Agency, and The San Francisco Redevelopment Agency). Mr. Lee has thirty years of experience in DBE certifications and has extensive, valuable institutional knowledge associated with implementation of DBE Programs.

Conversely, telephone interviews are less expensive than personal interviews and the interviewer has better control and supervision during the process.¹¹⁷ Thus, in mid-April 2016, Ms. Janice Salais, Caltrans Chief Certification Unit/Contract Evaluation Unit in the Office of Business and Economic Opportunity, was contacted to participate in a telephone interview. Ms. Salais has more than twenty years of extensive knowledge in the DBE field and she has been a strong advocate of DBE certification and participation in public contracting.

In late April and early May 2016, due to time constraints and limited resources, a thirty-minute telephone interview (see Appendix D) was conducted with four owners from professional services firms that were identified in BART's Oracle Business Intelligence Enterprise Edition (OBIEE) System, a data platform from Peoplesoft and the District's Vendor Payment Tracking (VPT) System. These systems have allowed the OCR staff to collect and verify payment data over the last four years. OCR staff have worked with BART's Chief Information Officer to enhance the VPT System. The firms were chosen based on the highest and least total dollar amounts awarded during the Study Period. In mid-May 2016, this task was completed after encountering repetitive obstacles such as the inability to directly connect with each firm owner, the lack of interest from owners, and time constraints were among other reasons.

A cross-sectional survey/questionnaire (see Appendix E) was used to collect forecasting data from sixty-seven owners from professional services firms identified in BART's Semi-Annual Reports, which represented a larger population sample. The purpose of the questionnaire was to collect: 1) first-hand information; 2) unbiased representation of population of interest; 3) the same information collected from every respondent; and 4) survey data to compliment existing data from secondary sources.¹¹⁸ In mid and late April 2016, and in early May 2016, an on-line questionnaire was sent to all of the firms' owners and only 19 percent or 13 respondents participated in this survey. For several weeks thereafter, follow-up calls were made to those owners who had not yet submitted their completed surveys, but there was no response. Similar to the telephone interviews, it was very difficult to communicate with each owner. This task was completed in mid-May 2016.

The Research Design Task Work Plan including the various methods used and completion dates for each task are illustrated in Table 2 below.

Table 2 – Research Design Task Work Plan

No.	Task	Method to Complete Task	Completion Date of Task
1	Interviewed Mr. Wayne Wong and Mr. Hayden Lee	1 Hour In-Person Interview	March 23, 2016 April 8, 2016
2	Interviewed Ms. Janice Salais	1 Hour Telephone Interview	April 8, 2016
3	Interviewed four (4) owners from professional services firms identified in BART’s OBIEE System.	30 Minutes Telephone Interview	April 29, 2016 May 6, 2016 May 13, 2016
4	An on-line survey/questionnaire was emailed to sixty-seven (67) owners from professional services firms listed in BART’s OBIEE System.	Survey/Questionnaire	Late April 2016 Mid May 2016

After collecting the final results, a summary of the research questions and the corresponding methods used for each are defined in Table 3 and the primary sources used for each method are described in Table 4.

Table 3 - Summary of Research Questions and Methods

Research Questions	Literature Review	Document Sources	In-Person Interview	Telephone Interview	Survey Data
1	•	•	•	•	•
1a		•	•		
1b		•	•		
1c		•	•	•	•
2	•	•	•	•	•
2a		•	•	•	•
2b		•	•		

Table 4 - Primary Sources used for Each Method

Method	Source
Literature Review	Academic Literature and Case Studies.
Document Sources	Academic Literature, Reports and Memoranda
In-Person Interview	In-Person Interview Questionnaire
Telephone Interview	Telephone Interview Questionnaire
On-line Survey/Questionnaire	On-line Survey/Questionnaire

Appendices A - E consist of several methodologies used to retrieve key information and answers linked to this paper's general research topic and the set of research questions described below. The answers from the interviewees and respondents were carefully analyzed to determine any necessary recommendations to BART's overall strategy of continuing to implement effective race-neutral measures to increase DBE utilization in the professional services area. Also, the information collected from the interviewees and questionnaires will be used to increase the existing pool of DBEs and SBEs on District projects.

The research goals were classified into theoretical and applicable approach categories. The theoretical goals were defined in the following first set of research questions that were investigated in the literature review. The second set of research questions applied the theoretical background, original research, and analysis to the utilization of DBEs in BART's federally funded professional services contracting. For each second set of research questions described below and in Appendix B-1, paraphrased responses from Mr. Wong and Mr. Lee are noted following each question.

Research Questions

Question 1: Are race-neutral efforts effective strategies in increasing DBE participation in state and local public transportation agencies' DBE Programs?

Scholarly research demonstrates that the proliferation of MBE Set-Aside Programs in the late 1980s was the result of responses to instances of past discrimination in the award of public contracts to minority and women-owned business enterprises.¹¹⁹ As a result of court cases requiring race conscious methods to be narrowly tailored to respond to documented instances of past discrimination, in 1999 race-conscious and race-neutral methods became a part of the USDOT's DBE Program to attain DBE participation in federal contracts.¹²⁰ These methods were utilized to increase the pool of available, willing and able qualified DBEs and SBEs. The DOT DBE Program requirements sought to have local agencies' DBE Programs provide for and attain the maximum feasible portion of any specified DBE goal through race-neutral means.¹²¹ According to the literature review, these strategies have been used by many USDOT recipients and they have increased DBE and SBE participation in public contracting.¹²²

Question 1a: What race-neutral measures have been most effective with increasing DBE utilization in BART's professional services agreements and why?

Mr. Wong's Response:

Generally DBEs tend to do better in the professional services area from the get go. In particular, Asians, African Americans and Women have done well in professional services because there is a very low barrier to entry. By contrast, in construction one needs supplies, equipment, insurance, and bonding to work in that field. In professional services, one does not have the same requirements because work can be performed out of the office. A professional service business can be conducted at a lower cost than a construction business and there are fewer barriers to be successful such as business needs, skill set and

the ability to network and partner. Race neutral efforts include partnering, unbundling the big General Engineering Consultant (GECs) and Construction Management (CM) projects, offer an opportunity for DBEs to be primes consultants (Prime). I remember that these contracts used to be \$30 million each piece, but then they were reduced to \$20 million and then dropped to \$15 million. Also, the District developed Statement of Qualifications Services Agreements that are out to bid at \$3 million and they allow Small Businesses to become Primes. Becoming a Prime is key to being able to learn how to manage the project and work directly with the owners, but when you are a subconsultant (Sub) you do not get to do that. The data will bear out. The Small Business Initiatives and Payment Information Report, dated March 10, 2016, to the BART Board shows that the majority amount of dollars that are going to M/WBEs are disproportionately in professional services. Professional services agreements make two thirds of BART's M/WBE participation. There are a lot more minority Primes in professional services than in construction projects. Race neutral efforts try to create more opportunities so that DBEs become Primes because that is where most of the dollars tend to go. It has been a strategy that the District has been using for the last fifteen years. Professional Primes tend to keep the work for themselves. The professional services industry is very different from the construction area. In professional services agreements, consultants get paid in thirty days compared to construction firm owners who get paid much later. Professional services consultants are highly educated, and in some point in their careers, they have learned how to deal with the bookkeeping, taxes and accounting aspects of their business.

Mr. Lee's Response:

One of the biggest race neutral efforts has been the unbundling of the contracts, which allow the contracts to be smaller so that DBEs are able to bid on these contracts. Sustaining architecture and engineering services were awarded prior to 2013 before contracting plans started. BART was unbundling contracts so that more DBEs could get a larger piece of the contract. The unbundling plans have helped increase M/WBE participation considerably. In general, BART's commitment to all these types of programs such as the DBE and ND Programs show a deep commitment on the part of the District to increase opportunities for small and M/WBE firms. Prime consultants know and they are speaking proudly on how they get DBEs on contracts to meet their goals. It has become BART's and Society's overall values that diversity efforts have been pretty strong. There is a commitment from BART through its supportive services, outreach events, advance notices, and networking sessions. It is fairly transparent compared to a number of agencies. BART sends a copy of the sign-in sheet from network sessions to all attendees so that everyone has each others' names although a lot of these firms already know each other.

Question 1b: Since FY12 – FY15, has there been a trend in the number of professional services agreements and dollars awarded to DBE firms?

Mr. Wong's Response:

I think that DBE participation has increased significantly in professional services as well as in construction. We have had a number of large projects that tend to bring more DBE participation. We have also awarded a number of large and small A&E and CM type contracts that have brought in DBE firms at the Prime level. In the last four or five years, there has been at least ten or twelve A&E awards to DBE firms.

Mr. Lee's Response:

No, I don't think so. I came in 2012 and I have been monitoring professional services contracts since then. During that period they all have been race-neutral and minorities, women and DBE firms have committed to 15 to 40 percent. I can not say they have gone up or down because I have not calculated the overall average.

Question 1c: Recently BART has experienced an increase of DBE utilization. Can this trend be attributed to BART's proactive approaches or marketplace conditions?

Mr. Wong's Response:

I think it is both. When I first started here most of the Prime opportunities were really big at \$30 million to \$40 million and most of them were going to non-DBEs. There was a call about twenty-five years (25) ago to start giving others the opportunity because the same people were eating at the dinner table. It has been very effective. In my last report to the Board, dated March 10, 2016, out of the \$120 million dollars of total Prime opportunities we got 30 plus percent M/WBE participation, but a lot of the money went to the Primes. BART's on call professional services agreements are indefinite quantity agreements meaning there is no commitment of funding so BART says we want you to be able to provide resources or staffing to support everything under the sky. If the District never requests services in certain types of work listed in the scope of work, then the work plan for some of the work expected to be performed by the listed subconsultant firms never goes out. At the time of award, we don't know what contracts and scopes of work are going to be used, but BART has a large part in dictating who gets used. The problem is that the Primes are eating the dollars. There is no commitment to use any of their Subs from the get go. No commitment at all. It is an on-call indefinite quantity agreement.

Mr. Lee's Response:

It has more to do with BART's practices. BART has done a pretty good job in working with DBEs and Primes by helping them. It has not been perfect, but we have done a pretty good job breaking down the projects. BART has done a fairly good job working with DBEs on requirements like the insurance and bonding. It has always come from the top down from the Board to the General Manager. Creating a level playing field for DBE firms and changing market conditions might be some of the reasons. The prevalence of DBE programs has also lent itself to that. The landscape has changed over the years. Agencies have a number of M/WBE employees in key positions that lend it to be open to contracting DBEs because you have key management creating the opportunities. In the old days, the "Good Old Boys" Network consisted of Caucasian males. No doubt that it still exists, but it has been replaced with a new "Good Old Boys" Network. Hopefully now with the intent of these programs, minority groups and women are brought in and DBEs would be included in the network. I understand there is a need of on-call contracts, but they should instead have project specific contracts. Certain DBEs or non-DBEs stay on those contracts for years and years and then get on the new contracts. Other firms have to wait five years to get on a contract and acquire the experience. Another obstacle with the on-call contracts is that some of our staff tends to use the same firms over and over. Also, some of the listed subconsultant firms do not get chosen to do the work and that becomes an obstacle. If professional services agreements were project specific, subconsultants would get the work because it is a defined scope of work.

Question 2: What are some of the barriers encountered by DBEs in public contracting?

According to several state and local public transportation agencies' availability study reports, the barriers to DBE and SB utilization include the: 1) California marketplace indicated

challenges to entry for DBEs into the California construction and engineering industries; 2) low rates of business ownership for certain groups working in the industries; 3) lower business earnings for DBE firms; and 4) access to capital.¹²³ Also, it was reported that public agencies favored large professional firms with substantial public contracting experience; but the most important obstacle was that the projects were too large for M/WBE firms to bid on.¹²⁴

Question 2a: What are the reason(s) there is a disparity between MBE and WBE participation in BART's professional service agreements?

Mr. Wong's Response:

There is more MBE than WBE participation because a lot more MBEs are out there like Asians and African Americans. Also, there is a low cost to entry in this field. I could start my office in my bedroom and all I need is a laptop and a printer. Construction has a very high cost of entry. You need a place to put your equipment, truck, tool sets. All those things take money and time, and you have to maintain them. In the professional services industry everything is done through email. I would never get to see you, but in construction it is different because you have to go to work.

Mr. Lee's Response:

I don't know how they are performing against their availability. From what I can gather there are MBE and WBEs available. Asians have a high percentage of work in professional services agreements. African Americans and Hispanic firms are getting very little work. Here at BART, we are very good in getting African American firms in professional services. I prefer if the DBE Program was separated between MBE and WBE goals. In the past, there was a program like that. No doubt that the utilization of women-owned businesses need to be remedied for past discrimination. In my opinion, women construction firms should not be certified because they are taking away from minority firms. It really is a fairness issue. I think that is why so many states passed Prop. 209. Phony women business firms

are more prevalent in the construction industry and they have always given the DBE Program a bad name. It all starts in the certification, which allows these firms into the program to abuse it. That is why there are many people who are anti-affirmative action.

Question 2b: Why did BART not attain its Triennial goal(s) during fiscal years 2012, 2013 and 2015?

Mr. Wong's Response:

The make-up of our DBE goal is professional, construction and very little procurement. In the federal spend down last year we bought a lot of equipment that did not have DBE participation. The number of contracts such as the Marine Barrier at \$10 million had only 2 percent of DBE participation. The Hayward Maintenance Project at \$100 million did not have any federal money. We also have to review how we set contract specific DBE goals by putting a system in place where the manager(s) approve them. Also, if goals are set very low you can not meet the District's 23 percent Triennial goal. The professional services agreements have been very stable and they provide us with DBE participation, enough to carry when we have all construction and procurement contracts.

Mr. Lee's Response:

One reason is that we have included a number of large procurements. BART purchased very expensive vehicles; multi-billion dollar pieces of equipment. These items were not included in our DBE goal attainment. Should we have a 23 percent goal? Probably not, but the Community expects us to have one. Most urban transit agencies like BART and L.A. METRO have high goals so it is difficult for BART to say we want to lower our goal to 18 percent. Part of it is we do not report procurement purchases under \$5,000, but we are looking at trying to put goals and count procurement contracts because it is a huge number. In the past, we did not report huge procurement purchases. The FTA would say include it, but if we do not include them FTA will not ding us. Now we are reporting and

bringing down our DBE participation percentage. Another issue is that we are setting low percentage goals and if we are not meeting our goals then we need to use higher goals. The Small Business Elements is part of the DBE program and it is meant to help DBE participation, but in the long run a lot of the work will be done by non-DBEs and it may not be conducive to DBE participation. If we are not going to use an SBE goal then we do not need to put it in our contracts. We should increase our DBE goals to meet our Triennial goal and count procurement contracts.

6. FINDINGS AND ANALYSIS

This study seeks to identify whether race-neutral efforts have had a positive effect on DBE utilization in BART's federally funded professional services agreements and if there has been an increase in the number of agreements and total dollar amounts received by DBEs during the Study Period. The research methodology is detailed in Chapter 5, while this chapter summarizes the findings and conclusions arising from extensive qualitative and quantitative data collected by various methods (i.e., BART data, interviews, and surveys).

In-Person Interviews

Overall, some of the key points agreed by Mr. Wong and Mr. Lee were that during the Study Period DBE participation has significantly increased in the professional services area because of the number of large and small A&E agreements (i.e., General Engineering Consulting and Construction Management Agreements) awarded to DBE firms at the Prime level. Also, they agreed there is a very low barrier to entry in the professional services area because the requirements to start a business in this field are less stringent compared to the construction industry. In Chapter 5 and in Appendix B-1, Mr. Wong's and Mr. Hayden's complete responses to the interview questions are summarized.

Caltrans Telephone Interview

Ms. Janice Salais also agreed that there has been an increase of DBE utilization in Caltrans professional services contracts because of Caltrans' transparency and strategic efforts of promoting open communication and networking between the Primes and Subs. Some of these strategies include: 1) providing the planholders list to the Subs so that they can directly contact the Primes weeks prior to the proposal due date; 2) conducting regional bi-monthly meetings whereby small businesses could voice their concerns and issues; and 3) developing ad hoc subcommittees to increase the participation of particular ethnic groups. A more detailed description of Ms. Salais' response to the interview questions is cited in Appendix C-1.

Telephone Interviews from Owners of Professional Services Firms

Due to time constraints, only four owners from professional services firms were interviewed and they were selected based on the highest and least total dollar amounts awarded during the Study Period. The firm owners decided to remain anonymous since they have had and continue to do business with BART. Two of the firms had at least twenty-five years of experience working with BART and the other two firms had ten years or less. The firms with a long working trajectory are WBEs while the other two firms are owned by MBEs. After interviewing the firm owners, there was a lot of commonality among them. For instance, they have been Prime consultants in at least one or two GEC or CM Agreements since doing business with BART and most of their work has been performed as a Sub. They agreed that "Word of Mouth" has been the most effective strategy to learn of BART's bidding opportunities and because of the long term working relationships most of the teams are already comprised six to nine months prior to the pre-proposal meeting and due date. Most of the challenges encountered by these owners were: 1) no one (referring to a Prime consultant) wants to give

you a piece of the pie unless they are forced to; 2) Subs do not have the resources and lack experience in working with the public sector, especially with BART; and 3) BART does not have a “Checks and Balances” system to request that Primes are transparent and accountable for their work especially when it relates to notifying their Subs of any future work that can be performed by these firms.

Appendix D-1 describes in more detail the remainder of the responses from the four owners interviewed. During the interview, all of the owners were forthcoming with their answers and some of them provided a lot more information than asked because they were very happy to be heard and they have high hopes that, eventually, their comments could reach the ears of BART’s decision makers.

On-Line Questionnaire from Owners of Professional Services Firms

On three different occasions, an on-line survey/questionnaire was emailed to sixty-seven professional services firms identified in BART’s OBIEE System and follow-up telephone calls were made to the non-respondents. After extensive outreach, only 19 percent or 13 respondents submitted their completed questionnaire. The following summarizes the results of the surveys.

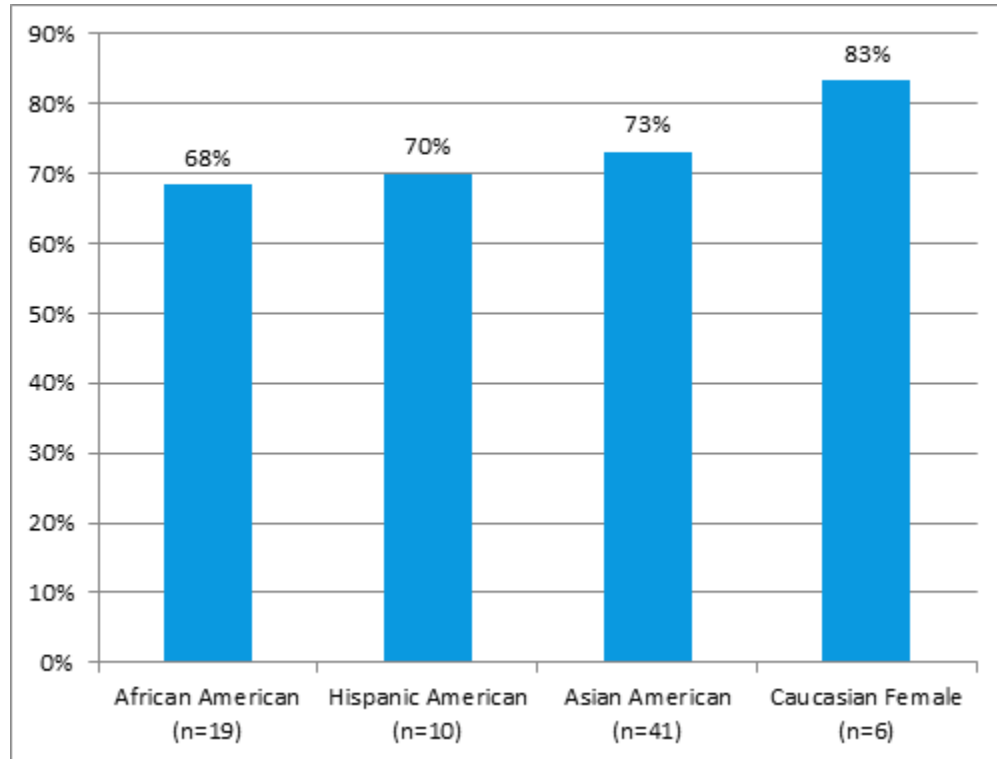
Seven of the thirteen owners from the professional services firms have been in business for more than twenty years, four owners have been in operation between eleven and sixteen years, and two owners have less than five years. Out of the thirteen respondents, nine are DBE firms while the rest are M/WBEs. Most of the owners or 62 percent agreed that their firms “Sometimes” received awarded contracts from BART. 70 percent of the owners confirmed to have performed the scheduled scope of work if their firm was listed on a BART contract. Out of the 13 respondents, eight indicated that race-neutral measures have “Always” or “Sometimes”

been effective strategies in increasing their firm's participation in BART's contracting activities.

The owners' responses to Question Nos. 4 - 9 are described, in more detail, in Appendix E-1

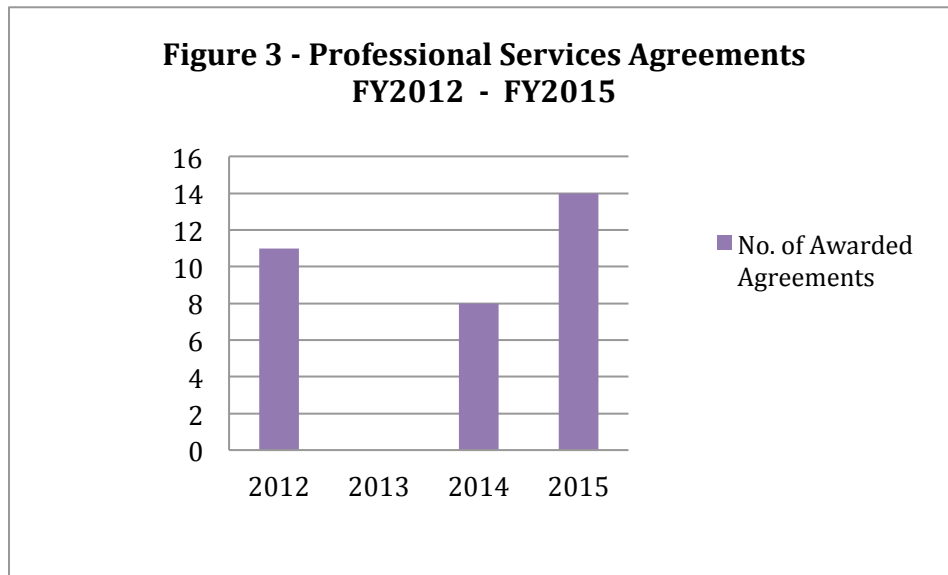
Figure 2 "Professional Services Utilization", which was part of a draft BART Board presentation, illustrates the distribution of payments to all DBEs on eight completed on-call GEC and CM agreements awarded between 2009 and 2015. This chart also shows the total percentage of subconsultants listed and utilized during the term of the agreement. There were one hundred nineteen subconsultants (56 M/WBEs) listed at award and fifty-eight (32 M/WBE) were utilized.¹²⁵ M/WBEs received \$31.9 million or 39 percent of total dollars of which \$12.4 million or 39 percent was received by prime consultants and \$19.5 million or 61 percent was received by subconsultants.¹²⁶ 83 percent of the DBE dollars were paid to nine (9) M/WBEs.¹²⁷ African Americans were least utilized at 68 percent while Asian Americans were most utilized at 73 percent of each respective group. Some of the possible reasons for this outcome may be attributed to the fact that most of the non-listed Subs added midstream were non M/WBEs and that prime consultants, including M/WBE prime consultants, tend to keep more work to themselves.¹²⁸

**Figure 2 - Professional Services Utilization
FY2009 - FY2015**



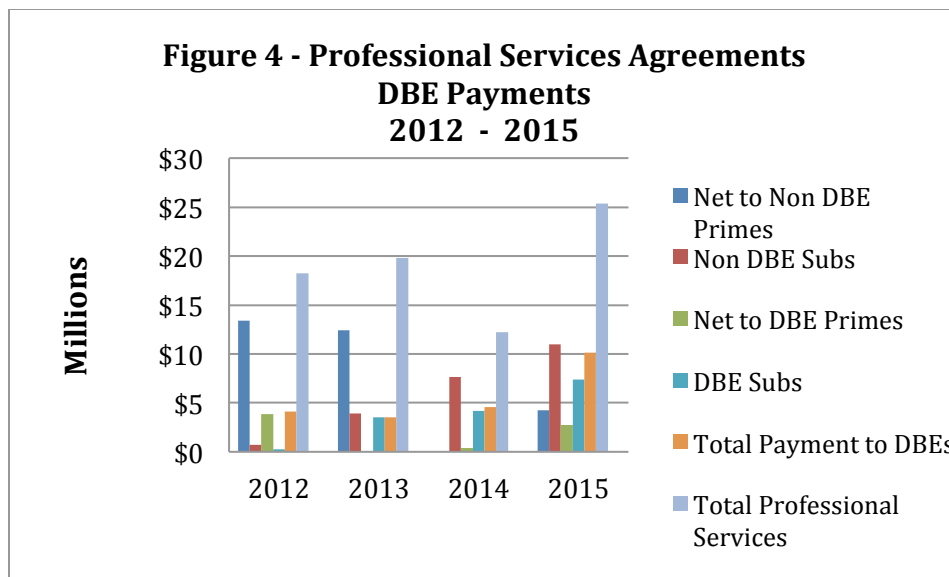
n= number of subcontracts

**Figure 3 - Professional Services Agreements
FY2012 - FY2015**



As illustrated in Figure 3 above, most of the professional services agreements awarded during the Study Period occurred in FYs 12 and 15 in which most of the agreements were awarded to DBE Primes. However, in FY13 no agreements were awarded, but in FY14 three of

the eight agreements were awarded to DBE Primes, respectively. Also, during this period a total of one hundred sixty-two DBE Subs were utilized to perform some portion of the awarded agreements' scope of work. In FY12 only eight M/WBE Subs were utilized, but that number tripled in FY13, and in FY14 36 M/WBE firms were utilized in BART's professional services agreements. Yet, in FY15 there was a large influx of over 90 M/WBE firms that were utilized. This significant increase of DBE participation may be because the nature of these agreements is ongoing (i.e., three years with two one year options) and on-call services based on work directives issued for specific tasks.



As illustrated in Figure 4 above, from calendar years 2012 thru 2015, payments to non-DBE primes (i.e., approximately \$13.4 million) decreased to \$4.3 million, but payments to non-DBE Subs significantly increased from less than one million to \$11 million dollars. In 2012, the net to DBE Primes was \$3.8 million, zero in 2013, less than half a million dollars in 2014, but it increased to \$2.8 million in 2015. During this period, the payments to DBE Subs gradually increased from \$281,207 to \$7.4 million dollars. Also, the total payments to DBEs significantly

increased from \$4.1 million to \$10 million as well as the dollar amounts paid to DBEs in the professional services industry from \$18.3 million to \$25.4 million, respectively.

7. CONCLUSION & RECOMMENDATIONS

Overall, during the Study Period, the research generated for this report consisted of valuable information (i.e., data sources, statistical analysis, and recommendations) that may be used by various internal and external stakeholders, public and private sectors, Small Businesses, and USDOT recipients who must also comply with similar federal regulations and who are having difficulty attaining their Annual DBE goal and/or Triennial goal. The purpose of the case studies discussed earlier was to identify other public agencies' race-neutral efforts and any challenges that have impacted the DBE participation in state and local public contracting. Additionally, these case studies showed that obsolete or incomplete data on DBE utilization in the professional services area appears to be a major deficiency and an issue among public agencies, including BART.

Nevertheless, after conducting my research analysis, it was determined that existing and current race-neutral measures (e.g., networking sessions, unbundling of contracts, etc.) have been very effective in DBE utilization resulting in an increase trend in the number of awarded BART federally funded professional services agreements and the total dollar amount received by DBEs. Currently, for FY16, the District's DBE participation is 34.7 percent in the professional services industry, which has a significant impact to the District's attainment of its Triennial goal.¹²⁸ Also, the research identified that past challenges or barriers continue to exist among DBEs and SBs; however, BART's race-neutral efforts have offset or mitigated the effects of these obstacles.

Conversely, while there appears to be recognition that race-neutral measures are necessary strategies that should be consistently implemented to have a significant impact in the increase of DBE utilization, few studies have been conducted that actually measure the success of these efforts.¹²⁹ Thus, it is important that public transit agencies continue to conduct more disparity studies to identify any DBE utilization trends, as well as challenges faced by DBEs. Agencies should propose any race-neutral efforts to enhance the existing pool of DBEs and SBEs. Nonetheless, many opponents such as Dr. George R. LaNoue, professor in the University of Maryland, Baltimore County, does not agree with this statement because disparity studies continue to: (1) be based on obsolete or incomplete data; (2) report results in ways that exaggerate disparities; (3) fail to test for nondiscriminatory explanations for the differences; and (4) make findings of discrimination without identifying any specific instances or general sources of biased behavior.¹³⁰

Furthermore, the study showed that the number of professional services agreements awarded to DBE Primes have continued to increase during the Study Period. Also, the dollar amounts paid to DBE Primes and Subs have increased, but the participation of DBE Subs has decreased due to the Primes not utilizing them on their project(s) instead they are self-performing the work. Another reason may be due to the lack of work plans issued by the District, which do not allow the Subs to perform project specific tasks.

The quantitative information used for this research will be beneficial to BART's recently implemented data collection system and its data driven process monitored by the OCR staff. The qualitative information, such as the feedback from the interviewees and the on-line surveys submitted by owners of professional services firms, should be carefully reviewed by BART staff to make any needed recommendations for changes to BART's Programs in order to increase the

effectiveness of its DBE Program and to enhance its current pool of available, ready and willing DBEs and SBEs.

Appendix A

Disadvantaged Business Enterprise (DBE) Criteria

Below is a definition of a DBE firm, its average annual income, and the ethnic groups considered socially and economically disadvantaged.

- A DBE is a for-profit, small business concern: 1) that is at least fifty-one percent (51 percent) owned by one or more individuals who are socially and economically disadvantaged or, in the case of a corporation, in which at least fifty-one percent (51 percent) of the stock is owned by one or more socially and economically disadvantaged individuals; and 2) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it;
- A DBE firm's average annual gross receipts, including those of its affiliates, for the previous three years does not exceed \$23.98 million (or as adjusted for inflation by the Secretary of Department of Transportation) pursuant to 49 CFR Section 26.65(b); and
- A socially and economically disadvantaged individual is a U.S. Citizen or permanent resident of the United States and is:
 - Black American (including persons having origins in any of the Black racial groups of Africa);
 - Hispanic American (including persons of Central or South Americans, Cuban, Dominican, Mexican, Puerto Rican, or other Spanish or Portuguese culture or origin, regardless of race)
 - Native American (including persons who are Aleuts, American Indians, Eskimos, or Native Hawaiians);
 - Asian-Pacific American (including persons whose origins are from Brunei, Burma (Myanmar), Cambodia (Kampuchea), China the Commonwealth of the Northern Marianas Islands, the Federated States of Micronesia, Fiji, Guam, Hong Kong, Indonesia, Japan, Juvalu, Kiribati, Korea, Laos, Macao, Malaysia, Nauru, the Philippines, Samoa, Taiwan, Thailand, Tonga, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), or Vietnam);
 - Subcontinent Asian American (including persons whose origins are from Bangladesh, Bhutan, India, the Maldives Islands, Nepal, Pakistan, or Sri Lanka);
 - A Woman; or
 - A member of any additional group that is designated as socially and economically disadvantaged by the Small Business Administration.

Appendix B

In-Person Interview Questions

- Question 1: What race-neutral measures have been most effective with increasing DBE utilization in BART's professional services agreements and why?
- Question 2: Since FY12 – FY15, has there been a trend in the number of professional services agreements and dollars awarded to DBE firms?
- Question 3: In your opinion, should the existing race-neutral efforts continue to be used or should other measures be used in conjunction?
- Question 4: Recently BART has experienced an increase of DBE utilization. Can this trend be attributed to BART's proactive approaches or marketplace conditions?
- Question 5: What are some of the barriers encountered by DBEs who participate in public contracting?
- Question 6: What are the reason(s) there is a disparity between MBE and WBE participation in BART's professional services agreements?
- Question 7: Why has BART not attained its Triennial goals in fiscal years 2012, 2013 and 2015?
- Question 8: Since you have had an extensive trajectory working in the DBE field, are there any differences between DBE participation in the construction and professional services industries?
- Question 9: What other race-neutral efforts do you recommend BART should implement to increase DBE participation in its professional services area?
- Question 10: Would you like to add any other comments?

Appendix B-1

In-Person Interview Answers

The answers to question Nos. 1, 2, and 4-7 were described earlier in Chapter 5 under “Research Questions”.

Question 3: In your opinion, should the existing race-neutral efforts continue to be used or should other measures be used in conjunction?

Mr. Wong’s Response:

Most of the initiatives proposed in the Small Business Opportunity Plan Phase I and Phase II primarily deal with construction and they are heavy, heavy in construction. The unbundling was for construction although it did have an impact in professional services, but it was primarily in construction. 70 or 80 percent of the dollars the District spent over the last six or seven years of the \$2 billion dollars was for construction. For example, some of the proposed initiatives include “Quick Pay” and a “Mentor/Protégé” Program to assist Small Businesses in the construction area. Professional services teams have the opportunity to conduct outreach activities nine (9) months to a year before the bid is advertised, which allow Small Businesses to be a part of the team. Also, rotational programs can be used in construction and professional services agreements. Outreach and revamping our existing outreach can go both ways, but heavily in construction designed to fix the built-in issues.

Mr. Lee’s Response:

BART has used effective measures in the past such as the professional liability insurance, which covers all Primes on our major contracts and it also helps DBEs and SBs cover their insurance.

Question 5: *What are some of the barriers encountered by DBEs who participate in public contracting?*

Mr. Wong's Response:

The bonding, insurance, getting paid, listed and used are some of the barriers encountered by DBEs. A part of it can be due to the "Good Old Boys" Network in terms of I can rely on Contractor A and Contractor A is not going to cost me my bond and insurance and I know Contractor A is going to get the resources and complete the work. As the Prime, I am responsible for the contract and I need someone who could get this work done. In construction there are a lot of impediments such as cash flow, equipment, and resources. These folks are not affiliated with the trades unions so they do not get the best workers.

Mr. Lee's Response:

There are a number of barriers that include: 1) financial burden; 2) government contracts tend to be large; 3) typically small minority women DBE firms don't have the capital to bid contracts; 4) not enough bonding to bid substantial contracts; and 5) the paperwork (i.e., submitting all the documentation and bids on time, and all the red tape involved in government contracts). Other obstacles could be the facility standards that we impose, the size of the project, the insurance requirements could be too high, the nature of the work in a lot of our professional services work is very specialized, and a firm's experience especially for new start-up firms is not enough.

Question 8: *Since you have had an extensive trajectory working in the DBE field, are there any differences between DBE participation in the construction and professional services industries?*

Mr. Wong's Response:

Since 1991, the growth in professional services has been exponential. The participation is now two times more than what it was twenty years ago. Twenty years ago there was no participation at the Prime level. There have been many more opportunities and at least a

third of those have gone to DBE Primes. Twenty years ago there were zero DBE Primes.

We have broken down and unbundled these opportunities and the District is doing very well in this area. Contrary, in the construction area there is a lack of DBE Primes.

Mr. Lee's Response:

Yes, there are huge difference between firms in the construction and professional services areas. Professional services consist of all college educated professionals, but in construction the workers are not educated. This does not mean that they are not necessarily smart and do not know their work, but it is comparing apples to oranges. There are more DBEs in the professional services area and we have had some DBE Primes who have done large contracts. BART has been able to get DBE participation partly because of their geography in which we have a number of these types of minority firms. Because of BART's emphasis, political and community relations, and the commitment from up top it is easier to get participation on professional services because they are more subjective. Construction is more contentious. It is difficult and hard to coordinate each subcontractor's work. There are a number of minority firms that are under capitalized and there are a number of firms who want to cut corners because of the prevailing wages. It is totally a different type of work and a different mentality between the workers and professional services employees.

Question 9: What other race-neutral efforts do you recommend BART should implement to increase DBE participation in its professional services area?

Mr. Wong's Response:

It is important to revamp our matchmaking effort. I heard again from our project staff that contractors are questioning the OCR's ability to bring in qualified DBE firms. The problem in construction is you are not getting a lot of Primes. Qualified means having technical and financial qualifications and many of them don't have that or have one or not the other. The

problem is we need to get new firms because the pool is getting stale and we have to bring in new fish. The pool is getting dry and we have to bring more people to the table. We need to do what we can on our own and we should outreach to the community. We can implement new initiatives to attract new people. The pool is drying out and with the economy improving it does not help us especially in construction. We need to start to strategize to get some fresh fish into this lake so that the Primes get more excited to participate in matchmaking sessions because we know matchmaking is dying. We need a big project such as the GO Bond to bring in new Small Businesses.

Mr. Lee's Response:

I would like to have a Mentor/Protégé Program where I can be able to train minority women firms in certain areas that they are lacking. For example, traffic signaling and heavy, duty electrical work like our traction power trade. There are tons of electrical minority firms, but most of the firms can not do that type of work and they could only do small projects. I like to focus on rebar because we are not counting rebar in our DBE goals because there are not any real DBE firms out there who are certified for rebar work. I would rather see it as a joint effort among a number of agencies like VTA, Caltrain, SFMTA, and BART do a Mentor/Protege Program because it is very susceptible to criticism and failure especially in construction. Another area, is implementing a working capital loan program whereby a small firm needs \$50,000 to make payroll and BART might not require any collateral. That is difficult, but some of these small firms, particularly African American firms, need the cash to bid on projects. It would be really nice if we had an African American Construction Program to help contractors get through their contract, grow, improve, and gain new knowledge. Most of these firms need the cash to make payroll, buy supplies and they are almost invariably under-capitalized. Working capital loan money will

be used to do anything and get through with their work. Some of these small businesses get account receivable loans with huge interest rates. We will need the backing of a bank to be able to administer this type of program. There is definitely a lot of risk, but there are success stories.

Question 10: Would you like to add any other comments?

Mr. Wong's Response:

My thoughts in this and having been here more than twenty-five (25) years, I don't know if this is true, everything is anecdotal, BART ended its Affirmative Action Program in construction right after Proposition 209 kicked in. We had a lot more in construction back then than we do today that could be the impact of Prop. 209. The City has kept those efforts until a few years ago when they lost the Supreme Court Case in the Coral Construction Case. The City has a stronger base of minority contractors who are more progressive than those at BART. It is very different. The contractor, the qualifications, and the nature of the work we do are very different as well. There were a lot more African American firms active pre 209 than post 209. Construction is very capital intensive and there are a lot of barriers to entry. Professional Services have no barriers. We could do our businesses out of our homes and communicate through emails and texting. In construction you have to do the work on the job site.

Mr. Lee's Response:

No comments.

Appendix C

Caltrans Telephone Interview Questions

- Question 1: What race-neutral measures have been most effective in the increase of DBE utilization on Caltrans engineering and professional services agreements and why?
- Question 2: Since Caltrans Availability and Disparity Study Report in 2007, has there been a difference in past and current race-neutral efforts used by Caltrans to increase DBE utilization in the professional services area?
- Question 3: In your opinion, should these measures be consistently used or should other proactive approaches be used in conjunction?
- Question 4: Has Caltrans experienced an increase of DBE utilization? If so, can this trend be attributed to Caltrans proactive approaches or marketplace conditions?
- Question 5: What are some of the barriers encountered by DBEs who participate in public contracting?
- Question 6: Have you noticed a disparity between MBE and WBE participation in Caltrans professional service agreements? If so, what are the reasons for this outcome?
- Question 7: Since you have had an extensive trajectory working in the DBE field, are there any differences with the DBE participation in the construction and professional services industries?
- Question 8: What other proactive approaches do you recommend that Caltrans should implement to increase DBE participation in its contracting activities?
- Question 9: Would you like to add any other comments?

Appendix C-1

Caltrans Telephone Interview Answers

Question 1: *What race-neutral measures have been most effective in the increase of DBE utilization on Caltrans engineering and professional services agreements and why?*

Ms. Salais' Response:

Caltrans has twelve districts in which small business liaisons do extensive outreach for the Small Business Community. We have a robust Calmentor Program that helps pair Prime consultants with small A&E consultants. Also, we have a Mentor Protégé Construction Program, but I am not sure in which districts it has been implemented. I do know that there are more mentors than protégés in these programs.

Caltrans Small Business Council (Council) is a professional services subcommittee, which basically represents Small Business organizations. It has been around for the last twenty years. Every year, there are six meetings throughout the State and each District Director attends these meetings. The meetings are very formal and educational and it is a venue for small businesses to voice their concerns and issues. The objectives of these meetings are to discuss and resolve any pending issues, make any policy changes, and propose any rule making decisions.

Question 2: *Since Caltrans Availability and Disparity Study Report in 2007, has there been a difference in past and current race-neutral efforts used by Caltrans to increase DBE utilization in the professional services area?*

Ms. Salais' Response:

Yes, we have increased DBE utilization in the professional services area by being transparent in providing the plan holders list to the Subs so that they can directly contact the Primes.

This promotes open communication and networking between these groups.

Question 3: *In your opinion, should these measures be consistently used or should other proactive approaches be used in conjunction?*

Ms. Salais' Response:

We will have more when our disparity study is completed. Caltrans' overall goals have increased because there has been a trend in the economy. Currently, our goal is 12.5 percent.

Question 4: *Has Caltrans experienced an increase of DBE utilization? If so, can this trend be attributed to Caltrans proactive approaches or marketplace conditions?*

Ms. Morris' Response:

Since Ms. Salais could not respond to this question, she referred me to her colleague, Esther Morris, but I was not able to reach her.

Question 5: *What are some of the barriers encountered by DBEs who participate in public contracting?*

Ms. Salais' Response:

Some of the barriers encountered by DBEs are insurance, bonding, prompt payment and just getting their foot in the door. Also, the same vendors continue to be used instead of giving opportunities to others.

Question 6: *Have you noticed a disparity between MBE and WBE participation in Caltrans professional services agreements? If so, what are the reasons for this outcome?*

Ms. Salais' Response:

In the professional services area, M/WBEs do pretty well. In FY15, we had a 15.2 percent commitment of award in our A&E contracts and awarded to three DBE firms. I am not sure about utilization because we do not gather the data.

Question 7: *Since you have had an extensive trajectory working in the DBE field, are there any differences with the DBE participation in the construction and professional services industries?*

Ms. Salais' Response:

The Council has a very low participation from the African American Community. As a result, two years ago an ad hoc subcommittee within the Council was created to increase African American participation with DBE engineers and A&E consultants. The ad hoc subcommittee meets during the same time as the Council and they meet with the Caltrans Director.

Question 8: *What other proactive approaches do you recommend that Caltrans should implement to increase DBE participation in its contracting activities?*

Ms. Salais' Response:

Currently, our DBE database has four thousand seven hundred DBEs listed.

Question 9: *Would you like to add any other comments?*

Ms. Salais' Response:

No comment.

Appendix D

Telephone Interview Questions to Owners of Professional Services Firms

- Question 1: Are you a Minority Business Enterprise or Women-owned Business Enterprise firm?
- Question 2: How long has your firm been working with BART?
- Question 3: How does your firm become aware of BART's bidding opportunities?
- Question 4: If you are listed on a BART Contract, have you performed the listed scope of work? If not, please explain why?
- Question 5: What type of contracts have you been awarded and how much has been the dollar amount?
- Question 6: Recently BART has experienced an increase of DBE utilization. Can this trend be attributed to BART's proactive approaches or marketplace conditions?
- Question 7: As a prime consultant, have you hired an DBE subconsultant? If so, what barriers (if any) have you encountered while working with these firms.
- Question 8: In your opinion, what race-neutral measures have been more effective with increasing DBE utilization on BART's professional services agreements and why?
- Question 9: What do you recommend BART should do differently to increase its DBE utilization in contracting opportunities?
- Question 10: Do you have any additional questions or comments?

Appendix D-1
*Telephone Interview Matrix of
Answers from Owners of Professional Services Firms*

Interview No. 1

The following telephone interview was conducted on April 29, 2016 and it took about an hour long to conclude.

1. *Are you an M/WBE firm?*

My firm is a MBE.

2. *How long has your firm been working with BART?*

I have been working with BART for the last eight (8) years; seven years as a Subs and one year as a Prime.

3. *How does your firm become aware of BART's bidding opportunities?*

My firm is registered in BART's Vendor Portal System, which allows me to review the upcoming bidding opportunities. I also attend the network sessions conducted by BART and most importantly I hear of future projects by "Word of Mouth".

4. *If you are listed on a BART Contract, have you performed the listed scope of work? If not, please explain why?*

No, I have not performed the listed scope of work in two BART contracts because apparently that particular scope of work has not been requested by BART staff.

5. *What type of contracts have you been awarded and how much has been the dollar amount?*

I have a Class A "General Engineering" License. My firm conducts construction work to locate underground utility for professional firms who then transfer the data and results on the renderings. My firm has been awarded ten (10) contracts worth \$2 million and out of that \$1.4 million was recently awarded to me as a Prime on a single contract to replace batteries in 16 stations.

6. Recently BART has experienced an increase of DBE utilization. Can this trend be attributed to BART's proactive approaches or marketplace conditions?

I agree that network events on a one to one dialogue (10-15 mins.), between the Primes and Subs, have been very effective means of communication.

7. As a Prime consultant, have you hired a DBE subconsultant? If so, what barriers (if any) have you encountered while working with these firms?

I have not hired a DBE Sub as of yet, but as a Sub I faced several challenges. Some of these challenges were that no one wants to give you a piece of the pie unless they are forced to and that is why they do outreach. Also, relations between the Primes and Subs are very important because if you have been working with a Prime for a very long time and if he or she likes your work and reliability for completion then your firm will be repeatedly used on future projects. Another challenge is when you submit your bid to a Prime, but you never hear why he or she did not choose your bid. I think it should be mandated that Primes respond to Subs' request to why they were not chosen for the subcontracted work. Therefore, public agencies awarding the contracts should identify deficiencies such as these and require Primes to respond to the Subs' requests and explain the reason(s) to the District.

8. In your opinion, what race-neutral measures have been more effective with increasing DBE utilization on BART's professional services agreements and why?

Again, networking sessions are an excellent measure as well as unbundling contracts and technical and supportive services.

9. What do you recommend BART should do differently to increase its DBE utilization in contracting opportunities?

BART should implement monetary penalties on Primes who do not meet their goals. There should be preference goals and dollar value discount for utilizing DBE firms. BART should have stringent guidelines in reviewing and following-up with the subcontractors or subconsultants listed on the Primes' "Good Faith" documentation. BART staff should inquire why Primes do not hire those firms who offered a bid and ask the Prime why it ended up doing most or all of the scope of work.

10. Do you have any additional comments or questions?

No comments.

Interview No. 2

The following telephone interview was conducted on April 29, 2016 and it took about forty minutes to conclude.

1. *Are you an M/WBE firm?*

My firm is a MBE.

2. *How long has your firm been working with BART?*

My firm has been doing work with BART as a Sub since 2006 and as a Prime as of last year. There is a big difference between a Sub and Prime awarded a contract because as a Prime there is more communication with BART staff regarding payments, assignments, and a lot of hand holding from BART staff.

3. *How does your firm become aware of BART's bidding opportunities?*

The Business Outreach Committee forums are quarterly meetings comprised of various public agencies, which assist Small Businesses and DBEs. I've attended BART Networking Sessions held once or twice a year. Also, I am registered in the Vendor Portal System. Another effective method is "Word of Mouth" from friends in the industry.

4. *If you are listed on a BART contract, have you performed the listed scope of work? If not, please explain why?*

No, I have not performed the listed scope of work on some of the BART contracts because the Prime ends up performing the subcontracted work.

5. *What type of contract have you been awarded and how much has been the dollar amount?*

As a Prime, we have been awarded a CM contract worth \$3 million for three (3) years. Each work plan or task order has been for an average of \$300k - \$500K.

As a Sub, we have been awarded three (3) contracts and only one was worth \$200K.

6. *Recently BART has experienced an increase of DBE utilization. Can this trend be attributed to BART's proactive approaches or marketplace conditions?*

In my opinion, the economy has gotten better. BART's General Manager has implemented new initiatives with the Small Business Council. Also, Sustainable RFQs have set-aside contracts for small businesses and it is good to have a change in staff who typically worked with the same Primes.

7. As a Prime consultant, have you hired a DBE subconsultant? If so, what barriers (if any) have you encountered while working with these firms?

Yes, the lack of appropriate resources (i.e., have proper BART training) from the Subs because they have a lack of experience and they have not worked for BART in that area.

8. In your opinion, what race-neutral measures have been more effective with increasing DBE utilization on BART's professional services agreements and why?

The race specific goals that exclude some races do not work. For example, Caltrans implemented the UDBE Method, which excluded Hispanics and it had race neutral goals. Primes were confused and preferred to do the work themselves. General DBE without specifying ethnicity is best.

Mentor/Protégé Program is another excellent race-neutral measure to implement because it works. For example, the Calmentor Program in District 4 (Oakland Area) and District 6 (Fresno Area) has been very effective. Subs learn from Primes how to do business from contractual code not technical.

Active attainment reporting should be conducted, not just to meet the goal on a regular basis and it should be shared with the public. Being able to be transparent with the data and share it with the public so that the Small Business Community could provide input. For instance, Caltrans shares their data reports every two (2) months in the Bay Area and in the State to the Small Business Council. Again, this promotes transparency and it allows for those who are reaching their goals to be complemented.

Another initiative is implementing capacity building workshops. For example, many years ago, Bechtel Corporation and higher management level conducted training workshops on pre and post phase award supportive and technical services. I was very fortunate to participate in the accounting workshop because it assisted me to set-up cost codes. If BART is planning to conduct similar workshops, my suggestions are to schedule workshops for professional services firms on Wednesdays and Thursdays starting at 4:30 p.m. or 5:30 p.m. and they should last for a couple of hours. These workshops should be a series of classes for several days with participants receiving a certificate of completion. BART should partner with the Department of General Services and the California Unified Certification Program to offer certification classes for Small Business and Disadvantaged Business Enterprises.

Another example of an effective race-neutral measure was about nine (9) years ago I had a three-year contract with the Alameda County Public Works to outreach to Small Businesses. We invited the Primes (not just the cost estimators, but the decision makers) and the Subs to review 80 to 90 percent of the plan renderings months before the contracts were out to bid.

Also, at the networking sessions (i.e., a brief meeting (10-15 mins)), the sponsors should take a look at their log and decision makers should be present to discuss the contract's scope of work.

9. What do you recommend BART should do differently to increase its DBE utilization in contracting opportunities?

BART is going on the right direction with the changes they are making. It should have annual comparisons on the data and make it transparent to internal and external stakeholders.

Areas that are corky are disparity studies because these studies are biased depending on who is working on it. Sometimes there are firms that should not be included in the report, but they are included.

10. Do you have any additional questions or comments?

None.

Interview No. 3

The following telephone interview was conducted on May 6, 2016 and it took about an hour and fifteen minutes to conclude.

1. *Are you an M/WBE firm?*

I am a DBE and WBE firm.

2. *How long has your firm been working with BART?*

I have been in business for twenty-four (24) years and I have been a Sub for half of that time.

3. *How does your firm become aware of BART's bidding opportunities?*

I am very actively involved with a variety of groups. I also have three full-time staff who are involved in business development and each is responsible for covering a certain area of the region. Also, I am registered with the IMS Sheet, a system that reviews nationwide all the various public agencies' bidding opportunities, and a monthly fee service is paid for this service. But "Word of Mouth" seems to work the best for obtaining bid opportunities because it is all about building trust and relationships among the different firms.

4. *If you are listed on a BART contract, have you performed the listed scope of work? If not, please explain why?*

No, it is an on-call contract with task orders and nothing relating to the scope of work has come up yet. You never know what type of work is being issued. Also, there have been situations when a Prime calls you on Friday late afternoon requesting that you provide an inspector by the following Monday morning. This is pretty much impossible to do based on the short notice. I would like BART to request that the Primes be transparent and accountable for their work.

5. *What type of contract have you been awarded and how much has been the dollar amount?*

Currently, I have a contract with VTA on the Berryessa Contract. It is \$2 million dollars over 3 years with two (1) year options.

6. *Recently BART has experienced an increase of DBE utilization. Can this trend be attributed to BART's proactive approaches or marketplace conditions?*

It is a combination of both. The attitude toward the program has been changing. BART is more forthright. It has upgraded its program and it has done a good job in the front end encouraging them to be Subs. In my opinion, I like to go after large projects because they are heavily scrutinized more for their participation. It is more profitable for us than going

after a small contract where we are a Sub and no one is paying attention. It works! We are the Sub of choice because we deliver.

This trend can be attributed to the marketplace conditions because people are reaching capacity and there is an awful lot of work. We only have a number of people who can do this type of project. Also, because of the specialized work we do, we have taken the role of being a “Finder” for the Primes in seeking qualified firms who can do the scope of work in the contract.

7. As a prime consultant, have you hired a DBE subconsultant? If so, what barriers (if any) have you encountered while working with these firms?

Some of the barriers encountered while working with DBE Subs have been that they can not provide the people to do the work and there is a lack of resource from their behalf. New emerging businesses should go through a Business 101 class.

8. In your opinion, what race-neutral measures have been more effective with increasing DBE utilization on BART’s professional services agreements and why?

BART should be more responsible in being assertive to make sure that what has said has been accomplished. DBEs have the responsibility to run a respectable business and to provide the requested work. BART has not been effective in its approach. BART should encourage and have a strong support of the DBE Community.

Prior to the pre-proposal meeting, teams are already formed way before. People are watching and reviewing the bid opportunities via BART’s website. Probably three to four weeks before the bids are due teams have already formed.

9. What do you recommend BART should do differently to increase its DBE utilization in contracting opportunities?

BART should conduct quarterly meetings with the Primes and the decision makers. It should have quarterly outreach events to go over the proposals that are coming out the next three to six months. First hour of the meeting should be dedicated to the upcoming projects and deadlines. The entire Construction Management Small Business Community should be invited and network at these events. This is a great place for DBE firms to network.

Some measures include that BART should “Talk the Talk and Walk the Walk.” They should make firms accountable for their actions and responsibilities. Outreach events should be general in nature and not contract specific. BART should also reward people that have been good stewards of its requirements for meeting their goals.

10. Do you have any additional questions or comments?

None.

Interview No. 4

The following telephone interview was conducted on May 13, 2016 and it took about fifty minutes to conclude.

1. *Are you an M/WBE firm?*

We are a MBE/WBE firm.

2. *How long has your firm been working with BART?*

I have been working with BART for twenty-five (25) as a Sub.

3. *How does your firm become aware of BART's bidding opportunities?*

By "Word of Mouth". It has been the most effective strategy that permits firms to team up way in advance (i.e., six to nine months). Also, existing long term working relationships with Primes has continued to allow us the opportunity to team up with Primes. We are also registered in BART's Vendor Portal System, which provides weekly updates of future bidding opportunities.

4. *If you are listed on a BART Contract, have you performed the listed scope of work? If not, please explain why?*

Yes and No. We have and have not performed the listed scope of work. An example includes, the times our firm has been listed as part of the "Key Resume" in the RFP submittal, which indicates that we are part of the consultant's team and we would actively participate in the project. However, it doesn't work that way. It has come to our knowledge that the consultant is using its own folks to perform the work instead of us. Another example is that the consultant we have teamed up has been awarded the agreement and we never receive a copy of the Notice to Proceed, but we have been asked to peer review the scope of work and submit Form 60.

I would like to know what is the best approach to convey these issues? And how do we effectively communicate this to BART staff and what is the process in doing so?

Also, I would like to be able to grow by using BART to foster our opportunities. BART is very pro-active in using Small Business utilization, but it has to gradually move toward a Check and Balance System. Some of the recommendations include issuing surveys as a mechanism to receive constructive criticism from Subs and the right of first refusal for Subs before the Prime does the work. Although it is a huge commitment and onerous to comply with contracting requirements, BART staff should make Primes more accountable and transparent.

5. What type of contracts have you been awarded and how much has been the dollar amount?

Recently as a Prime my firm was awarded one of the two CM agreements at \$3 million dollars. As I said earlier, we have been working with BART for more than twenty years and I don't know the total number of projects and dollar amount for each.

6. Recently BART has experienced an increase of DBE utilization. Can this trend be attributed to BART's proactive approaches or marketplace conditions?

I believe that the evolution of practices of utilization used by BART has increased Small Business utilization. The network sessions and general outreach forums have been very effective for professional services firms to get to know each other better. Having Micro Small Business Entity Set Aside contracts for professional services firms would increase the opportunity for more Small Businesses to participate in the BART's bidding process and continue to foster the economic development and growth in the industry.

In my opinion, marketplace conditions have not been at all effective in the increase of DBE utilization because the market is stronger today than six years ago. There is very little money to invest in building and improving the infrastructure in California.

7. As a prime consultant, have you hired a DBE subconsultant? If so, what barriers (if any) have you encountered while working with these firms?

Yes, I have hired DBE Subs to work on some of our projects, but I have not encountered any barriers while working with them because I have a long working relationship with them and they have the capacity to perform the subcontracted work.

8. In your opinion, what race-neutral measures have been more effective with increasing DBE utilization on BART's professional services agreements and why?

Outreach meetings are the most productive and effective measures to increase DBE utilization. For instance, I have been to different forums in which BART leadership have spoken about the various upcoming projects and this provides an equal opportunity to receive the information in a timely manner. About four years ago, BART staff had quarterly meetings with GEC and sustaining firms to "Check-In" and discuss the projects' status.

9. What do you recommend BART should do differently to increase its DBE utilization in contracting opportunities?

BART should implement MSBE set aside agreements for professional services firms, have "Check and Balance" System and the Right of First Refusal for Subs.

10. Do you have any additional comments or questions?

No comments.

Appendix E
*On-Line Survey/Questionnaire
to Owners of Professional Services Firms*

Firm Name: _____

How many years has your firm been in business? _____

Are you a DBE or M/WBE Firm? _____ Yes or _____ No

1. How often does your firm receive awarded contracts from BART?
_____ Always _____ Very Often _____ Often _____ Sometimes _____ Never

2. If you are listed on a BART contract, have you performed the listed scope of work?
Yes _____ or No _____ If not, please explain why?

3. Are race-neutral measures effective strategies in increasing your firm's participation in BART's contracting activities?
_____ Always _____ Very Often _____ Often _____ Sometimes _____ Never

4. Which race-neutral efforts have been the most effective strategies to increase your firm's participation?

5. If race-neutral measures are not attributed to your firm's participation, are marketplace conditions responsible? If yes, please identify the marketplace conditions.
_____ Yes or _____ No?

6. How frequently do you encounter barriers in public contracting?
_____ Always _____ Very Often _____ Often _____ Sometimes _____ Never

7. Please identify the barriers:

8. What are the reason(s) there is a disparity between MBE and WBE participation in public contracting?

9. Would you continue doing business with BART? If Yes or No, please why?

Appendix E-1

*Matrix of On-Line Survey/Questionnaire and Answers
from
Owners of Professional Services Firms*

Appendix F

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