



Policies and Procedures No. 26

Board Approval: 3/13/2025

SUBJECT:

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

PURPOSE:

To provide a program to ensure nondiscrimination in the award and administration of federally-assisted contracts and create a level playing field on which disadvantaged business enterprises (DBEs) can compete fairly for those contracts.

POLICY:

26.1 POLICY STATEMENT AND PROGRAM OBJECTIVES

Policy Statement/Objectives (49 CFR § 26.3, § 26.7, § 26.21, § 26.23)

San Diego Metropolitan Transit System (MTS) has established and adopted a DBE program in accordance with regulations of the U.S. Department of Transportation (DOT), Title 49, Code of Federal Regulations, Part 26 "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs (49 CFR Part 26)." MTS has received Federal financial assistance from the DOT and as a condition of receiving this assistance, MTS has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy of MTS to ensure that DBEs as defined in 49 CFR Part 26 have an equal opportunity to receive and participate in MTS's DOT-assisted contracts. It is also our policy to:

1. Ensure nondiscrimination in the award and administration of all MTS contracts and subcontracts;
2. Create a level playing field by which DBEs can compete for and perform in MTS's DOT-assisted contracts;
3. Ensure that the MTS DBE Program is narrowly tailored in accordance with applicable law and current legal standards, including the Ninth Circuit Ruling in *Western States Paving vs. Washington State Department of Transportation*;



4. Ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
5. Help remove procurement and contracting barriers, which impede DBE participation in MTS DOT-assisted contracts;
6. Monitor and enforce contractors' compliance in meeting established goal objectives and program requirements;
7. Assist in the development of DBEs and Small Businesses to increase their ability to compete successfully in the market place outside the DBE Program; and
8. Ensure MTS contractors and subcontractors take all necessary and reasonable steps to comply with these policy objectives.

As evidence of MTS's commitment to pursue these policy objectives, the Chief Executive Officer has designated Deputy General Counsel as the DBE Liaison Officer (DBELO). In this capacity, the DBELO is responsible for implementing all aspects of the DBE program. The DBELO has direct access to the Chief Executive Officer for DBE-related matters. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by MTS in its financial assistance agreements with DOT. MTS will disseminate this policy statement (See Exhibit A) to all of the departments of our organization through its intranet. Additionally, MTS will distribute this policy statement to DBE and non-DBE business communities that perform or are interested in performing work on MTS projects through its website. Through such efforts, MTS will ensure DOT-assisted contracting and procurement related processes promote equity in access, consideration and opportunity for DBEs and other small businesses in response to requirements set forth under 49 CFR Part 26, DOT Directives and Final Rules.

26.2 APPLICABILITY (49 CFR § 26.3, § 26.21)

MTS is a direct recipient of federal funds from the DOT and considered a Federal Transit Administration (FTA) Tier I recipient, as defined at 49 CFR §26.5. As a condition of Federal financial assistance, MTS is required to submit for approval to the DOT Operating Administration from which it receives the majority of its funding, a DBE Program developed in accordance with federal regulations published under 49 CFR Part 26 and subsequent guidance. This DBE Program sets forth the policies and procedures to be implemented by MTS to ensure that DBEs have an equitable opportunity to participate in DOT-assisted contracting opportunities.

In direct response to these regulatory requirements, MTS hereby establishes a DBE Program, which will:

1. Comply with federal regulations and financial assistance agreements;
2. Meet legal standards for narrow-tailoring requirements;
3. Ensure nondiscrimination in the award of DOT-assisted contracts; and
4. Reaffirm MTS's commitment to fairness and the principles of equal opportunity.

In conformance with 49 CFR Part 26, MTS will continue to carry out its DBE Program until all DOT funds have been expended.

MTS additionally complies with the California Department of Transportation's (Caltrans') DBE Program on projects on which it is a sub-recipient of federal funds through Caltrans.

MTS will advise all applicable DOT Operating Administrations of any significant updates and/or changes to this DBE Program.

26.3 DEFINITION OF TERMS (49 CFR § 26.5)

Race-Conscious Measure or Program: A program or portion thereof that focuses specifically on assisting only DBEs, including minority and women-owned DBEs, by the development and inclusion of participation goals or Good-Faith Effort activities.

Race-Neutral Measure or Program: A program or portion thereof that assists all small businesses, including DBEs, regardless of ownership status, in successfully participating in MTS's procurement program. For the purposes of the DBE Program, "race-neutral" includes gender-neutrality.

Any other term used in this DBE Program shall have the meaning set forth in 49 CFR Part 26.

26.4 RESPONSIBILITIES FOR DBE PROGRAM IMPLEMENTATION

A. DBE Liaison Officer (49 CFR § 26.25)

MTS has designated the following individual as the DBELO:

Deputy General Counsel
San Diego Metropolitan Transit System
1255 Imperial Avenue, Suite 1000
San Diego, CA 92101
Telephone: (619) 557-4539; Fax: (619) 814-1559
E-mail: DBEProgram@sdmts.com

In this capacity, the DBELO is responsible for implementing all aspects of the DBE Program and ensuring that MTS complies with all provisions of 49 CFR Part 26 and subsequent DOT-issued directives and final rules. The DBELO has direct, independent access to the MTS Chief Executive Officer concerning DBE Program matters. The DBELO has sufficient support personnel who devote a portion of their time to implement the Program. The DBELO is responsible for developing, implementing and monitoring the DBE Program, in coordination with other appropriate officials.

The DBELO's and/or designee's duties include, but are not limited to, the following activities:

1. Gathers and reports statistical data and other information as required by the DBE Program, including preparation of

semiannual DBE reports and related analysis for submission to the applicable DOT Operating Administration.

2. Reviews applicable contracts, purchase requisitions, advertisements, boilerplate language specifications and other related documentation specific to implementing applicable DBE requirements.
3. Consults with all affected departments in developing overall DBE goals.
4. Ensures that bid notices and requests for proposals are made available to DBEs in a timely manner.
5. Reviews DOT-assisted contracts and procurements for purposes of applying applicable race-neutral measures.
6. Analyzes MTS's progress towards meeting overall DBE goals by monitoring individual contract DBE attainments.
7. Ensures that pre-bid meetings inform potential bidders and/or offerors regarding MTS's DBE Program.
8. Advises the Chief Executive Officer and/or the MTS Board on DBE matters and achievements.
9. Assesses DBE participation eligibility towards MTS's overall DBE goal.

Additionally, the DBELO and/or designee is charged with implementing the race-neutral measures listed in this DBE Program document.

B. Reconsideration Official (49 CFR § 26.53)

Should MTS implement a race-conscious component to this DBE Program, the DBE Program will be amended to provide the procedures for the administrative reconsideration process and to specify MTS's Reconsideration Official.

26.5 ADMINISTRATIVE REQUIREMENTS

A. Non-Discrimination Requirements (49 CFR § 26.7)

MTS will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex, or national origin.

In administering its DBE program, MTS will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the DBE program with respect to individuals of a particular race, color, sex, or national origin.

B. Federal Financial Assistance Agreement Assurance (49 CFR § 26.13 {a})

MTS will sign the following assurance as a condition of financial assistance agreements with the DOT, and which is hereby made applicable to all of MTS's DOT-assisted contracts:

"MTS shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any U.S. DOTassisted contract or in the administration of its DBE Program or the requirements of 49 CFR Part 26. MTS shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of U.S. DOTassisted contracts. MTS's DBE Program, as required by 49 CFR Part 26 and as approved by U.S. DOT, is incorporated by reference in this agreement. Implementation of this Program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to MTS of its failure to carry out its approved program, the Department may impose sanctions as provided under 49 CFR Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.)."

C. DBE Financial Institutions (49 CFR § 26.27)

It is the policy of MTS to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to utilize these institutions, as available, and to encourage prime contractors on MTS's DOT-assisted contracts to make use of these institutions.

When MTS competitively procures financial services, MTS will notify any identified financial institutions owned by socially and economically disadvantaged individuals in MTS's geographic market area of the upcoming procurement. Through MTS's website and MTS's contract solicitations, MTS will also encourage contractors to use the services of financial institutions owned by socially and economically disadvantaged individuals identified from the listings. One example resource that may be used includes the yhe Federal Reserve Board, which compiles data on financial institutions that participate in the Department of the Treasury's Minority Depository Institution Program. The Internet address of this listing is <http://www.federalreserve.gov/releases/mob/>.

D. DBE Directory (49 CFR § 26.31)

MTS refers interested parties to the California Unified Certification Program (CUCP) Database of Certified DBE Firms (DBE Directory) to assist in identifying certified DBEs. The DBE Directory is published at <https://dot.ca.gov/programs/civil-rights/dbe>.

E. Overconcentration (49 CFR § 26.33)

MTS has not identified any types of work that have a burdensome overconcentration of DBE participation. However, should MTS determine that overconcentration exists in a work classification, MTS will obtain the approval of the concerned DOT Operating Administration of its determination and the measures devised to address it. Once these measures are approved, they will become part of MTS's DBE Program.

F. Business Development Programs (49 CFR § 26.35)

MTS has not established a business development program. The DBELO will continually evaluate the need and assess whether MTS should establish a Business Development Program and/or a Mentor Protege Program. If MTS establishes either program, the program will be guided by the applicable Appendix of 49 CFR Part 26 and approved by the cognizant DOT Operating Administration before being implemented.

G. Fostering Small Business Participation (49 CFR § 26.39)

MTS will structure contracting requirements to facilitate competition by small business concerns by advising the contracting community of the benefits of becoming SB certified, the eligibility requirements to become certified as a SB, and the online directory of certified SBs, found at the U.S. Small Business Administration (SBA) website (www.sba.gov).

MTS may also implement a Small Business Set Aside (i.e. competition among only small businesses) on certain contracts. The MTS Procurement Manager or designee shall consider whether there is a reasonable expectation of obtaining offers from three (3) or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery before applying a Small Business Set Aside to a procurement. MTS will define a small business as a business that meets the definition of small business concern set out in 49 CFR § 26.5. A certified DBE will be presumed eligible to participate in a small business set aside, as all certified DBEs must meet the definition of a small business concern. To avoid program fraud, MTS will verify eligibility of a firm to participate in a small business set aside.

MTS may also utilize the race-neutral outreach measures identified at Section 26.6 (D) of this Policy to foster participation from small business concerns.

H. Expanded Outreach to Additional Certified Firms (2 CFR § 200.321)

As appropriate and/or as required by the terms of a grant or funding award, MTS will further expand outreach measures to other certified firms, which includes, but is not limited to, minority owned businesses (MBE), women owned businesses (WBE), disabled veteran owned businesses (DVBE), veteran owned businesses (WBE), persons with disabilities owned businesses (PDBE), lesbian gay bisexual and transgender owned businesses (LGBTBE), small businesses (SB),

HUBZone small businesses; and/or labor surplus area businesses. This may include, but is not limited to, one or more of the following:

- 1) Including these business types on solicitation lists;
- 2) Soliciting these business types whenever they are deemed eligible as potential sources;
- 3) Dividing procurement transaction into separate procurement to permit maximum participation by these business types;
- 4) Establishing delivery schedules that encourage participation by these business types;
- 5) Utilizing organizations such as SBA and Minority Business Development Agency of the Department of Commerce; and/or
- 6) Requiring a contractor under an applicable grant or funding award to apply 2 CFR 200.321.

In addition, the following certification resources and databases may be used and shared with interested firms:

- 1) U.S. SBA website: <https://www.sba.gov/>;
- 2) California Department of General Services (DGS) website: <https://caleprocure.ca.gov/pages/PublicSearch/supplier-search.aspx.>; and
- 3) California Public Utilities Commission (CPUC) website: <https://www.cpuc.ca.gov/about-cpuc/divisions/news-and-public-information-office/business-and-community-outreach/supplier-diversity-program.>

26.6 DETERMINING, MEETING, AND COUNTING DBE PARTICIPATION TOWARDS THE OVERALL DBE GOAL (49 CFR § 26.45; § 26.51; § 26.55)

MTS is currently operating a strictly race-neutral DBE Program in accordance with DOT guidance following the *Western States Paving* decision of the 9th Circuit Court of Appeals. Should MTS incorporate a race-conscious DBE Program in the future, the breakout of estimated race-neutral and race-conscious participation in MTS's DBE goal will be updated.

As MTS is currently operating a strictly race-neutral DBE Program, contract goals are not applicable to MTS procurements. Should MTS, at a future date, incorporate a race-conscious component to its DBE Program, it will then use contract goals to meet any portion of the overall goal MTS does not project being able to meet using race-neutral means. As required by *Western States Paving*, if MTS incorporates a race-conscious DBE Program, MTS will gather evidence to determine if discrimination in the transportation contracting industry is present. MTS will make a determination at that time what type of evidence gathering is appropriate, based on DBE regulations and case law.

A. Methodology for Setting Overall DBE Goals (49 CFR § 26.45; 26.49)

In accordance with § 26.45(e)(3), and with FTA approval, MTS will establish an overall program goal on a triennial basis. The overall program goal will represent the amount of DOT-assisted funds MTS

anticipates expending on DBE firms over three years, and will be presented as a percentage of the total DOT assistance received.

The overall program goal will be developed in accordance with the 2-step process specified in § 26.45 (c) & (d). The first step is to determine the goal "base figure" based on the relative availability of DBEs in MTS's market area. The second step is to adjust the goal "base figure" from Step 1 so that it reflects as accurately as possible the DBE participation MTS would expect in the absence of discrimination based on past participation, a disparity study and/or information about barriers to DBE participation. Annual projections on DBE participation during each fiscal year will be developed as specified by § 26.45 (e)(3)(iii).

Additionally, MTS will provide for public participation in establishing an overall program goal. MTS will publish a notice of the proposed overall program goal on MTS's website and a newspaper of general circulation, informing the public that the proposed goal and its rationale are available for inspection and comment.

Additionally, MTS will consult with minority, women's and general contractor groups, community organizations, and other officials or organizations to solicit information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and MTS's efforts to establish a level playing field for the participation of DBEs.

MTS will submit the overall program goal to DOT in accordance with § 26.45 (f)(2). The overall goal submission to DOT will include a summary of information and comments received during this public comment/participation process and any MTS responses.

MTS will begin using our overall goal on October 1 of each year, unless we have received other instructions from DOT. If we establish a goal on a project basis, we will begin using our goal by the time of the first solicitation for a DOT-assisted contract for the project.

B. Shortfall Analysis and Corrective Action Plan (49 CFR § 26.47)

If at the end of each year, awards/commitments are less than the applicable overall goal, MTS will analyze the reasons for the shortfall and establish specific steps that may enable MTS to meet its overall goal in the next year. MTS will submit its Shortfall Analysis and Corrective Action Plan to the FTA by December 29 for any applicable year.

C. Transit Vehicle Manufacturers (TVM) Certifications (49 CFR § 26.49)

In accordance with § 26.49, MTS will not include TVM vehicle procurements in its overall goal calculation or semiannual reports. MTS will require each TVM, as a condition of being authorized to bid or propose on DOT-assisted transit vehicle procurements, to certify that it has complied with the requirements of this section. Only TVMs listed on FTA's list of eligible TVMs or that have a submitted goal methodology that has been approved by the FTA or has not been disapproved at the time

of solicitation, are eligible to bid on MTS's transit vehicle procurements. Alternatively, MTS may, at its discretion and with DOT approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of the TVM complying with this element of the program. Within 30 calendar days of making a contract award to a TVM, MTS will submit notice to the FTA regarding the name of the TVM successful bidder and the total dollar value (including the federal share if so requested) of the contract. MTS will also submit additional notifications if options are exercised in subsequent years.

D. Race-Neutral Measures (49 CFR § 26.51)

MTS will implement the following race-neutral measures which are aimed at increasing DBE and other small business concern participation.

1. MTS will hold and/or participate in conferences, which include a networking component to promote teaming opportunities between prospective prime contractors and the DBE and Small Business contracting community. MTS will also actively promote the Small Business conferences, programs, and support services offered by other agencies that have established DBE and Small Business Programs.
2. MTS will provide assistance in overcoming limitations such as inability to obtain bonding or financing or sharing resources regarding technical assistance. Specifically, MTS will, through its website, refer the DBE and Small Business contracting community to the U.S. SBA, Minority Business Development Agency of the Department of Commerce, Procurement Technical Assistance Centers, and San Diego Small Business Development Center.
3. MTS will solicit DBEs and other small business participation by carrying out information on specific contract opportunities. Specifically, MTS will: ensure the inclusion of DBEs and other small businesses on MTS's mailing lists of bidders and/or MTS's e-procurement web based vendor list; make available to prime contractors information on how to view a listing of potential DBE and other small business subcontractors; and provide contracting information in languages other than English, where appropriate and upon request.
4. MTS will advise its contracting community of the benefits of becoming DBE certified, the eligibility requirements to become certified as a DBE, and the online directory of certified DBEs, found at the CUCP website: <https://dot.ca.gov/programs/civil-rights/dbe>.

E. Use of Set-Asides or Quotas (49 CFR § 26.43)

Except as otherwise provided for in Section 26.5(G) (i.e. small business set aside), MTS shall not permit the use of quotas for DBEs on DOT-assisted contracts in accordance with 49 CFR Part 26. Further, MTS shall not set aside contracts for DBEs on DOT-assisted contracts subject

to the regulatory provisions, except in limited and extreme circumstances where no other method could be reasonably expected to redress egregious instances of discrimination.

F. Counting DBE Participation (49 CFR § 26.55)

MTS will count DBE participation toward overall goals as provided in 49 CFR Part 26.55.

MTS will count the value of the work actually performed by the DBE. MTS will not count the participation of a DBE subcontract toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE subcontractor.

MTS will count the dollar value of work performed by DBE if currently certified at the time of execution of the contract. MTS will not count the dollar value of work performed under a contract if the DBE is no longer certified.

G. Commercially Useful Function (49 CFR §26.55)

MTS will count expenditures to a DBE firm if the DBE is performing a commercially useful function on that contract. A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved, and as further described at §26.55.

1. Construction / Maintenance Services

MTS will count the entire amount of that portion of a construction / maintenance contract that is performed by the DBE's own forces, including the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except if supplies and equipment is purchased or leases from the prime contractor or its affiliate to a DBE subcontractor in which labor costs will only be counted).

2. Bona Fide Services

MTS will count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, provided MTS determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services. If services are of a broker, packger or manufacturer representative nature, only the fees or commissions will be counted.

3. Subcontracted Work

When a DBE firm subcontracts part of the work of its contract to another firm, the value of the subcontracted work will be counted only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm will not be counted.

4. Joint Venture

When a DBE performs as a participant in a joint venture, MTS will count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces.

5. Trucking

When a DBE owns and operates trucking services, MTS will count the entire amount awarded to the DBE firm if it is responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract. When a DBE firm leases trucks from another DBE firm, including an owner-operator who is certified as a DBE, MTS will count the total value of the transportation services the lessee DBE provides on the contract.

6. Materials and Supplies

MTS will determine the amount of credit awarded to a DBE firm for the provisions of materials and supplies (e.g., whether a firm is acting as a manufacturer, regular dealer, distributor, or a transaction facilitator) on a contract by contract basis. MTS's system to determine compliance with 49 CFR Section 26.55 will include review of Bidder List responses and/or direct contact by email or phone to determine whether each DBE supplier has the demonstrated capacity to perform a commercially useful function prior to its participation.

If the materials or supplies are obtained from a DBE manufacturer, MTS will count 100 percent of the cost of the materials or supplies.

If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies (including transportation costs).

If the materials or supplies are purchased from a DBE distributor that neither maintains sufficient inventory nor uses its own distribution equipment for the products in question, MTS will count 40 percent of the cost of materials or supplies (including transportation costs).

With respect to materials or supplies purchased from a DBE that is neither a manufacturer, a regular dealer, nor a distributor, MTS will count the entire amount of fees or commissions charged that is deemed to be reasonable, including transportation charges for the delivery of materials or supplies. MTS will not count any portion of the cost of the materials and supplies themselves.

26.7 REQUIRED CONTRACT PROVISIONS AND ENFORCEMENT

A. Contractor's Assurance Clause Regarding Non-Discrimination (49 CFR § 26.13)

MTS will include a clause in its DOT-assisted contracts that complies with 49 CFR 26.13 and will state, in substantially the same language: *"The contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of Title 49, CFR, Part 26 in the award and administration of MTS's U.S. DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as MTS deems appropriate, which may include, but is not limited to: (1) Withholding monthly progress payments; (2) Assessing sanctions; (3) Liquidated damages; and/or (4) Disqualifying the contractor from future bidding as non-responsible. Contractor shall be required to include this clause in its subcontracts."*

B. Prompt Payment Provisions (49 CFR § 26.29)

The DBE Program found at 49 CFR Part 26 requires that any delay or postponement of payment over 30 calendar days from the prime contractor to any subcontractor, or from subcontractor to any lower-tier subcontractor, for work performed pursuant to their agreements may take place only for good cause and with MTS's prior written approval.

1. Prompt Progress Payments to Subcontractors

In accordance with 49 CFR 26.29, MTS will include a contract clause that will require the prime contractor to pay each subcontractor participating on the contract for satisfactory completion of accepted work no later than 30 calendar days on DOT assisted contracts, or 7 calendar days if a public works contract as required by state law, from the receipt of each payment the prime contractor receives from MTS. Any subcontractor will also be required to pay any lower-tier subcontractors no later than 30 calendar days, or 7 calendar days if a public works contract as required by state law, from the receipt of each payment from the prime contractor. Any delay or postponement of payment over 30 calendar days may occur only for good cause following written approval of MTS. This clause applies to both DBE and non-DBE subcontractors. MTS will also require that the Prime Contractor include this clause in its subcontracts and lower-tier subcontracts related to the performance of a DOT assisted contract.

2. Payment of Retention Withheld from Subcontractor

When MTS declines to hold retainage from prime contractors, in accordance with 49 CFR 26.29, MTS will include a contract clause

requiring prime contractors to make prompt and full payment of any retainage kept by prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. Subcontractors will also be required to make prompt and full payment of any retainage kept by subcontractor to any lower-tier subcontractors within 30 days after the lower-tier subcontractor's work is satisfactorily completed.

When MTS elects to hold retainage from the prime contractor, MTS will provide prompt and regular incremental acceptances of portions of the work on each contract and pay retainage to the prime contractor based on these acceptances. Further, in accordance with 49 CFR 26.29, MTS will include a contract clause that will require the prime contractor to make prompt and full payment of any retainage owed to subcontractors, for satisfactory completion of the subcontractors work, within 30 calendar days on DOT assisted contracts, or seven (7) calendar days if a public works contract as required by state law, after MTS's payment to prime contractor. Subcontractors will also be required to make prompt and full payment of any retainage owed to any lower-tier subcontractors, for satisfactory completion of the lower-tier subcontractors work, no later than 30 calendar days, or 7 calendar days if a public works contract as required by state law, from the receipt of payment from the prime contractor. Any delay or postponement of payment over 30 calendar days may occur only for good cause following written approval of MTS. This clause applies to both DBE and non-DBE subcontractors. MTS will also require that the prime contractor include this clause in its subcontracts and lower-tier subcontracts related to the performance of a DOT assisted contract.

26.8 DBE CERTIFICATION STANDARDS (49 CFR § 26.61-3 26.73; § 26.81; § 26.83a)

As a non-certifying member of the CUCP, MTS will accept DBE certifications from certifying member agencies of the CUCP.

For more information about the certification process or to apply for certification, firms should visit the CUCP website at: <https://dot.ca.gov/programs/civil-rights/dbe>.

26.9 RECORD KEEPING AND MONITORING (49 CFR § 26.11, §29.29, § 26.37)

A. Bidders List (49 CFR § 26.11)

MTS will obtain bidder list information consisting of all firms bidding on prime contracts and subcontracts on MTS's DOT-assisted projects/contracts. MTS will enter this data in the DOT's designated system as prescribed at 49 CFR § 26.11. The following information will be included in the bidders list:

1. Firm Name;
2. Full Address (including zip code);

3. Year business was established / years in business;
4. Status as a DBE or non-DBE
 - a. As appropriate and as required by 40 CFR 33.501, MTS may also request status of other certifications, such as MBE and WBE);
5. North American Industry Classification System (NAICS) code for the type of Work bidding on;
6. Race and gender of firm's majority owner; and
7. Annual Range of Gross Receipts.

B. Reporting to DOT (49 CFR § 26.11)

MTS will submit to the applicable DOT Operating Administration the "Uniform Report of DBE Awards or Commitments and Payments" semiannually on June 1 and December 1 of each year, as required. The June 1 report will include DBE activity from October 1 through March 31. The December 1 report will include DBE activity from April 1 through September 30. This report presents a summary of DOT-assisted prime contracts and subcontracts that are: awarded or committed to; open; and completed during the applicable reporting period.

Upon request, MTS will compile and submit ad-hoc DBE contract award and progress reports for DOT-assisted projects. Furthermore, MTS will continue to provide reports relative to MTS's DBE Program, as directed. These reports will provide DBE participation information on MTS's race-neutral and gender-neutral contracts on all DOT assisted procurement activities.

C. Information, Confidentiality, Cooperation (49 CFR § 26.109)

MTS will safeguard from disclosure to third parties information that may reasonably be regarded as confidential business information, consistent with Federal Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a), California Public Records Act (Government Code § 6250 et seq) state, and local law. Notwithstanding the preceding provision, MTS will not release any information that may reasonably be construed as confidential business information to any third party (other than DOT) without the written consent of the firm that submitted the information.

D. Monitoring and Enforcement Mechanisms (49 CFR § 26.29, 26.37)

MTS will implement appropriate mechanisms to ensure compliance with 49 CFR Part 26 requirements by all program participants (e.g., applying legal and contract remedies available under Federal, state and local law).

1. Monitoring Work Committed to DBE

MTS's DBE Program will include a monitoring and enforcement mechanism to ensure that work committed to DBE prime or DBE subcontractors are actually performed by DBEs. This will include a written verification by MTS that contract records have been reviewed and work sites have been monitored to ensure the counting of each DBE's participation is consistent with its function

on the contract and that the work is actually performed by the DBE.

2. Running Tally

MTS will use a running tally that provides for a frequent comparison of cumulative DBE awards/commitments to DOT-assisted prime contract awards to determine whether current race-neutral measures are projected to be sufficient to meet MTS's overall goal, on an annual basis. MTS utilizes a report within its enterprise resource program that tallies all cumulative DBE awards/commitments to DOT assisted prime contracts to show DBE participation utilization. MTS will run this report monthly and will identify whether adjustments to its race-neutral measures may be necessary.

3. Termination or Substitution of DBE subcontractors

Should MTS implement a race-conscious component to this DBE Program, MTS will require the prime contractor to notify and receive consent from MTS whenever a DBE subcontractor is terminated or substituted.

4. Monitoring Prompt Payments and Return of Retainage to DBE and Non-DBE subcontractors

MTS proactively oversees prompt payments and return of retainage to subcontractors and lower-tier subcontractors over the course of any DOT-assisted contract. Such monitoring activities will be accomplished through the following methods: a contract clause in each federally assisted contract that the prime contractor must provide subcontractor payment information to MTS at time of invoicing, at project closeout, and as otherwise requested, as well as a contract clause that requires prime contractors and subcontractors to maintain records of payments to non-DBE and DBE subcontractors and lower-tier subcontractors, for a minimum of three (3) years. In addition, MTS reviews contract payments to subcontractors and lower-tier subcontractors when in receipt of invoices and at contract close out by requesting prime provide subcontractor payment information. Lastly, MTS may use a prompt payment certification form that requires prime contractor and/or subcontractor to certify prompt payments were made to subcontractor or lower-tier subcontractor, as required by the contract.

5. Prompt Payment Dispute Resolution

The obligations of prompt payment and release of retainage does not arise if there is a legitimate dispute over a subcontractor's or lower-tier subcontractor's performance. Subcontractor should first attempt to work with the prime contractor regarding whether subcontractor's work has been satisfactorily performed. If a

dispute remains as to whether work has been satisfactorily completed for purposes of prompt payment requirements, notice should be given to the DBELO to take further action. Steps to resolve dispute may include, but are not limited to, conducting a meeting between prime contractor, subcontractor, and MTS project manager to review whether subcontractor work was completed in accordance with contract, plans and specifications.

6. Prompt Payment Complaints

Complaints by subcontractors or lower-tier subcontractors regarding prompt payment should first be directed to the prime contractor and their payment bond surety, if applicable. If affected subcontractor needs assistance in communicating with the prime contractor regarding payment or is unable to resolve payment discrepancies with prime, subcontractor should contact DBELO in writing to initiate the complaint. The complaint should identify specifics regarding the subcontract payment language, items of work in question, and the subcontractor's attempts to obtain payment from the prime contractor and payment bond surety, if applicable.

Upon receipt of a subcontractor's written complaint that contains the above described information, DBELO will contact prime contractor directly, advising them of MTS's receipt of a prompt payment complaint, of prime contractor's responsibility to work with the subcontractor to resolve the dispute and potential enforcement action, as further described in Section 26.9 (D)(5) of this Board Policy. If after notice to the prime there is still no timely and meaningful action by the prime to resolve prompt payment disputes, affected subcontractor may refer the complaint to the responsible FTA contact.

7. Enforcement Action for Noncompliance of Prompt Payment and Return of Retainage

MTS will include a contract clause in its DOT- assisted contracts that any violation of prompt payment requirements, as defined in Section 26.27 (B) of this Board Policy, shall subject the violating prime contractor or subcontractor to: prime contractor not being reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have satisfactorily completed, contract termination and/or other remedy as deemed appropriate by MTS. If a public works project, then also the sanctions and other remedies specified in Section 7108.5 of the Business and Professions Code and Sections 7201 and 7107 of California Public Contract Code may apply.

8. Enforcement Action for False, Fraudulent or Dishonest Conduct

MTS will bring to the attention of the DOT any false, fraudulent, or dishonest conduct in connection with the program, so that DOT

can take the steps provided in § 26.107 (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules).

9. Procurement Protests Alleging Noncompliance with DBE Regulations

MTS Board Policy No. 52 "Procurement of Goods and Services", Section 52.7, describes MTS's procurement protest procedures. If there is a procurement protest alleging noncompliance with DBE regulations on a DOT assisted project, the MTS Procurement Manager will notify the DBELO of the allegation. The DBELO or its designee will investigate and provide findings to the MTS Procurement Manager. The MTS Procurement Manager will respond to the procurement protest accordingly.

Additional DBE Documents (Available from DBELO upon request)

- A. DBE Program Regulations
- B. DBE Program Organizational Chart
- C. Listing of DBE Financial Institutions located within MTS's geographic market area
- D. MTS Goal Setting Methodology
- E. Uniform Report of DBE Awards or Commitments and Payments
- F. DBE Program Related Third-Party Contractor Clauses and Forms

Original Policy approved on 12/6/84.

Policy revised on 4/28/88.

Policy revised on 4/25/91.

Policy revised on 1/26/95.

Policy revised on 10/16/97.

Policy revised on 8/12/99.

Policy revised on 8/10/00.

Policy revised on 9/27/01.

Policy revised on 7/25/02.

Policy revised on 3/11/04.

Policy revised on 7/22/04.

Policy revised on 2/16/12.

Policy revised on 7/16/15.

Policy revised on 7/26/18.

Policy revised on 7/25/19

Policy revised on 10/14/21

Policy revised on 6/20/2024

Policy revised on 3/13/2025

Attachments: Exhibit A – DBE Policy Statement

Exhibit A – MTS Board Policy No. 26

DBE POLICY STATEMENT

San Diego Metropolitan Transit System (MTS) has established and adopted a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), Title 49, Code of Federal Regulations, Part 26 "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs (49 CFR Part 26)." MTS has received Federal financial assistance from the Department of Transportation, and as a condition of receiving this assistance, MTS has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy of MTS to ensure that DBEs as defined in 49 CFR Part 26 have an equal opportunity to receive and participate in MTS's DOT-assisted contracts.

It is also MTS policy to:

1. Ensure nondiscrimination in the award and administration of all MTS contracts and subcontracts;
2. Create a level playing field by which DBEs can compete for and perform in MTS's DOT-assisted contracts;
3. Ensure that the MTS DBE Program is narrowly tailored in accordance with applicable law and current legal standards, including the Ninth Circuit Ruling in *Western States Paving vs. Washington State Department of Transportation*;
4. Ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
5. Help remove procurement and contracting barriers, which impede DBE participation in MTS DOT-assisted contracts;
6. Monitor and enforce contractors' compliance in meeting established goal objectives and program requirements;
7. Assist in the development of DBEs and Small Businesses to increase their ability to compete successfully in the market place outside the DBE Program; and
8. Ensure MTS contractors and subcontractors take all necessary and reasonable steps to comply with these policy objectives.

MTS has designated Deputy General Counsel as the DBE Liaison Officer (DBELO). In this capacity, the DBELO is responsible for implementing all aspects of the DBE program.

This signed and dated policy statement expresses MTS's commitment to pursuing the objectives of the DBE Program.

Sharon Cooney
Chief Executive Officer

Date