

Introduction

The Port of Oakland's Social Responsibility Division has engaged Rosales Business Partners, LLC, and Julian Gross Consulting, LLC, to assist the Port in consideration of enhancements to its Non-Discrimination and Small Local Business Utilization Policy (the "Policy"). The consulting team submitted its initial findings and recommendations to the Port in May 2015; the Port's Board of Commissioners considered these recommendations and the Policy at a series of meetings, directing the Social Responsibility Division to proceed with planning certain enhancements to the Policy.

At the Port's Board of Directors meetings in May and June 2015, the Board instructed staff to move forward promptly with enhancements to the Policy.

Our recommendations review the range of upcoming Port Construction projects, and include recommendations regarding concrete enhancements that the Port can implement – primarily on the International Arrivals Building project. Recommendations in Section A of this report pertain to explicit contract requirements and aspects of the award process.

Subsequent sections of this report make recommendations regarding improved outreach and capacity-building measures that the Port can implement outside the award process for any particular contract or set of contracts, and which will benefit target firms (small and local firms) on all Port projects (regardless of funding source), and for non-Port projects as well. Our recommendations regarding improvements in the Port's data gathering and analysis will also improve the Port's Policy implementation, whether or not the Port conducts a formal disparity study.

Our recommendations are preceded by a one-page summary. Our table of recommendations provides detail and a comparison to current Port practices. We have provided Port staff with additional detail and information about other jurisdictions' comparable programs.

Please see Appendix 2 for Rosales Business Partners' memorandum regarding the role of disparity studies in this area.

Summary of Recommendations

A. Enhancement of Port Practices on Upcoming Port Construction Projects.

International Arrivals Building (large, non-federally-funded)

- A.1.** Establish **minimum subcontracting participation levels** for small and local businesses (target firms).
- A.2.** **Award points in best value scoring** system to bidders who exceed minimum participation totals for small and local businesses, and otherwise demonstrate commitment.
- A.3.** Improve **monitoring, enforcement, and data tracking**.

Federally-funded Contracts

- A.4.** **Continue with federal DBE program**, with enhanced outreach, capacity building, and data collection.

Goods and Services Contracts

- A.5.** Implement **bonus points** for bids from certified small and local firms **on goods and services contracts**.

Other Upcoming Contracts (small, non-federally-funded)

- A.6.** Continue **assessments for set-asides** for small and local businesses, with enhanced outreach, capacity building, and data collection.

Antidiscrimination Efforts and M/WBE Utilization.

- A.7.** Consider conducting a **disparity study**.
- A.8.** Implement a **Data Collection Protocol to track use of M/WBEs** at the prime- and subcontractor level, to identify any patterns of discrimination.

B. Enhancement of the Port's Outreach and Capacity-Building Programs.

Outreach

- B.1.** Enhance and maintain a **list of target firms** to ensure maximum outreach.
- B.2.** Expand outreach by **coordinating outreach with agencies** with similar goals.
- B.3.** Upgrade and **expand access to outreach materials** using technology.

Capacity-Building

- B.4.** Implement a **Bonding Assistance Program** for small and local firms.
- B.5.** Continue implementation of **Prompt Payment Policy** to increase working capital for small and local firms.
- B.6.** Implement bonus points for **Mentor-Protégé teams** who submit a bid.
- B.7.** Improve and expand **technical assistance resources**, with a special focus on financial practices and controls.
- B.8.** Upgrade and expand **online training resources**.

C. Enhancement of Data Management Practices.

- C.1.** Implement enhanced **data collection and management** protocols.
- C.2.** Enhance **feedback collection** tools to collect feedback from contractors and staff.
- C.3.** Develop an **Evaluation Plan** with templates for periodic progress reports.

Recommendations and Current Port Practices

Section A: Enhancement of Port Practices on Upcoming Port Construction Projects.

International Arrivals Building.

Recommendation A.1. Establish minimum percentage requirements for utilization of small and local businesses in subcontract awards. These percentages should be based on a close review of type of work needed at the IAB, and past performance on local and small local business utilization on past projects. (Port Staff has conducted this analysis.)

- We recommend that the Port include a minimum percentage for use of businesses located in the Local Business Area (LBA) or Local Impact Area (LIA), and consider adding a minimum percentage requirement for LIA businesses.
- The Port should also include a single, smaller minimum requirement for participation by Small and Very Small Local Businesses (SLBEs and VSLBEs), with VSBLE participation counting double toward this percentage requirement.

Current Policy: The Port's current practice Alternative Project Delivery Approach (APDA) projects involve setting requirements for maximum participation of LIA/LBA businesses and small/very small businesses.

Recommendation A.2. Award points in best value scoring system to bidders who exceed minimum participation totals for small and local businesses, and otherwise demonstrate commitment.

- Allow respondents to commit to exceeding the project's minimum specified percentage requirements, and in such cases to receive additional points in the best value scoring system.
- Require each respondent to include in its response an Outreach and Implementation Plan for engagement of targeted businesses; and require respondents to demonstrate past performance in retaining targeted businesses on past projects and responses. Respondents with strong responses in these areas can receive points in the best value scoring system for contract award.

Current Policy: Under the APDA, respondents can receive financial incentives for exceeding minimum participation levels, and can receive points in the best value scoring process for a strong Outreach and Implementation Plan and past performance.

Recommendation A.3. Improve monitoring, enforcement, and data tracking. Improve oversight and enforcement of contract requirements related to utilization of small and local businesses, and real-time tracking of utilization of small and local businesses during implementation.

Assess liquidated damages if contractors do not abide by commitments of bid specifications and initial responses.

Current Policy: Contract compliance staff reviews and monitors small and local business utilization, yet has few formal reporting requirements except for the Oakland Army Base project and the Port's federally funded (airport improvement program (AIP) projects. Both are accomplished through use

of spreadsheets with limited technology support.

Federally-funded Contracts.

Recommendation A.4. Continue with DBE Program and Benefit from Enhanced Outreach. Terms of federal contracts prohibit the Port from implementing the bulk of its Policy on federally-funded projects. The enhanced capacity-building measures that we recommend in Sections B and C below will assist small and local businesses in all their projects, including federally-funded projects operated by the Port.

Current Policy: Terms of federal grants and contracts generally prohibit bid preferences or requirements to utilize small or local businesses. Instead, federally-funded projects are required to implement the federal Disadvantaged Business Enterprise (DBE) program. There is a small business component in the DBE program, which is mandated by the federal government to utilize small business entities; however, there are no goals presiding over this mandate at this time. The DBE program, however, sets an overall race-neutral goal to reach minority and women-owned firms.

Goods and Services Contracts

Recommendation A.5. Bonus Points on Goods and Services Contracts for Bids from Target Firms Implement a 5% rating bonus for bids from certified small and local firms for goods and services contracts.

Current Policy: The Port does not currently have a bonus preference system for target firms bidding on goods and services contracts.

Other upcoming contracts.

Recommendation A.6. Assess Contracts for Set-Asides. The Port should make an individualized assessment of each contract, and determine the appropriateness of setting aside the contract award for targeted businesses, under the Policy. As with federally-funded contracts, the enhanced capacity-building measures that we recommend in Sections B and C below will assist small and local businesses in remaining projects coming up at the Port. See Appendix 1 for list of upcoming contracts.

Current Policy: Engineering currently practices the assessment of projects for specific SBE set-asides as stand-alone bidding and also carving out portions from existing larger projects in progress, for separate contract awards.

Antidiscrimination Efforts and M/WBE Utilization.

Recommendation A.7. Disparity Study and/or Contract Equity Program. The Port's first step should be to make a decision regarding whether to proceed with a disparity study. (See Rosales Memo.) If the Port does not proceed with a disparity study, the Port should consider adopting a program modeled on EBMUD's Contract Equity Program, which is aimed at preventing race and gender discrimination in contracting and subcontracting by establishing goals for utilization of businesses owned by all demographic groups.

Current Policy: The Port has not conducted a disparity study.

Recommendation A.8. Implement a Data Collection Protocol for M/WBEs. Improve data-gathering practices regarding use of M/WBEs at the prime and subcontractor level.

Current Policy: The Port currently provides optional opportunities for businesses to list their race/ethnicity and gender in the Port's certification database and prevailing wage compliance database (MyLCM). As a requirement of the procurement of federally funded projects, quarterly reports are submitted reflecting DBE/M/WBE utilization.

Section B: Enhancement of the Port's Outreach and Capacity-Building Programs.

Outreach

Recommendation B.1. Enhance and Maintain List of Target Firms. Identify additional state, local, federal data sources that can be mined for additional target firms to add to list. This may include firms that are not currently certified, but are eligible to be certified as small and/or local. Develop protocol for creating a list of available, local firms to target when the scope of work is outside existing lists. Develop data protocol for validating/adding/expunging firms from list.

Current Policy: The staff does currently have an outreach list. However, there is an opportunity to identify and add additional small and local firms. This effort will be coordinated with data management improvements and the results of a disparity study (if approved). Will require an upfront investment of staff time and resources, but will result in long-term reduction in staff time and resources in maintaining an updated list of available target firms.

Recommendation B.2. Expand Outreach/Partner with Other Agencies. Coordinate outreach with local agencies that share the same goal of a healthy, vibrant community of small and local firms, through cross-posting of opportunities and co-branded events. The Port will expand its reach and local firms will be presented with more resources and opportunities. Suggested agencies to partner with include EBMUD, AC Transit, and BART.

Models for collaboration include the San Diego International Airport (SAN) and EBMUD. The San Diego International Airport leverages its participation in a local public agency consortium, which includes a number of public agencies that pool resources, to host quarterly outreach and networking events for small businesses, with the goal of pairing prime contractors with subcontractors across procurement areas.¹ EBMUD conducts business forums, including the Annual Construction Management Series (7-weeks) co-hosted with Bay Area Builders Exchange, Turner Construction Company, and Union Bank, in addition to participating in numerous community events

¹ Airport Cooperative Research Program, A Guidebook for Increasing Diverse and Small Business Participation in Airport Business Opportunities, p.73

and business expos.

Current Policy: The Port currently coordinates and participates in outreach events with other agencies. The Port belongs to the East Bay Interagency Alliance (EBIA) for the purpose of sharing information between agencies. The agencies involved include The Port of Oakland, the City of Oakland, Alameda County, and the Alameda County Transportation Commission. However, outreach is not project specific, rather a sharing of upcoming projects.

Recommendation B.3. Upgrade and Expand Access to Outreach Resources Using Technology. Use technology to upgrade and expand outreach materials, including access to materials and information provided at workshops to those who could not or cannot attend in-person through webinar services and online video archives. Partner with other agencies (i.e. AGC, ethnic chambers, etc.) to deliver the materials to their constituencies.

Current Policy: The Port does not currently offer a recording of its workshops online.

Capacity-Building

Recommendation B.4. Implement a Bonding Assistance Program. An effective bonding program would not only help firms secure bonding for a particular Port RFP, but help build the areas within the firm that make it “bondable” going forward. A bonding assistance program addresses “the credit, character, and capacity needs of small businesses that seek to become bond-ready, increase capacity, and compete for projects.”²

During focus groups conducted in the last year at the Port, potential contractors identified lack of access to bonding and capital as major obstacles. Bonding requirements can be rigorous (e.g., financial strength, trade references, working capital). Services that help make the firm more “bondable” include individual counseling to firms, especially an assessment of financial practices and controls. The technical assistance can help build firm capacity and will not only help the firm qualify for bond guarantees, but will make the firm more competitive for other opportunities.

Bonding assistance programs vary on the dollar amount of guarantees, as well as the additional capacity-building services offered.

San Diego “San Diego International Airport’s (SAN’s) Bonding and Contract Financing Assistance Program has helped some contractors get bonding, sometimes more than once. Some participants in this program are now able to bond on their own, having established a track record.”³

- Assistance in assembling bond submittal pack
- Bond guarantees up to 40% of the bond amount or \$750,000, whichever is less.

² Airport Cooperative Research Program (ACRP), A Guidebook for Increasing Diverse and Small Business Participation in Airport Business Opportunities.

³ ACRP, page 44.

- Loan guarantees to banks up to 50% of loan amount, or \$750,000 whichever is less.
- Accounting assistance.
- Contractor-focused Group Seminars

Los Angeles The City of Los Angeles, LAWA, LADWP, and the Port of Los Angeles together administer a bonding assistance program, which offers:

- Bid, performance, and payment bond guarantees to surety companies.
- Subsidies for the preparation of financial documents.
- Payment for funds control services (aids in the timely disbursement of funds through third-party funds administrator).
- Individual counseling and workshops on bonding, financing, and business management.

Current/Past Policy: A bonding program existed in the past, but lapsed due to prohibitive administrative costs and low utilization. The bonding program administrator attended each project pre-bid meeting to convey the bonding and finance availability offered by the Port.

Recommendation B.5. Prompt Payment Policy and Access to Capital. The implementation of a prompt payment policy will help address the concerns of small, prime contractors of maintaining enough working capital to successfully complete the project. It will also ensure subcontractors, who are often in the small and very small categories, get paid on time.

The following prompt payment policy is in the process of being implemented at the Port: “Payment is made within 10 days of receipt of the approved invoice. Prime Contractor pays (first tier) subcontractors no later than 5 working days after receipt of the Progress Payment. Then Prime is to report to the Port indicating amounts paid to first tier subcontractors.”

There is a national movement, the SupplierPay pledge, to encourage large corporations and agencies to develop ways to assist their small business suppliers in addressing financial challenges. “SupplierPay builds on the success of the Federal Government’s QuickPay initiative, which President Obama launched in 2011. QuickPay requires federal agencies to expedite payments to small business contractors with the goal of paying within 15 days and as a result of QuickPay, [there has been] well over \$1 billion in cost savings for small businesses since 2011, leading to greater investment and job creation. SupplierPay is the private sector’s equivalent, where companies have committed to pay small suppliers faster or help them get access to lower cost capital.”⁴ Other local agencies such as the City of Oakland and City of San Francisco have also implemented prompt payment policies.

Current Policy: This policy is in the first stages of implementation. The NDSLBP directed the implementation: “Port will implement a Prompt Payment Program to insure timely payment to contractors and consultants upon receipt of properly documented invoices or other contract billings. As part of this program, the Port will require that subcontractors, subconsultants, and

⁴ <https://www.whitehouse.gov/the-press-office/2014/07/11/president-obama-announces-new-partnership-private-sector-strengthen-amer>

suppliers in turn receive timely payments from the contractor or consultant after the Port has made payment. [Page 10]”

Recommendation B.6. Implement a Mentor-Protégé Program. We recommend that the Port implement bonus points in the bid process for a mentor-protégé team bid. A Mentor-Protégé program will help build the capacity of small, local businesses by encouraging established firms to partner with target firms.

A potential program will require the Port to have clear expectations for the mentor and protégé, a MOU template and/or requirements approved by the Port, a clear incentive for the mentor (bonus points in a bid process), and accountability measures to ensure the mentor and protégé fulfill their obligations.

The City of San Francisco’s program focuses on the following categories: Organizational/Structural, Leadership Development, Financial/Business Infrastructure, Insurance/Bonding, Networking/Business Community Engagement.⁵ Specific areas include:

- Accounting
- Advertising
- Business Development
- Contract Opportunities
- Financing
- Interview Process Coaching
- Labor Compliance
- Networking
- Proposal/Bid Submittal
- Project Team Development

The mentor-protégé teams can decide the areas of focus from above or propose additional focus areas.

Current Policy: The Port does not currently have a Mentor-Protégé program requirement or offer bid preferences to contractors that have one. This program will require staff resources to establish mentor-protégé expectations, a sample MOU, and to monitor/validate that the expectations are being met before the bid process and during the contract period.

Recommendation B.7. Improve and Expand Technical Assistance Program. Partner with external partners for additional resources with a special focus on financial practices and controls. The San Francisco PUC’s Center for Contractor Existence serves as an example. The Center works collaboratively with “other City agencies and government programs as well as community based organizations, non-profits, foundations, the private sector, and trade associations to more readily

⁵ <http://www.sfgsa.org/Modules/ShowDocument.aspx?documentID=12979>

meet the needs of the small, local businesses that all of these partners seek to serve.”

Current Policy: The Port does not currently have a formal relationship with any community agencies to provide technical assistance, but does refer firms to other agencies (e.g., SBA). The Port does not currently provide technical assistance on financial practice and controls. The Port does offer owner controlled insurance program (OCIP) to contractors.

Recommendation B.8. Improve and Expand Online Training Resources. Enhance resources available online by adding on-demand video of Port workshops, as well as linking to additional resources

Current Policy: The Port does not currently offer these resources online.

Section C: Enhancement of Data Management Practices.

Capacity-Building

Recommendation C.1. Implement Enhanced Data Collection and Management Protocols An enhanced data management system will streamline the process of providing data on the contracts awarded by the Port. The focus of data collection will be on the characteristics of the firms receiving the contract award. An enhanced system will report on the *number* and *dollar* of Port contracts broken down by the following dimensions:

- prime contractor and subcontractor
- small business enterprises (SBE) and very small business enterprises (VSBE)
- disadvantaged business enterprise (DBE)
- minority business enterprise (MBE) and woman owned business enterprise (WBE)
- firms located in the local impact area (LIA) and the local business area (LBA)
- city
- county
- “New” – whether a firm is interacting with the Port for the first time
- workforce (entire crew of prime and all subcontractors) composition by gender, ethnicity, and location.

A key component of any effort to streamline the data management process is the creation (or use, if Oracle integration or a custom module is possible) of unique identifiers for each firm. This will allow for the creation of a relational database (a collection of data sources that can be tied together for analysis).

Current Policy/Practices: SRD is not integrated with the Port’s Oracle system. Running reports on small and local business utilization is a time-consuming and manual process. The lack of data coordination and standardization makes it difficult to track the impact of new policies and requires significant staff time. Any program enhancements should be implemented concurrently with data collection and management enhancements. This recommendation requires an upfront investment of staff time and resources to design the system to meet the outlined goals.

Recommendation C.2. Feedback Collection Tools for Staff, Prospective Contractors, Successful

Bidders. Implement the use of a cloud-based survey tool to collect feedback on outreach, capacity building tools, bonding assistance, bid process, etc. from staff, potential bidders and successful bidders. The goal is to collect information that will inform a continuous improvement cycle and identify and address obstacles as quickly as possible.

Current Policy: The staff does currently collect feedback as a general practice. Feedback is solicited on selective projects/efforts. This enhanced feedback collection will streamline the process through online tools and incorporate the feedback into evaluation report templates recommended in C.3.

Recommendation C.3. Evaluation Plan with Templates for Periodic Progress Reports. The goal is to generate periodic reports as means of evaluating success, but also as a way to streamline the reporting process.

Current Policy: The federally-funded contracts require periodic progress reports and so there is a protocol in place. Reports on small and local business utilization are run on an ad hoc basis and require extensive manual processing.

APPENDIX 1: Upcoming Federally-Funded Projects, Anticipated During FY 2015-2018

Project	Amount	Projected Date
Runway 12-30 Rehabilitation	\$28,000,000	Design Q2 2016 Bid FY16-17
Taxiway Tango, APR RON, APR TX, ARRF, APMS	\$3,940,000	Design FY16-17 Bid FY17-18
Taxiway Bravo 2, Taxiway Romeo, Service Road TWA, APMS	\$1,370,000	Design FY16-17 Bid FY17-18
Taxiway Victor Centerline Lights	\$1,500,000	Design Q2 2016 Bid FY16-17
North Field Aprons L820, L810, L710, Executive Terminal, L410, APMS - (Note: Construction scheduled for FY2019)	\$500,000 (design)	Design FY17-18
Taxiway Juliet and Papa, APMS	\$740,000	Design Q2 2016 Bid FY16-17
Replace North Field Taxiway Signs	\$2,000,000	FY16-17
Terminal 1 GSE Electrification	\$4,000,000	Design Q1 2016 Bid Q2 2016
ARFF Truck	\$2,200,000	FY16-17

APPENDIX 2: Memorandum from Rosales Business Partners Regarding the Role of Disparity Studies

An economic analysis known as a “disparity study” is a powerful tool for a public entity to ascertain whether firms owned by racial minorities and women in their market area(s) are enjoying equal access to and participation in the agency’s contracts.

The components of a disparity study include: (1) a determination of the geographic area(s) which comprise the agency’s “relevant markets” from which the “interested” and “capable” firms are located; (2) an in-depth inquiry on the firms utilized by the public entity during a specific and recent time frame (e.g. the past three fiscal or calendar years); (3) a comprehensive analysis of the firms deemed “interested” in accessing the agency’s business opportunities as prime contractors, sub-contractors, consultants and vendors/suppliers and their “capacity” to perform such opportunities; (4) an analysis which compares the utilization of minority- and women-owned businesses (MBE/WBEs) on the agency’s contracts awarded during the study period to what those businesses might be expected to receive based on their availability for that work; (5) a gathering and examination of anecdotal evidence and marketplace practices; and (6) stakeholder engagement.

We identify the pros and cons of embarking upon a disparity study project.

PROS

- The results of a detailed, independent disparity study can serve as a diagnostic tool to assist the Port in understanding the demographic makeup of the Port’s current and potential business partners.
- By providing an analysis of MBE/WBE capacity in the area, the disparity study can provide a baseline to use for identification of potential race and gender discrimination (intentional and unintentional) in award of contracts and subcontracts.
- With disparity study results, the Port can assess its own “doing business” efforts with market area companies.
- Disparity study results can provide an understanding of whether and to what extent Port business participation efforts have been effective.
- Disparity study information can assist with the creation of new programmatic tools and strategies, such as direct marketing, firm-to-contract opportunity matching and thus incentivize participation from a larger pool of available firms.
- A disparity study can provide evidence of statistical or substantial significance needed to constitutionally justify the use of race/gender-conscious program measures, although the extent to which such measures can be adopted in California under Proposition 209 is an open question.

CONS

- The undertaking of a disparity study can be costly, and is typically in the \$400K-500K range, although the cost can be mitigated by collaboration with sister agencies embarking upon similar studies and/or taking official notice of the relevant results of a recent, relevant disparity study conducted by a sister agency.
- The due diligence required by a disparity study is complex and commonly commands at least a 6 month investigative effort.
- The results of a disparity study may yield useful information for business participation policies and programs, but may not support federal or state constitutional methods of enacting race/gender based contracting programs.
- A disparity study that demonstrates a constitutional basis for race/gender conscious business participation programs and policies under the U.S. Constitution can nonetheless not meet the stricter requirements under the California Constitution, (i.e. Prop. 209).