

Administrative Rules and Regulations for Implementation of Non-Discrimination and Small/Local Business Utilization Policy for Alternative Project Delivery Approaches

The Executive Director issues the following Administrative Rules and Regulations, pursuant to the authority of the By-Laws of the Board of Port Commissioners, as further supplemented by Non-Discrimination and Small/Local Business Utilization Policy for Alternative Project Delivery Approaches ("APDA Policy") adopted by the Board on June 18, 2002, per Board Resolution No. 02199.

The Port's diverse portfolio of infrastructure projects demands that any administrative rules and regulations accurately implement Board-approved policies, while preserving sufficient flexibility to accommodate new developments in project delivery procedures. Given the complexity and capital-intensive nature of the Port's Maritime and Aviation operations, the most effective implementation strategy for any particular project must be tailored to the unique competitive and technical circumstances of each contract. The Port's Social Responsibility Division working collaboratively with the Engineering Division, must have sufficient latitude to adapt the requirements to each project. Consequently, these Administrative Rules and Regulations provide default minimum requirements that must be met in the absence of more specific requirements contained in the contract documents (including RFQ/RFP) applicable to each particular project. All terms not otherwise specifically defined have the same meaning as set forth in the APDA Policy's Definitions.

Minimum Local Participation Levels

1. For each Alternative Delivery Prime Contract, the Social Responsibility Division and the Engineering Division, shall jointly establish overall minimum local business utilization levels, which may include separate and independent utilization categories based on any reasonable attribute of the work, including but not limited to, defined scope of services, character of services (i.e., professional services vs. trades), project phases, or geographic location of work. The overall minimum local business utilization levels will be based on review and interpretation of the following information:
 - 1.1. Potential availability of LIA/LBA firms.
 - 1.2. The performance base/capability of those firms relative to the scope and cost of the Alternative Delivery Prime Contract.
 - 1.3. The past LIA/LBA participation on similar Port projects (scope and relative size, e.g. building projects and/or projects in excess of \$50 million).
 - 1.4. Past local business participation on other similar projects nationwide.
2. Subject to Section 1, above, the RFQ/RFP will identify separate and independent minimum overall utilization levels as a percentage of the overall contract value for:
 - 2.1. Local business utilization
 - 2.1.1. The minimum proportion of the contract that must be allocated to Local Business Area Business Enterprises and Local Impact Area Business Enterprises, as defined pursuant to Part II of the APDA Policy.

2.1.2. The minimum proportion of the local business utilization level that must be allocated to Small Business Enterprises, as defined pursuant to Part II of the Port's Non-Discrimination and Small Local Business Utilization Policy, approved October 6, 1997.

2.2. Trucking

2.2.1. The minimum proportion of trucking services furnished under the Alternative Delivery Prime Contract that must be allocated to Small Local Trucking firms.

Calculating Local Business Utilization Credit

3. Utilization of local businesses will be calculated based upon payments actually received by certified local businesses, subject to the following qualifications.

3.1. **Geographic Proximity to Project Site.** Project Delivery Prime Contractor will receive credit for its utilization of local businesses based upon the proximity of those businesses to the project site, as follows:

3.1.1. **Local Business Area.** 50% of payments received by businesses qualifying as Local Business Area Business Enterprises, as defined pursuant to Part II of the APDA Policy.

3.1.2. **Local Impact Area.** Payments received by qualifying businesses located in the Local Impact Area:

3.1.2.1. **Local Impact Area Business Enterprise.** 100% of payments received by businesses qualifying as Local Impact Area Business Enterprises, as defined pursuant to Part II of the APDA Policy.

3.1.2.2. **Small Business Enterprise.** 100% of payments received by businesses qualifying as Small Business Enterprises, as defined pursuant to Part II of the Port's Non-Discrimination and Small Local Business Utilization Policy, approved on October 5, 1997.

3.1.2.3. **Very Small Business Enterprises.** 200% of payments received by businesses qualifying as Very Small Business Enterprises, as defined pursuant to Part II of the Port's Non-Discrimination and Small Local Business Utilization Policy approved on October 6, 1997.

3.2. **Truckers.** Notwithstanding Section 3.1, above, Project Delivery Prime Contractor will receive credit for payments received by qualifying trucking businesses only as follows:

3.2.1. **Small Local Truckers.** 100% of payments received by businesses qualifying as Small Local Truckers, pursuant to Sections 21-25, below.

3.2.2. **Small Local Trucking Broker.** 100% of payments received by the broker as its broker's fee, not to exceed 10% of the total cost of the brokered trucking services.

Evaluation of Project Delivery Prime Contractors Regarding Local Business Utilization

The scope of services for any Project Delivery Prime Contractor is not limited solely to delivering the work(s) of improvement described in the plans and specifications, but also includes, as a material term of any Port contract, strictly avoiding any type of prohibited discrimination, maximizing the utilization of local and small local business enterprises. Therefore, in selecting a Project Delivery Prime Contractor, the Port must evaluate not only technical proficiency and past experience, but also the candidate's capacity and ability to satisfy the objectives of the APDA Policy. Set forth below are the default guidelines for the evaluation of a Project Delivery Prime Contractor-candidate's ability to satisfy the objectives of the APDA Policy. These guidelines are not intended to apply to other aspects of a Project Delivery Prime Contractor's qualifications, such as general technical proficiency.

4. **Statement of Compliance.** The RFQ/RFP for any Project Delivery Prime Contractor procurement may specify a date for submission of a Statement of Compliance certifying that the Respondent has read and understands the APDA Policy, including any implementing administrative rules and regulations and will comply with it in its entirety. If no date is specified in the RFQ/RFP, Respondent will submit its Statement of Compliance with its Statement of Qualifications (SOQ).
5. **Basis of Evaluation.** The RFQ/RFP for any Project Delivery Prime Contractor will require the Respondent to furnish detailed information for the purpose of evaluating its capacity and ability to satisfy the objectives of the APDA, as approved by the Director of Social Responsibility. Except as otherwise approved by the Director of Social Responsibility, the RFQ/RFP will require the Respondent to furnish information addressing the following:
 - 5.1. **Past Experience:** Respondent's past experience and activities demonstrating its ability to successfully develop, implement and administer programs intended to foster increased business participation by defined demographic groups, including:
 - 5.1.1. Identify two prior successful projects and furnish for each project the owner's name (including address, telephone number, email address, and name of contracting officer), contract price, date of completion.
 - 5.1.2. Description of the program, including the targeted demographic group(s), description of Respondent's role in development, implementation and administration of the program.
 - 5.1.3. Initial goal set for participation by the targeted demographic group(s), quantification of the results of the program, including explanation for any variance between the initial objective and the final result.
 - 5.1.4. Incremental cost increase to the project as a result of implementing the program including administrative costs incurred for the program, such as overhead and staffing, as a percentage of the total contract price.
 - 5.1.5. Description of innovative methodologies utilized to achieve participation.
 - 5.2. **Community Responsiveness.** Respondent's history of community involvement in the LIA/LBA including but not limited to the following (other local community involvement may also be reported for consideration if no experience in the LIA/LBA):
 - 5.2.1. Participation in local job fairs and local hiring practices; and

5.2.2. Use of local interns on previous projects; and

5.2.3. Mentoring other local businesses on previous projects.

5.3. Preliminary Outreach and Implementation Plan. Respondent's preliminary project-specific plan to achieve the objectives of the APDA Policy, addressing the following:

5.3.1. Overall Contract Goals: Respondent's projected overall minimum local utilization levels, meeting or exceeding the Port's stated levels, which if Respondent is selected, will become part of their contract goals; and

5.3.1.1. Project-by-Project Goals: Respondent's projected project goals if more than one project is included in the Project Delivery Prime Contract, which if Respondent is selected, will become part of their contract goals; and

5.3.1.2. Category Contract Goals: Respondent's projected independent category goals as specified in the RFQ/RFP, which if Respondent is selected, will become part of their contract goals; and

5.3.2. Respondent's projection of availability of local and small local firms at that time.

5.3.3. Respondent must include in their plan, the identification of a dedicated staff person or subconsultant to administer the plan.

5.3.4. Respondent's proposed plans to enhance the Performance Base of participating local and small local businesses (e.g. improving bonding capacity, capitalization, technical proficiency and other strategies).

5.3.5. Respondent's preliminary subconsultant and subcontractor packaging and procurement plans, addressing at least the following:

5.3.5.1. Anticipated scope and cost of individual subconsultant contracts.

5.3.5.2. Anticipated scope and cost of individual trade subcontracts.

5.3.6. Respondent's strategies for achieving the highest level of local and small local business participation through the use of any combination of participation strategies described in Part 6, specifically addressed to particular subconsultant and trade subcontract packages.

5.3.6.1. Respondent's Mentor-Protégé Program as described in section 6.1.2. shall be a mandatory component of any Outreach and Implementation Program.

5.3.7. Respondent's proposed subconsultant and trade subcontractor minimum qualification standards, including, past experience, insurance requirements, bonding requirements, financial capacity, and staffing levels.

5.3.8. Respondent's key commercial terms to which subconsultants and trade subcontractors must agree, such as indemnity, liquidated damages, dispute resolution, exclusivity clauses, and pay-when-paid clause modifications.

5.3.9. Respondents' programs to provide assistance in developing bonding capacity of small local businesses and other financial assistance (e.g., loan guarantees and capitalization).

5.3.10. Respondent's prompt payment plan for subconsultants and subcontractors.

Utilization Strategies

6. Subject to Port's approval, as part of its Outreach and Implementation Plan, the Project Delivery Prime Contractor may employ a variety of participation strategies in order to achieve the contract goals. The Port recognizes the following potential participation strategies as consistent with the overriding objectives of the APDA Policy:

6.1. Mentor-protégé agreement(s) with SBE firms under which the Project Delivery Prime Contractor actively assists the protégé firm with respect to its financial and technical capacity in connection with the project. (Note: Participation of SBEs utilizing this methodology shall not contribute to more than 50% of the small local contract goal for the Alternative Delivery Prime Contract.)

6.1.1. Respondent must describe its process for selecting protégé firms in a manner that ensures a reasonable degree of competition.

6.1.2. Respondent must provide proposed language of a written mentor-protege agreement to be executed between the SBE and the mentoring firm that delineates the rights and responsibilities of each party; and includes:

6.1.2.1. A duration period for the agreement;

6.1.2.2. The objective(s) of the agreement.

6.1.2.3. The kinds of mentor skills provided to the SBE such as:

6.1.2.3.1. Managerial assistance provided (e.g. certified payrolls, project management and supervision, etc);

6.1.2.3.2. Technical Assistance provided (e.g. related computer applications, advanced construction methods and training, etc.);

6.1.2.3.3. Assistance in developing insurance and bonding capacity;

6.1.2.3.4. Financial Assistance (e.g. Loan guarantees and capitalization).

6.1.2.3.5. General commercial terms.

6.2. Require specific levels of LIABE or LBABE participation for a bid to be considered responsive.

6.3. Establish local business preference points, consistent with the Port's NDSLBU policy of October 6, 1997.

6.4. Utilization of MAPLA Small Business Exemption provisions as approved by the Port.

6.5. Utilization of VSBE Program, consistent with the Port's NDSBLU Policy of October 6, 1997.

6.5.1. Prime Builder may, with the approval of the Executive Director, identify contracts for placement in the VSBE Program.

6.6. Respondent may propose additional participation strategies for Port's consideration.

Post-Selection Procedures

7. Except as specified in the Alternative Delivery Prime Contract or otherwise authorized in writing by the Port, the selected Project Delivery Prime Contractor will take the following actions:
 - 7.1. At the time specified in the RFQ/RFP or the contract, the Project Delivery Prime Contractor must submit its Final Outreach and Implementation Plan for achieving the contract goals. If no time is specified in the RFQ/RFP or the contract, the Project Delivery Prime Contractor shall submit its Final Outreach and Implementation Plan within 30 days of any notice that it has been selected to receive the contract. Social Responsibility Division must approve the plan at the time specified in the RFQ/RFP or the contract. If no time is specified, then the plan must be approved prior to final approval of the Alternative Delivery Prime Contract or the Guaranteed Maximum Price, as defined in the RFQ/RFP, whichever occurs later.
 - 7.2. Post Selection Meeting: At the time specified in the contract solicitation documents or the contract, the Project Delivery Prime Contractor must host a publicly-advertised Post-Selection Meeting(s) with local firms to describe the overall project scope and contracting availabilities, the Outreach and Implementation Plan (including processes for participation and selection), and to facilitate local and small business joint venturing, partnering and mentoring relationships. If no time is specified in the RFQ/RFP or the contract, the Project Delivery Prime Contractor shall host the meeting within 30 days of any notice that it has been selected to receive the contract. The meeting should also include general details regarding other contract requirements such as the Maritime and Aviation Project Labor Agreement, OCIP, etc. and any technical assistance or financial assistance that will be available to the local business community. If the Project Delivery Prime Contractor must utilize subconsultant(s) to assist in performing the work of the Alternative Delivery Prime Contract, the Post -Selection Meeting must address the details for subconsultant participation and the selection process for choosing the subconsultants as a part of its Outreach and Implementation Plan.

Construction Phase Requirements

8. Project Delivery Prime Contractor will directly engage any subcontractor solely in its own name and not as an agent, partner, or joint venturer with the Port. Project Delivery Prime Contractor will be solely responsible for achieving the contract goals specified in its approved Outreach and Implementation Plan. In no event will the Project Delivery Prime Contractor's award of a subcontract be deemed an award of a contract by the Port.
9. **Subcontractor solicitation.** Except as specified in the Alternative Delivery Prime Contract or otherwise authorized in writing by the Port, Project Delivery Prime Contractor will utilize the following methods to solicit Project Development General Contractors under an Alternative Delivery Prime Contract:

- 9.1. Advertising, in at least three publications (two local and one trade publication), a Pre-Bid/Pre-Proposal Meeting. The notices should appear at least thirty business days prior to the bid/proposal due date. The advertisement should include at a minimum:
 - 9.1.1. General description of the work and its location; and
 - 9.1.2. The applicable trade subcontract goals for local and small local business utilization; and
 - 9.1.3. Potential sub-work items and/or bid packages; and
 - 9.1.4. Pre-bid/Pre-Proposal meeting date, time and location; and
 - 9.1.5. Bid/Proposal due date; and
 - 9.1.6. Other pertinent project information.
- 9.2. Directed solicitation of interest letters to the local business community (identified through Port's web-based Local Business Database and Contractors Association Mailing list) at least ten (10) business days before the pre-bid or pre-proposal meeting with a brief description of the scope of work, the value of work, the minimum qualifications (i.e. contractor's or professional licenses) necessary to perform the work, the applicable trade subcontract goals for local and small local business utilization, and the pre-bid or pre-proposal meeting date, time and location; and
- 9.3. Outreach to the local business community by scheduling pre-bid or pre-proposal meeting for local firms ten (10) business days prior to the bid or proposal due date. The agenda should include as a minimum:
 - 9.3.1. Local Business Utilization Plan, including trucking needs.
 - 9.3.2. Local business certification process.
 - 9.3.3. Project overview.
 - 9.3.4. Project specifications overview.
 - 9.3.5. Contract requirements.
 - 9.3.6. Bonding requirements.
 - 9.3.7. Insurance/OCIP requirements.
 - 9.3.8. Living Wage Policy, if applicable.
 - 9.3.9. Maritime Aviation Project Labor Agreement or other project labor requirements applicable to the project.
10. Prime Builder shall ensure that its subcontractors of any tier include in their subcontracts the requirement to comply with the applicable provisions of these regulations.

11. **Reporting and Monitoring.** Except as specified in the Alternative Delivery Prime Contract or otherwise authorized in writing by the Port, Project Delivery Prime Contractor must submit to the Social Responsibility Division the following information:
- 11.1. Project schedule specifying the estimated value of the work and bid or proposal due date(s). This information shall be submitted to Social Responsibility Division thirty (30) calendar days prior to advertising the work for bids or proposals.
 - 11.2. Prior to award of a subcontract, a report setting forth the names of the firms proposed to be selected, the basis for selection, and the local business participation achieved. This report shall be solely for purposes of information and monitoring. In no event will Port be deemed to have directed or approved the selection of a particular Project General Contractor or Project Sub.
 - 11.3. Outreach and Implementation Plan Status Reports with each progress payment application. The report will quantify progress to date with specific reference to the approved Outreach and Implementation Plan, including: actual variances, explanation of all variances, projected local business utilization on remaining work, actual payments made to date to local firms and the value of the work completed to date, in a form approved by the Port.
 - 11.4. Interim Exit Reports. Upon substantial completion of work by each Project General Contractor, Project Delivery Prime Contractor will submit to the Social Responsibility Division, a report stating in detail payments received by all tiers of subcontractors that provided professional services, construction, trucking, materials, equipment or supplies, including identification of certified LIABE, LBABE, SBE or VSBE firms.
 - 11.5. Final Program Report. After final completion and prior to acceptance of the work under the Alternative Delivery Prime Contract, as notified by the Port, Project Delivery Prime Contractor will submit to the Social Responsibility Division a report presenting final cumulative total amounts for all categories of information required by Section 10.3 and 10.4, above. The report will be in a form approved by the Social Responsibility Division. The Port's acceptance of the final report will be a condition precedent to Port's final payment and release of retention to the Project Delivery Prime Contractor.
12. **Modification.** Project Delivery Prime Contractor may apply to the Port for permission to modify its approved Outreach and Implementation Plan in order to achieve the purposes of the APDA Policy.
- 12.1. Project Delivery Prime Contractor will adhere to its approved Outreach and Implementation Plan until such time, if at all, that a modification has been approved in writing by both the Social Responsibility Division and the Engineering Division. The application for modification will include the Project Delivery Prime Contractor's proposed amended Outreach and Implementation Plan (with variances from the approved Outreach and Implementation Plan highlighted), explanation for the basis for the request, comparative projections of amounts of incentives/penalties under the approved and the proposed amended Outreach and Implementation Plan, and a description of the impact of the modifications on the approved Outreach and Implementation Plan.
 - 12.2. Port's approval of Project Delivery Prime Contractor's application for modification will be based on consideration of the following factors:

- 12.2.1. The specific alternative delivery method incorporated in the Alternative Delivery Prime Contract.
- 12.2.2. Fluctuations in contractor availability, including, but not limited to, the existence of other major construction projects in the region.
- 12.2.3. The degree to which the proposed amended Outreach and Implementation Plan will serve other Port social responsibility or community involvement goals.
- 12.3. Project Delivery Prime Contractor may modify its approved Outreach and Implementation Plan for the extended use of the VSBE Program by identifying the project, including cost and scope, and the available VSBEs who are qualified to bid. This identification shall act as the application for modification to be approved by the Executive Director.

Incentives Program

13. Project Delivery Prime Contractor may apply in writing to receive incentive payments for exceeding the contract goals applicable to the project.
 - 13.1. **Application.** At any time during the course of the project, but in no event later than 10 days after Port's final acceptance of all work under the Alternative Delivery Prime Contract, Project Delivery Prime Contractor may submit to the Port a written application(s) for incentive payment. The application will consist of one or more bound documents entitled, "Application to the Port of Oakland for Local Business Utilization Incentive Payment", and will contain the following:
 - 13.1.1. Table of Contents
 - 13.1.2. Separately compiled sections for each sub-category of contract goals agreed to in the Alternative Delivery Prime Contract.
 - 13.1.3. Within each separate section, a table listing the following information for each firm for which the Project Delivery Prime Contractor seeks local business utilization credit:
 - 13.1.3.1. Firm name, street address, and telephone number.
 - 13.1.3.2. State Contractors License Board number (if applicable).
 - 13.1.3.3. Amount of actual payments received by the firm under the Alternative Delivery Prime Contract.
 - 13.1.3.4. Amount of any unreleased stop notices affecting the local firm.
 - 13.1.3.5. Amount of any unreleased retention.
 - 13.1.3.6. Indication as to whether the firm has executed a Conditional or Unconditional Waiver and Release Upon Final Payment pursuant to California Civil Code, Section 3262.
 - 13.1.3.7. The amount of local business utilization credit applied for, in accordance with Section 3 of these Administrative Rules and Regulations.

13.1.4. Proposed Incentive Base. Within each separate section, a table listing:

13.1.4.1. Subject to Section 3, the aggregate amount, expressed in dollars, of the Project Delivery Prime Contractor's actual utilization of local businesses achieved to date.

13.1.4.2. Subject to Section 3, the aggregate amount, expressed in dollars, of the overall contract goals agreed to in the Alternative Delivery Prime Contract.

13.1.4.3. The aggregate amount, expressed in dollars, by which the Project Delivery Prime Contractor's actual utilization of local businesses *exceeded* the Project Delivery Prime Contractor's contract goals. Subject to Port's independent verification and the limitations in §12.4, below, this sum will constitute the proposed Incentive Base for calculating the amount of the incentive payment.

13.1.5. Copies of cancelled checks or other verification of actual payment received by all firms for which Project Delivery Prime Contractor seeks credit towards satisfying its obligations shall be made available at the Port's request.

13.1.6. Other information requested by the Director of Social Responsibility.

13.1.7. Certification by the Responsible Managing Officer or Responsible Managing Employee that all information contained in the application is accurate and complete under penalty of perjury.

13.2. **Port Evaluation.** To be entitled to receive incentive payments, Project Delivery Prime Contractor must provide documentation demonstrating that actual local business utilization exceeded the Project Delivery Prime Contractor's contract goals as follows:

13.2.1. The amount of payments actually received by qualifying local businesses exceeded the category contract goals for each separate and independent category set forth in the Alternative Delivery Prime Contract.

13.2.2. Port will independently calculate and verify the Incentive Base (see, §12.1.4).

13.2.3. Subject to Port verification, and upon recommendation by Social Responsibility Division and Engineering Division, the Executive Director will authorize an incentive payment by applying to the Port-verified Incentive Base figure the multiplier specified below.

13.3. **Calculation of Incentives.** Provided that Port concludes that Project Delivery Prime Contractor is entitled to an incentive payment, the amount of the payment will be calculated by applying the following formula:

13.3.1. Port-verified Incentive Base (See, §§12.1.4 and 12.2, above) multiplied by 0.03= Sum of Incentive Payment.

13.4. **Limitations.**

13.4.1. In calculating the Incentive Base, the following shall not be included:

13.4.1.1. Amounts earned by local businesses, but not released.

- 13.4.1.2. Amounts subject to good faith dispute by the local business firm for which the Project Delivery Prime Contractor seeks local business credit.
- 13.4.1.3. Amounts subject to unreleased stop notices, including stop notices provided under the Maritime and Aviation Project Labor Agreement.
- 13.4.1.4. Amounts for which the Project Delivery Prime Contractor fails to provide documentation.
- 13.4.2. Credit towards the achieved local business utilization levels will only be allotted for the work, services and goods directly provided by certified local business(es) as certified by the Port. Payments by local businesses to non-local subcontractors, sub-consultants and suppliers will not result in credit.
- 13.4.3. Local and small local firms that are part of joint ventures will only be credited towards the achieved local business utilization levels for the portion of work performed by the local joint venture partner as part of a bona fide joint venture entity. The joint venture must submit to the Port a copy of its written joint venture agreement, addressing issues such as relative equity positions, allocation of risks and liabilities, and profit allocation.
- 13.4.4. Double-counting prohibited. Except as authorized in writing by Port, Project Delivery Prime Contractor will receive local business credit only once for a single business transaction. Project Delivery Prime Contractor may allocate payments made pursuant to a single contract to different categories of local business utilization as defined the RFQ/RFP, when necessary to accurately reflect the actual services delivered.
- 13.4.5. **Absolute Limit.** In no event will the Port be required to award an incentive payment or payments that exceed 2.5% of the value of any Alternative Delivery Prime Contract.

13.5. **Performance Base Enhancement.** [Reserved.]

13.6. **Mentor-Protégé.** [Reserved.]

Safe-Harbor

14. For those projects, in which the RFQ/RFP specifies subcategories of local business utilization, in addition to the overall contract goals for all work under the Alternative Delivery Prime Contract, the Port will not assess any penalties if the Project Delivery Prime Contractor has achieved the overall contract goals, despite its failure to meet the contract goals for each subcategory.

Penalties

15. The Executive Director is authorized to impose penalties upon any Project Delivery Prime Contractor which has failed to meet the overall contract goals.

16. By executing any Alternative Delivery Prime Contract to which these rules and regulations apply, the Project Delivery Prime Contractor acknowledges:

16.1. Port will suffer economic damage if the overall contract goals are not met.

- 16.2. Because of the nature of the APDA Policy requirements, it would be impractical or extremely difficult to fix the amount of actual damages incurred by the Port because of the failure of the Project Delivery Prime Contractor to achieve the overall contract goals.
 - 16.3. Monetary penalties imposed upon any Project Delivery Prime Contractor, if any, constitute lawful liquidated damages as permitted by California Civil Code Section 1671.
 - 16.4. No anticipated payment to the Project Delivery Prime Contractor constitutes “property” or a “property interest” under the United States Constitution or the Constitution of the State of California.
17. **Procedure.** Prior to actually withholding any payment or portion of payment as a penalty, the Port will provide to the Project Delivery Prime Contractor the following:
- 17.1. Written notice of the Port's intent to impose penalties.
 - 17.2. Amount of the intended penalty.
 - 17.3. Explanation of the basis of the Port's action.
 - 17.4. Date and time upon which the Port's intended action will be implemented, absent a response from the Project Delivery Prime Contractor.
18. **Calculation of Penalty.** For any particular Alternative Delivery Prime Contract, Port will calculate the amount of any penalty based on the following:
- 18.1. Aggregate amount, expressed in dollars, of Project Delivery Prime Contractor's overall actual utilization of local businesses.
 - 18.2. Aggregate amount, expressed in dollars, of the overall contract goals.
 - 18.3. The aggregate amount, expressed in dollars, by which overall contract goals *exceeded* the Project Delivery Prime Contractor's actual utilization levels. The difference will constitute the amount of the penalty that Port will impose on the Project Delivery Prime Contractor.
19. **Willful Failure, Bad Faith, Fraud.** Upon a finding that any Project Delivery Prime Contractor failed to meet the overall contract goals due to its willful misconduct, bad faith or fraud, the Executive Director may take any or all of the following actions:
- 19.1. Termination of the Alternative Delivery Prime Contract.
 - 19.2. Disqualification of the Project Delivery Prime Contractor from future Port contracts.
 - 19.3. Any other lawful action.
20. **Limitations**
- 20.1. In no event will the Penalty Amount be a sum in excess of 3.5% of the value of any Alternative Delivery Prime Contract.

- 20.2. In no circumstances will the Port's failure to notify the Project Delivery Prime Contractor in advance of its potential future exposure to penalties be interpreted to waive the Port's right to impose any penalty. Strictly limited to the circumstances described in this Section 19.2, by executing an Alternative Delivery Prime Contract to which these rules and regulations apply, Project Delivery Prime Contractor waives any reliance upon the provisions of California Evidence Code Section 623, to the extent permitted by law.
- 20.3. To the extent permitted by law, penalties collected by the Port from Project Delivery Prime Contractors will be invested into account(s) for the promotion of social responsibility programs approved by the Executive Director.

21. Advisory Committee

- 21.1. The Project Delivery Prime Contractor shall coordinate and convene an Advisory Committee for the life of the project, the details of which shall be set forth in their Final Outreach and Implementation Plan.
- 21.1.1. The Advisory Committee shall provide at least semi-annual reports to the Port's Executive Director.
- 21.1.2. The scope of the Advisory Committee should not duplicate any other current Port sanctioned committee (e.g. Maritime Aviation Project Labor Agreement Social Justice Committee).
- 21.1.3. The Advisory Committee shall include at least one Port Social Responsibility Division representative, as approved by the Executive Director.

22. Small Local Trucking Program

- 22.1. Identifying Trucking Opportunities in Port Development Projects: For the purpose of the Small Local Trucking Program, trucking is defined as (i) the import and export of construction material, debris, bulk materials (including such items as engineered fill, aggregate, and asphalt concrete) to or from the project site via commercial motor vehicles (including dump truck, double bottoms, flatbeds and any other type of truck tractor and trailer), (ii) where the value of the transport services exceeds one thousand dollars (\$1,000) and (iii) where the origin of the transported items is within a fifty mile radius of the project site.
- 22.2. The Engineering Division in collaboration with the Social Responsibility Division and the Project Delivery Prime Contractor shall monitor the development of Port Development Project plans and specifications to determine whether the Projects provide trucking opportunities. If it is determined that a contract contains trucking opportunities, information related to the trucking opportunities shall be forwarded to Small Local Trucking Brokers.
- 22.2.1. Requirements for Inclusion in the Small Local Trucking Program:
- 22.2.1.1. A Small Local Trucker or Trucking Broker (SLT or SLTB respectively) to be certified by the Port must meet State of California trucking size standards and have a fixed office and yard located within the geographic boundaries of the Local Impact Area or Local Business Area. Post office boxes, temporary locations and moveable work sites will not establish status as a Port of Oakland certified business. Trucking firms that are City of Oakland SLBE certified may be required

to submit additional documents in order to receive Port of Oakland certification as a small local trucker (SLT).

22.2.1.1.1. A Small Local Trucking Broker must act as an agent or intermediary in making contracts for trucking services. An SLTB performs all the duties for procuring trucking services for more than one contractor.

22.2.1.2. Any trucking or trucking broker firm desiring to be included in the Port's Small Local Trucking Program may apply for certification as a Small Local Trucker or a Small Local Trucking Broker. All applicants must submit a completed certification to the Division of Social Responsibility and satisfy one of the following requirements:

22.2.1.2.1. Provide the following documentation:

22.2.1.2.1.1. Those documents listed in the subsequent sections 27.2 and 27.3; and

22.2.1.2.1.2. Truckers Registration/Certification Form; and

22.2.1.2.1.3. Current DMV Motor Carrier Permit; and

22.2.1.2.1.4. Copies of all current vehicle registrations - operational and non-operational; and

22.2.1.2.1.5. Current CHP 407-F Level 1 Inspection form or CHP 343 Safety Compliance Report Form; and

22.2.1.2.1.6. Current Certificate of Compliance with the DOT-FHWA Random Drug and Alcohol Testing Program (49CFR382); and

22.2.1.2.1.7. Proof of current liability insurance to validate status as an active trucking firm; or

22.2.1.2.2. Submit a current City of Oakland Certification as well as the following documents:

22.2.1.2.2.1. Completed Database Questionnaire; and

22.2.1.2.2.2. Truckers Registration/Certification Form; and

22.2.1.2.2.3. Current DMV Motor Carrier Permit; and

22.2.1.2.2.4. Copies of all current vehicle registrations - operational and non-operational; and

22.2.1.2.2.5. Current CHP 407-F Level 1 Inspection form or CHP 343 Safety Compliance Report Form; and

22.2.1.2.2.6. Current Certificate of Compliance with the DOT-FHWA Random Drug and Alcohol Testing Program (49CFR382); and

22.2.1.2.2.7. Proof of current liability insurance to validate status as an active trucking firm.

22.2.1.3. The Division of Social Responsibility shall maintain a current list of certified Small Local Truckers and Small Local Trucking Brokers that wish to participate in the Small Local Trucking Program. The list shall identify each firm with a listing of its operational equipment and respective certification status.

22.2.2. Firms requiring trucking services on Port Development Projects are required to take all necessary steps in accordance with this Program to ensure that Small Local Truckers have an opportunity to compete for and perform trucking work. Steps to be taken are included but not limited to the following:

22.2.2.1. Contractors regardless of tier are required to identify all areas where trucking will be performed as part of their scope of work, including, but not limited to trucking conducted to and from the project site, trucking conducted at night, batch plant hauls, inner-plant hauls and trucking due to extension of time period, amendments and/or change orders; and

22.2.2.2. Contractors must include on their bid documents all trucking brokers that will participate in the contract regardless to the dollar value of the brokers bid and regardless to whether the bidder is requesting any local business preference points for the listed broker; and regardless to whether the broker is contracted with the prime(s), subcontractor(s), supplier(s) or any other firm that is hired after the project start date to perform on the contract; and

22.2.2.3. Contractors shall ensure that they and their subcontractors, suppliers, regardless of tier, have a current signed contract with the local broker(s) performing on the contract that indicates the contract terms agreed upon at bid submission; and

22.2.2.4. Contractors shall not participate in, or allow their subcontractors, and suppliers to participate in illicit conduct including but not limited to price matching, combining trucking with another bid item to lower the bid price, or similar practice.

22.2.3. Requirements for Small Local Trucking Brokers.

22.2.3.1. A trucking broker must be certified in accordance with these Regulations and must demonstrate the ability to broker a contract by possessing the appropriate Brokers License and by being responsible for the management and supervision of the an agreed upon portion of the trucking operation for a particular contract; and

22.2.3.2. Must have a signed contract with the prime contractor, subcontractor and/or supplier, indicating the agreed-upon contract terms as of bid submittal; and

22.2.3.3. Must itself own and operate at least one fully licensed, insured, and operational truck used on the contract; and

22.2.3.4. Cannot perform more than 50% of the actual trucking with its own trucks or workforce on any given contract; and

22.2.3.5. Must utilize truckers on projects in the following order: small local Oakland truckers, small LIA truckers, small LBA truckers and then truckers from the greater Bay Area if there are no small LIA/LBA truckers available. This provision will be applied in accordance with the small local trucker goals.

22.3. Payment of Fees.

22.3.1. The listed trucking broker is the only party who may be compensated for providing trucking brokerage services. The fees for such services shall not exceed more than 5% of the total contract dollars for brokering trucking services.

23. A trucking broker must inform its sub-haulers, independent operators and any other trucking firm that participates on the project of the requirements of MAPLA or any other applicable project labor requirements and of the fees to be paid, such as prevailing wages, payment for stand-by time to/from the project site, prior to the commencement of that firm's participation on the project.

24. Requirements for Substitution of Small Local Trucking Brokers.

24.1. The Port will grant substitution of a listed trucking broker only if the following conditions are met:

24.1.1. The listed broker fails to satisfy its contractual agreement and poses a proven liability to the contractor; and

24.1.2. There is a written request from the contractor to substitute the broker with a small local trucking broker if one is available; or

24.1.3. There is a written statement from the listed trucking broker agreeing to be substituted.

25. Compliance, Monitoring and Penalties.

25.1.1. To ensure compliance with the Small Local Trucking Program the following shall apply:

25.1.1.1. Contractors who contract for trucking services, regardless of tier, shall permit the Port to review all pertinent records and documents; and

25.1.1.2. Trucking brokers must submit on a weekly basis, their daily trucking rosters detailing the truckers used on the project to the Division of Social Responsibility; and

25.1.1.3. Trucking brokers, must submit, within 10 days of completion of each project, a Progress Payment Record for Truckers Form detailing the total amounts received and the amounts paid to all truckers including owner-operators.

25.1.2. Failure to produce the requested documents described above will result in a penalty of 1% of the total contract amount or \$1,000 per day, whichever is less; and

26. Goals, incentives and penalties for small local trucking participation will be established on each project.

27. Local Business Certification

27.1. Persons and entities claiming local business status under this article who are not yet certified as an LIABE, LBABE, SBE or VSBE shall apply to the Social Responsibility Division for this certification at least thirty (30) business days prior to the execution of a contract. The Social Responsibility Division will provide forms for application, determine whether the completed application and documentation presented establishes eligibility for certification, and issue a letter of certification as a Local Business Area Business Enterprise (LBABE), Local Impact Area Business Enterprise (LIABE), Small Business Enterprise (SBE) or a Very Small Business Enterprise (VSBE) or joint venture with any of the above. The Port shall require the following:

27.1.1. The business must be located at a fixed commercial or residential address, which constitutes a business location where administrative, clerical, professional, or other productive work is continuously performed relative to its commercial contracts. A temporary or moveable office, a post office box, or a telephone answering service are not acceptable; and

27.1.2. The business must have located within the LBA or LIA at least one (1) year prior to the certification application date; and

27.1.3. The business must provide evidence of performing prior contracts while based within the LBA or LIA; and

27.1.4. The business must be economically independent and perform commercially useful functions for profit. A business acting as a passive conduit rather than contributing a value added or actual portion of the work performed does not qualify for certification; and

27.1.5. The business must be licensed, where applicable, in the type of work in which it is seeking a contract with the Port of Oakland at least one year prior to the certification application date; and

27.1.6. The business must be *bona fide* with real and continuing business ownership interests which are not created merely for the purpose of meeting the objectives of the Port's Non-Discrimination and Small Local Business Utilization Policy for Alternative Project Delivery Approaches.

27.2. Any business claiming local business or local impact area business status shall provide the following documentation to establish business location and time in business at the location:

- 27.2.1. Valid current business license or tax certificate issued by the city or county where it is located and doing business and dated at least twelve (12) months prior to its certification application. All applicants are required to submit this documentation; and
 - 27.2.2. Previous business license or tax certificate certified for authenticity by the city clerk or county clerk of the jurisdiction which issued it, for purposes of establishing length of time of doing business at the location; and
 - 27.2.3. Copy of current lease; if month-to-month then a letter from the leasing agent and a copy of the last check paid; if home office then copy of Federal Form 8829 or property tax statements; and
 - 27.2.4. Utility bills showing charges to the business at the location during specified time periods; and
 - 27.2.5. Past or current contracts with governmental agencies or private entities for work performed at or from the location; and
 - 27.2.6. Business card with local office address and contact information listed; and
 - 27.2.7. Professional or trade licenses or applicable certificates or permits required by law for doing business and issued by a federal or state governmental agency within the past ten (10) years.
- 27.3. Any business claiming small or very small local business status shall provide the following documentation to establish business location and time in business at the location:
- 27.3.1. Certification by the Social Responsibility Division as a LIABE pursuant to regulations Sections 27.1 and 27.2.
 - 27.3.2. The business also must provide evidence of annual gross receipts not to exceed the following size standards:
 - 27.3.2.1. For Small Business Enterprise (SBE) certification: State small business standards set forth in California Code of Regulations, Title 2, Chapter 4, Subchapter 8, equaling an average annual gross receipts of ten million dollars (\$10,000,000) over the past three (3) consecutive years.
 - 27.3.2.2. For Very Small Business Enterprise (VSBE) certification: an average annual gross receipts not to exceed \$2,000,000 (two million dollars) over the past three (3) consecutive years.
 - 27.3.3. Documentation to provide evidence of gross receipts includes tax returns or other acceptable documentation.

28. Miscellaneous

- 29. No provision of these Administrative Rules and Regulations, any RFQ/RFP, or any contract shall be interpreted to waive the Port's right to amend, revise, revoke or modify these rules and regulations, in whole or in part, at any time without notice.

30. With respect to contractor selection procedures, these Rules and Regulations set forth minimum default requirements for contracts utilizing an alternative project delivery process and shall not be interpreted to limit the right of the Port to include in any RFQ/RFP modified, amended or additional criteria. In the event that these rules and regulations conflict with the requirements of any specific RFQ/RFP the terms of the RFQ/ RFP shall prevail.
31. Unless expressly exempted, all disputes arising from the application of these rules and regulations will be subject to the claims and dispute resolution procedures in the Alternative Delivery Prime Contract.

Definitions

Incentive Base: The difference between the Project Delivery Prime Contractor's actual local business utilization level and the contract goals agreed to in the Alternative Delivery Prime Contract.

Respondent: A party which submits a response to an RFQ/RFP for an Alternative Delivery Prime Contract.