

## **Non-Discrimination and Small Local Business Utilization Policy for Alternative Project Delivery Approaches**

### **I. Statement of Purpose for Policy Enhancement**

It is the policy of the Port of Oakland to encourage and facilitate full and equitable participation by local and small local businesses in contracting opportunities to construct non-federally funded Port development projects approved by the Board for completion by alternative project delivery approaches. It is further Port policy that no discrimination shall be permitted in the utilization of small local businesses in contract work of Port development projects approved for completion by alternative project delivery methods. All contractors are prohibited from discriminating against or granting preferential treatment to any contractor on the basis of race, color, religion, sex, national origin, ancestry, age (over 40), physical or mental disability, cancer-related medical condition, a known genetic pre-disposition to a disease or disorder, veteran status, marital status or sexual orientation, in the performance of Port contracts approved for completion by alternative project delivery approaches.

The Port adopted, on March 4, 1997, as subsequently amended on May 8, 2001, a policy to promote maximum utilization of local businesses in Port contracts. The Port has used preferences for local businesses in the award of Port contracts to achieve this goal.

This policy enhancement extends the Port's Non-discrimination and Small Local Business Utilization Policy to development projects approved for completion by alternative project delivery methods. This policy enhancement provides procedures for maximum utilization of local and small local businesses in the alternative project delivery selection process under circumstances where the preference rating system may be applicable as well as where it may not apply.

Under alternative project delivery methods, the project delivery prime contractor (e.g., design-builder, construction manager at risk, etc.) will have primary responsibility for the application of the Policy on all projects covered under the designated alternative project delivery method. The project delivery prime contractor will also be responsible for ensuring that the rules and regulations governing this Policy are included in, and that contractors performing alternative delivery project work comply with, all their contractual agreements regardless of the tier.

The Executive Director is responsible for implementation of this policy and will issue regulations and standards for the programs adopted by the Port. The Executive Director is authorized to adjust and modify the regulations and may suspend or modify programs when, in consultation with the Director of Engineering and Director of Social Responsibility, it is determined to be in the best interest of the Port to do so.

## II. Definitions

The definitions set forth in the Non-Discrimination and Small Local Business Utilization Policy shall apply to the Alternative Delivery Prime Contract. In addition, unless otherwise specified, the following supplementary definitions shall also apply to Alternative Project Delivery Contracts.

**"Alternative Delivery Prime Contract"** shall mean the aggregate of all work to be undertaken by and through the Project Delivery Prime Contractor under its contract with the Port.

**"Alternative Project Delivery Method"** shall mean any project delivery method used for the design and construction of a Port Development Project that does not conform to the design-bid-build process.

**"Construction Manager at Risk"** shall mean any firm entering a contract with the Port or a Master-Builder to construct a Port Development Project for a guaranteed maximum price or rate in accordance with Project Development specifications, in which the scope of work requires the Construction Manager at Risk to perform (1) preconstruction services throughout the design process of the Project; and/or (2) general contracting services during the construction phase of the Development Project and managing other contractors to perform the work pursuant to one or more contracts awarded.

**"Design-Builder"** shall mean any firm entering a contract with the Port or a Master-Builder in which the scope of work includes both the furnishing of design services for which professional registration is required under the California Business & Professions Code and construction contracting services for which a contractor's license is required under the California Business & Professions Code.

**"LBA or LIA Business Enterprise (LBABE or LIABE)"** shall mean an economically independent and continuing business performing a commercially useful function for profit, which is located within the Local Business Area or Local Impact Area, respectively, as shown by the following:

1. The business must be located at a fixed commercial or residential address which constitutes a business location and where administrative, clerical, professional or productive work is being continuously performed, relative to its commercial contracts, and not a temporary or movable office, a post office box or a telephone answering service; and
2. The location of the business must also have been within the LBA or LIA for at least one (1) year prior to the bid or proposal due date; and

3. The business must have a valid business license or tax certificate from its respective city or county dated at least one (1) year prior to the bid or proposal due date; and
4. The business must have proof of past contracts citing the LBA or LIA business address; and
5. The LBABE or LIABE shall be considered *bona fide* if the business' ownership interests are real and continuing and not created merely for the purpose of meeting the objectives of the Port's Non-Discrimination and Small Local Business Utilization Policy; and
6. The business, in the LBA or LIA, may not act as a passive conduit without contributing a value added or actual portion of the work awarded.

**"Local"** shall mean either the Local Business Area (LBA) or the Local Impact Area (LIA) as appropriate.

**"Local Business Area (LBA)"** shall mean all of Alameda County and Contra Costa County.

**"Local Impact Area (LIA)"** shall mean the area most impacted by Port projects. The LIA includes the cities of Oakland, Alameda, Emeryville and San Leandro.

**"Market Solutions"** shall mean the deployment of principles, practices, ideologies that are germane to the Construction Industry.

**"Master-Builder"** shall mean the person, firm or corporation entering a contract with the Port to complete the construction of multiple Port Development Projects by means of one or more contracts utilizing any of the alternative project delivery or traditional contracting methods described herein.

**"Performance Base"** shall mean a local business's and/or a small local business's good faith estimate of their capability and capacity to timely perform Port Development Project work within their trade or business based on reasonable and measurable criteria established by the Port.

**"Port Development Project"** shall mean for these purposes, any capital improvement project set forth on the Port's Capital Improvement Program list.

**"Project Delivery Prime Contractor"** shall mean the person, firm or corporation entering a contract with the Port to complete the construction of a Port Development Project under an Alternative Delivery Prime Contract. The Project Delivery Prime Contractor includes, but is not limited to a firm contracting with the Port to perform work in the capacity of Construction Manager at Risk, Design-Builder, Master-Builder, etc.

**"Project Development General Contractor (Project General Contractor)"** shall mean a construction contractor who contracts directly with a Project Delivery Prime Contractor.

**"Project Development Subcontractor (Project Sub)"** shall mean a contractor who contracts with a Project Development General Contractor or higher tier subcontractor to complete construction of defined work.

**"Project Development Subconsultant (Project Subconsultant)"** shall mean a consultant who contracts with a Project Delivery Prime Contractor, lower tier Project Development General Contractor or other Project Development Subconsultant to complete work in the nature of professional services.

**"Small Local Trucker"** shall mean a trucking firm that is Port of Oakland certified as a small local trucker (SLT), as described in the Regulations.

**"Small Local Trucking Broker"** shall mean a firm that is Port of Oakland certified as a small local trucking broker (SLTB), as described in the Regulations.

**"Social Responsibility Division (SRD)"** shall mean the Social Responsibility Division for the Port of Oakland.

**"Trucker"** shall mean a business that provides trucking services for profit and includes sub-haulers, independent operators and brokers as these terms are commonly understood within the trucking industry.

### **III. Policy Enhancements**

#### **A. Non-Discrimination in Projects Completed by Alternative Delivery Methods**

The Port strictly prohibits all unlawful discrimination and preferential treatment in the award of contracts, of whatever tier, for construction of Development Projects by Alternative Delivery Methods.

The Port will insure that local impact area business enterprises (LIABEs) and local business area business enterprises (LBABEs) have significant opportunities to submit proposals and/or bids. The process shall be as open, fair and consistent as possible and will be implemented pursuant to the administrative regulations pertaining to this Policy.

## **B. Overall Minimum Local Utilization Levels**

Unless prohibited by state or federal law or regulations, the Port, through its Social Responsibility Division (SRD) and Engineering Division will establish overall minimum requirements for utilization of local businesses for each Alternative Delivery Prime Contract.

The overall minimum local utilization levels established for each Project Delivery Prime Contractor will include an overall minimum local business utilization level and a subset overall minimum small local business utilization level. The minimum level(s) will be expressed as a percentage of the overall value of the Alternative Delivery Prime Contract. A minimum participation level for trucking will also be established, expressed as a percentage of the estimated dollar amount of trucking that will be available for award in the Alternative Delivery Prime Contract.

Minimum local business and small local business utilization requirements for the Alternative Delivery Prime Contract shall be set by the Executive Director, after consultation with the Director of Social Responsibility, the Director of Engineering and the Port Attorney. The Project Delivery Prime Contractor's proposal and ensuing contract with the Port will include minimum local and small local business contract goals that meet or exceed the Port's overall minimum local utilization levels. Included as a condition of the contract, the Project Delivery Prime Contractor's proposal shall include a local and small local business outreach and implementation plan, approved by SRD, which will be specifically tailored to the Port Development Projects and alternative delivery methods to be utilized and will be included as a condition of the contract.

The Project Delivery Prime Contractor shall determine individual project minimum local business utilization levels under the Port Development Project(s) as set forth in the Regulations. These utilization levels must be reviewed by the Director of Social Responsibility, the Director of Engineering and the Port Attorney. Once approved, the Executive Director, or his designee, shall announce the approved individual project utilization levels in open, publicly noticed, meetings. Such determinations shall be made for all such contracts prior to solicitation of proposals or requests for bids, as the case may be, by a Project Delivery Prime Contractor.

The Port, through SRD, will maintain a database of information on local and small local firms' relative availability and performance. The database will be electronically maintained on an on-going basis and will be accessible through the Internet.

### **C. Small Local Trucking Program**

It is the policy of the Port of Oakland that small local truckers shall have maximum commercially reasonable opportunity to participate in the performance of its contracts. The Port recognizes the difficulties small local truckers encounter when competing against larger more established businesses for brokering and trucking opportunities and has implemented a Small Local Trucking Program to assist in the utilization of small local truckers. The Port and its contractors shall take all necessary and reasonable steps in accordance with this policy to ensure that small local trucking firms have the opportunity to compete for and perform work on Port Development Projects.

This Small Local Trucking Policy covers only those trucking firms located within the LIA and LBA. To qualify for inclusion under the Small Local Trucking Policy, an applicant must be certified as such. If so certified, the business will be placed in a pool with other local businesses.

In order to ensure the effectiveness and integrity of the Small Local Trucking Policy, and in accordance with the Port's non-discrimination policy, the Small Local Trucking Policy will be race and gender neutral. Any business seeking inclusion in the pool of small local truckers will be able to apply for certification. Additionally, the Port will monitor the Small Local Trucking Policy by a system of penalties for violations of the policy or regulations, including exclusion from any future bidding on or participation in Port projects.

### **D. Policy Enhancement for Participation by Very Small Businesses**

The Very Small Business Program set forth in the Non-Discrimination and Small Local Business Utilization Policy shall apply, upon approval by the Director of Engineering in consultation with the Director of Social Responsibility, for Alternative Delivery Prime Contracts, in a manner consistent with that described in said Policy. To the extent Board approval is required for placing a project in the Very Small Business Program, under said Policy, the Executive Director is authorized to act for and on behalf of the Board to place contracts in the Very Small Business Program that may be awarded through Project Delivery Prime Contractors.

### **E. Monitoring**

Achievement of the contract goals will be monitored on a regular basis by SRD. The Project Delivery Prime Contractor will report progress on the implementation and outreach plan with progress payment requests. The Project Delivery Prime Contractor may adjust goals, with the approval of SRD and Engineering, to achieve the purposes of this policy. The approval will be contingent upon the adjustments reflecting the specific alternative delivery method involved, market

realities and opportunities or other "social responsibility" or community involvement goals of the Port of Oakland.

The Project Delivery Prime Contractor will be responsible for administering their Port approved outreach and implementation plan.

The progress reports submitted to the Port with progress payment requests from the Project Delivery Prime Contractor will provide, at a minimum, an update on the status of contract activities, percent and dollars of LIA/LBA participation and efforts to promote local participation on the project under the Project Delivery Prime Contractor's outreach and implementation plan.

#### **F. Incentives**

The Executive Director, upon the recommendation of the Director of Social Responsibility and the Director of Engineering, will award incentives for exceeding the contract goals on Alternative Delivery Prime Contracts. Incentives shall apply only after the contract goals have been achieved. The Incentive Program will also apply to other local business initiatives, more specifically, programs to expand local business performance base and to provide mentoring experience for the benefit of small local businesses.

Once the Port enters into a contract with a Project Delivery Prime Contractor, control over the work and opportunities for completing the Project is the responsibility of the Project Delivery Prime Contractor. Formulas for calculating and awarding incentives will be included in the regulations.

#### **G. Penalties**

The Executive Director shall have the authority to impose sanctions on the Project Delivery Prime Contractor upon a finding by the Executive Director of non-compliance by the Project Delivery Prime Contractor or any of its consultants or contractors. As set forth in the regulations, penalties will be assessed for failure to meet and maintain goals.

#### **H. Bonding Program**

The Port may continue to implement a Surety Bond and Loan Program to assist contractors in obtaining bonding and financing to meet the Port's local business utilization levels as more fully set forth in the Non-Discrimination and Small Local Business Utilization Policy.

Selection of a Project Delivery Prime Contractor shall include evaluation of proposals for among other things, the effectiveness of their respective outreach and implementation plans. One component of the evaluation shall include rating proposals for completeness and effectiveness of each respective plan's delineated strategies and programs to provide assistance in developing bonding capacity of small

local businesses and other financial assistance (e.g. loan guarantees and capitalization).

#### **I. Prompt Payment Program**

The Port will require that the Project Delivery Prime Contractor include language in its contracts requiring timely payment to contractors, subcontractors, sub-consultants, and suppliers from higher tier contractors or consultants and alternative dispute resolution provisions for expedited claims resolutions.

#### **J. Management and Technical Assistance Programs**

The Port may co-sponsor and encourage development of programs for training in business skills and business development for owners and operators of small businesses. The Port may also provide networking and other opportunities for prospective participants at all levels of contracting.

### **IV. Implementation**

The Executive Director, with the advice and assistance of the Port Attorney, shall implement this policy and is authorized to adopt rules of practice and procedure and issue regulations reasonably necessary to carry out the provisions of this Policy and effectuate its purposes.