

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

SUSPENSION AND DEBARMENT POLICY

Section 1 Statutory Authority. The San Francisco Bay Area Rapid Transit District is a rapid transit district created by the California Legislature, with authority to exercise the powers and responsibilities necessary to carry out the purposes of its enabling legislation, including, but not limited to, the authority to make, supervise, and regulate Contracts [California Public Utilities Code Sections 28763, 28766, 28768, 28970; 28971].

Section 2 Findings and Objectives.

A. The Board of Directors of the San Francisco Bay Area Rapid Transit District finds that in order to promote integrity in the public contracting processes and to protect the public interest, it will contract only with Responsible individuals and entities. Debarment and Suspension are discretionary actions that, taken in accordance with this policy, are among the appropriate means to effectuate this objective.

B. Toward this end, the District shall have, through this policy, the discretion to exclude from contracting with the District a Contractor who is Debarred pursuant to the Debarment procedure or Suspended pursuant to the Suspension procedure in this policy or who appears on any Suspended, excluded or Debarment list by any local, state or federal government.

C. To protect the public interest the Board of Directors finds that procedures and processes are necessary to ensure that businesses found to be non-Responsible be prevented from contracting with the District.

D. To promote integrity in the public contracting process, and to assure that Contractors doing business with the District are provided proper safeguards and

procedures and to avoid the occurrence of de facto Debarments, a formal Suspension and Debarment procedure is necessary.

E. To ensure compliance with 49 Code of Federal Regulations, Part 26 in federally funded projects and the District's non-federal equity programs, the Board of Directors finds that procedures and processes are necessary to ensure that businesses found to be in violation of federal guidelines for disadvantaged business entity status on federally funded projects and/or found to have misrepresented their small, minority or disadvantaged business entity status be prevented from contracting with the District.

F. As a grantee of federal funds BART is accountable for the use of the funds provided and must comply with the requirements and standards set forth by the Federal Government including the determination of Contractor Responsibility.

G. The serious nature of Debarment and Suspension requires such sanctions to be imposed only if in the public interest for the District's protection and not for the purpose of punishment. The District shall impose Suspension and Debarment to protect its interests only for the causes and in accordance with the procedures set forth in this policy.

Section 3 Definitions. The following terms, whenever used in this policy, shall be construed as defined in this section.

A. “Affiliate” Entities and/or Persons are Affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or a third Person or entity controls or has the power to control both. Indicia of control include but are not limited to: interlocking or overlapping management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees or a business entity organized following the Debarment, bankruptcy, dissolution, or reorganization of a Contractor or entity which has the same or similar management, ownership, or Principal employees as the, Debarred, Ineligible, or voluntarily excluded entity or Person.

B. “BART” or “District” means the San Francisco Bay Area Rapid Transit District acting through its Board of Directors, or through any officer or employee with powers delegated by the Board of Directors or authorized by law.

C. “Benefit” means money, or any other thing of value provided by or realized because of, a Contract with BART. A thing of value includes insurance or guarantees of any kind.

D. “Civil Judgment” means a decision in a civil action at the trial or appellate level by any court of competent jurisdiction, whether entered by verdict, settlement, stipulation or otherwise creating a civil liability for the wrongful acts complained of.

E. “Settlement” means an agreement between BART and a Contractor that releases one or more party’s claims against another party to the agreement. “Contract” means any agreement to provide goods to, or perform any type of work or services for or on behalf of, the District.

F. "Contractor" means entities doing business with the District as defined in the District Contractor Code of Conduct, including but not limited to Persons, partnerships, corporations, joint ventures or other entities who contract directly or indirectly (e.g. through an Affiliate) with, or are seeking to contract with, the District to provide goods to, or perform any type of work or services for or on behalf of, the District. A Contractor includes a contractor, supplier, consultant, subcontractor, subsupplier, subconsultant, vendor, manufacturer, broker or Affiliate.

G. "Contracting Officer" means the District's administrative head of procurement or the Person serving in any successor position or his or her designee.

H. "Covered Transaction" means any procurement program, activity, agreement or transaction with the District, regardless of type, amount or source of funding.

I. "Conviction" means a judgment or conviction of a criminal offense of a type which would give rise to Debarment of the convicted party under the terms of this policy by any court of competent jurisdiction at the trial or appellate level whether entered upon a verdict or a plea and includes a conviction upon a plea of *nolo contendere*.

J. "Debarment" means an action taken by BART which results in a Contractor, and/or any Affiliate of the Contractor, being prohibited from bidding upon, submitting a Proposal for, being awarded, and/or performing work on a Covered Transaction or Related Transactions with the District for a period of up to three (3) years, or longer if circumstances warrant, consistent with the factors provided in 2 CFR Parts 180.860-180.865. A Contractor who has been determined by the District to be subject to such a prohibition is "Debarred."

K. “Debarring Official” means the General Manager of the District who may delegate any of his or her functions under this policy and authorize successive delegations. The Debarring Official is responsible for initiating recommended Debarment actions and obtaining legal advice from the Office of the General Counsel.

L. “Ex Parte Communication” means any communication with a member of the Executive Review Panel, other than by Panel member’s staff, which is direct, or indirect, oral, or written, concerning the merits or procedures of any pending proceeding which is made by a party in the absence of any other party.

M. “Executive Review Panel” means the three-member panel designated by the Debarring Official or the Suspending Official, as the case may be, to preside over Contractor Debarment or Suspension hearings and make findings. Members of the panel shall not have been involved in the investigation of the grounds for Debarment. The term “Executive Review Panel” also means a hearing officer or retired judge appointed in lieu of the three-member panel by the Debarring Official, as authorized by paragraph B. of Section 12, or by the Suspending Official as authorized by paragraph A. of Section 31.

N. “Indictment” means indictment for a criminal offense. Any information or other filing by competent authority charging a criminal offense shall be given the same effect as an Indictment.

O. “Ineligible” means excluded from BART contracting (and subcontracting, if appropriate) pursuant to statutory, Executive Order, policy, or regulatory authority (including the Federal Government).

P. “Notice” means the written communication served on a Contractor, its bonding companies and Affiliates in accordance with Section 8, to initiate a Debarment action or in accordance with Section 20 to advise of a Debarment decision, or in

accordance with Section 30 to initiate a Suspension or advise of a Suspension decision. Notice shall be considered to have been received by the Contractor, its bonding companies and Affiliates five (5) days after being deposited in the U.S. Mail, postage pre-paid, and addressed by BART to the Contractor, its bonding companies and Affiliates' last known addresses based on information provided by the Contractor, its bonding companies and/or Affiliates.

Q. "Participant" means any Person who submits a Proposal for, enters into, or reasonably may be expected to enter into a Covered Transaction. This term also includes any Person who is legally authorized to act on behalf of or to commit a Participant in a Covered Transaction.

R. "Person" means any individual, corporation, partnership, association, member of a joint venture, unit of government or legal entity, however organized.

S. "Preponderance of the Evidence" means proof by information that, compared with that opposing it, tends to the conclusion that the fact at issue is more probably true than not.

T. "Principal" means officer, director, owner, partner, key employee or other Person within a Contractor with significant management or supervisory responsibilities; a Person who has a critical influence on or substantive control over a Covered Transaction, whether or not employed by the Participant or any Affiliate of a Participant.

U. "Proposal" means any response to a solicitation, invitation for bid, request for quote, request for application, request for qualification, request for proposal, invitation to submit a proposal or similar communication by or on behalf of a Contractor seeking to participate or receive a Benefit, directly or indirectly, in or under a Covered Transaction.

V. “Related Transaction” means a transaction related to a Covered Transaction, which assists the Participant in executing a Covered Transaction, regardless of the extent of the influence on or substantive control over the Covered Transaction by the Person performing the Related Transaction. Related Transactions include, but are not limited to, transactions of the Participant with any of the following Persons:

1. Contractors (including direct subcontractors);
2. Principal investigators;
3. Loan officers;
4. Staff appraisers and inspectors;
5. Underwriters;
6. Bonding companies;
7. Appraisers and inspectors;
8. Real estate agents and brokers;
9. Management and marketing agents;
10. Accountants, consultants, investment bankers, architects, engineers, attorneys and others in a business relationship with Participants in connection with a Covered Transaction under a BART procurement or agreement or activity;
11. Vendors of materials and equipment in connection with a BART procurement, agreement or activity;
12. Closing agents;
13. Turnkey developers of projects;
14. Title companies;
15. Escrow agents;
16. Project owners; and
17. Employees or agents of any of the above.

W. “Respondent” means a Contractor or Person against whom a Debarment or Suspension action has been initiated.

X. "Responsible" means having the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform a District Contract.

Y. “Suspension” means action taken by the Suspending Official to disqualify a Contractor temporarily from participating in Covered Transactions and/or Related Transactions with the District. A Contractor so disqualified is “Suspended.”

Z. “Suspending Official” means the administrative head of procurement for the District or his or her designee. The Suspending Official is responsible for Suspending a Contractor after obtaining legal advice from the Office of the General Counsel.

AA. “Voluntary Exclusion or Voluntarily Excluded” means a status, assumed by a Person, who is excluded from participating in Covered Transactions and Related Transactions with the District in accordance with the terms of a Settlement with the District.

BB. “Warning Letter” means a written communication from the District to one or more Persons concerning acts and/or omissions prohibited by this policy.

Section 4 Coverage.

This policy applies to:

A. Any Contractor who has participated, is currently participating, or may reasonably be expected to participate, in a Covered Transaction, irrespective of the source of funding or the date on which the Covered Transaction occurred. This policy shall expressly apply to Covered Transactions that occurred before its adoption by the Board of Directors;

B. Any Contractor who has participated, is currently participating, or may reasonably be expected to participate, in a Related Transaction, irrespective of the source of funding;

C. Any Principal of the Contractors described in paragraphs A. or B.; and

D. Any Affiliate of the Contractors described in paragraphs A. or B..

Section 5 General.

A. The District, after obtaining legal advice from the Office of the General Counsel, shall decide whether to proceed with the Debarment of a Contractor.

B. The causes of Debarment set forth in Section 7 are not intended to be an exhaustive list of the acts or omissions for which a Person may be Debarred; grounds other than those enumerated in this section may be a basis for Debarment.

C. The District may Debar a Contractor for any of the causes set forth in Section 7 using the procedures set forth in this policy. The existence of a cause for Debarment, however, does not necessarily require that the Contractor be Debarred; the seriousness of the Contractor's acts or omissions and any mitigating factors shall be considered in making any Debarment decision.

D. Debarment constitutes Debarment of all divisions or other organizational elements of the Contractor named in the Debarment proceedings, unless the Debarment decision is limited by its terms to specific Affiliates, divisions, organizational elements and/or individuals. The Debarring Official may extend the Debarment decision to include any Affiliates of the Contractor and Persons if they are:

1. Specifically named, and
2. Given written Notice of the proposed Debarment and an opportunity to respond.

E. The BART Board of Directors hereby delegates the Debarment of Contractors to the General Manager or his or her designee.

Section 6 Investigation and Referral.

A. It is the responsibility of all BART employees to report to the Debarring Official any information which would support a cause for Debarment.

B. The Office of the Inspector General shall report to the Debarring Official the results of any investigation by the Inspector General which would support a cause for Debarment.

C. The District shall conduct the inquiry into the cause for Debarment and develop the documentation required by paragraph E of this section.

D. Information concerning the existence of a cause for Debarment from any source shall be promptly reported and referred to the Debarring Official and the Office of the Inspector General . The Debarring Official shall be responsible for deciding whether or not to proceed with Debarment. After consideration, the Debarring Official may issue a Notice of proposed Debarment, pursuant to Section 8.

E. The District shall develop basic documentation that includes, but is not limited to:

1. The name of the specific Respondent(s) against whom the action is being taken;
2. The reason(s) for proposing the Debarment;
3. A short narrative stating the facts and/or describing other evidence supporting the reason(s) for the proposed Debarment;
4. The recommended time period for the Debarment;
5. Copies of any relevant supporting documentation identified under

this section.

F. The Office of the General Counsel is responsible for reviewing the documentation and Notices for legal sufficiency.

G. If as a result of an inquiry into the existence of a cause for Debarment it is the opinion of the Inspector General and/or the BART Police Department that a criminal referral should be made to one or more prosecutorial agencies, they shall cooperate and coordinate in the referral.

Section 7 Debarment of Contractors.

A. The District may Debar a Contractor if it finds, in its discretion, that the Contractor is responsible for any of the following:

1. Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public agreement or transaction;
2. Violation of federal or state antitrust statutes, including those prescribing price fixing between competitors, allocation of customers between competitors, and bid rigging;
3. Commission of embezzlement, theft, forgery, bribery, fraud, making false statements, submitting false information, receiving stolen property, making false claims, obstructing justice, fraudulently obtaining public funds, or attempting to commit any of the foregoing;
4. Performance or conduct on one or more private or public agreements or transactions that caused or may have caused a threat to the health or safety of the Contractor's employees, District employees, any other Persons involved with the transaction, the general public or property;

5. Debarment by any other governmental agency;
6. Violation of federal guidelines for disadvantaged business enterprises on federally funded projects including, but not limited to, violation of 49 Code of Federal Regulations, part 26, *et seq.*, and/or misrepresenting small, minority or disadvantaged business entity status or violation of non-federal District Equity Program Requirements;
7. Noncompliance with the prevailing wage requirements of applicable law, including any pending violations by the Contractor, or any Affiliate of the Contractor;
8. Violation of any District requirements for providing a drug-free workplace;
9. Violation of any nondiscrimination provisions included in any public agreement or transaction;
10. Any other significant labor law violations, including, but not limited to, child labor violations, failure to pay wages, or unemployment insurance tax delinquencies;
11. A violation of a statutory, regulatory, or District policy provision or requirement applicable to a public or private agreement or transaction, including, but not limited to, any violation of the District Contractor Code of Conduct;
12. Violation of any licensing, subletting or sublisting laws;
13. Falsification, concealment, withholding and/or improper destruction of records;
14. Violation of settlement agreements and/or consent decrees

which impose obligations on the Contractor to perform certain activities and/or to refrain from certain acts;

15. Violation of any law, regulation, policy or agreement relating to conflict of interest with respect to government funded procurement;

16. Knowingly or negligently doing business with a Person that is debarred, suspended, ineligible, or voluntarily excluded by any public entity in connection with a Covered Transaction or a Related Transaction;

17. Violation of a material provision of any settlement of a Debarment action;

18. Commission of an act or offense which indicates a lack of business integrity or business honesty;

19. Willful failure to perform in accordance with the terms of one or more contracts;

20. A history of failure to perform, or of unsatisfactory performance of one or more contracts including, but not limited to, default on contracts with the District or any other public agency;

21. Commission of any act or omission which negatively reflects on the Contractor's quality, fitness or capacity to perform a contract with the District or any other public entity, including, but not limited to, deficient performance of contracts, false certifications or statements, fraud in performance or billing, or lack of financial or technical resources;

22. Any other cause of so serious or compelling a nature that it affects the present responsibility of a Contractor.

Section 8 Notice of Proposed Debarment.

A. A Debarment proceeding shall be initiated by Notice to the Contractor, its bonding companies and Affiliates, at least ninety (90) calendar days prior to the date of the Debarment hearing advising:

1. That Debarment is being considered;
2. Of the specific Debarment action proposed;
3. Of the reasons for the proposed Debarment in terms sufficient to put the Contractor, its bonding companies and Affiliates on Notice of the conduct or transaction(s) upon which it is based;
4. Of the cause(s) relied upon under Section 7 for proposing Debarment;
5. Of the provisions of this policy, and any other procedures, if applicable, governing Debarment decision making;
6. That the Contractor, its bonding companies and/or Affiliates must submit a written response within thirty calendar (30) days of the receipt of the Notice of Proposed Debarment and the consequence of not providing a response;
7. Of the right to a hearing before the Executive Review Panel;
8. Of the date, time and place of the Debarment hearing;
9. Of the potential effect of a Debarment;
10. That the Contractor, its bonding companies and/or Affiliates, may appear at the Debarment hearing to challenge the Debarment action and that failure to appear may result in a waiver of the Contractor's, its bonding companies' and/or Affiliates' defenses to the Debarment action, and be taken as

an admission by the party failing to appear that the basis for the Debarment is accurate, except to the extent the Contractor, its bonding companies and/or Affiliates challenge the Debarment action solely by means of a written submission; and

11. That the District may submit a reply to the written response of the Contractor, its bonding companies and/or Affiliates within (30) calendar days following receipt of the response made by or on behalf of the Contractor, its bonding companies and/or Affiliates.

B. The Notice to the Contractor, its bonding companies and Affiliates shall be signed by the Debarring Official and transmitted by certified mail, return receipt requested to the last known address provided the District by the Contractor, its bonding companies and Affiliates.

C. The Office of the General Counsel will be consulted for legal advice on all proposed Debarment actions prior to the Notice being sent to the Respondent.

D. Notice to the Contractor, its bonding companies and Affiliates shall be deemed sufficient if it is served by any of the means authorized by Code of Civil Procedure Section 1013, or as otherwise specified in Section 10.

E. Any attempt by the Contractor, its bonding companies and/or Affiliates to affirmatively avoid service by way of example, and not limitation, refusing to pick-up a certified letter, shall be deemed ineffective and shall not prevent the Debarment proceeding from going forward.

Section 9 Documents Submitted to the Executive Review Panel.

A. Respondent's Response.

1. The Respondent shall submit to the Executive Review Panel and serve in accordance with Section 10, a response to the Notice of Proposed Debarment within thirty (30) calendar days of receipt of the Debarring Official's Notice which response shall:

- a. State whether the Respondent will appear at the hearing;
- b. Respond to the allegations of the District. Allegations by the District contained in the Notice to the Respondent may be deemed admitted by the Executive Review Panel when not specifically denied in the Respondent's response; and
- c. Be certified under oath and pursuant to the laws of the State of California by the Respondent, or an officer or director of Respondent that the contents of the response is true and correct.

2. The response may set forth any affirmative defenses and any evidentiary support therefore, to the allegations by the District. Where a Respondent intends to rely on any affirmative defense, it must be set forth in the response.

3. If the Respondent intends to waive its right to a hearing and rely solely on the response in support of its position, the response must clearly state such intention. Failure to clearly state such intention may be deemed a waiver of

the Respondent's defenses to the Debarment action if the Respondent does not appear at the hearing.

4. In the event that the Respondent fails to file a written response within thirty (30) calendar days of receipt of the Debarring Official's Notice in accordance with this section, the allegations of the District may be deemed admitted, the Executive Review Panel may enter an order of default and transmit it to the Debarring Official. The Debarring Official's decision shall thereafter issue, with service on the parties.

B. Reply by the District. The District may submit to the Executive Review Panel and serve in accordance with Section 10, a reply to the Respondent's response not later than thirty (30) calendar days after receiving the Respondent's response.

C. Stipulations. The parties are encouraged to meet and resolve as many matters as possible by stipulated agreement prior to the hearing. The parties may stipulate as to any relevant matters of fact or law. Stipulations may be received in evidence at the hearing, and when received shall be binding on the parties with respect to the matter stipulated.

D. Document and Submission Requirements.

1. An original and one copy of all documents to be presented to the Executive Review Panel and a list of all witnesses to be called at the Debarment hearing shall be served on the Executive Review Panel no later than ten (10) calendar days before the scheduled hearing, and copies of all documents served on the Executive Review Panel shall be served simultaneously on the opposing party at the specific location designated on the Notice of Debarment.

2. All documents required or permitted under this policy, in addition to being served on the Executive Review Panel in accordance with this section, shall be served upon:

- a. The Office of the General Counsel;
- b. The Respondent or Respondent's representative;

3. Documents served in accordance with this section and Section 10 shall state clearly the party's name and the title of the document. All documents should be typewritten or printed in clear, legible form.

Section 10 Service.

A. Service of documents on the Respondent, including the Notice, shall be made by any reasonable means, including by first class mail, fax, e-mail or delivery to:

1. The Respondent to be served or that Respondent's designated representative or agent, at the last known address;
2. The Respondent's last known place of business; or
3. A Principal of the Respondent.

B. Proof of service shall not be required unless the fact of service is denied under oath and put in issue by appropriate objection on the part of the Respondent allegedly served. In such cases, service may be established by written receipt signed or on behalf of the Respondent to be served, or may be established prima facie by any responsible means, including, but not limited to affidavit or certificate of service of mailing.

C. Service of documents on bonding companies and Affiliates shall follow the procedures set forth in paragraphs A. and B.

Section 11 Time Computation. Any period of time prescribed or allowed by this policy shall include in its computation of the prescribed period, Saturdays, Sundays and national holidays, except that when the last day of the period is a Saturday, Sunday, national holiday or other day that the District’s administrative headquarters is closed, the period shall run until the end of the next following business day.

Section 12 Executive Review Panel Powers and Responsibilities.

A. Debarment proceedings shall be presided over by the Executive Review Panel, as defined in paragraph M. of Section 3. The Debarring Official shall appoint the three members of the Executive Review Panel.

B. At the request of the Debarring Official, the Office of the General Counsel may appoint legal counsel to advise the Executive Review Panel during the Debarment hearing.

C. If the Debarring Official determines in his or her sole discretion that the Debarment proceeding will be unusually complex or is expected to be of extended duration, or for any other reason, he or she may appoint a hearing officer, who may, but is not required to be, a retired judge, to conduct the hearing. Any hearing officer so appointed shall have all of the powers and duties otherwise reserved to the Executive Review Panel.

D. To ensure that the proceedings before the Executive Review Panel are not only fair and impartial, but are conducted expeditiously, it shall have the power to :

1. Regulate the course of the hearing and the conduct of the parties and their counsel;
2. Consider and rule upon all evidentiary and procedural matters pertaining to the hearing, including, but not limited to, setting page limits on

documents that may be submitted;

3. Receive evidence and rule on offers of proof; and

4. Take any other action necessary to protect each party's rights, to avoid delay in the disposition of the Debarment proceeding and to maintain order.

E. Further Powers of the Executive Review Panel.

1. The Executive Review Panel shall conduct a fair and impartial hearing and, to that end, shall, in addition to the powers set forth in paragraph D., have the power to:

a. Schedule the Debarment hearing date, time and place;

b. Postpone the Debarment hearing date;

c. Hold conferences to facilitate the settlement or simplification of the issues by consent of the parties or at the request of a party;

d. Make findings of fact and take Notice of any material fact not appearing in evidence in the record which would properly be a matter of judicial notice;

e. Administer oaths and affirmations;

f. Issue a decision imposing Debarment of the Respondent with respect to future BART transactions, or imposing no sanction; and

g. Recommend to BART staff, if so requested, a course of action to remedy Respondent's past actions which gave rise to the Debarment action.

F. Prohibition Against Ex Parte Communications. Ex Parte communications are prohibited unless:

1. The purpose and content of the communication have been disclosed in advance or simultaneously to all parties involved; or
2. The communication is a request for information to the Executive Review Panel's staff concerning the status of the Debarment action.

Section 13 Debarment Hearing Procedure.

A. Right to Hearing.

1. All Respondents subject to Debarment pursuant to this policy shall be entitled to a hearing at the date, time and place set forth in the Notice.

2. The Respondent may elect to waive its right to a hearing and rely solely on a written response. If the Respondent elects to waive its right to a hearing, such waiver must be clearly stated in the Respondent's response.

However, if the Respondent fails to file a written response as required under Section 9, the allegations of the District shall be deemed admitted, and an order of default shall be entered pursuant to Section 9 A. 4.

3. The Executive Review Panel shall perform no independent collection of evidence and shall render a decision based on the evidence as submitted by the parties, although the Executive Review Panel may take judicial notice of common, uncontested facts.

B. Conduct of Hearing.

1. The hearing shall be informal in nature and members of the Executive Review Panel may ask questions at any time.

2. The hearing shall proceed with all reasonable speed. The Executive Review Panel may order the hearing be recessed for good cause, stated on the record. The Executive Review Panel may, for convenience of the parties,

or in the interest of justice, order that the hearing be continued or extended to a later date.

3. The Respondent and/or its attorney or other authorized representative shall be given an opportunity to appear at the hearing and to submit documentary evidence, present and/or cross-examine witnesses, and offer rebuttal evidence at the hearing. Prior to the hearing, the Respondent is entitled to request the District's complete files with respect to the proposed Debarment, excluding any records or information that are privileged under applicable law.

C. Representation of the Parties.

1. The District may be represented by a member of the staff of the Office of the General Counsel and/or by an attorney assigned by the Office of the General Counsel, as may be appropriate in a particular case.

2. The Respondent may be represented at the hearing as follows:

- a. Individuals may appear on their own behalf;
- b. A member of a partnership or joint venture may appear on behalf of the partnership or joint venture;
- c. A bona fide officer may appear on behalf of a corporation or association upon a showing of adequate authorization;
- d. An attorney who submits a Notice of appearance and representation to the Executive Review Panel may represent the Respondent; or

e. An individual not included within subparagraphs a. through d., above, may represent the Respondent upon an adequate showing, as determined by the Executive Review Panel, that the individual possesses

the legal, technical or other qualifications necessary to advise and assist in the presentation of the Respondent's case.

D. All testimony provided at the hearing shall be under oath.

E. At the request of either the Respondent or the District, the proceedings shall be transcribed by an authorized court reporter. The cost of the transcript of the proceedings shall be paid by the party requesting the transcript, or in the event both parties request the transcript, the cost shall be divided evenly between them.

Section 14 Standard of Proof. The cause for Debarment must be established by a Preponderance of the Evidence.

Section 15 Burden of Proof.

A. The District has the burden of proof to establish the cause for Debarment.

B. The Respondent has the burden of proof to establish mitigating circumstances and any affirmative defenses.

C. Where the proposed Debarment is based upon a Conviction, Civil Judgment, or a Debarment by another governmental agency and the District submits evidence as to the existence of such, the District shall be deemed to have met its burden of proof to establish cause for Debarment.

Section 16 Closing of the Hearing Record.

A. The closing of the hearing record may be postponed by the Executive Review Panel, in its discretion, in order to permit the admission of other evidence into the record after the hearing. In the event further evidence is admitted, each party shall be given an opportunity within a reasonable time to respond to such evidence.

B. Once the Executive Review Panel deems the hearing to be concluded there shall be no further proceedings before it or evidence accepted by it on the cause for

Debarment unless a request is made in writing within three (3) calendar days following the conclusion of the hearing, and good cause shown.

Section 17 Rules of Evidence

A. Every party shall have the right to present its case or defense by oral or documentary evidence and to submit rebuttal evidence. The Executive Review Panel may, within its discretion, permit cross-examination of witnesses on request. The Executive Review Panel may exclude irrelevant, immaterial or unduly repetitious evidence.

B. The Debarment hearing need not be conducted according to technical rules relating to evidence and witnesses except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

C. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but, over timely objection, shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

D. The rules of privilege as set forth in the California Code of Civil Procedure shall apply. The Executive Review Panel has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.

E. The Executive Review Panel shall not have the power or authority to compel any witness or party to give evidence in contravention of any evidentiary

privilege recognized under applicable law, including, but not limited to, the Fifth Amendment privilege against self-incrimination under the Constitution of the United States of America and the attorney-client privilege.

Section 18 Scope of Debarment.

A. Debarment of a Contractor and its Affiliates under this policy constitutes Debarment of all its specifically identified Principals, individuals, divisions and other organizational elements from all Covered Transactions and Related Transactions with the District, unless the Debarment decision is limited by its terms to one or more Principals, individuals, divisions or other organizational elements or to specific types of transactions.

B. As may be appropriate, the Debarment action may include any Affiliate of the Participant that is specifically named and given Notice of the proposed Debarment and an opportunity to respond.

C. The Debarment of a Contractor and its Affiliates under this policy may include the Debarment of any other business that is, has been or will be controlled or owned by the Contractor and its Affiliates or by any entity owned or controlled by a Person or Persons who own a controlling interest in a Contractor and its Affiliates then or at the time the Debarment was imposed.

Section 19 Period of Debarment.

A. Debarments shall be for a period commensurate with the seriousness of the Respondent's conduct, up to three (3) years or longer if circumstances warrant, consistent with the factors provided in 2 CFR Parts 180.860-180.865

Section 20 Debarment Decision.

A. The Debarment decision shall be made within forty-five (45) calendar

days after conclusion of the hearing, unless the Executive Review Panel extends this period for good cause.

B. In Debarment actions where Respondent fails to provide any submission in opposition by the time provided in paragraph A. of Section 9, the Executive Review Panel may, in its discretion, enter an order of default against the Respondent, and Notice shall be provided by the Debarring Official;

C. Written findings of fact shall be prepared if requested by the parties. The Executive Review Panel shall base its decision on the facts as found, together with any information and argument submitted by the parties and any other information in the administrative record.

D. If the Executive Review Panel decides to impose Debarment, it shall forward its decision to the Debarring Official.

E. The Debarring Official shall review the recommendation of the Executive Review Panel and either affirm or modify the recommendation. If the Debarring Official modifies the recommendation, he or she shall document the reason(s) for the modification.

F. The Debarring Official shall, within forty-five (45) calendar days of the close of the hearing, provide Notice to the Respondent which Notice shall include, but not be limited to, the following:

1. Reference to the Notice of proposed Debarment;
2. Whether the cause for Debarment has been established; and
3. If the cause for Debarment has been established:
 - a. Specifying the reasons for Debarment;
 - b. Stating the period of Debarment, including effective

dates;

c. Advising of the scope of the Debarment;

d. If the Debarring Official has modified the recommendation of the Executive Review Panel, stating the reason(s) for the modification; and

e. Stating the time period in which the Respondent may submit an appeal.

G. The Notice to the Respondent shall be in writing, signed by the Debarring Official, and transmitted by certified mail, return receipt requested. The Office of the General Counsel will be consulted for legal advice on all Debarment actions prior to the Notice being sent to the Respondent.

Section 21 Appeal of Final Determination.

A. Any party may request review of the Debarment decision by filing a written appeal with the Debarring Official within twenty-one (21) calendar days of receipt of the final Debarment decision. The appeal shall specifically identify the issues and the bases upon which appeal is based and shall be served in accordance with Section 10.

B. Any party to the Debarment hearing opposing the appeal may submit a response opposing review. The response must be submitted to the Debarring Official and served in accordance with Section 10 within fourteen (14) calendar days of the receipt of the appeal.

C. Each complete and timely filed appeal shall be reviewed by the Debarring Official whose determination shall result in one of the following findings:

1. Affirming the decision of the Executive Review Panel;

2. Overturning the decision of the Executive Review Panel;
3. Directing a modification of the decision, including, but not limited to, the scope of duration of any Debarment; or
4. Referring the matter back to the Executive Review Panel for additional proceedings consistent with this policy.

D. The Debarring Official shall issue a determination within thirty (30) calendar days of submission of the appeal, unless notice is given to the Executive Review Panel and the parties extending the period for submitting a determination. The Debarring Official's review shall be limited to the factual record produced before the Executive Review Panel. The determination of the Debarring Official need not be a formal written determination; rather a letter, served upon all parties in accordance with Section 10, setting forth the determination of the appeal.

E. The submission of an appeal shall have no effect on the decision of the Executive Review Panel, unless and until the Debarring Official issues a determination modifying the Executive Review Panel's determination.

Section 22 Review of Debarment Period.

A. After the period for appeal has lapsed, a debarred Respondent may request that the Debarring Official withdraw or modify the terms of the Debarment, if any of the following circumstances arise:

1. Newly discovered material evidence;
2. Reversal of a Conviction or Civil Judgment upon which a Debarment was based;
3. A meaningful change in ownership or management;
4. Elimination of other causes for which the Debarment was imposed;

or

5. Any other reason that is in the best interests of the District.

B. A request for review shall be in writing, supported by documentary evidence and served in accordance with Section 10.

Section 23 The Parties Excluded From Procurement Programs List.

A. The District shall maintain a Parties Excluded From Procurement Programs List. Such list shall contain the names of all Contractors currently suspended or debarred by the District.

B. The District shall periodically, but in no case less than twice annually, forward to the appropriate agency with the state and federal governments the then current Parties Excluded From Procurement Programs List.

Section 24 Effect of Suspension or Debarment.

A. Contractors on the Parties Excluded From Procurement Programs List are excluded from Covered Transactions and Related Transactions as either Participants or Principals, and the District shall not solicit or accept offers from, award Contracts to, or consent to subcontracts with any such Contractors. Contractors on the Parties Excluded From Procurement Programs List are also excluded from conducting business with the District as agents, or Affiliates of other Persons.

B. Contractors included on the Parties Excluded From Procurement Programs List as having been declared Ineligible for receiving Contracts from the District, and if applicable, subcontracts, are Ineligible under the conditions and for the period set forth in the Parties Excluded From Procurement Programs List. The District shall not solicit offers from, award Contracts to, or consent to subcontracts with these Contractors under those conditions and for that period.

C. Contractors included on the Parties Excluded From Procurement Programs List are excluded from acting as individual sureties to any Person, Contractor, Principal or Participant.

D. Each time Proposals are received for any District procurement, the Contracting Officer shall review the list of Parties Excluded from Procurement Programs. Any Proposal received from any Contractor included on the Parties Excluded From Procurement Programs shall be rejected.

E. Proposals or offers received from any Contractor included on the Parties Excluded From Procurement Programs List shall not be evaluated for award nor shall discussions be conducted with any such Contractor during a period of Ineligibility. If the period of Ineligibility expires or is terminated prior to award, the Contracting Officer may, but is not required to, consider such Proposals or offers.

F. Immediately prior to award, the Contracting Officer shall again review the Parties Excluded from Procurement Programs List to ensure that no award is made to a Contractor on such List.

G. Contractors included on the Parties Excluded From Procurement Programs List who participate in BART transactions during the period of their Debarment or Suspension will not be paid for goods, work or services provided and their Contracts shall be deemed void.

Section 25 Imputed Conduct.

A. Conduct of the type described in Section 7 by an officer, director, shareholder, partner, employee, Principal, Affiliate or other individual associated with a Contractor may be imputed to the Contractor when the conduct occurred in connection with the individual's performance or duties for or on behalf of the Contractor, or with the

Contractor's knowledge, approval or acquiescence. The Contractor's acceptance of the Benefits derived from the conduct shall constitute evidence of such knowledge, approval or acquiescence.

B. Conduct of the type described in Section 7 by a Contractor may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the Contractor who participated in, knew of, or had reason to know of the Contractor's conduct.

C. Conduct of the type described in Section 7 by one Contractor participating in a joint venture or similar arrangement may be imputed to the other Contractors participating in the joint venture if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these Contractors. Acceptance of the Benefits derived from the conduct shall be evidence of such knowledge, approval or acquiescence.

Section 26 Continuation of Current Contracts.

A. Notwithstanding the Debarment, Suspension or proposed Debarment or Suspension of a Contractor, the District may suspend the performance of Contracts or subcontracts in existence at the time the Contractor was debarred, suspended or proposed for Suspension or Debarment unless the General Manager or his or her designee, directs otherwise. A decision to terminate a contract should be made only after review by BART contracting and technical personnel and after obtaining legal advice from the Office of the General Counsel to ensure the propriety of the proposed action.

B. The District shall not award options to Contracts or in any way extend the duration of current Contracts, or consent to additional subcontracts, with

Contractors proposed for Suspension or Debarment or included on the Parties Excluded From Procurement Programs List unless specifically approved in writing by the General Manager, or his or her designee, for good cause shown.

Section 27 Restrictions on Subcontracting. When a Contractor debarred, suspended or proposed for Suspension or Debarment is proposed as a subcontractor for any subcontract subject to District consent, the Contracting Officer shall not consent to any such subcontracts.

Section 28 Actions Other Than Debarment. As an alternative to Debarment, one or more of the following actions may be taken:

A. Voluntary Exclusion.

1. BART and a Contractor may agree to a Voluntary Exclusion of the Contractor and any of its Principals and/or Affiliates from BART activities and transactions for an agreed-upon period.

2. Contractors and any of their Principals and/or Affiliates who are Voluntarily Excluded from participation in District transactions shall be placed on the Parties Excluded From Procurement Programs List.

3. Contractors and any of their Principals and/or Affiliates who participate in District transactions during the period of their Voluntary Exclusion will not be paid for goods, work or services provided, and may be considered for Debarment.

B. Settlement. Contractors and any of its Principals and/or Affiliates found to be in violation of one or more provisions of this policy may enter into a Settlement with the District. The Settlement will specifically provide that the Person will refrain from the act(s) or omission(s) that had been found to be in violation of

this policy. A Settlement may be entered into alone or in conjunction with one or more of the procedures described in this section.

C. **Warning Letter.** Where there appears to be an act or omission in violation of this policy, at the sole discretion of the Debarring Official, a warning letter may be issued to the Contractor and any of its Principals and/or Affiliates. In all subsequent transactions between the Contractor and any of its Principals and/or Affiliates and the District, the warning letter will be considered notice concerning such acts or omissions and may be evidence in a subsequent Debarment proceeding.

Section 29 Suspension of Contractors.

A. The Suspending Official may, to protect the public interest, suspend a Contractor or Contractor's Affiliate suspected, upon sufficient evidence, of committing of any act described in Section 7, or subject to an Indictment for any of the causes set forth in Section 7.

B. The District may modify or terminate the Suspension at any time. The District reserves the discretion to lift a Suspension on the basis that it finds insufficient grounds to proceed with Debarment.

C. Suspension is a serious action to be imposed on the basis of sufficient evidence, pending completion of an investigation or legal proceedings, when it has been determined that immediate action is necessary to protect the interests of the District.

D. Suspension constitutes Suspension of all divisions or other organizational elements of the Contractor, unless the Suspension decision is limited by its terms to specific divisions or organizational elements. The Suspending Official may extend the Suspension decision to include any Affiliates of the Contractor if they are:

1. Specifically named; and

2. Given written Notice of the Suspension and an opportunity to respond.

Section 30 Notice of Suspension. When a Contractor is suspended, it and its bonding companies and Affiliates shall be immediately notified of the Suspension by certified mail, return receipt requested. The Notice of Suspension shall include the following information:

A. That the Contractor has been suspended and that the Suspension is based upon an Indictment or other sufficient evidence that the Contractor has committed an act described in Section 7;

B. A description of the actions of the Contractor giving rise to the Suspension sufficient to place the Contractor on notice without disclosing the District's evidence;

C. That the Suspension is for a temporary period pending the completion of an investigation and such proceedings as may ensue;

D. The effect of the Suspension;

E. That, within 30 calendar days after receipt of the Notice of Suspension, the Contractor may submit, in writing, information and argument in opposition to the Suspension; and

F. Except for Suspensions based upon an Indictment, that additional proceedings shall be conducted if the Contractor disputes any material facts supporting the Suspension.

Section 31 Suspension Procedures.

A. Following the imposition of Suspension, the Contractor may within 30 calendar days, submit written information and argument to the Suspending Official in opposition to the Suspension. If it is found that the Contractor's submission

in opposition raises a genuine dispute over facts material to the Suspension, the Suspending Official shall:

1. Constitute the Executive Review Panel or, in lieu thereof, appoint a hearing officer or retired judge, who will exercise all of the powers of an Executive Review Panel; and

2. Notify the Contractor as to the date certain of the hearing on the facts supporting the Suspension.

B. In the event that the Contractor fails to file a written response within thirty (30) calendar days of receipt of the Suspending Official's Notice of Suspension in accordance with this section, the Contractor shall be deemed to have waived any opposition to the Suspension and shall not be entitled to a hearing on the Suspension.

C. The suspended Contractor shall, no later than ten (10) calendar days before the hearing before the Executive Review Panel, provide a written list of proposed witnesses to be presented at the hearing and a description of each writing to be submitted for consideration by the Executive Review Panel. The Contractor proposed for Suspension will be entitled to request and review the District's complete files relating to the proposed Suspension, excluding any privileged records or information under applicable law. Failure by the suspended Contractor to provide the required information within the time required by this paragraph shall be sufficient cause for continuance of the hearing.

D. The Contractor proposed for Suspension and/or its attorney or other authorized representative shall be given an opportunity to appear at the Suspension hearing and to submit documentary evidence, present and/or cross-examine witnesses, and offer rebuttal evidence at the hearing. All testimony provided at the hearing shall be

under oath. Failure to dispute all the bases for the Suspension either in writing or at the time of the hearing shall be deemed an admission that each undenied basis for Suspension is true.

E. At the request of either the Contractor or the District the proceedings shall be transcribed by an authorized court reporter. The cost of the transcript of the proceedings shall be paid for by the party requesting the transcript, or in the event both parties request the transcript, the cost shall be divided evenly between them.

F. The cause for Suspension must be established by a Preponderance of the Evidence. Where the proposed Suspension is based upon a Conviction or Civil Judgment, the standard shall be deemed to have been met.

G. Once the Executive Review Panel or hearing officer deems the hearing to be concluded there shall be no further proceedings before it or evidence accepted by it relating to the Suspension.

Section 32 Suspension Decision.

A. Within ten (10) calendar days of the conclusion of the Suspension hearing, the Executive Review Panel shall submit to the Suspending Official its determination whether the Suspension shall be upheld, modified or terminated.

B. The Suspending Official shall review the findings of the Executive Review Panel and may uphold or modify the recommendation. If the Suspending Official modifies the recommendation, he or she shall document the reason(s) for the modification.

C. The Suspending Official shall provide Notice of the determination to the Suspended Contractor and any Affiliates and bonding companies, which Notice shall be in writing, signed by the Suspending Official, and transmitted by certified

mail, return receipt requested. The Office of the General Counsel will be consulted for legal advice on all Suspension actions prior to any Notices being sent to the Respondent.

Section 33 Period of Suspension.

A. Suspension shall be for a temporary period pending the completion of the District's investigation and any ensuing proceedings, unless sooner terminated by the Suspending Official.

B. If the District does not initiate Debarment proceedings within twelve (12) months after the date of the Suspension Notice, the Suspension will terminate automatically unless there are pending legal proceedings. However, once Debarment proceedings have been initiated, the Suspension may continue indefinitely pending resolution of the Debarment proceeding.

Section 34 Scope of Suspension. The scope of Suspension shall be the same as that for Debarment.

Section 35 Preemption. In the event any Contract is subject to federal and/or state laws that are inconsistent with the terms of this policy, such laws shall control.

Section 36 Severability. If any section, subsection, subpart or provision of this policy, or the application thereof to any Person or circumstances, is held invalid, the remainder of the provisions of this policy and the application of such to other Persons or circumstances shall not be affected thereby.

Section 37 Judicial Review.

A. Judicial review of any final decision reached by the District under this policy shall be conducted by the Superior Court of California pursuant to an administrative writ of mandate as described under Code of Civil Procedure Section

1094.5, but only if the petition for writ of mandate is filed within the time limits set forth in Code of Civil Procedure Section 1094.6.

B. In every final decision reached under this policy, Notice of such final decision shall only be given directly to the Respondent and its bonding companies and Affiliates and such Notice shall explain that Code of Civil Procedure Section 1094.6 governs the time period within which judicial review of any such final decision must be sought. Final Notice to the Respondent and its bonding companies and Affiliates shall include the following statement:

THE DISTRICT HAS REACHED A FINAL DECISION IN THIS ADMINISTRATIVE MATTER . IF YOU CHOOSE TO SEEK JUDICIAL REVIEW OF THE DISTRICT'S FINAL DECISION IN THIS MATTER, SUCH ACTION SHALL BE INITIATED UNDER CODE OF CIVIL PROCEDURE SECTION 1094.5 AND TIME LIMITS FOR FILING SUCH AN ACTION ARE SET FORTH IN CODE OF CIVIL PROCEDURE SECTION 1094.6. IT IS YOUR SOLE RESPONSIBILITY TO TAKE WHATEVER ACTION YOU DEEM APPROPRIATE IN RESPONSE TO THIS NOTICE.