



SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT
INDEPENDENT OFFICE OF THE INSPECTOR GENERAL

BART IMPROPERLY EMBEDDED A BEST-VALUE PROCUREMENT INTO A FIXED-PRICE CONSTRUCTION CONTRACT

INVESTIGATION RESULTS



BART incorporated a best-value procurement process into its fixed-price, sealed-bid procurement for the M-Line Tunnel lighting construction project for a light fixture that was not available in the open market. The contract specifications included numerous requirements, including performance and safety requirements, that the light fixture was expected to meet. BART staff evaluated and approved a fixture that did not meet all the performance requirements and had not undergone the required testing for safety certification. Evaluation and approval of such products are incompatible with a sealed bid procurement and should be done through a separate procurement process.

The light fixture BART approved did not meet several contract specifications that were significant variations from the specifications, including required safety requirements. However, BART did not issue an amendment to the Request for Proposals (RFP) to allow such deviations, which gave the approved manufacturer an unfair advantage over another manufacturer that was also competing to provide the light fixtures for the M-Line Tunnel lighting project.

RELEVANT CALIFORNIA LAW



Under California's Public Contract Code, products that require evaluation must be procured under a process other than a fixed-price, sealed bid procurement, including 1) one that specifically allows items to be added or deducted from the scope of work; 2) a competitive negotiation process for introducing new technologies; 3) a best-value process that considers quality, price, and other elements; or 4) a process that allows for evaluating prototype equipment.

WHY THIS INVESTIGATION MATTERS



Proper procurement practices allow contractors and vendors to have a fair opportunity in the bidding process and they stimulate competition in a manner that allows for the District to receive the best product or service at the best value.

Proper procurement practices also ensure compliance with laws, grants, and safety requirements, and allow for the inclusion of contractors who can bring new ideas and perspectives to the District.

RECOMMENDATIONS IN BRIEF

To support fair competition and compliance with laws and standards, BART management should:

- Establish procedures for evaluating UL or ETL safety certification.
- Do two separate solicitations when construction projects require products not available on the open market.
- Provide a timeline and updated costs for the M-Line Tunnel lighting project.

See page 15 for details.

INVESTIGATION RESULTS CONTINUED

BART agreed to our recommendation to terminate its approval of the light fixture but instead terminated the construction contract with the prime contractor “in Whole” (BART’s emphasis). BART staff later directed the prime contractor to tell the light manufacturer to complete production of the light fixtures the contractor had ordered under a noncancelable, nonrefundable purchase order. Because BART’s Board of Directors approved the original contract, it also should have approved the contract termination, but BART staff did not bring it to the Board to approve the termination. BART paid the prime contractor \$2.4M in contract settlement fees, which included the light fixtures purchase and mobilization costs, and incurred an additional \$12,060 to obtain a field approval from Underwriters Laboratories (UL, now UL Solutions) to confirm that the wire harnesses the manufacturer provided, which were not UL listed, were safe to use in the project.¹

When BART terminated the contract in December 2019, they planned to complete the work in-house, but the project has not yet been done. BART management did not present a cost analysis at the time but did one in early 2022 that showed BART expected it to cost \$7.9M to complete the work. Since then, wage increases for BART staff and inflation on items yet to be procured have caused the cost estimate to increase to at least \$8.5M, and they will continue to increase until the work is completed. Combined with what BART has already paid in settlement fees and other costs for the project, as well as lost time on the light-fixture warranty, it likely would have been more cost effective to complete the work under the original contract.



Follow Up Investigation

This investigative report is a follow up the independent Office of the Inspector General’s (OIG) October 2019 report addressing unmet specifications for light fixtures for the M-Line tunnel lighting project. Our enabling statute requires us to identify operating practices that result in waste and to identify best practices that BART can adopt in its delivery of capital projects. Accordingly, this follow-up investigation also identifies the effects of terminating the contract in its entirety and makes recommendations to prevent similar occurrences in the future.

¹ This report was updated since its release on March 26, 2024, to clarify \$2.4M includes \$1M in mobilization fees. This has no impact on the findings, conclusions, or recommendations.

BACKGROUND

The OIG received a complaint in August 2019 alleging that BART should not have approved the light fixture it did for use in the M-Line Tunnel lighting project because the fixture did not meet several contract specifications. BART used a competitive sealed bid process that included detailed specifications for both the light fixtures and tunnel construction requirements. Because no light fixture was available in the open market that met BART's specifications, the contract required the prime contractor to submit light fixture specifications, performance and safety testing results, and sample fixtures for BART to review and approve for compliance with the contract specifications. Our investigation confirmed that the light fixture BART approved did not meet several contract specifications.² We issued a detailed draft report to the General Manager and subsequently published a summary report in [October 2019](#), which included recommendations that BART:

- rescind its approval of the light fixture.
- ask the contractor to provide new fixture submittals, based on the contract specifications, for BART to review and approve.
- provide modifications, if any, to the specifications prior to requesting the new submittals.
- provide appropriate extensions of time to the contractor, without penalty, to complete the contract work based on the need for BART to review and approve a new light fixture and to provide sufficient lead time for the approved fixture to be manufactured and shipped.

In response to a recommendation in our October 2019 report, BART management agreed to rescind its approval of the light fixture. Instead, BART terminated the contract for convenience, "in whole" (BART's emphasis), with the prime contractor in December 2019. BART management said at a Board meeting that terminating the entire contract was in BART's best interest, BART staff would perform the work, and BART was looking at available options with the goal of moving away from the selected fixture. However, two months later, BART directed the contractor to complete the purchase of 2,182 light fixtures, 100 spare lights, and 50 spare LED drivers under the terminated contract, without issuing a new contract for the purchase. The cost was \$819,567.28 (7 percent) of the terminated [\\$11.6 million contract](#).³ BART management said it bought the fixtures because the contractor had issued a noncancelable, nonrefundable purchase order to the distributor.⁴ BART also thought it would cost more to rescind the order than the price quoted in the order.

² In October 2020, the former inspector general toured the M-Line Tunnel and rode a train through another tunnel where BART temporarily installed some of the lights. The former inspector general confirmed that two of the issues raised regarding the fixture, glare, and galvanization, were not an issue. However, several other features of the fixtures still did not meet the contract specifications.

³ The purchase order cost was \$813,941 (7 percent) of the \$11.6M contract. The increased cost of \$5,626.32 was because the purchase order underestimated the sales tax by one percent.

⁴ Graybar was the authorized distributor for the manufacturer's lights.

Our original investigation focused on the allegations of unmet specifications. This follow-up report focuses on the root causes that led to BART selecting a light fixture that did not fully meet those specifications and allegations in a second complaint we received after completing our original investigation that BART did not achieve the benefits it claimed it would by terminating the contract. The second complaint alleged that the termination resulted in:

- additional and unnecessary costs to BART.
- unnecessary delays in project implementation.
- damage to the contractor, including excessive delays and extra work.
- disadvantages to other suppliers.
- erroneously convincing the Board and the public that self-performing the contract was both possible, advantageous, practical, and feasible, though it had not been technically and economically vetted.

In June 2020, BART staff provided a follow-up response to our original investigation. It focused on showing that the light fixture BART approved was suitable for use in the M-Line Tunnel. Regardless, the fixture did not meet all contract specifications, which was the focus of our investigation findings and a requirement for fixed-price construction contracts.

The contractor had two years to complete the project, including providing and installing light fixtures and doing related construction work. However, because no fixture was available in the open market that met all of BART's specifications, the contractor had to identify a manufacturer that could design a fixture, obtain performance testing and safety certification to demonstrate that the fixture met the contract specifications, and manufacture the newly designed fixture within a timeframe that would provide the contractor sufficient time to complete the work. By terminating the contract, a Measure RR project that was scheduled to be completed in January 2021 has not yet been performed.



Contract Termination Resulted in BART:

- Incurring \$2.4M in costs to the contractor, which included \$1M for mobilization & the light fixtures & \$1.4M in contract settlement fees.
- Incurring \$12K in fees to obtain a field approval from UL to use the wire harnesses (i.e., cord and connector) that were not UL listed.
- Losing \$2.4 million in potential contract savings due to the contractor's bid being 17 percent below the engineer's estimate.
- Giving up \$5.1 million of work that would have been allocated to a local small business and \$1.6 million that would have been allocated to a woman-owned business.

The above costs do not include \$1.0M in fees to a consulting firm for contract resident engineer services; inventory holding costs, which are typically 20 to 30 percent per year of the inventory value, or \$164K to \$246K annually, for the light fixtures that BART purchased but has not yet installed; or BART staff costs associated with initiating and administering the contract or negotiating the settlement agreement. Further, because the light fixtures have not yet been installed, BART has lost more than half of the seven-year warranty that became effective on the purchase date of March 19, 2020.

The contract specifications were not inherently inappropriate. Rather, the process used to procure light fixtures that addressed BART's needs did not comply with public contracting requirements and best practices. The actions taken on this contract exposed several issues related to the contracting process, which are discussed in the findings below.

KEY FINDINGS

Inaccurate Calculation Led to Decision to Purchase Fixtures After Canceling the Contract

BART management said they directed the contractor to purchase the light fixtures because 1) the contractor had issued a noncancelable, nonrefundable purchase order for the fixtures, and 2) it would have cost \$889,704 for the contractor to cancel its \$813,941 purchase order with the distributor for the fixtures.

After receiving BART's approval of the light fixture, the contractor issued a noncancelable, nonrefundable purchase order to ensure the manufacturer would complete the order in a timely manner but put the order on hold in September 2019 pending the results of our original investigation. BART management met with the contractor in October 2019 to discuss our investigation results and BART's plan to rescind its approval of the light fixture. BART asked the contractor to provide a detailed estimate of the manufacturer's actual hard costs incurred up to the order hold date. The manufacturer sent a letter documenting incurred costs of \$491,857 for "development, testing, and sourcing" the light fixtures. This included \$386,982 for on-site inventory (i.e., sourcing) of 150 completed fixtures and all components for the purchase order quantities for the remaining fixtures, which were not yet assembled. The quoted costs did not include a distributor markup or sales tax. The contractor's representative said it was likely they could have negotiated the manufacturer's quoted costs down significantly due to its misrepresentation of the safety certification (see discussion below), but BART did not ask the contractor to do so.



The manufacturer’s letter said the total on-site inventory was in support of the purchase order. However, BART staff believed the manufacturer needed to purchase additional inventory (parts) based on a statement from the contractor that the inventory material costs “appear to represent about 52.9% of the order or 1268 finished fixtures at \$305 cost.” However, only 100 fixtures – those without brackets – were priced at \$305 each; 2,182 were priced at \$328 each. This statement also led BART staff to believe the total cost to rescind the order would be substantially more, and they recalculated that BART would have to pay \$889,704 for the contractor to rescind the purchase order, which was \$75,763 more than the purchase order total and \$397,847 more than the manufacturer’s submitted costs. However, because the manufacturer had purchased the parts needed for all the fixtures, the difference between their claimed costs and the purchase order price was only to assemble the remaining fixtures in the order.

Decision to Cancel the Contract May Not Have Been Cost Effective

As previously mentioned, BART incurred costs of \$3.4M for the terminated contract, including resident engineer services. The contract price, which did not include the resident engineer services because those were provided by a different contractor, would have been \$11.6M. BART staff estimated it would cost \$7.9M to complete the project in-house.

We identified some errors in BART’s calculation and made the following adjustments to BART’s estimated cost to complete the project in house:

<p><u>Inventory Holding Costs</u></p> <p>At least \$164K in expenses for storage, transportation, labor, handling, insurance, taxes, item replacement, shrinkage, and depreciation from keeping the lights in storage.</p>	<p><u>Labor Costs</u></p> <p>Adjusted BART’s estimated labor costs to reflect wage increases that BART employees received since the contract was terminated, which was 3.5 percent in FY23 and will be 3.0 percent in FY 24.</p>	<p><u>Sales Tax</u></p> <p>Added 10.25 percent for sales tax to the amounts in BART’s estimate for small tools and supplies and for other procurement costs.</p>
<p><u>Inflation Factor</u></p> <p>Added an inflation factor of 4.9 percent to BART’s estimate for small tools and supplies and other procurement costs. The factor used is the 12-month San Francisco-Oakland-Hayward Consumer Price Index for January-December 2022.</p>	<p><u>Contingency</u></p> <p>Recalculated the contingency amount after revising the small tools and supplies costs to include the inflation factor and sales tax.</p>	<p><u>Sunk Costs</u></p> <p>Included costs already allocated to the project (i.e., “sunk costs”) for contract settlement fees, the Underwriters Laboratories fees, and inventory holding costs.</p>

The table in Appendix I shows BART's estimated costs to complete the project in house, as well as our adjustments to those costs. Because BART has not yet initiated implementation of this project in house, the costs to complete it continue to increase and are likely to be more than if BART had allowed the contractor to complete the project as scheduled.

Inappropriate Procurement Process

BART management said they issue specifications to the "highest standard," may waive or issue variances for some requirements when evaluating proposals, and that this is a common practice for public works procurements. However, it is contrary to California's Public Contract Code (PCC) for sealed bid procurements, which was the method used for this procurement and requires contracts to be awarded to the lowest, responsible, and responsive bidder. To comply with [PCC](#) regulations, BART would have had to issue an RFP amendment to waive certain requirements in the specifications. The PCC requirements are intended to provide all qualified bidders with a fair opportunity in the bidding process and to stimulate competition in a manner conducive to sound fiscal practices. The PCC requirements also help eliminate favoritism, fraud, and corruption when awarding public contracts. Allowing variances from the specifications is also an indicator of a "want" vs. a "need," as indicated by The Institute for Public Procurement.



Maximizing Competition

"Requirements and specifications should maximize competition. Restrictive specifications that unnecessarily limit the number of potential offerors should be avoided and are often, but not always, a sign of a 'want' over a 'need.'"

~ The Institute for Public Procurement

BART awarded the contract to the lowest responsible and responsive bidder. However, the contract required a separate evaluation process for the light fixtures that were to be used in the project, which is inconsistent with the intent of a sealed bid procurement process and the concept of awarding contracts to the lowest responsible and responsive bidder. The PCC provides some alternatives to the sealed bid process for this type of product:

- [PCC §20103.8](#): Allows items to be added or deducted from the scope of work when the solicitation specifies how the lowest bid will be determined, including consideration of the additive and deductive items.
- [PCC §20217](#): Allows transportation agencies to use a competitive negotiation process when a competitive sealed bid process is not feasible for products undergoing rapid technological changes or for introducing new technologies into operations.
- [PCC §20221\(a\)](#): Specifically allows BART to award public works contracts based on a proposal that provides the best value, based on the combination of quality, price, and other elements in a proposal.

- **PCC §20226:** Specifically allows BART to purchase prototype equipment in an amount sufficient to conduct and evaluate operational testing without further observation of any provisions requiring contracts, bids, or notice; requires approval by two-thirds of the BART Board.

The Federal Transit Administration's (FTA) *Best Practices Procurement & Lessons Learned Manual* recommends using a sealed bid procurement process when a complete, adequate, precise, and realistic specification description is available, and the successful bidder can be selected based on price and price-related factors listed in the solicitation. It recommends using a competitive negotiation process when technical performance is important, which was the case with the tunnel light fixtures that BART wanted to procure. The negotiation process allows for tradeoffs between technical performance and price so a selection can be made based on the best overall combination of the two (i.e., best value) and is consistent with PCC requirements for competitive negotiated or best-value contracting methods.

Had BART followed FTA guidance and PCC requirements, there would have been two procurement processes. In the first procurement, BART would have selected a light fixture that met or came closest to meeting its needs. The second process would have been a competitive sealed bid procurement for the construction phase of the project, with a requirement for the contractor to use the light fixture BART selected in the first procurement. Using separate procurements also would have eliminated placing an inappropriate level of risk on a construction contractor to find a fixture that met BART's specifications when no such fixture was available in the open market, which as noted above, the FTA acknowledges should not occur. It also could potentially have prevented BART's decision to terminate the construction contract.



Contracting Best Practice

"A properly selected contracting method will work in the interests of the procuring agency to provide a product or service that meets the agency's needs at a reasonable price without undue risks to the contractor and without excessive contract administration costs and contractor claims."

~ Federal Transit Administration
Best Practices & Lessons Learned Manual

BART management provided reasons to support why it accepted the light fixture despite it not meeting every specification. Although some of their reasons may be acceptable based on BART determining after issuing the RFP that a fixture that did not fully meet the published specifications would meet BART's needs, doing so circumvented both the PCC's sealed-bid requirements and public procurement best practices. In this situation, it also put a competing manufacturer that attempted to meet the specifications at an unfair disadvantage because that manufacturer did not know they potentially had the option to propose, and for BART to potentially accept, a product that did not meet the contract specifications. Although minor irregularities can be waived, some of the unmet specifications were not minor irregularities and, to be fair to all potential

manufacturers, would have required BART to issue an amendment to the RFP to indicate a change in the minimum specifications. For example, BART accepted something less than what the following specifications required without issuing amendments to the RFP:

- A coloring rendering index (CRI) of 85. The selected fixture had a lower CRI. In response to our investigation, BART staff said a CRI of 85 was not critical to emergency egress on tunnel walkways, and the contractor said the selected manufacturer could provide a fixture with a CRI of 85, but it would be at a higher cost and have a longer lead time.
- A minimum of 80,000 operating hours before reaching the degradation point. The selected fixture had tested to only 54,000 hours at the time of the contract award.

The higher cost associated with providing the required CRI and the significant deficiency in tested operating hours support that neither of those deficiencies were minor irregularities that BART should not have accepted and gave the selected manufacturer an unfair advantage over other manufacturers.

BART Allowed Unmet Safety Requirements to Be Met After Approval

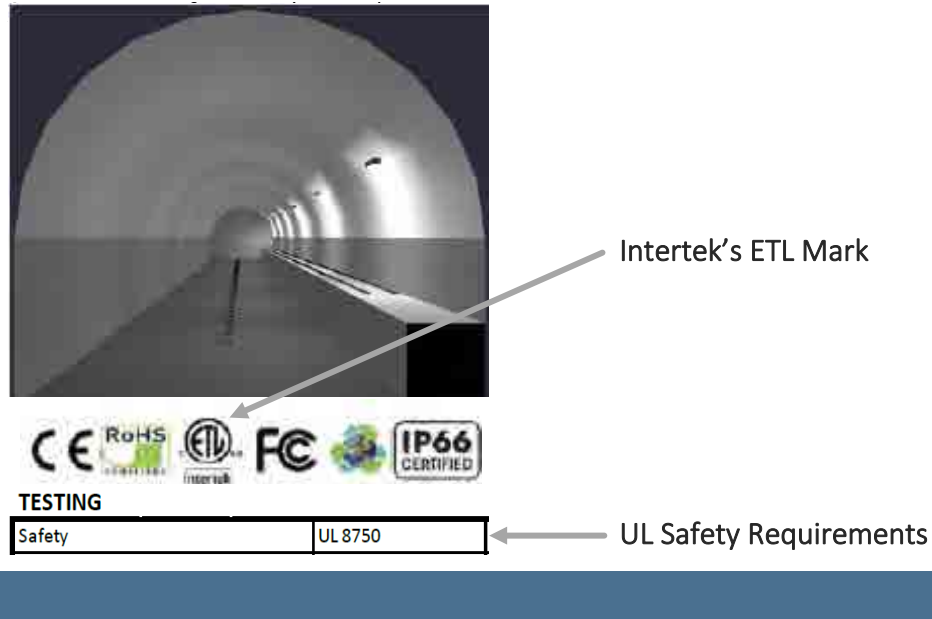
BART approved the light fixture and accepted the accompanying wire harnesses although neither met the UL safety standards required in the contract specifications, which was a significant departure from the specifications. This happened because BART did not have an adequate process for verifying that those standards were met. The process should: 1) require contractors to submit a copy of the UL or ETL certificate that lists the specific safety standards that the product meets, and 2) require BART staff to verify through UL's or Intertek's online database that the product is currently listed. The manufacturer's misrepresentation that its light fixture met the required safety standards would have been sufficient reason for BART to rescind its approval of the fixture. Instead, after learning through our investigation that the fixture BART approved was not safety certified, BART allowed the manufacturer to proceed with the safety certification process.

Selected Fixture was not UL or ETL Listed

BART approved the fixture in July 2019 based, in part, on the manufacturer's misrepresentation that the fixture met the UL safety requirements although the manufacturer had not yet submitted the fixture to an authorized laboratory for safety testing. The RFP required the fixtures to meet the UL 8750 safety standard for light emitting diode (LED) equipment but did not require bidders to provide proof of that safety certification. Both UL and Intertek have online databases that can be used to verify if a product is certified and which standards it has met. BART should have checked Intertek's database since the manufacturer did not submit either a listing certificate or an "authorization to mark" letter. Instead, BART relied on performance testing reports and a brochure the manufacturer submitted to BART that included Intertek's ETL mark and a testing table that

showed the fixture met the UL safety requirements (Exhibit 1). The manufacturer’s submissions were clear misrepresentations that the fixture met BART’s required safety specifications.⁵

Exhibit 1 – Misrepresentation of Safety Specifications



An Intertek representative confirmed that the performance testing it performed on the manufacturer’s fixture was not to certify that the fixture met the safety requirements. To be certified, an Intertek inspector must visit the manufacturing facility and observe the manufacturing process to ensure the product is made in compliance with safety requirements. Intertek does not do this unless and until the manufacturer formally enters its product into Intertek’s certification program, which the manufacturer did not do until June 2019, after it had already submitted the documentation to BART that included the ETL certification symbol. After we notified BART management that the fixture was noncompliant, BART notified the contractor who requested and received additional information from the manufacturer in September 2019 indicating that the deficiency had been cured. However, this statement was also a misrepresentation because Intertek did not certify the fixture until November 2019 – four months after BART approved it for use in the M-Line Tunnel and two months after the manufacturer claimed the issue had been corrected. Intertek does not allow its ETL mark to be used in any manner until it has certified the product and issued an “authorization to mark” letter for the product. Intertek’s representative confirmed that the manufacturer would have known it was not yet authorized to use the ETL mark because it had undergone the certification process in the past for other products.

BART required the manufacturer to submit a sample light fixture for evaluation, but the fixture did not have a label affixed to show that it was ETL listed. The contractor sent an email to the manufacturer in August 2019 requesting an ETL label to put on the sample fixture if the fixtures “match the specification to a T.” The

⁵ Intertek conducts its tests based on UL’s published safety standards. BART accepts the ETL mark as a UL equivalent.

contractor made that statement because of the allegations that the fixture did not meet all the specifications. The manufacturer sent the label, thereby inferring that the fixture met the UL/ETL safety requirements, although it was still undergoing Intertek’s safety evaluation, but did not address if the fixture matched the specification “to a T.”

The repeated misuse of the ETL mark indicates that the manufacturer intentionally misrepresented the status of its ETL safety certifications.

Wire Harnesses also not UL or ETL Listed

After directing the contractor to purchase the light fixtures, BART had to obtain a separate field approval from UL to use the wire harnesses that the manufacturer shipped with the fixtures because those also were not safety certified. Late in our initial investigation, we received an allegation that the wire harnesses the manufacturer provided to BART with the fixtures were not UL or ETL listed. We did not address this issue at the time because we received it after BART management agreed to rescind its approval of the light fixture, which meant that neither the fixtures nor the wire harnesses would be purchased. However, after learning that BART had purchased the fixtures, we investigated this allegation as part of our follow up.

The UL database did not list the wire harness, but the cable and connector were both individually listed as recognized components. Accordingly, the shipping box for the wire harnesses was labeled with the UL Recognized mark, rather than the wire harnesses being individually labeled with the UL Listed mark. UL uses the recognized mark for components that are intended to be installed in another device, system, or end product at the factory, not in the field. Intertek’s representative confirmed that they did not test and certify the wire harness as part of the complete light fixture, which meant the components used in the wire harnesses still needed to be safety tested as a combined unit.



BART had already received the light fixtures and wire harnesses when we confirmed with a UL representative that UL will not certify a product after it has left the factory because UL cannot determine if it was manufactured in compliance with UL’s safety requirements. After we notified BART management that the wire harnesses were not UL listed, they held back \$135,000 of the contractor’s payment for the light fixtures and contacted UL to get a field evaluation and approval to use the wire harnesses. A UL field approval is not the same as certifying and listing a product but allows a product to be used in the specific application for which it was evaluated. The UL evaluation process consists of documentation review, visual and mechanical inspection, suitability for installation in accordance with the adopted installation codes, applicable testing, and an engineering report. Approved products are labeled with an “Evaluated” mark, rather than a listed mark. BART paid UL \$12,060 to obtain the field evaluation. The following table shows the various types of UL markings and what each means:

Examples of UL Marks		
		
<p><u>UL Recognized Mark</u> Used on Product Components</p>	<p><u>UL Listed Mark</u> Used for safety-certified products</p>	<p><u>UL Evaluated Mark</u> Used for products evaluated in the field</p>

BART Required Contractor to Perform Work After Terminating Contract for Convenience “in Whole”

BART’s General Conditions allowed the contract to be terminated for convenience “in whole or in part,” and BART’s termination for convenience letter to the contractor said the contract “is terminated in Whole” (BART’s emphasis). When doing a partial termination, the termination letter must state the portion of work to be completed. When terminating a contract in whole, as BART did, the contract terms and conditions are void for any work not yet performed. BART’s letter told the contractor to **terminate all orders** (emphasis added) and subcontracts; **place no further orders** (emphasis added) or subcontracts; assign to the District all of the right, title, and interest of the contractor under any orders and subcontracts; and **transfer title and deliver to the District the fabricated or unfabricated parts** (emphasis added), work in progress, completed work, supplies, and other material produced as a part of, or acquired in performance of the work.

BART cited three reasons for directing the contractor to complete its purchase of the manufacturer's light fixtures:

- The purchase order was nonrefundable and noncancelable.
- BART would still have to pay the full price of the light fixtures if the order were canceled.
- BART could not direct the contractor to not do business with the manufacturer.

These reasons did not acknowledge that:

- The contractor had suspended the order upon learning the manufacturer had misrepresented the fixture as having the required safety certification, and the manufacturer knew that the order might be canceled for those reasons.
- The manufacturer submitted a buy-out cost estimate that was substantially less than the full price of the purchase order (see previous discussion), which was an indication that it did not expect reimbursement of the full purchase order value.
- The purchase order for the light fixtures was between the contractor and the distributor, not between BART and the distributor. Thus, its terms and conditions, including the provisions that it was nonrefundable and noncancelable, were also between the contractor and distributor. BART could have requested that the contractor transfer its interest in the purchase order to BART under the termination letter directive to assign all of the right, title, and interest of the contractor under any orders and subcontracts to the District.
- Our recommendations for BART to rescind its approval of the light fixtures and obtain new submittals did not mean the contractor could not do business with the manufacturer. The contractor could have asked the manufacturer to provide a new submittal for a fixture that met the contract specifications.
- BART could have rescinded its approval of the fixture based on the manufacturer's misrepresentation of its safety certification. Doing this likely would have resulted in the buy-out cost being substantially less than what the manufacturer submitted, or even nothing at all due to the manufacturer submission of false statements. Rescinding approval of the fixture also would have allowed the contractor to submit a different light fixture for approval and complete the project instead of being terminated for convenience.

Regardless, BART could have avoided the decision to terminate the contract, and the associated costs, altogether by following the PCC requirements for competitively negotiated and sealed bid contracts rather than approving a product that did not meet the contract specifications. Because BART did not do that and the contract was terminated, BART should have issued a new contract to complete the purchase of the light fixtures.

MANAGEMENT RESPONSE

Recommendations	
1.	<p>Recommendation: Establish procedures to verify during the product evaluation process that a product has a current UL or ETL safety certification when contract specifications require a product to meet certain safety requirements.</p> <p>Implementation Date: July 31, 2024</p> <p>Corrective Action Plan: Applicable procedures will be reviewed, and revisions/enhancements will be made to verify the submitted / proposed products have the current UL or ETL safety certification as per the contract specifications and requirements.</p>
2.	<p>Recommendation: When soliciting for a construction that includes installing a product that is not currently available on the open market, do two separate solicitations. The first solicitation should be to design and obtain BART’s approval of the product based on the contract specifications using a negotiated procurement method allowed under the Public Contract Code. BART should purchase the approved product directly to avoid incurring additional mark-up costs by the contractor who will install the product. The second solicitation should be for the project construction with a requirement to use the product approved by BART in the first solicitation.</p> <p>Implementation Date: September 30, 2024</p> <p>Corrective Action Plan: Existing procedures and processes will be reviewed for further improvement opportunities, accounting for best practices and lessons learned. BART will ensure we are using the appropriate contracting method for future purchases. BART will either use two separate solicitations as recommended or use a contracting mechanism such as Design/Build, which would allow for these types of efforts. Alternative contracting methods such as Design/build or Progressive Design/Build contracts identify the methodology to be used to evaluate proposals and include a competitive negotiation process for products not on the open market or design improvements to products available on the market.</p>

Recommendations	
	BART has paid closer attention since the original OIG recommendations and continues to work with the Procurement department and General Counsel’s Office to validate the appropriate contracting mechanism.
3. Recommendation:	Provide a timeline to the BART Board of Directors for when the work will be performed and how, i.e., BART staff or contract, along with updated estimated costs that correspond to that timeline.
Implementation Date:	August 2025
Corrective Action Plan:	The existing inventory will be installed by BART personnel as a compliment to regularly performed maintenance. This work has begun and personnel are expected to finish the existing light installs in the next 18-24 months. In the event BART purchases additional lights or would like a contractor to do further upgrades in the future, staff would go to the Board of Directors at that time.

APPENDIX I – OIG ADJUSTMENTS TO BART’S ESTIMATED PROJECT COMPLETION COSTS

Description	BART’s Estimated Cost	OIG’s Adjusted Costs, Including Labor Increase of 3.5% for FY23	OIG’s Adjusted Costs, Including Labor Increases of 3.5% for FY23 & 3% for FY24
Demolition and construction	\$6,192,931.76	\$6,192,931.85 ¹	\$6,192,931.85 ¹
Adjustment for increased labor costs		<u>\$172,835.94</u>	<u>\$326,166.12</u>
Revised demolition and construction		\$6,365,767.79	\$6,519,097.97
5% for small tools and supplies	\$309,646.59	\$318,288.39	\$325,954.89
Subtotal: Revised Demolition/Construction & Tools & Supply Costs		\$6,684,056.18	\$6,845,052.86
Procurement costs (e.g., lights, wiring, conduit)	\$753,306.21	\$753,306.21	\$753,306.21
Inflation for procurement costs ²		<u>\$36,912.00</u>	<u>\$36,912.00</u>
Revised procurement costs		\$790,218.21	\$790,218.21
Sales tax @ 10.25%		<u>\$80,997.37</u>	<u>\$80,997.37</u>
Subtotal: Revised Procurement Costs	\$753,306.21	\$871,215.58	\$871,215.58
Equipment Costs (also included in Demolition and Construction Costs Above)		\$282,379.05	\$282,379.05
Inflation for equipment costs ²		<u>\$13,836.57</u>	<u>\$13,836.57</u>
Revised Subtotal Based on All Above Adjustments		\$7,569,109.34	\$7,730,105.02
10% Contingency	\$650,257.84	\$756,910.83	\$773,010.50
Revised Costs to Perform Work In House	\$7,906,142.40	\$8,312,182.60	\$8,489,278.95
Sunk costs not included in BART estimate (e.g., contract settlement fees, UL Solutions fee, inventory holding costs) ³		\$2,564,925.46	\$2,564,925.46
OIG’s Revised Project Total ⁴		\$10,877,108.06	\$11,054,204.41
Savings (Excess Cost) to Perform Work In-house		\$743,460.01	\$566,363.66

¹ BART’s estimated cost plus the OIG’s correction for several minor differences of one or two cents each, likely due to rounding.

² Based on the 12-month Consumer Price Index factor of 4.9 percent for January-December 2022

³ To provide an equal comparison with BART’s estimated costs of the terminated contract, the sunk costs listed do not include the resident engineer costs previously cited.

⁴ This revised estimate would increase to \$11,297,417 to account for increased labor costs if the work is not completed before the end of FY 25, thereby reducing the estimated savings to perform the work in house to \$323,151. However, the costs would likely be higher, thereby negating any savings, due to additional inflation increases on the procurement and equipment costs for calendar years 2023 and 2024.

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