

APPENDIX A

DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENTS



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The Transportation District Commission of Hampton Roads (HRT) has established a fair and objective HRT program within which Disadvantaged Business Enterprises (DBEs) can compete for HRT Contracts involving U.S. Department of Transportation (USDOT) funding as prime Contractors, joint venture partners, or Subcontractors and Suppliers. This Appendix provides offerors (bidders and proposers) with information about the DBE program requirements and the responsibilities of offerors and their potential Subcontractors in the solicitation process and during Contract performance. Clarification of the DBE requirements and assistance in completing the forms can be obtained by contacting the HRT's DBE Program Manager, at (757) 222-6000, ext. 6257.

The USDOT program requires that, when a Contract goal for DBE participation is established, offerors must manifest a commitment either to attain or exceed the goal, or to attain the maximum level of DBE participation available which is less than the goal. If the level attained is less than the goal, the offeror must demonstrate that, prior to submittal of the bid or proposal, it exerted good faith efforts to attain the goal. A full discussion of what constitutes good faith efforts is contained in 49 CFR Part 26. Methods of demonstrating good faith efforts may include, as appropriate, the following (the list is not exhaustive or exclusive):

- Soliciting in a timely fashion through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capacity to perform the work of the Contract.
- Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goal will be achieved. This includes, where appropriate, breaking out Contract work items into economically feasible units to facilitate DBE participation, even when the prime Contractor might otherwise prefer to perform these work items with its own forces.
- Providing interested DBEs with adequate information about the plans, specifications, and requirements of the Contract in a timely manner to assist them in responding to a solicitation.
- Negotiating in good faith with interested DBEs. It is the offeror's responsibility to make a portion of the work available to DBE Contractors and Suppliers. The selected portions of work or material needs should also be consistent with the available DBE Contractors and Suppliers, so as to facilitate DBE participation.

Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and



specifications for portions of the work to be performed; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

- An offeror using good business judgment should consider a number of factors in negotiating with Subcontractors, including DBE Subcontractors, and should take a firm's price and capabilities, as well as Contract goals into consideration.

However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the Contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime Contractor to perform the work of a Contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime Contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

- Not rejecting DBEs as being unqualified without sound reasons based on an investigation of their capabilities. The Contractor's standing within the industry, membership in specific groups, organizations, or associations and political or social affiliations (for example, union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the Contractor's efforts to meet the project goal.
- Making efforts to assist DBEs in obtaining bonding, lines of credit, or insurance as required by the Commission or the Contractor.
- Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, etc.
- Effectively using the services of available minority/women community organizations; minority/women Contractors' groups; local, state and federal minority/women business assistance offices; and other private or non-profit organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

General information on the USDOT DBE program, including a discussion of good faith efforts, can be found on the website of the U.S. Department of Transportation, Office of Small and Disadvantaged Business Utilization (OSDBU), <http://www.osdbu.dot.gov/>. The governing regulation, 49 CFR Part 26, can be found at:

http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26_main_02.tpl

POLICY

It is the policy of the Commission that Disadvantaged Business Enterprises as defined in the U.S. DOT Regulations codified at 49 CFR Part 26 shall have the opportunity to fairly compete for and participate in the performance of Contracts and subcontracts financed in whole or in part with Federal funds. HRT shall utilize established procedures to monitor pre- and post-award DBE



participation on HRT Contracts with documented goals; and report the results to the Commission, community stakeholders, state, local, and federal reporting agencies, as requested.

INELIGIBLE FIRMS

If at any time, an offeror or Contractor believes, or has reason to believe, that a proposed DBE has become ineligible due to change in ownership, management, personal net worth or size of the business, the offeror or Contractor shall, within ten (10) days, notify the Commission of that fact in writing. When a commitment has been made to use an ineligible firm, but a subcontract or Contract has not been executed before the ineligibility is identified, the firm's participation will not count toward the DBE Contract goal. The offeror or Contractor must then attain the solicitation goal or Contract commitment through use of one (1) or more eligible DBE firms or demonstrate that it has made a good faith effort to do so, within ten (10) days after its notification to the Commission. Efforts to replace an ineligible DBE firm shall be coordinated with HRT's DBE Program Manager. If certification is completed and the firm is deemed ineligible, no participation credit will be granted for services and supplies rendered for work on the Contract, regardless of the execution of a subcontract agreement. **The Contractor assumes the risk when they utilize a non-certified DBE firm.** If a Contractor has executed a subcontract with the firm prior to notification of the firm's ineligibility, the Contractor may continue to use the firm on the Contract, however the Contractor will not receive credit toward its DBE goal for the firm's work. In this case where Contractor has let a Contract to a DBE that is later ruled ineligible, the portion of the ineligible firm's work remaining after issuance of ineligibility notification shall not count toward the overall goal nor may it count toward the Contract goal. If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the Contract, the Contractor may continue to count its participation on that Contract toward both the Contract and overall goals.

SOLICITATION REQUIREMENTS:

The DBE goal for this Contract is noted in the Terms and Conditions, Item 4, Disadvantaged Business Enterprise (DBE) Participation.

In soliciting DBE Subcontractors or Suppliers, prime Contractors may not enter into an agreement with any DBE by which the DBE promises not to offer to participate in other offers.

For an offer to be considered acceptable, the following documents shall be completed and submitted as specified below.

With the submittal of a bid or proposal:

Form A - Schedule of DBE Participation. This represents a promise by the bidder or proposer that, upon award of a Contract as the result of this solicitation, it will attain the specified level of



DBE participation over the course of performance of the Contract. All DBE firms scheduled to participate in the Contract, including the Scope of Work to be performed and the dollar value of the services, supplies or equipment should be included on this form. Upon execution of a Contract with the Commission, the Contractor must enter into a formal agreement with the DBE(s) listed within thirty (30) days. This information is also located at the bottom of the attached Form A – Schedule of DBE Participation. The level specified may be above or equal to the goal established for this solicitation. Failure to submit this form with a bid or proposal will render the offeror non-responsive and ineligible for further consideration for Contract award. There can be no substitution of the DBE(s) listed on Form A without prior written approval of HRT’s DBE Program Manager.

Form B – Vendor Profile. All DBE firms shown on Form A, shall complete Form B, which should be updated annually. Completed forms shall be included with each bid package.

Form C – DBE Firms Unavailability to Perform as a Supplier/Subcontractor Certification (if applicable). This information should be completed by DBEs invited to quote, but who decline to do so. In the event that the DBE failed to sign the form for any reason, the unsigned form should be submitted. This form is applicable, and should be submitted with the bid, if the bidder has failed to meet the established DBE goal.

Form D – Letter of Intent to Perform As a Subcontractor. This manifests the agreement between the prime Contractor and the Subcontractor/Supplier that the aforementioned Subcontractor/Supplier will perform the services identified at the price specified. It commits the parties that, upon execution of a Contract with the Commission, the Contractor will enter into a formal agreement with the Subcontractor/Supplier on the basis indicated in the Letter of Intent, not to exceed thirty (30) days from Contract execution. In the event that the bidder/proposer is unable to properly execute the form by the bid due date, the form will be accepted within two (2) business days immediately following the bid opening. Fax transmittals of this form are acceptable; however, the original should follow in U.S. mail the following business day.

Documentation of Good Faith Efforts. If the offeror has demonstrated good faith efforts, but has been unable to attain the specified goal, it shall provide documentation of such items as contacts with potential DBEs or community organizations, advertisements in appropriate media, other correspondence, records of negotiations, etc. Failure to submit this good faith effort documentation with a bid or proposal will render the offeror non-responsive and ineligible for further consideration for Contract award. If a DBE was tendered a Letter of Intent (Form C) but failed to sign and return the form for any reason, the unsigned form should be included.

It is the obligation of the offeror to verify the certification status of the DBEs it intends to include in its bid or proposal. To be considered as a DBE, a firm must be certified with the Virginia



Department of Minority Business Enterprise (<http://www.dmb.state.va.us/>) or the Metropolitan Washington Airport Authority (<http://www.metwashairports.com/>), which is designated by the USDOT as the certifying agencies for the Commonwealth of Virginia., prior to the submission of the bid or proposal. Certification through another state program may be accepted providing that the firm has submitted an application for Virginia certification, which is needed to qualify for HRT Contracts.

If this procurement is an Invitation for Bids (IFB), all certifications must be completed at the time of bid submittal. If this is a Request for Proposals (RFP) the certification process must be completed prior to Contract award. Since RFPs are negotiated procurements, the potential exists for the DBE participation level and makeup to change in negotiations; however, this does not relieve proposers from the requirement to submit an initial commitment for DBE participation (Form A) with the original proposal, and to update that commitment with every proposal revision, an/or addition of DBE firms.

In general DBE participation shall be counted in terms of the percentage of gross Contract dollars, including relevant modification and limited notices to proceed (LNTP), that are committed to be paid to DBE firms, for performing a commercially useful function. Work that is subcontracted to non-DBE firms, or work which would not be necessary in the usual performance of the scope of the Contract, is not considered commercially useful. Special rules apply to calculation of the participation by trucking firms. If the materials or supplies are purchased from a DBE which is a regular dealer in such items, sixty percent (60%) of the cost of the materials or supplies is counted toward the DBE goal. If materials or supplies are acquired from a DBE which is neither a manufacturer nor a regular dealer, the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees for transportation charges for delivery of the items are counted, provided the fees are determined to be reasonable and not excessive as compared with fees customarily allowed for similar services. However, no portion of the cost of the materials and supplies themselves are counted. There is a full discussion of how participation is counted at 49 CFR Part 26, §26.55.

If the Commission makes a determination that an offeror is ineligible for Contract award due to failure of submitted documentation to demonstrate good faith efforts, the offeror shall have an opportunity for administrative reconsideration. A letter requesting reconsideration shall be sent to HRT's DBE Program Manager, with a copy to the Contracting Officer, and shall provide documentary support for the request. The request will be reviewed and decided by a reconsideration official who did not participate in the initial determination. The offeror may also request a meeting with the reconsideration official to discuss the issues. The reconsideration official shall send the offeror a written decision on its request. The result of the reconsideration process is not administratively appealable to USDOT.



CONTRACT REQUIREMENTS:

Each Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of Commission Contracts. Failure to carry out these or any other DBE-related requirement is a material breach, which may result in the termination of the Contract or such other remedy as the Commission deems appropriate.

Participation by DBE firms toward the Contractor's committed level of DBE activity is calculated on the actual amount paid to the Contractor and the actual amount paid to the participating DBE firm(s). As a result, it is important that, in proposing any Contract change order, the Contractor identify any impact the change will have on the DBE participation level, and request any appropriate change in the DBE commitment. If the change will involve any elimination of or change in the activity of current DBE firms, or the addition of new DBE firms, the change must be identified by the Contractor in its proposal.

The Contractor shall submit signed copies of subcontracts or purchase orders with DBE Subcontractors and Suppliers to HRT's DBE Program Manager and HRT's Project Manager no later than thirty (30) business days after execution of its Contract with the Commission, pursuant to the assurance listed on the Form A – Schedule of DBE Participation.

CONTRACT CLAUSE

The prime Contractor shall include in each subcontract or purchase order issued under its Contract with the Commission the following clause and requires that each Subcontractor or Supplier include it in any subcontracts or purchase orders it issues hereunder:

“The Contractor, Sub-recipient or Subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Contract. The Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted Contracts. Failure by the Contractor to carry out these requirements is a material breach of this Contract, which may result in the termination of this Contract or such other remedy as the Commission deems appropriate.”

CHANGE ORDERS

Should the actual Contract amount increase or decrease (through approved change orders) the DBE Program Manager will determine if any adjustment to the level and nature of DBE participation is appropriate. Unless a change in the goal is specifically included in a change order, the initial DBE participation goal applies to the total value of the Contract, including change orders.



REPORTING REQUIREMENTS

The Contractor is responsible for documenting to the Commission the participation of and payments to DBE Subcontractors as part of each invoice submittal, monthly. For this purpose, the Contractor shall submit Form E - Contractor's Monthly DBE Payment Report. Form E should be submitted to HRT's DBE Program Manager no later than the 7th day of each month. Since Form E is used solely by the DBE office, that information should be forwarded directly to the HRT DBE Program Manager. Information recorded on Form E should address those payments made to DBE firms. In order for Form E to be deemed compliant, all required information must be completed in its entirety. The form may not be altered, or changed in any manner other than official modifications completed by the DBE Program Manager. It is important to ensure that all information reflects accurate payment and task information relevant to the month prior. In an effort to expedite submission of the document, the form may be emailed or faxed to the office of the HRT DBE Program Manager at (757) 222-6043, with a hard copy to follow within five (5) business days, with the appropriate authorizing signatures. If the original document is not received within five (5) business days, a determination of non-compliance may be made.

Each DBE Subcontractor is responsible for completing Form E-2 - Subcontractor's Monthly DBE Payment Report, which verifies receipt of payment from the Contractor, and as such should be submitted by the 7th day of each month following the start of work. This form is submitted directly to the HRT DBE Program Manager and should, at no time, be shared with the Contractor.

Failure to submit Form E may result in delay or suspension of payments to the Contractor or such other remedies as the Commission deems appropriate. If at any time the Commission has reason to believe that any person or firm has willfully and knowingly failed to submit any required forms, provided incorrect information or made false statements, it may utilize such remedies as may be provided by the Contract, up to and including termination for default. It may also refer the matter to USDOT for further action.

PROMPT PAYMENT

The Contractor shall strictly comply with the provisions of the Contract governing prompt payment to Subcontractors.

SUBSTITUTION OF DBEs:

Except as provided herein, the Contractor shall not have work identified as to be performed by DBEs performed by any firm other than that identified in its Form A - Schedule of DBE



Participation. However, the Contractor may, in unusual situations, be permitted to replace a DBE Subcontractor or Supplier. No substitution may be made either prior to or after award of the Contract, without the Commission's prior written approval. A request for substitution must be made in writing, with appropriate documentation supporting the request. The request must include evidence that the Contractor has made every effort to continue with the current DBE firm; if the replacement is not a DBE; the Contractor must document its good faith efforts to find another DBE Subcontractor to replace the original DBE and to replace the portion of DBE participation lost by the substitution. The term "unusual situation," includes but is not limited to a DBE's:

- Failure to qualify as a DBE, or to maintain DBE certification status.
- Death or physical disability, if the DBE is an individual.
- Dissolution, if the DBE is a corporation or partnership.
- Bankruptcy of the DBE, only in instances where the bankruptcy affects the DBE's ability to perform.
- Inability to obtain, or loss of, a license, permit or other requirement of law or regulation necessary for the performance of the particular category of work.
- Material failure to comply with the terms and conditions of this Contract or those of its Subcontractor or joint venture agreement.
- Demonstrated material failure or inability to successfully perform the Contract tasks.

The prime Contractor cannot terminate for convenience a DBE Subcontractor listed on Form A and perform the work of the terminated DBE with its own forces or those of an affiliate without the prior written consent of the Commission's DBE Program Manager.

AUDIT AND PENALTIES:

During the performance of any Contract and for a period of up to three (3) years following completion of the Contract, the Commission, the Commonwealth of Virginia or the U.S. Department of Transportation may conduct reviews for compliance with the requirements of the DBE program. Such reviews may include the evaluation of monthly reports, desk audits and site visits. Additionally, the records of non-DBE Subcontractors may also be reviewed and inspected.

Where a prime Contractor is found to be in noncompliance with the requirements of the DBE program during the performance of the Contract, it will be required to take corrective action. If the noncompliant Contractor does not promptly take action to come into compliance, the



Commission may, in its discretion, take any or all of the following actions, in addition to any other contractual remedies otherwise provided by law:

- 1) The prime Contractor may be ordered to suspend work without cost or liability to the Commission until compliance with the program is achieved.
- 2) The Contract may be terminated for default.
- 3) Suspension or debarment proceedings may be commenced in accordance with Virginia Law.
- 4) The matter may be referred to the U.S. Department of Transportation for possible suspension or debarment action under 40 CFR Part 29.
- 5) Any performance bond may be enforced.

FAILURE TO MEET GOAL COMMITMENT:

In the event that a Contractor fails to actually attain the level of DBE participation committed to in the Contract, the Commission may assess liquidated damages resulting from the shortfall. Damages will be calculated in an amount equal to the dollar difference between the total Contract amount multiplied by the DBE percentage commitment and the actual amount of documented DBE participation in the Contract. For example, if the Contract is for \$100,000 and the DBE commitment is 10% (\$10,000) and the Contractor actually pays DBEs \$9,000, the Contractor will be liable for liquidated damages of \$1,000. Any such liquidated damages may be deducted from amounts due and unpaid to the Contractor; if such amounts are not sufficient, the Contractor will be required to remit the difference to the Commission. The Commission may waive liquidated damages where the shortfall is deemed beyond the Contractor's reasonable control and the Contractor is judged to have exerted good faith efforts to attain the commitment, or when good cause is shown for the deficiency.