

**NOTICE OF REQUIREMENTS  
FOR  
DISADVANTAGED BUSINESS ENTERPRISE (DBE)**

**Modified August 2021**

**49 CFR § 26.21 Who must have a DBE program?**

(a) If you are in one of these categories and let DOT-assisted contracts, you must have a DBE program meeting the requirements of this part:

(2) FTA recipients receiving planning, capital and/or operating assistance who will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which exceeds \$250,000 in FTA funds in a Federal fiscal year.

Please note that subparts (1) and (3) have been omitted as they apply only to entities that report to the Federal Aviation Administration (FAA) and Federal Highway Administration (FHWA).

**~APPENDIX B~**

**DISADVANTAGED BUSINESS ENTERPRISE (DBE)**

**1. DISADVANTAGED BUSINESS ENTERPRISE (DBE) REQUIREMENT:**

The DBE requirements of the Washington Metropolitan Area Transit Authority (Metro) DBE Program Plan apply to this contract. Accordingly, the contractor shall carry out the requirements of Metro's DBE Program Plan and this Appendix B in the award and administration of this Federally assisted contract.

**2. POLICY:**

It is the policy of Metro and the Federal Transit Administration (FTA), United States Department of Transportation (US DOT) that DBE shall compete fairly to receive and participate in performing Federally Assisted Contracts, including contracts and subcontracts at any tier. It is further the policy of Metro, the FTA, and the US DOT that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts. The contractor hereby agrees to carry out this policy in the award and administration of subcontracts to the fullest extent possible consistent with efficient contract performance. **(See 49 CFR § 26.29, Prompt Payment).**

**3. CONTRACT GOAL:**

(a) If the bidder is not a DBE, the bidder agrees that the DBE goal for this contract shall be met by 1<sup>st</sup> tier DBE subcontractors or by using 2<sup>nd</sup> tier relationships with a contractual relationship with a non-DBE subcontractor or the contractor by joint ventures with DBEs. The goal set forth for this contract is (\_\_\_%) of the final contract price, including amendments, option renewals, and modifications. The amount of DBE participation will be determined by the dollar value of the work performed and/or supplies furnished by DBE firms as compared to the total value of all work performed and/or supplies furnished under this contract. The contractor shall have met this goal if the contractor's DBE participation meets or exceeds this goal.

(b) In cases where work is added to the contract by modification or change order request such that additional DBE participation is necessary to meet this goal; the contractor shall increase the participation of one or more firms listed on the "Schedule of DBE Participation" or submit additional

DBE-certified firms to meet the goal. In cases where work is deleted from the contract, the contractor shall be permitted to meet the goal by revising its DBE participation, provided that the revision shall not result in DBE participation that is less than the original goal. The contractor must complete a Termination Substitution Request to drop, add, or reallocate funds due to a change order/modification or change in DBE plan based on Scope of Work (SOW), issues revolving around non-compliance of a DBE firm, loss of DBE eligibility, or a DBE's inability to perform.

#### 4. DEFINITIONS:

- (a) **Appendix B** - the Notice of Requirements for DBE, when attached to a solicitation, implements the DBE requirements of the Authority's DBE Program Plan <https://www.wmata.com/business/Small-Business-Programs-Office/upload/DBE-Program-Plan.pdf>, the award, and the administration of Metro's Federally Assisted Contracts.
- (b) **Certified DBE** - means a for-profit small business concern (a) that is at least 51% owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51% of the stock is owned by one or more such individuals; (b) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it; and (c) whose eligibility is evidenced by a current Metro Certification letter, a District of Columbia (DC) Department of Transportation Certification letter, or a certification letter issued by the Metropolitan Washington Unified Certification Program (MWUCP).
- (c) **Contractor** - any individual or other legal entity that directly or indirectly (e.g., through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Metro contract, including a contract for carriage or commercial bills of lading, or a subcontract under a prime contract.
- (d) **Good Faith Efforts** - Efforts to achieve a DBE goal or other requirements of Metro's DBE Program Plan which by their scope, intensity, and appropriateness to the objective can reasonably be expected to fulfill the DBE goal requirement.
- (e) **Joint Venture** - An association between a DBE firm and one (1) or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills, and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and shares in the capital contribution, control, management, risks, and profits of the joint venture commensurate with its ownership interest.
- (f) **District of Columbia Unified Certification Program (DCUCP)** formerly the Metropolitan Washington Unified Certification Program (MWUCP) - A unified certification program mandated by 49 CFR § 26.81 between two (2) Federal transit recipients (Metro and the DC Department of Transportation).
- (g) **Pre-certification** - A requirement under 49 CFR § 26.81(c) that all certifications by the DCUCP be made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.
- (h) **Race-conscious** - A measure or program that is focused specifically on assisting only DBEs, including women-owned DBEs.
- (i) **Race-neutral** - A measure or program that assists all small businesses. Race-neutral DBE participation includes, but is not limited to, any time a DBE wins a prime contract through a customary competitive procurement procedure, is awarded a subcontract on a prime contract that

does not carry a DBE Goal, or even if there is a DBE Goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., strict low bid). For the DBE Program, race-neutral also includes gender-neutral participation in the DBE Program.

- (j) **Small Business Concern** - For the purposes of this P/I, a small business concern is defined consistent with the definition, standards, and eligibility requirements set forth for small business concerns in section 3 of the Small Business Act (15 U.S.C. § 632) and the Small Business Administration's (SBA) implementing regulations (13 CFR Part 121); further, a small business concern may not exceed the cap on average annual gross receipts set forth in 49 CFR § 26.65(b).
  
- (k) **Socially and Economically Disadvantaged Individual** - Any individual who is a citizen (or other lawfully admitted permanent resident) of the United States pursuant to 49 CFR § 26.5 and who Metro finds to be a socially and economically disadvantaged individual on a case-by-case basis, and any individual in the following designated groups, members of which are rebuttably presumed to be socially and economically disadvantaged.
  - (1) African - Americans, which includes persons having origins in any of the Black racial groups of Africa;
  - (2) Hispanic Americans, which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
  - (3) Native Americans, which includes persons who are enrolled members of a Federally or State recognized Indian tribe Alaska Natives, or Native Hawaiians;
  - (4) Asian-Pacific Americans, which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Mariana Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;
  - (5) Subcontinent Asian Americans, which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka;
  - (6) Women; and
  - (7) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.
  
- (l) **Tiering** - is the process in which a contractor subcontracts a portion of an original contract to a subcontractor (non-minority or minority) who in turns subcontracts a portion of the subcontract to another party.
  
- (m) **US DOT Assisted Contract** - any contract between the Authority and a contractor (at any tier) funded in whole or in part with US DOT financial assistance, including letters of credit or loan guarantees.
  
- (n) **Unified Certification Program (UCP)** - The program mandated by 49 CFR § 26.81(a), which requires all US DOT recipients of Federal financial assistance to participate in a statewide certification program by March 2002.

- (o) **Washington Metropolitan Area Transit Authority (Metro)** - The transit system (rail and bus) serving the metropolitan Washington area, including parts of Virginia and Maryland.

## 5. HOW IS DBE PARTICIPATION COUNTED TOWARD GOALS?

### Pursuant to 49 CFR § 26.55:

DBE participation shall be counted towards meeting the DBE goal in accordance with the following:

- (a) When a DBE participates in a contract, only the value of the work performed by the DBE towards DBE Goals is counted. **See 49 CFR § 26.55.**
  - (1) Count the entire amount of that portion of a construction contract (or other contract not covered by paragraph (A)(2) of this section) that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).
  - (2) Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract toward DBE goals provided you determine the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
  - (3) When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.
  - (4) When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.
- (b) Count expenditures to a DBE contractor towards the DBE goal only if the DBE is performing a Commercially Useful Function (CUF) on that contract. **See 49 CFR § 26.55.**
  - (1) DBE performs a CUF when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a CUF, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a CUF, Metro will evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing, and the DBE credit claimed for its performance of the work, and other relevant factors.
  - (2) A DBE does not perform a CUF if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, Metro must examine similar transactions, particularly those in which DBEs do not participate.
  - (3) If a DBE does not perform or exercise responsibility for at least 30% of the total cost of its contract with its own work force, or if the DBE subcontracts a greater portion of the work of a

contract than would be expected on the basis of normal industry practice for the type of work, Metro must presume that the DBE is not performing a CUF.

- (4) When a DBE is presumed not to be performing a CUF as provided in paragraph (C)(3) of this section, the DBE may present evidence to rebut this presumption. Metro may determine that the firm is performing a CUF given the type of work involved and normal industry practices.
  - (5) Your decisions on commercially useful function matters are subject to review by the concerned operating administration but are not administratively appealable to the US DOT.
- (c) The following factors will be used by the Authority in determining whether a DBE trucking company is performing a commercial useful function:

- (1) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible for on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting the DBE goals.
- (2) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
- (3) The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
- (4) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
- (5) The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks with drivers from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE leased trucks equipped with drivers not to exceed the value of transportation services on the contract provided by DBE-owned trucks or leased trucks with DBE employee drivers. Additional participation by non-DBE owned trucks equipped with drivers receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the appropriate DOT operating administration.

Example to paragraph (c)(5): DBE Firm X uses two (2) of its own trucks on a contract. It leases two (2) trucks from DBE Firm Y and six (6) trucks equipped with drivers from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four (4) of the six (6) trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. DBE credit could be awarded only for the fees or commissions pertaining to the remaining trucks Firm X receives as a result of the lease with Firm Z.

- (6) The DBE may lease trucks without drivers from a non-DBE truck leasing company. If the DBE leases trucks from a non-DBE truck leasing company and uses its own employees as drivers, it is entitled to credit for the total value of these hauling services.

Example to paragraph (c)(6): DBE Firm X uses two of its own trucks on a contract. It leases two additional trucks from non-DBE Firm Z. Firm X uses its own employees

to drive the trucks leased from Firm Z. DBE credit would be awarded for the total value of the transportation services provided by all four (4) trucks.

- (7) For purposes of this paragraph (c), a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.
- (d) The following guidelines will be used to count expenditures with DBEs for materials or supplies towards the DBE goal: **See 49 CFR § 26.55(e).**
- (1) If the materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies toward DBE goals. **See 49 CFR § 26.55(1)(e)(i).**
- (2) For purposes of this paragraph, a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications. **See 49 CFR § 26.55 (e)(1)(ii).**
- (3) If the materials or supplies are purchased from a DBE regular dealer, count 60% of the cost of the materials or supplies toward DBE goals. **See 49 CFR § 26.55(e)(2)(i).**
- (4) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment of the general character described by the specification and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. **See 49 CFR § 26.55(e)(2)(ii).**
- A. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.
- B. A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.
- C. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph.
- (5) With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided you determine the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. However, do not count any portion of the cost of the materials and supplies themselves towards DBE goals. **See 49 CFR § 26.55(e)(3).**

- (6) Determine the amount of credit awarded to a firm for the provisions of materials and supplies (e.g., whether a firm is acting as a regular dealer or a transaction expeditor) on a contract-by-contract basis. **See 49 CFR § 26.55(e)(4).**
- (7) If a firm is not currently certified as a DBE in accordance with the standards of 49 CFR § 26.81 of this part at the time of the execution of the contract, do not count the firm's participation toward any DBE goals, except as provided for in 49 CFR §26.87(i). **See 49 CFR § 26.55(f).**
- (8) Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward your overall goal. **See 49 CFR § 26.55(g).** Do not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE. **See 49 CFR § 26.55(h).**

## 6. BIDS AND REQUIREMENTS (WITH THE RESPONSE)

The bidder shall submit the following with its bid. Any bidder who fails to complete and return this information with its bid shall be deemed to be non-responsive and may be ineligible for contract award. Bidders that fail to meet the DBE goal above and fail to demonstrate "good faith efforts" to justify waiver of the DBE goal (See paragraph 6.C. below) shall be deemed to be non-responsible and will be ineligible for contract award.

- (a) Completed "**WMATA DBE Form Part 1 – Certified DBE Utilization and Fair Solicitation Affidavit**", "**WMATA DBE Form Part 2- Schedule of DBE Participation**" and **WMATA DBE form Part 3 Letter of Intent**" sufficient to meet the above goal. If the bidder is a DBE firm and intends to satisfy the appropriate DBE requirement with its own firm, it must list its firm on the WMATA DBE form Part 2 - Schedule of DBE Participation and complete the "**WMATA DBE form Part 3 Letter of Intent**" to perform as a subcontractor/joint venture for the area of work and percentage it will perform to satisfy the goal. All offerors must attach current Metro, DC DOT, or DCUCP certification letters for each DBE listed on the Schedule.
- (b) Executed "Letters of Intent." If the bidder is not a DBE or intends to satisfy the requirements through other DBE firms, then it must attach these letters from each certified DBE listed on the schedule.
- (c) Waiver Request should indicate on the Appendix B, part 1 affidavit waiver of DBE goal. If in the submittal of its bid, the bidder fails to meet the DBE goal above, the bidder has the burden of furnishing sufficient documentation with its bid of its "good faith efforts." Such justification shall be in the form of a detailed report. The following is a list of actions that shall be considered as part of the bidder's good faith efforts to obtain DBE participation. Other factors or types of efforts may be relevant in appropriate cases:
  - (1) Soliciting 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 capability to perform the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The offeror must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.
  - (2) 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.

- (3) 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.
- (4) Negotiating in good faith with interested DBEs. It is the offeror's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors 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 the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work. "DBE Unavailability Certifications" shall be completed as appropriate.
- (5) An offeror using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as the contract goal 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 contract with its own organization does not relieve the offeror 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.
- (6) Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its 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.
- (7) Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.
- (8) Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
- (9) 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 organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

## **7. BID AND RESPONSE REQUIREMENTS (See 7-2-7 Procurement Manual page 113)**

- (a) The Contracting Officer shall require that bidders or proposers submit the following with any bid or proposal for a Federally Assisted Contract for which the SBPO has established a DBE goal:
  - (1) A completed "Schedule of DBE Participation" which is sufficient to meet the contract DBE goal;
  - (2) An executed document of commitment to use the DBE subcontractors whose participation it submits to meet the goal;
  - (3) Executed "Letters of Intent to Perform as a Subcontractor/Joint Venture" from each of the DBE firms identified in the "Schedule of DBE Participation";
  - (4) If applicable, a request for waiver of the DBE goal;
  - (5) A description of any in-house DBE program operated by the prime contractor; and
  - (6) A description of past participation with DBE firms.
- (b) The documents referenced above are intended to be submitted with the bid or proposal. Any waiver request based on good faith efforts shall be resolved prior to contract execution. Any bidder or proposer that fails to meet the contract DBE goal and fails to demonstrate "good faith efforts" to support a waiver of the DBE goal shall be deemed non-responsible and will be ineligible for contract award. Deficiencies and inconsistencies related to the referenced submissions shall be treated as matters of responsibility, not responsiveness; however, the commitment to DBE participation and/or the demonstration of good faith efforts must be in place prior to execution of



the contract.

- (c) The Contracting Officer shall provide written notice to any bidder or proposer that in Metro's determination, it has failed to meet the requirements of this subpart. The notice shall provide a deadline, prior to award, for the bidder or proposer to request administrative reconsideration in writing. Upon receipt of a written request for reconsideration, the Contracting Officer shall name an official, not involved in the original determination, to meet with the bidder or proposer in person to discuss whether it met the goal or made adequate good faith efforts. After the meeting, the official must provide a written determination on the request for reconsideration. Award shall not be made until the written determination is issued.
- (d) The Contracting Officer shall require that a bidder or proposer submit the following Appendix B documentation, if applicable, within ten (10) calendar days after notification that it is the apparent successful bidder or selected proposer:
  - (1) Documents itemized on the DBE Certification Instructions for each proposed DBE firm including the "DBE Disclosure Affidavit".
  - (2) "Information for Determining Joint Venture Eligibility"; and
  - (3) A copy of any Joint Venture Agreement.
- (e) All DBE firms must be certified with Metro no later than the time of the bid or proposal due date for the solicitation in which the firm wishes to participate as a DBE.
- (f) On the first day of each month, Procurement Managers shall report to the DBE Liaison Officer the number of DBEs, and the number of all firms, that have bid or proposed Federally Assisted Contracts during the previous month. The report shall also include the value of contracts awarded to DBEs, contract terms, and the percent of work performed by DBEs on contracts with and without DBE goals respectively.
- (g) All SBE firms must be certified with Metro no later than the time of the bid or proposal due date for the solicitation in which the firm wishes to participate as an SBE.

**8A. CONTRACT ADMINISTRATION REQUIREMENTS: (See *Procurement Manual*, section 2-6 "Authority and Responsibilities of Contracting Officers")**

- (a) The following requirements apply after contract award:
  - (1) The SBPO is responsible for monitoring DBE participation and related DBE and SBE contract compliance activities in accordance with 49 CFR Part 26 and Metro's DBE Program Plan, such as reviewing contract records, monitoring work sites, performing compliance reviews, reviewing contractor records and documents pertaining to DBE and SBE participation. Any deficiencies shall be forwarded to the Contracting Officer for resolution, and if unresolved will be subject to further compliance actions including affecting responsibility determinations in future procurements, debarment, and referral to the U.S. Department of Transportation. In addition, the Contracting Officer shall support the SBPO in monitoring and enforcing the Authority's DBE Program as it relates to procurement activities.
  - (2) The prime contractor shall monitor the performance of, its DBE subcontractors, collect and report data on DBE participation, including payments to DBEs, to the SBPO on the "DBE Participation Status Report", which shall be submitted monthly with each payment request. The Contracting Officer shall consider the suspension of contract payments or other remedies if the contractor fails to submit the status report in a timely fashion.
  - (3) The prime contractor shall certify with each payment request to the Authority that payment has been or will be made to all subcontractors' due payment, within 10 days after receipt of payment from the Authority for work by those subcontractors. Failure by the contractor to carry-out the requirements of Appendix B is a breach of the contract. The Contracting Officer shall consider all remedies, including referral to the DOT to initiate suspension or debarment proceedings, enforcement action and/or prosecution if the contractor fails to perform as

required by the contract.

- 4) Any allegation that any person or firm has willfully and knowingly provided incorrect information or made false statements regarding the DBE Program shall be referred to SBPO.
  - 5) The Contracting Officer shall provide Davis-Bacon and related data regarding DBE firms to SBPO or designee. The Contracting Officer shall provide a close-out notice to SBPO, or designee, within five days of the Contracting Officer's determination that the contract has been closed. The Contracting Officer shall forward all intermediate, if any, and final reports pertaining to contracts with DBE participation, and non-DBE small-business firms during a race-neutral effort, to SBPO. The reports shall include the value of the work performed by DBEs, including monthly data regarding payments received by DBEs. Copies of all subcontracts shall be forwarded to the DBE Liaison Officer at the time of their execution by the prime contractor.
- (b) The contractor shall include the following provision in each subcontract it awards in support of the DBE goal:

The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Contracting Officer may impose sanctions as provided for under 49 CFR part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. § 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. §§ 3801-3812).

The contractor, subrecipient 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 recipient deems appropriate, which may include, but is not limited to:

- (1) Withholding monthly progress payments;
- (2) Assessing sanctions;
- (3) Liquidated damages; and/or
- (4) Disqualifying the contractor from future bidding as non-responsible.

**8B. WHAT PROMPT PAYMENT MECHANISMS MUST RECIPIENTS HAVE, PER 49 CFR PART 26?**  
**(Ref. 49 CFR §26.29)**

- (a) You must establish, as part of your DBE program, a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment you make to the prime contractor.
- (b) You must ensure prompt and full payment of retainage from the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. You must use one of the following methods to comply with this requirement:
  - (1) You may decline to hold retainage from prime contractors and prohibit prime contractors from holding retainage from subcontractors.
  - (2) You may decline to hold retainage from prime contractors and require a contract clause

obligating prime contractors to make prompt and full payment of any retainage kept by the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed.

- (3) You may hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after your payment to the prime contractor.
- (c) For purposes of this section, a subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented as required by the recipient. When a recipient has made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed.
- (d) Your DBE program must provide appropriate means to enforce the requirements of this section. These means may include appropriate penalties for failure to comply, the terms and conditions of which you set. Your program may also provide that any delay or postponement of payment among the parties may take place only for good cause, with your prior written approval.
- (e) You may also establish, as part of your DBE program, any of the following additional mechanisms to ensure prompt payment:
  - (1) A contract clause that requires prime contractors to include in their subcontract's language providing that prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes. You may specify the nature of such mechanisms.
  - (2) A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.
  - (3) Other mechanisms, consistent with this part and applicable state and local law, to ensure that DBEs and other contractors are fully and promptly paid.

**8C. Pursuant to Metro Procurement Procedures Manual 7-2-8 (Contract Administration Requirements) p. 115, Section (c):**

- (1) The Contractor shall monitor the performance of, collect and report data on DBE participation to Metro's SBPO on the Metro website at [www.wmata.com](http://www.wmata.com) under the Metro Supplier Portal. Failure to enter payment data on the Metro Supplier Portal on a monthly basis may result in suspension of contract payments. The contractor shall certify with each payment request that payment has been or will be made to all subcontractors due payment, within ten (10) days after receipt of payment from Metro for work by that subcontractor. The contractor shall inform the Contracting Officer or Contracting Officer Technical Representative (COTR), with their payment request, of any situation in which scheduled subcontractor payments have not been made and the reasons, therefore.
- (2) The contractor shall require each subcontractor to report Prompt Payment data to Metro's SBPO online at [www.wmata.com](http://www.wmata.com) under the Metro Supplier Portal monthly. The subcontractor shall certify that payment has been received.
- (3) The contractor and the subcontractor are required to have Prompt Payment reporting training for each Metro contract which has been awarded to them. Failure to complete this training may result in suspension of contract payments. Please send an email to the [DBEhotline@WMATA.com](mailto:DBEhotline@WMATA.com) to request appropriate training.

#### **8D. Modification/Change Orders**

If at any time, the contractor believes or has reason to believe that it needs to obtain a substitute for a DBE contractor named in the "Schedule of DBE Participation or add a DBE not previously approved," the contractor shall, within ten (10) days, notify the SBPO and copy (cc) the Contracting Officer of that fact in writing on Termination Substitution or Reduction (TSR). A copy of this written request will be forwarded to the DBE vendor. The vendor shall have ten (10) days to respond in writing to the SBPO. The Contracting Officer shall meet with SBPO to review the documentation submitted. A written determination will be made within ten (10) days on whether to approve or deny the request. There is no appeal to this decision. A copy of this decision shall be maintained in the contract file. Situations which may warrant substitution for a DBE firm include, but are not limited to the following:

- (1) Evidence of change in ownership or circumstances regarding the firm's status as a DBE.
- (2) Death or physical disability, if the named subcontractor or DBE partner of the joint venture is an individual.
- (3) Dissolution, if a corporation or partnership.
- (4) Bankruptcy of the subcontractor, subject to applicable bankruptcy law, and only instances where the bankruptcy affects the contractor's ability to perform.
- (5) Inability to furnish a reasonable performance or payment bond, if required.
- (6) Inability to obtain, or loss of, a license necessary for the performance of the particular category of work.
- (7) Failure or inability to comply with a requirement of law applicable to contractors and subcontractors on a construction, alteration, or repair project.
- (8) Failure or refusal to execute the subcontract in accordance with the terms of an offer submitted to the contractor prior to the contractor's submission of its offer, but only where the Contracting Officer or other delegated Authority representative can ascertain with reasonable certainty the terms of such offer. In the absence of any other factors, such a failure or refusal will be considered an unusual situation only if the offeror obtained, prior to bidding/proposing, an enforcement commitment from the subcontractor involved.
- (9) Failure to comply with the terms and conditions of this contract or those of its subcontract or joint venture agreement.

#### **8E. Pursuant to 49 CFR 26.53 "What are the good faith efforts procedures recipients follow in situations where there are contract goals?"**

- (1) In addition to post-award terminations, the provisions of this section apply to pre-award deletions or substitutions for DBE firms put forward by offerors in negotiated procurements. **See 49 CFR 26.53(f)(6).**
- (2) When a DBE subcontractor is terminated as provided in paragraph 49 CFR § 26.53(f) or fails to complete its work on the contract for any reason, you must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal you established for the procurement. The good faith efforts shall be documented by the contractor. If the recipient requests documentation under this provision, the contractor shall submit the documentation within seven (7) days, which may be extended for an additional seven (7) days if necessary, at the request of the contractor, and the recipient shall provide a written determination to the contractor stating whether or not good faith efforts have been demonstrated. **See 49 CFR 26.53(g).**
- (3) You must include in each prime contract the contract clause required by 49 CFR § 26.13(b) stating that failure by the contractor to carry out the requirements of this part is a material breach of the contract and may result in the termination of the contract or such other remedies set forth in that

section you deem appropriate if the prime contractor fails to comply with the requirements of this section. **See 49 CFR 26.53(h).**

- (4) You must apply the requirements of this section to DBE bidders/offerors for prime contracts. In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, you count the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers. **See 49 CFR 26.53(i).**
- (5) You must require the contractor awarded the contract to make available upon request a copy of all DBE subcontracts. The subcontractor shall ensure that all subcontracts or an agreement with DBEs to supply labor or materials require that the subcontract and all lower tier subcontractors be performed in accordance with this part's provisions. **See 49 CFR 26.53(j).**
- (6) If the Termination Substitution or Reduction (TSR) form submitted does not equal the percentage of the previously approved DBE goal approved at time of award, the contractor will be notified by the SBPO assigned auditor that they have ten (10) days to provide a revised plan to reflect the approved percentage by making every reasonable effort to subcontract the same or other work equivalent in value to other certified DBE firms. These efforts must be submitted in writing to the Contracting Officer and SBPO. Examples of reasonable efforts include, but are not limited to the following:
  - (a) documentation of efforts made to assist the DBEs contacted that needed assistance in obtaining bonding or insurance required by the bidder or Metro;
  - (b) documentation of efforts to utilize the services of small business organizations, community, and contractor groups to locate qualified DBEs;
  - (c) documentation that the bidder has broken out contract work items into economically feasible units in fields where there are available DBE firms to perform the work; and
  - (d) evidence that adequate information was provided to interested DBEs about the plans, specifications, and requirements of the contract, and that such information was communicated in a timely manner.

8F The contractor shall forward copies of all subcontracts to the DBE Office at the time of their execution.

8G The contractor shall not terminate a DBE subcontractor or an approved substitute DBE firm without Metro's SBPO's prior written consent. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.

8H If the Contracting Officer or other delegated Metro representative determines that the contractor has failed to comply with Appendix B, he/she will notify the contractor of such noncompliance and the action to be taken. The contractor shall, after receipt of such notice, take corrective action. If the contractor fails or refuses to comply promptly, the Contracting Officer or other delegated Metro representative may issue a "stop work order" stopping all or part of the work until satisfactory corrective action has been taken. No part of the time lost due to any such stop work order shall be made the subject of claim for extension of time or for excess costs or damages by the contractor. When Metro proceeds with such formal actions, it has the burden of proving that the contractor has not met the requirements of this Appendix. The contractor's failure to meet its Appendix B goal shall shift the burden to it to show that it has met the good faith requirements of this Appendix. After exhausting all of its administrative and legal remedies, if the contractor is found to have failed to exert a "good faith effort" to involve DBEs in the work, Metro may suspend or debar the contractor.

8I The contractor agrees to cooperate in any studies or surveys as may be conducted by Metro which are necessary to determine the extent of the contractor's compliance with this Appendix.

8J The contractor shall keep records and documents for two (2) years following performance of this contract to indicate compliance with this Appendix. These records and documents, or copies thereof, shall be made available at reasonable times and places for inspection by any authorized

representative of the Authority and will be submitted upon request, together with any other compliance information that such representative may require.

If Metro, FTA, or the US DOT has reason to believe that any person or firm has willfully and knowingly provided incorrect information or made false statements regarding the DBE Program, the matter shall be referred to Metro's DBE office and Metro's Office of Inspector General (OIG).

- 8K Failure by the contractor to carry out the requirements of this Appendix is a material breach of this contract that may result in the termination of this contract or such other remedy as Metro deems appropriate.

Pursuant to Metro SBPO, the contractor must have the prior, written approval of the Contracting Officer, the SBPO, and DBE Liaison before substitution of a DBE subcontractor, regardless of the reason for the substitution. Failure to obtain Metro's approval could result in the contractor's suspension or debarment.

The prime contractor must provide the documents listed below to the Metro Contract Administrator (CA) and the SBPO/DBE Office in the form of a written request. The documents are as follows:

- **Letter of Intent** - *signed by both parties*
- **Schedule of Participation** - *signed by both parties*
- **Written Request with Explanation for DBE Addition** - *provided by prime contractor*

The written request will be reviewed by the SBPO and a letter to approve or deny the addition of the DBE subcontractor will be provided to the prime contractor and Metro CA.

## **SUMMARY OF SUBMITTALS**

### **With the Response**

1. Completed "WMATA DBE Form Part 1 - Certified DBE Utilization and Fair Solicitation Affidavit."
2. Completed "WMATA DBE Form Part 2 - Schedule of DBE Participation (Non-DBE Prime) and/or (DBE-Prime)" with current certification letters attached for each listed DBE.
3. Executed "WMATA DBE Form Part 3 - Letters of Intent DBE (Non-DBE Prime) and/or (DBE-Prime)," Pages 1 & 2.
4. Completed "WMATA DBE Form Part 4 – DBE Unavailability Form," if applicable.

Documentation to support "Good Faith Efforts" when requesting a partial or full Waiver include completed "DBE Unavailability Form" as appropriate.

### **Response Requirements (Apparent Low Bidder)**

1. Information for Determining Joint Venture Eligibility, if applicable.
2. Copy of Joint Venture Agreement, if applicable.

### **After Contract Award**

1. "Prompt Payment Report-Prime Contractor's Report" - uploaded monthly payment data in the Metro Supplier Portal.

2. "Prompt Payment Report-Subcontractor's Report" (Attachment B-7) – uploaded monthly payment data into the Metro Supplier Portal.
3. Request to substitute DBE contractor - submitted as required.
4. Copies of subcontracts - submitted at the time of their execution.

## **DBE Certification Instructions**

### **Important Notice**

If you do not have a current, certification from Metro or DDOT, you are not pre-certified and are therefore not eligible to participate as a DBE on the bid.

Businesses interested in becoming certified as a DBE must complete and submit an application through the Supplier Portal.

### **DBE Certification Application Steps -Home State**

For WMATA purposes you are considered "Home State" if your principal place of business is the District of Columbia. Click here if your company is not located in D.C.

#### **Steps to Submit an Application**

1. Download and complete the Uniform Certification Application (UCA).
2. Collect all supporting documents (page 15 of the UCA)
3. Download and complete the required Personal Net Worth (PNW) Form.
4. Register as a supplier using WMATA's Supplier Portal. A temporary password will be sent to the email provided during registration.
5. Apply for Certification; Sign-In using your User ID and Password.
6. Click on **Main Menu** then on **DBE/SBE/MBE Certification > Add a New Value**

#### **Certification Documents**

- Uniform Certification Application
- DBE Personal Net Worth Statement

### **DBE Certification Application Steps -Interstate Certification**

Applies to firms located outside the District of Columbia.

#### **Steps to Submit an Application**

1. Firm must be certified as a DBE in its home state and make sure that their information is displayed accurately on the home state's DBE directory.
2. Firm may seek DBE certification with WMATA by providing a copy of their certification notice from its home state
3. WMATA will confirm that the firm has a current valid certification from its home state by reviewing the electronic directory of the firm's home state or obtaining written confirmation from the home state certifying agency.
4. Register as a supplier using WMATA's Supplier Portal. A temporary password will be sent to the email provided during registration.
5. Apply for Certification; Sign-In using your User ID and Password.
6. Click on **Main Menu** then on **DBE/SBE/MBE Certification > Add a New Value**

***Information for Determining Joint Venture Eligibility***

Page 1

.....  
Name and address of Joint Venture:

\_\_\_\_\_  
\_\_\_\_\_

Contact Person: \_\_\_\_\_ Telephone: \_\_\_\_\_

Have you attached a copy of the Joint Venture agreement? ☐ Yes ☐ No

NOTE: Affidavit will not be processed without a copy of the Joint Venture agreement.

.....  
Name and address of Joint Venture partner: \_\_\_\_\_

\_\_\_\_\_

Contact Person: \_\_\_\_\_ Telephone: \_\_\_\_\_

Status of firm: ☐ DBE ☐ Non-Minority

Does firm have current Metro, DC DOT or DCUCP DBE certification? ☐ Yes ☐ No

.....  
Name and address of Joint Venture partner: \_\_\_\_\_

Contact Person: \_\_\_\_\_ Telephone: \_\_\_\_\_

Status of firm: ☐ DBE ☐ Non-Minority

Does firm have current Metro, DC DOT or DCUCP DBE certification? ☐ Yes ☐ No

.....  
Describe the nature of the Joint Venture's business:

Describe the role in the Joint Venture of each partner listed above:

Describe the experience and business qualifications of each partner in the Joint Venture listed above:

.....



**Information for Determining Joint Venture Eligibility**

Page 2

.....

Indicate the percentage of ownership in the Joint Venture for each Joint Venture partner, indicating dollar amounts wherever applicable.

Name of Partner	Percentage of Ownership	Profit and Loss Sharing	Capital Contributions including Equipment	Other Agreements
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

TOTALS:

.....

Identify by name, title, race, sex, and company affiliation those individuals responsible for the management control of and participation in this contract:

1. Financial decisions, such as payroll, insurance, surety and/or bonding requirements:

Name: \_\_\_\_\_ Race: \_\_\_\_\_

Title: \_\_\_\_\_ Sex: ☐ Male ☐ Female

Company affiliation: \_\_\_\_\_

2. Management decisions, such as estimating, marketing and sales, hiring and firing, purchasing supplies:

Name: \_\_\_\_\_ Race: \_\_\_\_\_

Title: \_\_\_\_\_ Sex: ☐ Male ☐ Female

Company affiliation: \_\_\_\_\_

3. Supervision of field operations:

Name: \_\_\_\_\_ Race: \_\_\_\_\_

Title: \_\_\_\_\_ Sex: ☐ Male ☐ Female

Company affiliation: \_\_\_\_\_

.....

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**Information for Determining Joint Venture Eligibility**

Page 3

.....

The undersigned swears that the foregoing statements are correct and include all material information necessary to identify and explain the terms and operations of our following named Joint Venture:

\_\_\_\_\_

and the intended participation by each Joint Venture in the undertaking. Further, the undersigned covenant and agreement to provide the Authority current, complete, and accurate information regarding actual Joint Venture work and the payment thereof and any proposed changes in any of the Joint Venture arrangements and to permit the audit and examination of the books, records, and files of the Joint Venture, or those of each Joint Venture relevant to the Joint Venture, by authorized representatives of the Authority or the Federal funding agency. Any material misrepresentation will be grounds for terminating any contract which may be awarded and for initiating action under Federal and State laws concerning false statements.

It is recognized and acknowledged that the Authority's DBE Program shall have access to the information provided herein above for establishing eligibility and authenticity of the minority/woman-owned status of the Joint Venture.

It is understood that trade secrets and information privileged by law, as well as commercial, financial, geological, and geophysical data furnished will be protected.

\_\_\_\_\_  
(NAME OF FIRM)

\_\_\_\_\_  
(NAME OF SECOND FIRM)

\_\_\_\_\_  
(SIGNATURE OF AFFIANT)

\_\_\_\_\_  
(SIGNATURE OF AFFIANT)

\_\_\_\_\_  
(PRINT NAME)

\_\_\_\_\_  
(PRINT NAME)

\_\_\_\_\_  
(TITLE)

\_\_\_\_\_  
(TITLE)

\_\_\_\_\_  
(DATE)

\_\_\_\_\_  
(DATE)

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<b>M</b>
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**Information for Determining Joint Venture Eligibility**

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.....  
Date: \_\_\_\_\_ State: \_\_\_\_\_ County: \_\_\_\_\_

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_,

before me appeared \_\_\_\_\_  
(Name)

to me personally known, who, being duly sworn, did execute the foregoing Affidavit, and did state that he or she was properly authorized by \_\_\_\_\_  
(Name of Firm)

to execute the Affidavit and did so as his or her free act and deed.

(Seal) Sworn and subscribed before me \_\_\_\_\_  
(Notary Public)

Commission Expires: \_\_\_\_\_

.....  
Date: \_\_\_\_\_ State: \_\_\_\_\_ County: \_\_\_\_\_

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_,

before me appeared \_\_\_\_\_  
(Name)

to me personally known, who, being duly sworn, did execute the foregoing Affidavit, and did state that he or she was properly authorized by \_\_\_\_\_  
(Name of Firm)

to execute the Affidavit and did so as his or her free act and deed.

(Seal) Sworn and subscribed before me \_\_\_\_\_  
(Notary Public)

Commission Expires: \_\_\_\_\_

.....  
**M**

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