

## EXHIBIT W

### LABOR, EMPLOYMENT AND DBE/SWAM RELATED MATTERS

In the event of any discrepancy between the provisions of this Exhibit W that are intended to incorporate or summarize statutes, rules or regulations promulgated by a Governmental Authority and the actual statutes, rules or regulations in effect from time to time, the actual statutes, rules or regulations shall apply and supersede the inconsistent provisions set forth herein. Further, such statutes, rules and regulations shall apply to the Project at any time only to the extent such statutes, rules and regulations are required to apply to the Project by applicable Law or regulation. In addition, in the event the Agreement and this Exhibit W apply different standards, procedures or requirements for the same matters, the standards, procedures and requirements specified in the Agreement shall control.

#### 1. Labor and Wages

The Developer shall comply with the provisions and requirements of the workers' compensation law and public statutes that regulate hours of employment on public work.

- (a) **Predetermined Minimum Wages:** The provisions of laws requiring the payment of a minimum wage of a predetermined minimum wage scale for the various classes of laborers and mechanics, when such a scale is incorporated in the Agreement, expressly shall be made a part of any Project Agreement. The Developer and its agents shall comply promptly with all such applicable provisions.

Any classification not listed and subsequently required shall be classified or reclassified in accordance with the wage determination. If other classifications are used, omission of classifications shall not be cause for additional compensation. The Developer shall be responsible for determining local practices with regard to the application of the various labor classifications.

- (b) **Labor Rate Forms:** The Developer shall complete Form C-28, indicating by classification the total number of employees, excluding executive and administrative employees, employed on the Project. The Developer also shall indicate on the form the compensation rate per hour for each classification. The Developer shall submit an original and two copies of the form prior to the due date of the second estimate for payment and for each 90-day period thereafter until the work specified in the Agreement has been completed. If at the time of Final Acceptance the period since the last labor report is 30 days or more, the Developer shall furnish an additional labor report as outlined herein prior to payment of the final estimate.

#### 2. Equal Employment Opportunity

- (a) The Developer shall comply with the applicable provisions of presidential executive orders and the rules, regulations, and orders of the President's

Committee on Equal Employment Opportunity (“EEO”). The Developer shall maintain the following records and reports as required by the EEO provisions:

- record of all applicants for employment
- new hires by race, work classification, hourly rate, and date employed
- minority and non-minority employees employed in each work classification
- changes in work classifications
- employees enrolled in approved training programs and the status of each
- minority subcontractor or subcontractors with meaningful minority group representation
- copies of Form C-57 (Contractor’s Monthly EEO Report) submitted by subcontractors

The Developer shall cooperate with the Department in carrying out EEO obligations and in the Department’s review of activities under the Agreement. The Developer shall comply with the specific EEO requirements specified in this Exhibit and shall include these requirements in every subcontract of \$10,000 or more with such modification of language as may be necessary to make them binding on the subcontractors.

- (b) EEO Policy: The Developer shall accept as operating policy the following statement:

It is the policy of this Company to assure that applicants are employed and that employees are treated during employment without regard to their race, religion, sex, sexual orientation, gender identity, color, or national origin. Such action shall include employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship or on-the-job training.

- (c) EEO Officer: The Developer shall designate and make known to the Department an EEO Officer who can effectively administer and promote an active Developer EEO program and who shall be assigned adequate authority and responsibility to do so.

- (d) Dissemination of Policy:

1. Members of the Developer’s staff who are authorized to hire, supervise, promote, and discharge employees or recommend such action or are substantially involved in such action shall be made fully aware of and

shall implement the Developer's EEO policy and contractual responsibilities to provide equal employment opportunity in each grade and classification of employment. The following actions shall be taken as a minimum:

- a. Periodic meetings of supervisory and personnel office employees shall be conducted before the start of work and at least once every 6 months thereafter, at which time the Developer's EEO policy and its implementation shall be reviewed and explained. The meetings shall be conducted by the EEO Officer or another knowledgeable company official.
- b. New supervisory or personnel office employees shall be given a thorough indoctrination by the EEO Officer or another knowledgeable company official covering all major aspects of the Developer's EEO obligations within 30 days following their reporting for duty with the Developer.
- c. The EEO Officer or appropriate company official shall instruct employees engaged in the direct recruitment of employees for the Project relative to the methods followed by the Developer in locating and hiring minority group employees.

2. In order to make the Developer's EEO policy known to all employees, prospective employees, and potential sources of employees such as, but not limited to, schools, employment agencies, labor unions where appropriate, and college placement officers, the Developer shall take the following actions:

- a. Notices and posters setting forth the Developer's EEO policy shall be placed in areas readily accessible to employees, applicants for employment, and potential employees.

The Developer shall furnish, erect, and maintain at least two bulletin boards having dimensions of at least 48 inches in width and 36 inches in height at locations readily accessible to all personnel concerned with the Project. The boards shall be erected immediately upon initiation of the Agreement work and shall be maintained until the completion of such work, at which time they shall be removed from the Project. Each bulletin board shall be equipped with a removable glass or plastic cover that when in place shall protect posters from weather or damage. The Developer shall promptly post official notices on the bulletin boards.

- b. The Developer's EEO policy and the procedures to implement such policy shall be brought to the attention of employees by

means of meetings, employee handbooks, or other appropriate means.

(e) Recruitment:

1. When advertising for employees, the Developer shall include in all advertisements for employees the notation “An Equal Opportunity Employer” and shall insert all such advertisements in newspapers or other publications having a large circulation among minority groups in the area from which the Project work force would normally be derived.
2. Unless precluded by a valid bargaining agreement, the Developer shall conduct systematic and direct recruitment through public and private employee referral sources likely to yield qualified minority group applicants, including, but not limited to, state employment agencies, schools, colleges, and minority group organizations. The Developer shall identify sources of potential minority group employees and shall establish procedures with such sources whereby minority group applicants may be referred to it for employment consideration.
3. The Developer shall encourage its employees to refer minority group applicants for employment by posting appropriate notices or bulletins in areas accessible to all employees. In addition, information and procedures with regard to referring minority group applicants shall be discussed with employees.

(f) Personnel Actions: Wages, working conditions, and employee benefits shall be established and administered, and personnel action of any type shall be taken without regard to race, color, religion, sex, or national origin.

1. The Developer shall conduct periodic inspections of project sites to ensure that working conditions and employee facilities do not indicate discriminatory treatment of personnel.
2. The Developer periodically shall evaluate the spread of wages paid within each classification to determine whether there is evidence of discriminatory wage practices.
3. The Developer periodically shall review selected personnel actions in depth to determine whether there is evidence of discrimination. Where evidence is found, the Developer promptly shall take corrective action. If the review indicates that the discrimination may extend beyond the actions reviewed, corrective action shall include all affected persons.
4. The Developer shall investigate all complaints of alleged discrimination made to it in connection with obligations under the Agreement, attempt to resolve such complaints, and take appropriate corrective action. If the investigation indicates that the discrimination may affect persons other

than the complainant, corrective action shall include those persons. Upon completion of each investigation, the Developer shall inform every complainant of all avenues of appeal.

(g) Training:

1. The Developer shall assist in locating, qualifying, and increasing the skills of minority group and women employees and applicants for employment.
2. Consistent with work force requirements and as permissible under federal and state regulations, the Developer shall make full use of training programs, i.e., apprenticeship and on-the-job training programs for the geographical area of Agreement performance. Where feasible, 25 percent of apprentices or trainees in each occupation should be in their first year of apprenticeship or training.
3. The Developer shall advise employees and applicants for employment of available training programs and the entrance requirements for each.
4. The Developer periodically shall review the training and promotion potential of minority group employees and shall encourage eligible employees to apply for such training and promotion.
5. If the Agreement provides a pay item for trainees, training shall be in accordance with the requirements of Section 518 of the *Road and Bridge Specification*.

(h) Unions: If the Developer relies in whole or in part on unions as a source of employees, best efforts shall be made to obtain the cooperation of such unions to increase opportunities for minority groups and women in the unions and to effect referrals by such unions of minority and women employees. Actions by the Developer, either directly or through its agents or subcontractors, shall include the following procedures:

1. In cooperation with the unions, best efforts shall be used to develop joint training programs aimed toward qualifying more minority group members and women for membership in the unions and to increase the skills of minority group employees and women so that they may qualify for higher-paying employment.
2. Best efforts shall be used to incorporate an EEO clause into union agreements to the end that unions shall be contractually bound to refer applicants without regard to race, color, religion, sex, sexual orientation, gender identity or national origin.
3. Information shall be obtained concerning referral practices and policies of the labor union except that to the extent the information is within the exclusive possession of the union. If the labor union refuses to furnish the

information to the Developer, the Developer shall so certify to the Department and shall set forth what efforts he made to obtain the information.

4. If a union is unable to provide the Developer with a reasonable flow of minority and women referrals within the time limit set forth in the union agreement, the Developer shall, through its recruitment procedures, fill the employment vacancies without regard to race, color, religion, sex, sexual orientation, gender identity or national origin, making full efforts to obtain qualified or qualifiable minority group persons and women. If union referral practice prevents the Developer from complying with the EEO requirements, the Developer shall immediately notify the Department.
- (i) Subcontracting: The Developer shall use best efforts to use minority group subcontractors or subcontractors with meaningful minority group and female representation among their employees. The Developer shall use best efforts to ensure subcontractor compliance with its EEO obligations.
1. Records and Reports: The Developer shall keep such records as are necessary to determine compliance with its EEO obligations. The records shall be designed to indicate the following:
    - i. the number of minority and nonminority group members and females employed in each work classification on the Project;
    - ii. the progress and efforts being made in cooperation with unions to increase employment opportunities for minorities and females if unions are used as a source of the work force;
    - iii. the progress and efforts being made in locating, hiring, training, qualifying, and upgrading minority and female employees; and
    - iv. the progress and efforts being made in securing the services of minority group subcontractors or subcontractors with meaningful minority group and female representation among their employees.
  2. Records shall be retained for a period of three years following completion of the Work and shall be available at reasonable times and places for inspection by authorized Representatives of the Department.
  3. Form C-57 shall be submitted each month for the first three months after each Contractor commences the Work pursuant to a notice to proceed issued by the Department pursuant to Section 8.03(b) or Section 9.02 (as applicable) of the Agreement and every month of July thereafter for the duration of the Project. Form C-57 shall be completed to indicate the number of minority, nonminority, and female employees currently engaged in each work classification shown on the form. The completed Form C-57 shall be submitted within three weeks after the reporting

period. Failure to do so may result in delay of approval of the Developer's monthly progress estimate for payment.

### **3. Use of Disadvantaged Business Enterprises (DBEs) and Small, Women and Minority-Owned Businesses (SWaMs)**

The Developer shall comply with all the requirements of the Department's "Special Provision 1 for Section 107.15 – Use of Small, Women and Minority Owned-Businesses (SWaMs)" dated February 18, 2014 (attached hereto as Attachment 1). Attachment 1 and "Special Provision 2 for Section 107.15 – Use of Disadvantaged Business Enterprises (DBEs)", (described in more detail below) amend and supersede Section 107.15 of the *Road and Bridge Specification* in its entirety and shall be read in conjunction with Section 24.04 of the Agreement.

### **4. Civil Rights**

(a) DBE-SWaM Forms: The Developer shall complete the following forms or equivalent forms as part of its compliance with the DBE-SWaM goals set forth in the Agreement.

- Form C-111 (Minimum DBE Requirements)
- Form C-112 (Certification Of Binding Agreement)
- Form C-48 (Subcontractor/Supplier Solicitation And Utilization Form)
- Form C-49 (DBE Good Faith Efforts Documentation)

(b) On-the-Job Training Forms: The Developer shall comply with the Special Provision Copied Note for Section 518 of the *Road and Bridge Specifications*.

(c) Design Requirements and Submittals: Payments made to DBE and SWaM consultants must be submitted on Form C-63 (DBE Report) or an equivalent form on a quarterly basis. Form C-63 and submittal information for the form is set forth in the Department's Construction Directive Memorandum CD-2007-6.

(d) Construction Requirements and Submittals:

1. EEO Contract Compliance:

i. The following forms and associated submittal information are required from the Design-Build Contractor and its subcontractors (including haulers and suppliers as applicable).

- Form C-64 (Company Employment)
- Letter Designating EEO Officer

- Semi-annual Minutes of an EEO Meeting
  - Form C-57 (Contractor’s Monthly EEO Report)
- ii. The Design-Build Contractor and its subcontractors are subject to formal Department EEO Contractor Compliance Reviews at least annually.
2. Labor Compliance: The Developer shall submit, or cause the submission, of the following. In addition, the Developer’s employees (and the employees of its subcontractors) may be subject to interviews by the Department.
    - i. Weekly payrolls from the Design-Build Contractor and its subcontractors and haulers;
    - ii. Form C-28 (Basic Hourly Rates paid by Contractor); and
    - iii. Form C-56 (Statement of Compliance).
  3. DBE Compliance:
    - i. DBE subcontractors, suppliers, manufacturers and haulers must be listed and submitted on Form C-111 or an equivalent form, indicating the task(s) assigned and the approximate dollar value of the planned work pursuant to “Special Provision 2 for Section 107.15 – Use of Disadvantaged Business Enterprises (DBEs)” dated April 18, 2016 (attached hereto as Attachment 2). Attachments 1 and 2 amend and supersede Section 107.15 of the *Road and Bridge Specification* in its entirety and shall be read in conjunction with Section 24.03 of the Agreement.
    - ii. Payments made to DBE firms must be submitted on Form C-63 on a quarterly basis. .
    - iii. All DBE firms are subject to formal DBE contract compliance reviews at least once during active participation on the Project.
    - iv. Attachment 2 provides guidance on removal of a DBE firm from the contract or for substituting another firm for all or portions of items of work designated to be performed by a DBE firm. Advance approval must be obtained from the District Civil Rights Office.
  4. SWaM Compliance:
    - i. SWaM subcontractors, suppliers, manufacturers and haulers shall be listed and submitted on Form C-111 or an equivalent form,



indicating the task(s) assigned and the approximate dollar value of the planned work pursuant to Attachment 1.

- ii. Payments made to SWaM firms must be submitted on Form C-63 on a quarterly basis in order to receive credit. See Construction Memorandum CD-2007-6.

5. Electronic Submission of Payrolls and Payments to Subcontractors

- i. The Developer shall, and shall cause all Subcontractors and Sub-subcontractors to, submit all certified payroll documentation and reflect DBE and SWaM payments electronically through the Department's web Transport Civil Rights and Labor (the "CRL System"). These requirements supersede DBE payroll submission and DBE and SWaM payment requirements set forth in Sections 107.13 and 107.14 of the Standard Specifications and Section 107.15 of the Division I Amendments.
- ii. The Developer shall ensure it and its Subcontractors and Sub-subcontractors submit such documentation and payment information via computer systems compatible with the Department's system.
- iii. Promptly following the Effective Date, Department will provide to the Developer a link to and Developer-specific log-in information for the CRL system to a designated employee of the Developer and its Subcontractors and Sub-subcontractors for purposes of the Project.
- iv. The Developer and each Subcontractor and Sub-subcontractor may meet their obligation to submit all certified payroll documentation and reflect DBE and SWaM payments electronically into the CRL System by either (a) manually entering all required information into the CRL System, (b) importing such information through the CRL system's XML converter tool or (c) converting payroll program data to an XML file to import into the CRL system.
- v. Notwithstanding the foregoing, the Department may (itself or through its agents) at any time require, upon written demand, paper certified payrolls from the Developer or any of its Subcontractors or Sub-subcontractors with respect to the Work.
- vi. For purposes of this Section, both the defined terms "Subcontractor" and "Sub-subcontractor" shall include all trucking entities subject to the FHWA-1273.

6. On-the-Job Training Compliance (applicable only during the performance of the Design-Build Work):

- i. The Project has been assigned a goal of 24 trainees, as indicated in the Special Provision for Section 518 of the *Road and Bridge Specifications*.
- ii. Upon notification of intent to assign employees into an approved program, the Department's Civil Rights office shall provide Form C-65, which initiates the training process. The Developer is responsible for submitting the completed form for approval by the District Civil Rights Manager ("DCRM"). Trainees may not have received prior training in the classification planned for the training opportunity. A journeyman in that classification must be on site and be available to assist with the training. The DCRM must be in agreement with the selected candidate.
- iii. Trainees may be current employees, newly hired employees, or individuals from the Business Opportunity and Workforce Development ("BOWD") Program. The BOWD Program is a Department developmental supportive services program and partnering initiative funded by FHWA for selected DBE firms of various skill and competence levels interested in entering, enhancing, or expanding highway contracting opportunities with prime contractors/consultants. The BOWD Program also supports On-the-Job Training supportive services to increase the participation of minority, disadvantaged persons, and women through a pre-employment training program into journey-level positions to ensure that a competent workforce is available to meet highway construction hiring needs and to address the historical under-representation of these groups in highway construction skilled and semi-skilled crafts. The partnering initiative between prime contractors/consultants, subcontractors and perspective trainees provides the opportunity for the further development of DBE firms through performance on contracts and guidance from prime contractors/consultants. The intent of this partnering initiative is to increase capacity by perfecting existing skills and knowledge, expanding into new work areas, and prime contractor/consultant joint venturing with DBE firms. The Developer is encouraged to achieve all or a percentage of the required DBE participation/goals determined for this Project by the utilization of approved BOWD firms. To assist the Developer in taking advantage of this opportunity for utilization of approved BOWD firms, please contact the BOWD Center for additional information, details, resources, and support. For further information on the BOWD Center and to view the DBE profiles, please go to [www.virginia.org/business/BOWD.asp](http://www.virginia.org/business/BOWD.asp). The BOWD Center can be contacted at (804) 662-9555 or via email to [BOWDCenter@vdotvirginia.gov](mailto:BOWDCenter@vdotvirginia.gov).

- iv. Form C-67, weekly training hours report, is required and must have concurrence from the DCRM as to the number of hours of training received for that week.

## **5. Local and Veteran Hiring Program**

- (a) The Commonwealth of Virginia is committed to reducing barriers to employment to ensure a diverse workforce in the construction industry. Therefore, the purpose of the Local and Veteran Hiring Program is to support and grow the Commonwealth's commitment by means of a robust hiring and retention program for local workers and veterans and a robust On-the-Job Training (OJT) Program.
  - 1. The Developer and any subcontractors shall comply with Exhibit W - Labor, Employment and DBE/SWaM Related Matters, Section 5 Local and Veteran Hiring Program.
  - 2. The Developer, recognizing the importance of recruiting, hiring, and technical and workplace training of local workers and veterans in the development and execution of the Project, shall utilize workforce on-the-job training, apprenticeship and recruitment programs to actively recruit local workers and veterans.
- (b) The Developer and subcontractors shall complete Form C-66 VDOT Local Worker and Veteran Employment Report quarterly until Project Completion. Form C-66, can be obtained from the VDOT website at: <http://vdotforms.vdot.virginia.gov/>.

**EXHIBIT W**

**ATTACHMENT 1**

**VIRGINIA DEPARTMENT OF TRANSPORTATION  
SPECIAL PROVISION 1 FOR  
SECTION 107.15**

September 19, 2011

**Section 107.15—Use Small, Women-Owned and Minority-Owned Businesses (SWaMs)**

It is the policy of the Department that Small, Women-Owned, and Minority-Owned Businesses (SWaMs) shall have the maximum opportunity to participate in the performance of the Contract. The Contractor is encouraged to take necessary and reasonable steps to ensure that SWaMs have the maximum opportunity to compete for and perform work on the Contract, including participation in any subsequent subcontracts.

A SWaM firm shall mean a small business concern as defined pursuant to the Code of Virginia, Title 2.2 -1401 for the purpose of reporting small, women-owned, and minority-owned business participation in state contracts and purchases pursuant to §§ 2.2-1404 and 2.2-1405. To that end the following terms shall apply:

**Small business** means an independently owned and operated business which, together with affiliates, has 250 or fewer employees, or average annual gross receipts of \$10 million or less.

**Women-owned business** means a business concern that is at least 51% owned by one or more women who are U.S. citizens or legal resident aliens, or in the case of a corporation, partnership, or limited liability company or other entity, at least 51% of the equity ownership interest is owned by one or more women who are citizens of the United States or non-citizens who are in full compliance with the United States immigration law, and both the management and daily business operations are controlled by one or more women who are U.S. citizens or legal resident aliens.

**Minority-owned business** means a business concern that is at least 51% owned by one or more minority individuals or in the case of a corporation, partnership, or limited liability company or other entity, at least 51% of the equity ownership interest in the corporation, partnership, or limited liability company or other entity is owned by one or more minority individuals and both the management and daily business operations are controlled by one or more minority individuals.

**Minority individual** means an individual who is a citizen of the United States or a non-citizen who is in full compliance with United States immigration law and who satisfies one or more of the following definitions:

1. African American means a person having origins in any of the original peoples of Africa and who is regarded as such by the community of which this person claims to be a part.
2. Asian American means a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands, including but not limited to Japan, China, Vietnam, Samoa, Laos, Cambodia, Taiwan, Northern Mariana, the Philippines, a U.S. territory of the Pacific, India, Pakistan, Bangladesh, or Sri Lanka and who is regarded as such by the community of which this person claims to be a part.
3. Hispanic American means a person having origins in any of the Spanish-speaking peoples of Mexico, South or Central America, or the Caribbean Islands or other Spanish or Portuguese cultures and who is regarded as such by the community of which this person claims to be a part.
4. Native American means a person having origins in any of the original peoples of North America and who is regarded as such by the community of which this person claims to be a part or who is recognized by a tribal organization.
5. a member of another group, or other individual, found to be economically and socially disadvantaged by the Small Business Administration under 8(a) of the Small Business Act as amended (15 U.S.C. 637[a]).

**State agency** means any authority, board, department, instrumentality, institution, agency, or other unit of state government. "State agency" shall not include any county, city, or town.

A list of Virginia Department of Minority Business Enterprise (DMBE) certified SWaM firms is maintained on the DMBE web site (<http://www.dmb.state.va.us/>) under the **SWaM Vendor Directory** link.

SWaM certification entitles firms to participate in VDOT's SWaM program; however, this certification does not guarantee that the firm will obtain work nor does it attest to the firm's abilities to perform any particular work.

The Contractor is encouraged to use the services of banks owned or controlled by minorities or females; however, use of such services will not be credited toward participation achievement for the Contract. The Department has on file, and will make available on request, the names and addresses of known minority- and female-owned banks in the Commonwealth of Virginia.

The Contractor shall designate and make known to the Department a liaison officer who is assigned the responsibility of actively and effectively administering, encouraging and promoting a responsive program for the use of SWaMs.

The performance of the Contract for the purpose of this specification shall be interpreted to include, but not necessarily be limited to, subcontracting; furnishing materials, supplies, and services; and, leasing equipment or where applicable, any combination thereof.

If the Contractor intends to sublet a portion of the work on the Project in accordance with the provisions of Section 105.06 of the Specifications, the Contractor is encouraged to seek out and consider SWaMs as potential subcontractors. The Contractor is encouraged to contact SWaMs to solicit their interest, capability, and prices and shall retain on file the proper documentation to substantiate such contacts.

By signing the bid, the bidder certifies to the following:

- That on the work proposed to be sublet and shown on Form C-31 for *Contractors Proposal to Sublet*, the bidder has taken reasonable steps to seek out and consider SWaMs as potential subcontractors.
- That, if awarded the Project, any work proposed to be sublet and not shown on the form for *Contractors Proposal to Sublet*, the same reasonable steps certified herein will be taken.

If the Department has determined that specific opportunities for participation by SWaMs are available on a particular Contract and the bidder chooses to claim credit for SWaM participation, the extent of such participation will be shown as a percentage of the Contract amount and will be indicated on Form C-111, *SWaM Participation*.

If the bidder is a SWaM that is owned and controlled by a minority female(s), participation achievement may be shown as either minority or female, but not both, as the certification indicates. Further, each bidder shall comply with the requirements of Section 102.01.

If the apparent low bidder is a currently certified SWaM firm, the SWaM requirements of this provision will not be applicable except for those referring to the reporting of participation achievement.

The following are examples of efforts the Department encourages bidders and Contractors to make in soliciting SWaM participation. Other factors or types of efforts may be relevant in appropriate cases. The Contractor is encouraged to:

- (a) attend any pre-solicitation or pre-bid meetings at which SWaMs could be present and/or informed of contracting and subcontracting opportunities;
- (b) advertise in general circulation, trade association and minority-focus media concerning the subcontracting opportunities;
- (c) provide written notice to a reasonable number of specific SWaMs that their interest in the Contract is being solicited in sufficient time to allow the SWaMs to participate effectively;

- (d) follow-up initial solicitations of interest by contacting SWaMs to determine with certainty whether the SWaMs are interested;
- (e) select portions of the work to be performed by SWaMs in order to increase the likelihood of obtaining SWaM participation (including, where appropriate, breaking down proposed contract work into economically feasible units to facilitate SWaM participation);
- (f) provide interested SWaMs with adequate information about the plans, Specifications, and requirements of the Contract;
- (g) negotiate in good faith with interested SWaMs, not rejecting SWaMs as unqualified without sound reasons based on a thorough investigation of their capabilities;
- (h) make efforts to assist interested SWaMs in obtaining bonding, lines of credit, or insurance required by the Department or Contractor;
- (i) make efforts to assist interested SWaMs in obtaining necessary equipment, supplies, materials, or other necessary or related assistance or services; and,
- (j) effectively use the services of available minority, woman and small business community organizations; minority, woman and small business contractors' groups; local, state and federal minority, woman and small business assistance offices; and other organizations that provide assistance in the recruitment and placement of SWaMs.

Any agreement between a bidder and a SWaM whereby the SWaM agrees not to provide quotations for performance of work to other bidders is prohibited.

The Contractor shall submit to the Department a fully executed Form C-111 showing the name(s) and certification number(s) of any currently certified SWaMs who will perform work eligible to be reported as said participation credit.

The Contractor shall furnish, and require each subcontractor to furnish, on a quarterly basis, information relative to all SWaM involvement on the Project. The information shall be indicated on Form C-63, DBE and SWAM Payment Compliance Report or by copies of canceled checks with appropriate identifying notations. If participation achievement is to be fulfilled with a SWaM whose name has not been previously furnished to the Department for the Contract in question, an initial or revised Form C-111, whichever is appropriate, shall be submitted prior to such SWaM beginning the work. Failure to provide the Department the forms by the fifth of the month following each quarterly reporting period may result in delay of the Contractor's estimate for payment.

If a SWaM, through no fault of the Contractor, is unable or unwilling to fulfill his agreement with the Contractor, the Contractor shall immediately notify the Department and provide all relevant facts. If any subcontractor is relieved of the responsibility to perform work under their subcontract, the Contractor is encouraged to take the appropriate steps to obtain a SWaM to

perform an equal or greater dollar value of the remaining subcontracted work. The substitute SWaM's name, description of the work, and dollar value of the work shall be submitted to the Department on Form C-111 prior to such SWaM beginning the work, if such work is to be counted for participation achievement.



## ATTACHMENT 2

### VIRGINIA DEPARTMENT OF TRANSPORTATION SPECIAL PROVISION 2 FOR SECTION 107.15 FOR DESIGN-BUILD PROJECTS

April 18, 2016

**Section 107.15** of the Specifications is replaced by the following:

#### **Section 107.15—Use of Disadvantaged Business Enterprises (DBEs) for Design-Build Projects**

##### **A. Disadvantaged Business Enterprise (DBE) Program Requirements**

Any Design-Builder, subcontractor, supplier, DBE firm, and contract surety involved in the performance of work on a federal-aid contract shall comply with the terms and conditions of the United States Department of Transportation (USDOT) DBE Program as the terms appear in Part 26 of the Code of Federal Regulations (49 CFR as amended), the USDOT DBE Program regulations; and the Virginia Department of Transportation's (VDOT or the Department) Road and Bridge Specifications and DBE Program rules and regulations.

For the purposes of this provision, Offeror is defined as any individual, partnership, corporation, or Joint Venture that formally submits a Statement of Qualification or Proposal for the work contemplated there under; Design-Builder is defined as any individual, partnership, or Joint Venture that contracts with the Department to perform the Work; and subcontractor is defined as any supplier, manufacturer, or subcontractor performing work or furnishing material, supplies or services to the contract. The Design-Builder shall physically include this same contract provision in every supply or work/service subcontract that it makes or executes with a subcontractor having work for which it intends to claim credit.

In accordance with 49 CFR Part 26 and VDOT's DBE Program requirements, the Design-Builder, for itself and for its subcontractors and suppliers, whether certified DBE firms or not, shall commit to complying fully with the auditing, record keeping, confidentiality, cooperation, and anti-intimidation or retaliation provisions contained in those federal and State DBE Program legal requirements. By submitting a Proposal on this contract, and by accepting and executing this contract, the Design-Builder agrees to assume these contractual obligations and to bind the Design-Builder's subcontractors contractually to the same at the Design-Builder's expense.

The Design-Builder and each subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Design-Builder shall carry out applicable requirements of 49 CFR Part 26 in the award, administration, and performance of this contract. Failure by the Design-Builder to carry out these requirements is a material breach of this contract, which will result in the termination of this contract or other such remedy, as VDOT deems appropriate.

All administrative remedies noted in this provision are automatic unless the Design-Builder exercises the right of appeal within the required timeframe(s) specified herein. Appeal requirements, processes, and procedures shall be in accordance with guidelines stated herein and current at the time of the proceedings. Where applicable, the Department will notify the Design-Builder of any changes to the appeal requirements, processes, and procedures after receiving notification of the Design-Builder's desire to appeal.

All time frames referenced in this provision are expressed in business days unless otherwise indicated. Should the expiration of any deadline fall on a weekend or holiday, such deadline will automatically be extended to the next normal business day.

## **B. DBE Certification**

The only DBE firms eligible to perform work on a federal-aid contract for DBE contract goal credit are firms certified as Disadvantaged Business Enterprises by the Virginia Department of Small Business and Supplier Diversity (SBSD) or the Metropolitan Washington Airports Authority (MWAA) in accordance with federal and VDOT guidelines. DBE firms must be certified in the specific work listed for DBE contract goal credit. A directory listing of certified DBE firms can be obtained from the Virginia Department of Small Business and Supplier Diversity's website: <http://www.sbsd.virginia.gov>.

## **C. Bank Services**

The Design-Builder and each subcontractor are encouraged to use the services of banks owned and controlled by socially and economically disadvantaged individuals. Such banking services and the fees charged for services typically will not be eligible for DBE Program contract goal credit.

## **D. DBE Program-Related Certifications Made by Offerors/Design-Builders**

By submitting a Proposal and by entering into any contract on the basis of that Proposal, the Offeror/Design-Builder certifies to each of the following DBE Program-related conditions and assurances:

1. That the Offeror/Design-Builder agrees to comply with the project construction and administration obligations of the USDOT DBE Program, 49 CFR Part 26 as amended, and the Standard Specifications setting forth the Department's DBE Program requirements.
2. Design-Builder shall comply fully with the DBE Program requirements in the execution and performance of the contract. Design-Builder acknowledges that failure to comply may result in enjoinder from participation in future Department or State procurements and/or other legal sanctions.
3. To ensure that DBE firms have been given full and fair opportunity to participate in the performance of the contract. The Design-Builder certifies that all reasonable steps were,

and will be, taken to ensure that DBE firms had, and will have, an opportunity to compete for and perform work on the contract. The Design-Builder further certifies that the Design-Builder shall not discriminate on the basis of race, color, age, national origin, or sex in the performance of the contract or in the award of any subcontract. Any agreement between a Design-Builder and a DBE whereby the DBE promises not to provide quotations for performance of work to other Design-Builders are prohibited.

4. Design-Builder shall make good faith efforts to obtain DBE participation in the proposed contract at or above the goal. The Offeror shall submit a written statement as a part of its Statement of Qualifications and/or Proposal indicating the Offeror's commitment to achieve the minimum requirement related to DBE goal indicated in Request for Qualification (RFQ) and/or Request for Proposal (RFP) for the entire value of the contract. The Offeror, by signing and submitting its Proposal, certifies the DBE participation information that will be submitted within the required time thereafter is true, correct, and complete, and that the information to be provided includes the names of all DBE firms that will participate in the contract, the specific item(s) that each listed DBE firm will perform, and the creditable dollar amounts of the participation of each listed DBE.
5. Offeror further certifies, by signing its Proposal, it has committed to meet the contract goal for DBE participation. Award of the contract will be conditioned upon meeting these and other listed requirements of 49 CFR Part 26.53 and the contract documents. By signing the Proposal, the Offeror certifies that good faith efforts will be made on work that it proposes to sublet; and that it will seek out and consider DBE firms as potential subcontractors and subconsultants. The Design-Builder shall, as a continuing obligation, contact DBE firms to solicit their interest, capability, and prices in sufficient time to allow them to respond effectively, and shall retain on file proper documentation to substantiate its good faith efforts.
6. Design-Builder shall not unilaterally terminate, substitute for, or replace any DBE firm that was designated in the executed contract in whole or in part with another DBE, any non-DBE firm, or with the Design-Builder's own forces or those of an affiliate of the Design-Builder without the prior written consent of Department as set out within the requirements of this Special Provision.
7. Design-Builder shall designate and make known to the Department a liaison officer who is assigned the responsibility of administering and promoting an active and inclusive DBE program as required by 49 CFR Part 26 for DBE firms. The designation and identity of this officer needs to be submitted only once by the Design-Builder.
8. Design-Builder shall comply fully with all contractual requirements and Legal Requirements of the USDOT DBE Program, and shall cause each DBE firm participating in the contract to fully perform the designated work items with the DBE firm's own forces and equipment under the DBE firm's direct supervision, control, and management. Where a contract exists and where the Design-Builder, DBE firm, or any other firm retained by the Design-Builder has failed to comply with federal or Department DBE

Program requirements, Department has the authority and discretion to determine the extent to which the DBE contract regulations have not been met, and will assess against the Design-Builder any remedies available at law or provided in the contract.

9. If a bond surety assumes the completion of work, if for any reason VDOT has terminated the Design-Builder, the surety shall be obligated to meet the same DBE contract terms and requirements as were required of the original Design-Builder in accordance with the requirements of this specification.

#### **E. DBE Program Compliance Procedures**

The following procedures shall apply to the contract for DBE Program compliance purposes:

1. **Prequalification of Subcontractors:** All prospective DBE subcontractors shall prequalify with the Department in accordance with the *Rules Governing Prequalification*.
2. **DBE Goal, Good Faith Efforts Specified:** Design-Builder shall evidence attainment of the DBE commitment equal to or greater than the required DBE Goal through submission, to Department, of completed Form C-111, Minimum DBE Requirements; Form C-112, Certification of Binding Agreement; and Form C-48, Subcontractor/Supplier Solicitation and Utilization, as a part of the good faith efforts documentation set forth below:

**Design Phase:** Thirty (30) days after the Notice to Proceed for Design, the Design-Builder shall submit to Department for review and approval Forms C-111 and C-112 for each DBE firm to be utilized during the design phase to meet the DBE minimum requirement and Form C-48. Failure to submit the required documentation within the specified timeframe shall be cause to deny credit for any work performed by a DBE firm and delay approval of the Design-Builder's monthly payment.

**Construction Phase:** No later than thirty (30) days prior to the DBE firm undertaking any work, Design-Builder shall submit to Department for review and approval Forms C-111, C-112, and C-48. Failure to submit the required documentation within the specified timeframe shall result in disallowed credit of any work performed prior to approval of Forms C-111 and C-112 and delay approval of monthly payment.

The District Civil Rights Office (DCRO) will monitor good faith effort documentation quarterly to determine progress being made toward meeting the DBE minimum requirement established for the contract.

Forms C-48, C-49, C-111, and C-112 can be obtained from the VDOT website at:

<http://vdotforms.vdot.virginia.gov/>

3. **Good Faith Efforts Described:** Department will determine if Design-Builder demonstrated

adequate good faith efforts, and if given all relevant circumstances, those efforts were made actively and aggressively to meet the DBE requirements. Efforts to obtain DBE participation are not good faith efforts if they could not reasonably be expected to produce a level of DBE firm participation sufficient to meet the DBE Program requirements and DBE Goal.

Good faith efforts may be determined through use of the following list of the types of actions the Design-Builder may make to obtain DBE participation. This is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts of similar intent may be relevant in appropriate cases:

- (a) Soliciting through reasonable and available means, such as but not limited to, attendance at pre-bid meetings, advertising, and written notices to DBE firms who have the capability to perform the work of the contract. Examples include: advertising in at least one daily/weekly/monthly newspaper of general circulation, as applicable; phone contact with a completely documented telephone log, including the date and time called, contact person, or voice mail status; and internet contacts with supporting documentation, including dates advertised. DBE firms shall have no less than five (5) business days to reasonably respond to the solicitation. Design-Builder shall determine with certainty if the DBE firms are interested by taking reasonable steps to follow up initial solicitations as evidenced by documenting such efforts as requested on Form C-49, DBE Good Faith Efforts Documentation.
- (b) Selecting portions of the work to be performed by DBE firms in order to increase the likelihood that the DBE Goal will be achieved. This includes, where appropriate, breaking out work items into economically feasible units to facilitate DBE firm participation, even when the Design-Builder might otherwise prefer to completely perform all portions of this work in its entirety or use its own forces;
- (c) Providing interested DBE firms with adequate information about the plans, specifications, and requirements of the contract in a timely manner, which will assist the DBE firms in responding to a solicitation;
- (d) Negotiating for participation in good faith with interested DBE firms;
  1. Evidence of such negotiation shall include the names, addresses, and telephone numbers of DBE firms that were considered; dates DBE firms were contacted; a description of the information provided regarding the plans, specifications, and requirements of the contract for the work selected for subcontracting; and, if insufficient DBE participation seems likely, evidence as to why additional agreements could not be reached for DBE firms to perform the work;
  2. Design-Builder should, using good business judgment, consider a number of factors in negotiating with subcontractors/subconsultants, and should take a DBE

firm's price, qualifications, and capabilities, as well as contract goals, into consideration. However, the fact that there may be some additional costs involved in finding and using DBE firms is not sufficient reason for a Design-Builder's failure to meet the DBE goal as long as such costs are reasonable and comparable to costs customarily appropriate to the type of work under consideration. Also, the ability or desire of a Design-Builder to perform the work with its own organization does not relieve the Design-Builder of the responsibility to make diligent good faith efforts. Design-Builders are not, however, required to accept higher quotes from DBE firms if the price difference can be shown by the Design-Builder to be excessive, unreasonable, or greater than would normally be expected by industry standards;

- (e) A Design-Builder cannot reject a DBE firm as being unqualified without sound reasons based on a thorough investigation of the DBE firm's capabilities. The DBE firm's standing within its industry, membership in specific groups, organizations, associations, and political or social affiliations, and union vs. non-union employee status are not legitimate causes for the rejection or non-solicitation of bids in the Design-Builder's efforts to meet the contract goal for DBE participation;
- (f) Making efforts to assist interested DBE firms in obtaining bonding, lines of credit, or insurance as required by Department or by Design-Builder;
- (g) Making efforts to assist interested DBE firms in obtaining necessary equipment, supplies, materials, or related assistance or services subject to the restrictions contained in this Special Provision;
- (h) Effectively using the services of appropriate personnel from VDOT and from SBSB; available minority/women community or minority organizations; 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 utilization of qualified DBEs.

#### **F. Documentation and Administrative Reconsideration of Good Faith Efforts**

Design-Builder must provide Form C-49, DBE Good Faith Efforts Documentation, of its efforts made to meet the DBE goal within the time frames specified in this provision. The means of transmittal and the risk for timely receipt of this information shall be the responsibility of the Design-Builder. Design-Builder shall attach additional pages to the certification, if necessary, in order to fully detail specific good faith efforts made to obtain the DBE firm's participation in the proposed work.

However, Design-Builder shall timely submit its completed and executed forms C-111, C-112, C-48, and C-49, as aforementioned. Failure to submit the required documentation within the specified time frames shall be cause to disallow DBE goal credit and delay approval of the Design-Builder's monthly payment.

**During the Contract:** If a DBE, through no fault of the Design-Builder, is unable or unwilling to fulfill his agreement with the Design-Builder, the Design-Builder shall immediately notify the Department and provide all relevant facts. If a Design-Builder relieves a DBE subcontractor of the responsibility to perform work under their subcontract, the Design-Builder is encouraged to take the appropriate steps to obtain another DBE firm to perform the remaining subcontracted work for the amount that would have been paid to the original DBE firm. In such instances, Design-Builder is expected to seek DBE participation towards meeting the goal during the performance of the contract.

If at any point during the execution and performance of the contract it becomes evident that the remaining dollar value of allowable DBE goal credit for performing the subcontracted work is insufficient to obtain the DBE contract goal, and the Design-Builder has not taken the preceding actions, the Design-Builder and any aforementioned affiliates may be subject to disallowance of DBE credit until such time as sufficient progress toward achievement of the DBE goal is achieved or evidenced.

**Project Completion:** If, at final completion, the Design-Builder fails to meet the DBE goal, and fails to adequately document that it made good faith efforts to achieve sufficient DBE goal, then Design-Builder and any prime contractual affiliates, as in the case of a joint venture, may be enjoined from bidding, responding, or participating on Department projects for a period of ninety (90) days and be removed from Department's prequalification list.

Prior to such enjoinder or removal, Design-Builder may submit documentation to the State Construction Engineer or other designee of Department to substantiate that failure was due solely to quantitative underrun(s), elimination of items subcontracted to DBEs, or to circumstances beyond Design-Builder's control and that all feasible means had been used to achieve the DBE goal. The State Construction Engineer, or such other designee, upon verification of such documentation shall determine whether Design-Builder has met the requirements of the contract.

If it is determined that the aforementioned documentation is insufficient or the failure to meet required participation is due to other reasons, the Design-Builder may request an appearance before the Department's Administrative Reconsideration Panel to establish that all feasible means were used to meet such participation requirements. The Administrative Reconsideration Panel will be made up of Department Division Administrators or their designees, none of who took part in the initial determination that the Design-Builder failed to make the DBE goal or make adequate good faith efforts to do so. After reconsideration, Department shall notify the Design-Builder in writing of its decision and explain the basis for finding that the Design-Builder did or did not meet the DBE goal or make adequate good faith efforts to do so. The decision of the Administrative Reconsideration Panel shall be administratively final. If the decision is made to enjoin the Design-Builder from bidding or participating on other Department work as described herein, the enjoinder period will begin upon Design-Builder's failure to request a hearing within the designated time frame or upon the Administrative Reconsideration Panel's decision to enjoin, as applicable.

## G. DBE Participation for Contract Goal Credit

DBE participation on the contract will count toward meeting the DBE contract goal in accordance

with the following criteria:

1. The applicable percentage of the total dollar value of the contract or subcontract awarded to the DBE firm will be counted toward meeting the DBE goal in accordance with the **DBE Program-Related Certifications Made by Offerors/Design-Builder's** section of this Special Provision for the value of the work, goods, or services that are actually performed or provided by the DBE firm itself or subcontracted by the DBE to other DBE firms.
2. When a DBE performs work as a participant in a joint venture with a non-DBE firm, the Design-Builder may count toward the DBE goal only that portion of the total dollar value of the subcontract equal to the distinctly defined portion of the work that the DBE firm has performed with the DBE firm's own forces or in accordance with the provisions of this Section. The Department shall be contacted in advance regarding any joint venture involving both a DBE firm and a non-DBE firm to coordinate Department review and approval of the joint venture's organizational structure and proposed operation where the Design-Builder seeks to claim the goal credit.
3. When a DBE firm subcontracts part of the work to another firm, the value of that subcontracted work may be counted toward the DBE contract goal only if the DBE firm's subcontractor is a DBE firm. Work that a DBE firm subcontracts to a non-DBE firm, or to a firm that may be eligible to be a DBE firm, but has not yet been certified as a DBE firm, will not count toward the DBE. The cost of supplies and equipment a DBE subcontractor purchases or leases from the Design-Builder or prime contractual affiliates, as in the case of a joint venture, will not count toward the DBE goal.
4. The Design-Builder may count expenditures to a DBE subcontractor toward the DBE goal only if the DBE performs a Commercially Useful Function (CUF) on that subcontract, as such term is defined in subparagraph H below.
5. A Design-Builder may not count the participation of a DBE subcontractor toward the DBE goal until the amount being counted has actually been paid to the DBE firm. Design-Builder may count sixty (60) percent of its expenditures actually paid for materials and supplies obtained from a DBE certified as a regular dealer, and one hundred (100) percent of such expenditures actually paid for materials and supplies obtained from a manufacturer DBE firm.
  - (a) For the purposes of this Special Provision, a "regular dealer" is defined as a firm or person that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment required and used under the contract are bought, kept in stock, and regularly sold or leased to the public in the



usual course of business. To be a regular dealer, the DBE firm or person shall be an established business that regularly engages, as its principal business and under its own name, in the purchase and sale or lease of the products or equipment in question. Packers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions will not be considered regular dealers.

- (b) A DBE firm or 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 where it keeps such items in stock if the DBE firm both owns and operates distribution equipment for the products it sells and provides for the work, provided further that the DBE firm or person has been certified with an appropriate North American Industry Classification System (NAICS) code for supply of such bulk items. Any supplementation of a regular dealer's own distribution equipment shall be by a long-term lease agreement and not on an *ad hoc* or contract-by-contract basis to be eligible for credit to meet the DBE goal credit.
- (c) If a DBE regular dealer is used for DBE goal credit, no additional credit will be given for hauling or delivery to the project site goods or materials sold by that DBE regular dealer. Those delivery costs shall be deemed included in the price charged for the goods or materials by the DBE regular dealer, which shall be responsible for distribution of the goods or materials.
- (d) For the purposes of this Special Provision, a manufacturer will be defined as 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 project specifications. A manufacturer shall include firms that produce finished goods or products from raw or unfinished material, or purchase and substantially alter goods and materials to make them suitable for construction use before reselling them.
- (e) A Design-Builder may count toward the DBE goal the following expenditures to DBE firms that are not regular dealers or manufacturers for DBE program purposes:
  - 1. 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 the federal-aid contract, if the fee is reasonable and not excessive or greater than would normally be expected by industry standards for the same or similar services.
  - 2. The entire amount of that portion of the contract that is performed by the DBE firm's own forces and equipment under the DBE firm's supervision. This includes the cost of supplies and materials ordered and paid for by the DBE firm for work, including supplies purchased or equipment leased by the DBE firm, except Design-Builder supplies and equipment a DBE subcontractor purchases or leases from the Design-Builder or its affiliates.

- (f) Design-Builder may count toward the DBE goal one hundred (100) percent of the fees paid to a DBE trucker or hauler for the delivery of material and supplies required on the project job site, but not for the cost of those materials or supplies themselves, provided that the trucking or hauling fee is determined by Department to be reasonable, as compared with fees customarily charged by non-DBE firms for similar services. Design-Builder shall not count costs for the removal or relocation of excess material from or on the job site when the DBE trucking company is the manufacturer of or a regular dealer in those materials and supplies. The DBE trucking firm shall also perform a CUF on the project and not operate merely as a pass through for the purposes of gaining DBE goal credit. Prior to entering into a trucking subcontract, Design-Builder shall determine, or contact the Department Civil Rights Division or its district offices for assistance in determining, whether a DBE trucking firm will meet the criteria for performing a CUF on the project. See section on **Miscellaneous DBE Program Requirements; Factors used to Determine if a DBE Trucking Firm is Performing a CUF.**
  
- (g) Design-Builder will receive DBE goal credit for the fees or commissions charged by and paid to a DBE broker who arranges or expedites sales, leases, or other work arrangements provided that those fees are determined by Department to be reasonable and not excessive as compared with fees customarily charged by non-DBE firms for similar services. For the purposes of this Special Provision, a broker is defined as a person or firm that regularly engages in arranging for delivery of material, supplies, and equipment, or regularly arranges for the providing of project services as a course of routine business, but does not own or operate the delivery equipment necessary to transport materials, supplies or equipment to or from a job site.

#### **H. Performing a Commercially Useful Function (CUF)**

No credit toward the DBE goal will be allowed for payments or reimbursement of expenditures to a DBE firm if that DBE firm does not perform a CUF on that contract. A DBE firm performs a CUF when the DBE is solely responsible for execution of a distinct element of the work and the DBE firm actually performs, manages, and supervises such work with the DBE firm's own forces or in accordance with the provisions of the **DBE Participation for Contract Goal Credit** section of this Special Provision. To perform a CUF the DBE firm alone shall be responsible and bear the risk for the material and supplies used on the contract, selecting a supplier or dealer from those available, negotiating price, determining quality and quantity, ordering the material and supplies, installing those materials with the DBE firm's own forces and equipment, and paying for those materials and supplies. The amount the DBE firm is to be paid under the subcontract shall be commensurate with the work the DBE actually performs and the DBE goal credit claimed for the DBE firm's performance.

**Monitoring CUF Performance:** It shall be the Design-Builder's responsibility to confirm that all DBE firms selected for subcontract work on the contract, for which he seeks to claim credit toward the DBE goal, perform a CUF. Further, the Design-Builder is responsible for

and shall confirm that each DBE firm fully performs the DBE firm's designated tasks in accordance with the provisions of the **DBE Participation for Contract Goal Credit** section of this Special Provision. For the purposes of this Special Provision the DBE firm's equipment will mean either equipment directly owned by the DBE as evidenced by title, bill of sale or other such documentation, or leased by the DBE firm, and over which the DBE has control as evidenced by the leasing agreement from a firm not owned in whole or part by the Design-Builder or an affiliate of the Design-Builder.

Department will monitor Design-Builder's DBE involvement during the performance of the contract. However, Department is under no obligation to warn the Design-Builder that a DBE firm's participation will not count toward the goal.

**DBE Firms Must Perform a Useful and Necessary Role in Contract Completion:** A DBE firm does not perform a CUF if the DBE firm's 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 firm participation.

**DBE Firms Must Perform The Contract Work With Their Own Workforces:** If a DBE firm does not perform and exercise responsibility for at least thirty (30) percent of the total cost of the DBE firm's contract with the DBE firm's own work force, or the DBE firm 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 involved, Department will presume that the DBE firm is not performing a CUF and such participation will not be counted toward the DBE goal.

**Department Makes Final Determination On Whether a CUF Is Performed:** Department has the final authority to determine, in its sole discretion, whether a DBE firm has performed a CUF on the contract. To determine whether a DBE is performing or has performed a CUF, Department will evaluate the amount of work subcontracted by that DBE firm or performed by other firms and the extent of the involvement of other firms' forces and equipment. Any DBE work performed by the Design-Builder or by employees or equipment of the Design-Builder shall be subject to disallowance under the DBE Program, unless the independent validity and need for such an arrangement and work is demonstrated. When a DBE firm is presumed not to be performing a commercially useful function the DBE may present evidence to rebut the Department's finding. Department has the final authority to determine, in its sole discretion, whether a DBE firm has performed a CUF on the contract.

## **I. Verification of DBE Participation and Imposed Damages**

Within fourteen (14) days after subcontract execution between Design-Builder and DBE subcontractors (or subcontract execution between DBE subcontractors and DBE subcontractors), Design-Builder shall submit to the DCRO, a copy of the fully executed subcontract agreement for each DBE firm used to claim credit in accordance with the requirements stated on Form C-111. The subcontract shall be executed by both parties stating the work to be performed, the details or specifics concerning such work, and the price which will be paid to the DBE subcontractor. Because of the commercial damage that the Design-

Builder and its DBE subcontractor could suffer if their subcontract pricing, terms, and conditions were known to competitors, the Department staff will treat subcontract agreements as proprietary Design-Builder trade secrets with regard to Freedom of Information Act requests. In lieu of subcontracts, purchase orders may be submitted for haulers, suppliers, and manufacturers. These too, will be treated confidentially and protected. Such purchase orders must contain, as a minimum, the following information: authorized signatures of both parties; description of the scope of work to include contract item numbers, quantities, and prices; and required federal contract provisions.

The Design-Builder shall also furnish, and shall require each subcontractor to furnish, information relative to all DBE involvement on the project for each quarter during the life of the contract in which participation occurs and verification is available. The information shall be indicated on Form C-63, DBE and SWAM Payment Compliance Report. The Department reserves the right to request proof of payment via copies of cancelled checks with appropriate identifying notations. Failure to provide Form C-63 to the DCRO within five (5) business days after the reporting period may result in delay of approval of the Design-Builder's monthly payment. The names and certification numbers of DBE firms provided by the Design-Builder on the various forms indicated in this Special Provision shall be exactly as shown on SBSB's latest list of certified DBEs. Signatures on all forms indicated herein shall be those of authorized representatives of the Design-Builder as shown on the Prequalification Application, Form C-32 or the Prequalification/Certification Renewal Application, Form C-32A, or authorized by letter from the Design-Builder. If DBE firms are used which have not been previously documented with the Design-Builder's minimum DBE requirements documentation and for which the Design-Builder now desires to claim credit toward the contract goal, the Design-Builder shall be responsible for submitting necessary documentation in accordance with the procedures stipulated in this Special Provision to cover such work prior to the DBE firm beginning work. Form C-63 can be obtained from the VDOT website at: <http://vdotforms.vdot.virginia.gov/>

Design-Builder shall submit to the Department's Project Manager with a copy to the DCRO, a narrative with each project schedule submission, as required in the Special Provision for Design-Build Project Schedule (Part 3, Exhibit 11.1). The project schedule narrative shall include a log of applicable DBE participation activities in the Design-Builder's project schedule for which the Design-Builder intends to claim credit for attaining the DBE goal required in the contract. The log shall include the proposed start/finish dates, durations, and dollar values of the DBE participation activities.

Narratives or other agreeable format of schedule information requirements and subsequent progress determination shall be based on the commitment information shown on the latest Form C-111 as compared with the appropriate Form C-63.

Prior to beginning any major component of the work to be performed by a DBE firm not previously submitted, Design-Builder shall furnish a revised Form C-111 showing the name(s) and certification number(s) of any such DBEs for which Design-Builder seeks DBE goal credit. Design-Builder shall obtain the prior approval of the Department for any assistance it may provide to the DBE firm beyond its existing resources in executing its

commitment to perform the work in accordance with the requirements listed in the **Good Faith Efforts Described** section of this Special Provision. If Design-Builder is aware of any assistance beyond a DBE firm's existing resources that Design-Builder, or another subcontractor, may be contemplating or may deem necessary and that have not been previously approved, Design-Builder shall submit a new or revised narrative statement for Department's approval prior to assistance being rendered.

If the Design-Builder fails to correctly complete and any of the required documentation requested by this Special Provision within the specified time frames, the Department will withhold payment until such time as the required submissions are received by Department. Where such failures to provide required submittals or documentation are repeated, Department will move to enjoin the Design-Builder and any prime contractual affiliates, as in the case of a joint venture, from bidding, responding or participating Department projects until such submissions are received.

#### **J. Documentation Required for Semi-final Payment**

Design-Builder must submit Form C-63 to the DCRO sixty (60) days prior to date of final completion, set forth on the Baseline Schedule (as updated from time to time in accordance with the contract). The form must include each DBE firm used on the contract and the work performed by each DBE firm. The form shall include the actual dollar amount paid to each DBE firm for the accepted creditable work. The form shall be certified under penalty of perjury, or other applicable legal requirements, to be accurate and complete. Department will use this certification and other information available to determine applicable DBE credit allowed to date by Department and the extent to which the DBE firms were fully paid for that work. The Design-Builder acknowledges by the act of filing the form that the information is supplied to obtain payment regarding the contract as a federal participation contract. A letter of certification, signed by both the Design-Builder and appropriate DBE firms, will accompany the form, indicating the amount, including any retainage, if present, that remains to be paid to the DBE firm(s).

#### **K. Documentation Required for Final Payment**

Design-Builder shall submit a final Form C-63 marked "Final" to the DCRO thirty (30) days from final payment. The form must include each DBE firm used on the contract and the work performed by each DBE firm. The form shall include the actual dollar amount paid to each DBE firm for the creditable work. Department will use this form and other information available to determine if Design-Builder and DBE firms have satisfied the DBE goal and the extent to which credit was allowed. Design-Builder acknowledges by the act of signing and filing the form that the information is supplied to obtain payment regarding the contract as a federal participation contract.

#### **L. Prompt Payment Requirements**

Design-Builder shall make prompt and full payment to the subcontractor(s) (including DBE subcontractors) of any retainage held by Design-Builder after the subcontractor's work is

satisfactorily completed.

For purposes of this Special Provision, a subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished, documented, and accepted as required by the contract documents by Department. If Department has made partial acceptance of a portion of the contract, then Department will consider the work of any subcontractor covered by that partial acceptance to be satisfactorily completed. Payment will be made in accordance with the requirements of Section 107.01, Section 109.08, and Section 109.09 of the Division I Amendments to the Standard Specifications (Part 5).

Upon Department's payment of the subcontractor's portion of the work as shown on the application for payment and the receipt of payment by Design-Builder for such work, the Design-Builder shall make compensation in full to the subcontractor for that portion of the work satisfactorily completed and accepted by the Department. For the purposes of this Special Provision, payment of the subcontractor's portion of the work shall mean the Design-Builder has issued payment in full, less agreed upon retainage, if any, to the subcontractor for that portion of the subcontractor's work that Department paid to Design-Builder pursuant to the applicable application for payment.

Design-Builder shall make payment of the subcontractor's portion of the work within seven (7) days of the receipt of payment from Department in accordance with the requirements of Section 107.01, Section 109.08, and Section 109.09 of the Division I Amendments to the Standard Specifications (Part 5).

If Design-Builder fails to make payment for the subcontractor's portion of the work within the time frame specified herein, the subcontractor shall notify the Department and the Design-Builder's bonding company in writing. Upon written notice from the subcontractor, the Design-Builder's bonding company and Department will investigate the cause for non-payment. Barring mitigating circumstances that would make the subcontractor ineligible for payment, the Design-Builder's bonding company shall be responsible for insuring payment to the subcontractor in accordance with the requirements of Section 107.01, Section 109.08, and Section 109.09 of the Division I Amendments to the Standard Specifications (Part 5).

By accepting and executing this contract, the Design-Builder agrees to assume these obligations, and to bind the Design-Builder's subcontractors contractually to these obligations.

Nothing contained herein shall preclude Design-Builder from withholding payment to the subcontractor in accordance with the terms of the subcontract in order to protect the Design-Builder from loss or cost of damage due to a breach of the subcontract by the subcontractor.

#### **M. Miscellaneous DBE Program Requirements**

**Loss of DBE Eligibility:** When a DBE firm has been removed from eligibility as a certified DBE firm, the following actions will be taken:

1. When a Design-Builder has made a commitment to use a DBE firm that is not currently certified, thereby making the Design-Builder ineligible to receive DBE goal credit for work performed, the ineligible DBE firm's work does not count toward the DBE goal. Design-Builder shall meet the DBE goal with a DBE firm that is eligible to receive DBE credit for work performed, or must demonstrate to the DCRO that it has made good faith efforts to do so.
2. When a Design-Builder has executed a subcontract with a DBE firm prior to official notification of the DBE firm's loss of eligibility, Design-Builder may continue to use the firm on the contract and shall continue to receive DBE credit toward DBE goal for the subcontractor's work.
3. When Department has executed a prime contract with a DBE firm that is certified at the time of contract execution but that is later ruled ineligible, the portion of the ineligible firm's performance on the contract before VDOT has issued the notice of its ineligibility shall count toward the contract goal.

**Termination of DBE:** If a DBE subcontractor is terminated, or fails, refuses, or is unable to complete the work on the contract for any reason, Design-Builder must promptly request approval to substitute or replace that DBE firm in accordance with this section of this Special Provision.

Design-Builder, shall notify DCRO in writing before terminating and/or replacing the DBE firm that is being used or represented to fulfill DBE-related contract obligations during the term of the contract. Written consent from the DCRO for terminating the performance of any DBE firm shall be granted only when the Design-Builder can demonstrate that the DBE firm is unable, unwilling, or ineligible to perform its obligations for which the Design-Builder sought credit toward the DBE goal. Such written consent by the Department to terminate any DBE shall concurrently constitute written consent to substitute or replace the terminated DBE with another DBE. Consent to terminate a DBE firm shall not be based on the Design-Builder's ability to negotiate a more advantageous contract with another subcontractor whether that subcontractor is, or is not, a DBE firm.

1. All Design-Builder requests to terminate, substitute, or replace a DBE firm shall be in writing, and shall include the following information:
  - (a) The date the Design-Builder determined the DBE to be unwilling, unable, or ineligible to perform.
  - (b) The projected date that the Design-Builder shall require a substitution or replacement DBE to commence work if consent is granted to the request.
  - (c) A brief statement of facts describing and citing specific actions or inaction by the DBE firm giving rise to Design-Builder's assertion that the DBE firm is unwilling, unable, or ineligible to perform;

- (d) A brief statement of the DBE firm's capacity and ability to perform the work as determined by the Design-Builder;
  - (e) A brief statement of facts regarding actions taken by the Design-Builder, that Design-Builder believes constitute good faith efforts toward enabling the DBE firm to perform;
  - (f) The current percentage of work completed by the DBE firm;
  - (g) The total dollar amount currently paid for work performed by the DBE firm;
  - (h) The total dollar amount remaining to be paid to the DBE firm for work completed, but for which the DBE firm has not received payment, and with which the Design-Builder has no dispute;
  - (i) The total dollar amount remaining to be paid to the DBE firm for work completed, but for which the DBE firm has not received payment, and over which the Design-Builder and/or the DBE firm have a dispute.
2. Design-Builder's Written Notice to DBE of Pending Request to Terminate and Substitute with another DBE.

Design-Builder shall send a copy of the "request to terminate and substitute" letter to the affected DBE firm and make best efforts to ensure its receipt by the DBE firm, in conjunction with submitting the request to the DCRO. The DBE firm may submit a response letter to the DCRO and Department within two (2) business days of receiving the notice to terminate from the Design-Builder. If the DBE firm submits a response letter, then Design-Builder shall, as part of its subcontract, obligate the DBE firm to explain its position concerning performance on the committed work. The Department will consider both the Design-Builder's request and the DBE firm's response and explanation before approving the Design-Builder's termination and substitution request.

If, after making its best efforts to deliver a copy of the "request to terminate and substitute" letter, the Design-Builder is unsuccessful in notifying the affected DBE firm, the Department will verify that the DBE firm is unable or unwilling to continue performing its subcontract let with respect to the contract. Department will timely approve the Design-Builder's request for a substitution.

3. Proposed Substitution of Another Certified DBE

Upon termination of a DBE firm, Design-Builder shall use reasonable good faith efforts to replace the terminated DBE firm. The termination of such DBE firm shall not relieve Design-Builder of its obligations under this Special Provision, and the unpaid portion of the terminated DBE firm's subcontract will not be counted toward the DBE goal.



When a DBE substitution is necessary, the Design-Builder shall submit an amended Form C-111 to the DCRO for approval with the name of another DBE firm, the proposed work to be performed by that DBE firm, and the dollar amount of the work to replace the unfulfilled portion of the work of the original DBE firm.

Should Design-Builder be unable to commit the remaining required dollar value to the substitute DBE firm, the Design-Builder shall provide written evidence of good faith efforts made to obtain the substitute value requirement. Department will review the quality, thoroughness, and intensity of those efforts. Efforts that are viewed by Department as merely superficial or pro-forma will not be considered good faith efforts to meet the DBE goal. Design-Builder must document the steps taken that demonstrated its good faith efforts to obtain participation as set forth in the **Good Faith Efforts Described** section of this Special Provision.

**Factors Used to determine if a DBE Trucking Firm is performing a CUF:**

The following factors will be used to determine whether a DBE trucking company is performing a CUF:

1. To perform a CUF, the DBE trucking firm shall be completely responsible for the management and supervision of the entire trucking operation for which the DBE trucking firm is responsible by subcontract under the contract. There shall not be a contrived arrangement, including, but not limited to, any arrangement that would not customarily and legally exist under customary construction project subcontracting practices for the purpose of meeting the DBE goal;
2. The DBE firm must own and operate at least one fully licensed, insured, and operational truck used in the performance of the contract work. This does not include a supervisor's pickup truck or a similar vehicle that is not suitable for and customarily used in hauling the subject materials or supplies;
3. Design-Builder is eligible to receive full credit toward the DBE goal for the total reasonable amount the DBE firm is paid for the transportation services provided on the subcontract under the contract using acceptable trucks the DBE firm owns, insures, and operates using drivers that the DBE employs and manages;
4. The DBE trucking firm may lease trucks from another DBE firm, including from an owner-operator who is a DBE firm. Design-Builder is eligible to receive credit for the total fair market value actually paid for transportation services the lessee DBE firm provides to the DBE firm that leases trucks from such lessee DBE firm on the contract;
5. The DBE firm may also lease trucks from a non-DBE firm, including an owner-operator. Design-Builder may be eligible to receive DBE goal credit for the services of a DBE firm who leases trucks from a non-DBE firm up to the total

value of the transportation services provided by non-DBE lessees, *not to exceed the value of transportation services provided by DBE-owned trucks on the contract*. For additional participation by non-DBE lessees, the DBE will only receive credit for the fee or commission it receives as a result of the lease arrangement.

**Truck Counting**

Design-Builders may count for credit against the DBE goal the dollar volume attributable to no more than twice the number of trucks owned by a DBE firm or leased from another DBE firm.

As an example, DBE credit would be awarded for the total transportation services provided by DBE Firm X and DBE Firm Y, and may also be awarded for the total value of transportation services by four (4) of the six (6) trucks provided by non-DBE Firm Z (not to exceed the value of transportation services provided by DBE-owned trucks).

<u>Firm X</u>	
Truck 1	Owned by DBE
Truck 2	Owned by DBE
<u>Firm Y</u>	
Truck 3	Leased from DBE
Truck 4	Leased from DBE
<u>Firm Z</u>	
Truck 5	Leased from Non-DBE
Truck 6	Leased from Non-DBE
Truck 7	Leased from Non-DBE
Truck 8	Leased from Non-DBE
Truck 9	Leased from Non-DBE*
Truck 10	Leased from Non-DBE*

**Credit = 8 Trucks**

DBE credit would be awarded for the total transportation services provided by DBE firm X and DBE Firm Y, and may also be awarded for the total value of transportation services by four (4) of the six (6) trucks provided by non-DBE Firm Z (not to exceed the value of transportation services provided by DBE-owned trucks).

In all, full DBE credit would be allowed for the participation of eight (8) trucks (twice the number of DBE trucks owned and leased) and the dollar value attributable to the Value of Transportation Services provided by the 8 trucks.

\* With respect to the other two trucks provided by non-DBE Firm Z, DBE credit could be awarded only for the fees or commissions pertaining to those trucks that DBE Firm X receives as a result of the lease with non-DBE Firm Z.

6. For purposes of this section, the lease must indicate that the DBE firm leasing the truck has exclusive use of and control over the truck. This will not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, provided the lease gives the DBE absolute priority for and control over the use of the leased truck. Leased trucks must display the name and identification number of the DBE firm that has leased the truck at all times during the life of the lease.

## **N. Suspect Evidence of Criminal Behavior**

Failure of Design-Builder or any subcontractor to comply with the Standard Specifications, this Special Provision, or any other contract document wherein there appears to be evidence of criminal conduct shall be referred to the Attorney General for the Commonwealth of Virginia and/or the FHWA Inspector General for criminal investigation and, if warranted prosecution.

### **Suspected DBE Fraud**

In appropriate cases, Department will bring to the attention of the United States Department of Transportation any appearance of false, fraudulent, or dishonest conduct in connection with the DBE program, so that USDOT can take the steps, e.g., referral to the Department of Justice for criminal prosecution, referral to the USDOT Inspector General, action under suspension and debarment or “Program Fraud and Civil Penalties” rules provided in 49 CFR Part 31.

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