

# **SBE Contract Requirements**

## **Civil Rights: Equal Employment Opportunity and SBE Program Requirements RFP/IFB**

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## **PART A**

### **SPECIFIED FEDERAL REQUIREMENTS**

The Contractor/Consultant shall perform its obligations and shall require each Subcontractor regardless of the tier to perform its respective obligations under the Contract and the Subcontract(s) in accordance with the following requirements. The Contractor shall insert this Part A, SBE Contract Requirements and all flow-down provisions as detailed in this SBE Contract Requirements into each Subcontract regardless of the tier.

#### **1. CIVIL RIGHTS REQUIREMENTS APPLICABLE TO THE CONTRACT**

##### **1.1 CIVIL RIGHTS**

Nondiscrimination - In accordance with Title VI of the Civil Rights Act, as amended, 42 U.S.C. § 2000d, section 303 of the Age Discrimination Act of 1975, as amended, 42 U.S.C. § 6102, section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, and Federal transit law at 49 U.S.C. § 5332, Contractor agrees that it will not discriminate against any employee or applicant for employment because of race, color, religion, national origin, sex, age, or disability. In addition, Contractor agrees to comply with applicable Federal implementing regulations and other implementing requirements FTA may issue.

Equal Employment Opportunity – RTD is an equal opportunity employer. The following equal employment opportunity requirements apply to the underlying Contract:

Race, Color, Religion, Sex, Sexual Orientation, Gender Identity, Or National Origin - In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e, and Federal transit laws at 49 U.S.C. § 5332, Contractor agrees to comply with all applicable equal employment opportunity requirements of U.S. Department of Labor (U.S. DOL) regulations, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor,"

41 CFR Parts 60 et seq., (which implements Executive Order No. 11246, "Equal Employment Opportunity," as amended by Executive Order No. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," 42 U.S.C. § 2000e note), and with any applicable Federal statutes, executive orders, regulations, and Federal policies that may in the future affect activities undertaken in the course of the Contract. Contractor agrees to take affirmative action to ensure that applicants are employed, and that employees are treated fairly during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to, the following: 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. In addition, Contractor agrees to comply with any implementing requirements FTA may issue.

Age - In accordance with section 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 623 and Federal transit law at 49 U.S.C. § 5332, Contractor agrees to refrain from discrimination against present and prospective employees for

reason of age. In addition, Contractor agrees to comply with any implementing requirements FTA may issue.

Disabilities - In accordance with section 102 of the Americans with Disabilities Act, as amended, 42 U.S.C. § 12112, Contractor agrees that it will comply with the requirements of U.S. Equal Employment Opportunity Commission, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 CFR Part 1630, pertaining to employment of persons with disabilities. In addition, Contractor agrees to comply with any implementing requirements FTA may issue.

Contractor also agrees to include these requirements in each subcontract regardless of the tier financed in whole or in part with Federal assistance provided by FTA, modified only if necessary to identify the affected parties.

**During the performance of the Contract, the Contractor or subcontractor:**

- (i) Will not discriminate against any employee or applicant for employment because of race, color, religion, national origin, sex, gender identity, disability or age. The Contractor will ensure that equal employment opportunity is afforded to all applicants in recruitment and employment, and that employees are treated fairly, during employment, without regard to their race, color, religion, national origin, sex, disability or age. Such equal employment opportunity shall include, but not be limited to the following: 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. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to setting forth provisions of this nondiscrimination clause.
- (ii) Will in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, national origin, sex, gender identity, disability or age. The Contractor agrees to comply with any regulations promulgated by the EEOC, OFCCP, Department of Labor, Department of Justice; the Regional Transportation District, Colorado Revised Statutes and all other relevant state and local laws.

## **PART B SMALL BUSINESS ENTERPRISE PROGRAM REQUIREMENTS**

RTD has adopted and may use some of the standards of Subpart A, B, C and F of 49 CFR Part 26 to determine the SBE Goals, Good Faith Efforts, Counting, Compliance and Enforcement in RTD's locally funded contracts.

### **1. DEFINITIONS**

Unless the context requires otherwise, capitalized terms used in this SBE Contract Requirements shall have the meanings given to them in the Instructions to Proposers. However, if there is a conflict, the definitions in this section shall prevail. In addition, the following capitalized terms shall have the meanings set out below:

***Bidder/Proposer*** means a firm or a person submitting a bid or proposal in response to a solicitation by RTD.

***Contract Goal (SBE goal)*** means a goal determined by such factors as the type of work involved, the location of the work and the availability of the SBEs for the work of the particular contract.

***Contractor*** means any Project Contractor that subcontracts with a SBE for performance of the Work, as applicable.

***Commercially Useful Function*** occurs when a SBE firm 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 in substance as defined under the DBE federal regulations, 49 CFR Part 26. The SBE firm must also be responsible for materials and supplies used on the Contract, for negotiating price, determining quality and quantity, ordering the material, installing (where applicable) and paying for the materials itself. Additionally, for an SBE to be considered as performing a commercially useful function, an SBE must perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force.

***Small Business Enterprise (SBE)*** means a firm that is currently certified as a "Small Business Enterprise" by the RTD Small Business Opportunity Office. Additionally:

- (a) The average annual gross sales for the past 3 years cannot exceed \$30.72 million. This amount includes any affiliate businesses owned in whole or part by any applicant owner or stockholder regardless of their ownership interest.
- (b) The personal net worth of the qualifying owner(s) / stockholders of an SBE must be less than \$2,047,000 (on an individual basis) - not including the equity in their primary residence or in the business being certified. At least 51% of the owners/stockholders must meet the personal net worth criteria for the business to be eligible. Applicants cannot transfer ownership solely for the purpose of qualifying for the SBE Program. RTD will evaluate transfers of ownership within the past two years to determine compliance with the personal net worth requirements.
- (c) To count a small business' participation toward the goal established for the Contract, the firm must be certified as an SBE with RTD Small Business Opportunity

Office and perform a “commercially useful function” as defined in this SBE Contract Requirements. Prime contractors should also be sure that the SBE is certified as of the date that RTD receives this bid/proposal.

***SBE Category*** means each of the following:

- (a) SBE Category 1: SBEs with gross receipts less than \$1 Million;
- (b) SBE Category 2: SBEs with gross receipts between \$1 Million and \$5 Million;
- (c) SBE Category 3: SBEs with gross receipts between \$5 Million and \$10 Million; and
- (d) SBE Category 4: SBEs with gross receipts in excess of \$10 Million and less than \$30.72 Million

***SBE Enclosures*** means the certificates and forms provided in the enclosures to these SBE Contract Requirements.

***SBE Goals*** has the meaning given to it in Section 3.1 of this SBE Contract Requirements.

***SBE Liaison*** means a representative of the Contractor with direct and independent access to the Contractor’s project manager and/or chief operating officer. This can be a collateral duty. The SBE Liaison has management responsibility for implementing, managing and reporting on achievement of the SBE Goals, ensuring compliance monitoring in accordance with the DBE regulations as defined under 49 CFR Part 26, communicating to subcontracting businesses and developing supportive service activities at all tiers. The SBE liaison is also responsible for serving as the point of contact with RTD’s Small Business Opportunity Office for all reporting, submission of properly completed forms/documents, and for responding to any compliance issues/matters.

***SBE Participation Report*** has the meaning given to it in Section 3.10 of this SBE Contract Requirements.

***SBE Plan*** means a required plan, prepared by or on behalf of the Contractor as required by RTD in the procurement documents that describes how the Contractor plans to satisfy requirements set forth in this Part B of the SBE Contract Requirements.

***Small Business Opportunity Office*** or ***SBO*** means the RTD Department responsible for administering the SBE Programs.





## DBE PROGRAM POLICY STATEMENT

### Section 26.1, 26.23 Objectives/Policy Statement

The Regional Transportation District (RTD) established a Disadvantaged Business Enterprise (DBE) Program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26. RTD receives Federal financial assistance from the DOT, and as a condition of receiving this assistance, RTD signed assurances that it will comply with 49 CFR Part 26.


It is the policy of RTD to ensure that DBEs as defined in 49 CFR Part 26 have an equal opportunity to receive and participate in DOT assisted contracts. It is also RTD's policy:

1. To ensure nondiscrimination in the award and administration of DOT assisted contracts;
2. To create a level playing field on which DBEs can compete fairly for DOT assisted contracts;
3. To ensure that the DBE Program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
5. To help remove barriers to the participation of DBEs in DOT assisted contracts; and
6. To assist in the development of firms that can compete successfully in the marketplace outside the DBE Program.

Alexis Serrano Castro, Manager, Small Business Opportunity Office within the RTD's Civil Rights Division, is delegated the responsibility and designated as the RTD DBE Liaison Officer. In that capacity, **Alexis Serrano Castro is responsible for implementing and overseeing all aspects of RTD's DBE Program.** Implementation of RTD's DBE Program is accorded the same priority as compliance with all other legal obligations incurred by RTD in its financial assistance agreements with the DOT.

The Policy Statement is posted on the RTD website and included in its outside procurements/solicitations (i.e., Invitation for Bids and Requests for Quotes). RTD distributed this Policy Statement to DBE and non-DBE business communities that perform work pertaining to RTD's DOT-assisted contracts. The Policy Statement was faxed/mailed/e-mailed to all known DBE stakeholder organizations and associations who do or attempt to do business with RTD. A current list of recipients can be obtained by contacting the Civil Rights Division. All questions or related correspondence shall be directed to Alexis Serrano Castro, Small Business Opportunity Office Manager at 303.299.2072 or Carl Green Jr., Director, Civil Rights Division at 303.299.2370 or via mail at RTD Civil Rights Division, 1660 Blake Street, Blk-31 Denver, CO 80202.

  
Debra A. Johnson, General Manager and CEO

  
Date

## 2. **OVERVIEW OF RTD'S SBE PROGRAM POLICY**

RTD's policy is to ensure nondiscrimination in the award and administration of the District's construction contracts, professional service contracts, and in the procurement of common goods and services. The RTD Small Business Enterprise (SBE) program was created by RTD and adopted by its Board of Directors to ensure local participation of small businesses on locally funded projects. It is a race and gender-neutral program. The Contractor shall comply with and implement requirements of RTD's SBE Program and 49 CFR Part 26 in the award and administration of Subcontracts under this Agreement. The Contractor shall not discriminate on the basis of race, color, religion, national origin, sex, age, or disability in the administration and performance of the Contract. The Contractor shall ensure that the nondiscrimination clause(s) and flow-down provisions found in Section 4 of this SBE Contract Requirements are incorporated in all SBE subcontract agreements regardless of tier. It is RTD's intention to create a level playing field on which SBEs can compete fairly for locally funded contracts. Failure by the Contractor to comply with or implement these requirements is a material breach of the Contract, which may result in the termination of the Contract or such other remedy as RTD deems appropriate. These legal remedies may include but are not limited to: withholding monthly progress payments, assessing sanctions, liquidated damages, and/or disqualifying the Contractor from future bidding as non-responsible (see 49 CFR Part 26.13). RTD's commitment to the SBE Goals is not intended to and shall not be used as a justification to discriminate against any qualified company or group of companies.

### **Additionally, it is important to note and restate applicable requirements of SBE firms:**

To be certified as a SBE, a firm must meet the business size eligibility requirements, personal net worth requirements and at least be 51% owned and controlled by individuals who are US citizens or permanent alien residents. The qualifying applicant(s) are required to submit proof of the owner (s) capability to perform the services for which they are requesting certification as well as execute the application and the Personal financial statement in the presence of a notary. RTD will make SBE certification decisions based on the facts as a whole.

The RTD SBE Certification Program is open to all businesses regardless of the race or gender of the owner(s) of the business. Eligible firms will be classified in one of the four categories of eligibility depending on their three (3) year average gross receipts, as follows:

*Category 1: Approved firms with gross receipts less than \$1 Million.*

*Category 2: Approved firms with gross receipts between \$1 Million and \$5 Million.*

*Category 3: Approved firms with gross receipts between \$5 Million and \$10 Million.*

*Category 4: Approved firms with gross receipts in excess of \$10 Million and less than \$30.72 Million.*

- A. The average annual gross sales for the past 3 years cannot exceed \$30.72 million. This amount includes any affiliate businesses owned in whole or part by any applicant owner or stockholder regardless of their ownership interest.

- B. The personal net worth of the qualifying owner(s) / stockholders of a SBE must be less than \$2,047,000 (on an individual basis) - excluding the equity of the qualifying owner's primary residence and the equity of the qualifying owner's firm. At least 51% of the owners/stockholders must meet the personal net worth criteria for the business to be eligible. Applicants cannot transfer ownership solely for the purpose of qualifying for the SBE Program. RTD will evaluate transfers of ownership within the past two years to determine compliance with the personal net worth requirements. Additionally, the qualifying owner may be disqualified if there is evidence that he or she is not economically Small due to assets and resources that indicate an ability to accumulate substantial wealth based on specific factors, similar to those used by the Small Business Administration (SBA), that are set out in the SBESBE SBE regulations. (see 49 CFR Part 26.67(b)).
- C. To count a small business' participation toward the goal established for the Contract, the firm must be certified as a SBE and perform a "commercially useful function" as defined in this SBE Contract Requirements. The proposed SBE(s) must be certified as a SBE with RTD Small Business Opportunity Office under the proper NAICS code that coincides with the scope of work that they will execute in the project. Prime contractors should also be sure that the SBE is certified as of the date that RTD receives this bid/proposal unless some other time frame is required by the nature of the project delivery method, project duration or when the SBE is approved by RTD to be added to the Contractor's Schedule of Participation.

### **3. GENERAL REQUIREMENTS**

#### **A. SBE GOALS AND GOOD FAITH EFFORTS**

- i) Unless otherwise indicated in the Contract or an addendum to the Contract, for Invitations for Bids (IFB), the Contract will be awarded to the lowest responsive and responsible bidder. For Request for Proposals (RFP) with best value criteria, the Contract will be awarded to the responsive and responsible proposer or proposers who best meet the Evaluation Criteria, cost and other factors considered (including SBE Program requirements). A bidder/proposer who fails or refuses to complete and return the required enclosures to this SBE Contract Requirements may be deemed non-responsive. For the purposes of the RTD SBE program, at times the SBE goal is dispersed amongst the 4 SBE categories to ensure equitable opportunities. Consequently, SBEs are able to compete with other SBEs of the same business size. The specified SBE participation goal applies to all post selection negotiations. The Contractor's commitment to the percentage of certified SBE utilization during the term of the Contract will be stated in the SBE Affidavit (Enclosure 1A). All extensions, amendments, change orders and options of the Contract are subject to review by RTD's SBO. The SBO may determine that a modification may impact the Contractor's ability to comply with its initial commitment. However, a partial waiver of the goal will not be considered until the end of the Contract and the totality of the Contractor's compliance efforts are assessed to determine its ability to comply with the initial commitment. The SBO will evaluate all decisions to self- perform scopes of work where SBE availability was present, yet not solicited, not utilized or disregarded.

- ii) RTD has specified the SBE Participation goal on this project as found on Enclosure 1A - SBE Affidavit. If the SBE goal is dispersed amongst the 4 categories, the bidder/proposer must find SBEs certified in specific categories to meet the goal identified for that particular category. It is permissible for bidders/proposers to utilize SBEs in lower categories to meet the goal on the higher categories, however, bidders/proposers are not able to use SBEs from higher categories to meet the goal on lower categories, (ie. SBE category 4 goal can be met with SBEs certified in categories 1 through 4, yet SBE category 2 goal can only be met with SBEs certified in categories 1 and 2). Bidders/proposers must make adequate good faith efforts to meet this goal in order to be deemed as a responsive and responsible bidder. Award of the Contract will be conditioned on meeting the requirements of this section. 49 CFR Part 26.53 and Appendix A of 49 CFR Part 26 shall serve as the criteria for evaluating compliance with the good faith efforts requirements. Additionally, bidders/proposers are required to solicit the support and assistance of RTD's SBO if they are unable to meet the SBE participation goal assigned to the Contract. The bidders/proposers can meet this requirement in one of two ways:
- iii) First, the bidder/proposer can meet this goal by demonstrating and documenting their commitments for participation by SBEs for at least the total percentage identified above, or a percentage that exceeds the goal for the project. 49 CFR Part 26.53 explains the procedures that recipients/agencies such as RTD should follow in this situation. For purposes of this section, RTD will only accept SBE(s) that are currently certified with RTD as a SBE under the NAICS code(s) that coincides with the scope of work that they will execute in this project. RTD reserve the right to accept other certification programs, such as DBE under the Colorado Unified Certification Program, or MWBEs or SBEs under the City and County of Denver Certification Program. The acceptance of these other certifications will be announced by SBO and will have to be included as part of solicitation or advertisement process of any IFB or RFP. All certified firms (same as for any other certification accepted for a particular period) must be certified prior to the bid/proposal submission, except in a "design-build" or "turnkey" contracting situation where RTD will explain its procedure in section 3 of this document. RTD requires that all bidders/proposers submit the following information to RTD, under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures:
  - a. The names and addresses of SBE firms that will participate in the Contract; (please include SBE current certification letters issued by RTD);
  - b. Description of the work that each SBE will perform. To count toward meeting a goal, each SBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the Contract; (this is RTD Enclosure 2 – SBE Schedule of Participation and Enclosure 3 - SBE Letter of Intent, also please include SBE current certification letters issued by RTD);
  - c. The dollar amount of the participation of each SBE firm participating; (This is included on RTD Enclosure 2A - SBE Schedule of Participation and Enclosure 3 - SBE Letter of Intent);

- d. Written documentation of the bidder/proposer's commitment to use a SBE subcontractor whose participation it submitted to meet a contract goal; (this is covered under RTD Enclosure 1A or 1B – SBE Affidavit as well as Enclosure 3 - SBE Letter of Intent);
  - e. Written confirmation from each listed SBE firm that it is participating in the Contract in the kind and amount of work provided in the bidders'/proposers' commitment. (This is included on RTD Enclosure 3 - SBE Letter of Intent).
- iv) Second, if the bidder/proposer does not meet the SBE goal identified in the Contract, or is able to only meet part of this goal, they must document adequate good faith efforts. RTD's SBE program follows the DBE Program, Appendix A to 49 CFR part 26 which clearly states that the bidder/proposer must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful. Additionally, 49 CFR Part 26.53 explains the good faith efforts procedures that recipients/agencies such as RTD should follow when a bidder/proposer does not meet the goal.

The following are a list of information that bidders/proposers must submit as proof of good faith efforts along with RTD Enclosure 6 – Small Business Outreach and Enclosure 7 – SBE Unavailability Certification form. Bidders/proposers are expected to document adequate/sufficient good faith efforts to meet the SBE goal.

The kinds of efforts that are considered demonstrative of a "good faith" effort include, but are not limited to, the following:

- a. Whether the bidders/proposers solicited through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified SBEs who have the capability to perform the work of the Contract. The bidders/proposers must solicit this interest within sufficient time to allow the SBEs to respond to the solicitation. The bidders/proposers must determine with certainty if the SBEs are interested by taking appropriate steps to follow up initial solicitations.
- b. Whether the bidders/proposers selected portions of the work to be performed by SBEs in order to increase the likelihood that the SBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate SBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.
- c. Whether the bidders/proposers provided interested SBEs with adequate information about the plans, specifications, and requirements of the Contract in a timely manner to assist them in responding to a solicitation.
- d. Whether the bidders/proposers negotiated in good faith with interested SBEs. It is the bidder's responsibility to make a portion of the work available to SBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available SBE subcontractors and suppliers, so as to facilitate SBE participation. The fact that a bidder/proposer may

perform 100% of the work with its own workforce is not sufficient justification to fail to negotiate with SBEs or not to meet the SBE participation goal assigned to a project.

- e. Evidence of such negotiation includes the names, addresses, and telephone numbers of SBEs 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 SBEs to perform the work.
- f. Whether the bidders/proposers made efforts to assist interested SBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.
- g. Whether the bidders/proposers made efforts to assist interested SBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
- h. Whether the bidders/proposers effectively used the services of available minority/women community organizations, contractors' groups and other organizations to provide assistance in the recruitment and placement of SBEs, including RTD's SBO.
- i. Whether other bidders/proposers on the procurement met the SBE goals and submitted an acceptable SBE Plan demonstrating compliance with the SBE Program requirements for a turnkey, multi-year design-build project, alternative method contracts, other multi-year projects, On-Call or Task-Order projects.
- j. Bidders/proposers are required to submit copies of each SBE and non-SBE subcontractor quote submitted to them when a non-SBE subcontractor was selected over a SBE for work on the Contract so RTD SBO can review whether SBE prices were substantially higher; and contact the SBEs listed on a contractor's solicitation to inquire as to whether they were contacted by the prime. Pro forma mailings to SBEs requesting bids are not alone sufficient to satisfy good faith efforts. A bidder/proposer will not be deemed to demonstrate good faith if it rejects a SBE simply because it is not the low bidder, or if it is unable to find a replacement SBE at the original price. It is important to note that a complete good faith efforts procedure is described under 49 C.F.R. §26.53 for further guidance and review.
- v) All good faith efforts information must be complete and accurate and adequately documented by the bidders/proposers and shall be submitted with the bid/proposal.

To award a contract to a bidder/proposer that has failed to meet the SBE contract goals, the RTD SBO Office Manager will decide whether the Contractor made a "good faith" effort to actively, effectively and aggressively seek SBEs to meet those goals prior to bid/proposal submission and in its commitments as set forth in their Schedule of Participation or SBE Plan to continue its efforts to meet the SBE participation goals for subsequent phases of the project. Contractors are also responsible for collecting good faith effort documentation of all major non-SBE

subcontractors/suppliers as part of their responsibility to implement the SBE Program. If, after reviewing the "good faith efforts" documentation submitted by the bidder/proposer, the RTD SBO Office Manager determines that good faith efforts were met, the Contract will be recommended for award to the responsive and or responsible bidder/proposer.

- vi) If RTD determines that the apparent successful bidder/proposer has failed to meet the SBE goal or make adequate/sufficient good faith efforts, before awarding the contract, RTD will provide the bidder/proposer an opportunity for administrative reconsideration.
  - a. The bidder/proposer will be informed in writing that their submittal was deemed non-responsive to the SBE Contract Requirements and will not be considered for contract award. The bidder/proposer may appeal the decision of the RTD SBO Office Manager to the reconsideration official(s). If the bidder/proposer wishes to appeal, they must do so in writing to the RTD Contracting and Procurement Director within 5 business days of being informed of the decision of the RTD SBO Office Manager that their submission was non-compliant. As part of this reconsideration, the bidder/proposer must have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so.
  - b. If the decision of the SBO Office Manager is appealed in writing, within the 5 day submission window, the reconsideration official(s) will review the documentation submitted by the Contractor as part of Contractor's bid/proposal– and no other information under this Section, including any additional information provided with Contractor's request for administrative reconsideration, to decide whether the SBE requirements have been satisfied through "good faith efforts".
  - c. The reconsideration official will be a member of RTD staff who did not take part in the initial "good faith efforts" decision. If the written appeal request is received after the 5-business day submission window, it will be disallowed and the determination of the RTD SBO Office Manager that the submission was non-compliant will stand.
  - d. The bidder/proposer will have the opportunity to meet in person with RTD's reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so.
  - e. If the reconsideration official(s) determines that "good faith efforts" were met, the contract will be recommended for award to the Contractor. If the reconsideration official(s) determines that the Contractor has failed to meet the good faith effort requirements, the Contractor will be informed in writing. RTD will send the bidder/proposer a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.
  - f. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

- g. The reconsideration official will review the documentation submitted as part of Contractor's bid/proposal– and no other information, including any additional information provided with Contractor's request for administrative reconsideration - under this Section to decide whether the SBE requirements have been satisfied through good faith efforts.

## **B. MULTI-YEAR DESIGN BUILD PROJECT REQUIREMENTS**

- a. In a design-build, unless different and specific instructions are provided for alternative delivery method procurements, the Bidder/Proposer must make the good faith efforts to meet or exceed the specified project SBE Goal at the time of bid or proposal submission. To be considered a responsive bidder/proposer, when a SBE Goal is specified for design-build, a Bidder/Proposer must meet the goal referred to in the bid specification by committing to meet the SBE Goal for each phase of the design build or other alternative delivery method project process by specifically identifying certified SBE firms that will be performing services. Bidder/Proposer is required to submit two sets of SBE Enclosures. One for **"design phase"**, and one related to the **"construction phase"**.

- (i) For the **"design phase"**:

- a. Award of the Contract will be conditioned on meeting the requirements of this section. 49 CFR Part 26.53 and Appendix A of 49 CFR Part 26 shall serve as the criteria for evaluating compliance with the good faith efforts requirements.
- b. Proposers can meet the SBE requirements of this section in one of two ways. First, and for the "design phase" only, Proposer can meet the SBE goal by demonstrating and documenting its commitments for participation by SBEs for at least the total percentage identified above or a percentage that exceeds the goal for the "design phase". The SBE Contract Requirements provided in the Attachment E of RFP/IFB (the "SBE Contract Requirements") as well as 49 CFR Part 26.53 explain the procedures that RTD will follow in this situation.
- c. Second, in the rare event, a Proposer does not meet the SBE goals identified in this contract or is able to only meet part of this goal, it must document adequate good faith efforts (GFE). Appendix A to 49 CFR part 26 clearly states, "This means that the proposer must show that it took all necessary and reasonable steps to achieve a SBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient SBE participation, even if they were not fully successful." Additionally, the SBE Contract Requirements as well as 49 CFR Part 26.53 explain the good faith efforts procedures that recipients/agencies such as RTD should follow when a Proposer does not meet the goal.



- d. By the proposal due date, and for the "design phase" only, proposer is required to submit the following Enclosures:
  - i. Enclosure 1A - SBE Affidavit
  - ii. Enclosure 1B - SBE Prime Affidavit (only when proposer is a certified SBE)
  - iii. Enclosure 2A - Schedule of SBE Participation
  - iv. Enclosure 3 - Letter of Intent to Perform as a SBE Subcontractor
  - v. Enclosure 4 - Bidders List Information (Information of Subcontractors Seeking to Work) (one for each subcontractor (SBE and non-SBE)
  - vi. Enclosure 5 - Employer Certification Workforce
  - vii. Enclosure 6 - Small Business Outreach
  - viii. Enclosure 7 - SBE Unavailability Certification
- e. Regarding the SBE Enclosure 4 (Bidders List Information (Information of Subcontractors Seeking to Work)), Bidder/Proposer is required to submit certain information for those firms (SBEs and non-SBEs) that are interested in working on the Contract. The required information applies to all firms that has submitted quotes, or bids for a subcontract amount, specifically related to the project you are bidding or submitting proposal. Information applies to all firms submitting quotes or bids and not limited to the ones preliminary selected as the best bid or quote. For this purpose, please refer to SBE Enclosure 4 – (Bidders Information of Subcontractors Seeking to Work).
- f. Contractor is required to make good faith efforts to fulfill their commitment to SBE participation/utilization throughout the duration of the "design phase" contract.

(ii) For the **"construction phase"**:

- a. Bidder/Proposer is required to submit different sets of SBE Enclosures at different stages throughout the Contract.
- b. By the proposal due date, and for "construction phase" only, Proposer is required to submit:
  - i. SBE Enclosure 1A (SBE Affidavit);
  - ii. SBE Enclosure 1B (SBE Prime Affidavit – when bidder/proposer is a certified SBE); and
  - iii. SBE Enclosure 2B Open-Ended Performance Plan (SBE OEPP). The SBE Open-Ended Performance Plan (OEPP) must include a commitment to meet the SBE goal for the construction phase and provide details of the types of subcontracting work or services, with projected dollar amount that the bidders/proposer will solicit SBEs to

perform. The OEPP must also include an estimated time frame in which actual SBE subcontracts would be executed. A Contractor must submit an updated OEPP every month of the construction phase to ensure compliance with the original submitted OEPP and scheduled timeframe. Unless otherwise specified, a Bidder/Proposer is required to submit the OEPP along with the bid or proposal to be considered responsive.

- c. Within seven (7) days after the first Notice to Proceed (NTP) related to "construction phase", is issued, the awarded Contractor will submit the following SBE Enclosures required for the "construction phase":
    - i. SBE Enclosure 2A (Schedule of SBE Participation);
    - ii. SBE Enclosure 3 (Letters of Intent to Perform as a SBE Subcontractor);
    - iii. SBE Enclosure 4 – (Bidders List Information (Information Regarding Subcontractors Seeking to Work));
    - iv. SBE Enclosure 5 (Employer Certification of Workforce);
    - v. SBE Enclosure 6 (Small Business Outreach); and
  - d. Once each SBE have been identified and selected, Contractor will update Enclosure 2A (Schedule of SBE Participation), and provide Enclosure 3 (Letter of Intent to Perform as SBE Subcontractor) for each SBE added to the updated Enclosure 2A. Contractor will submit to RTD an update Enclosure 2A each time a SBE is added, to satisfy SBE participation committed on Enclosure 2B (Open-Ended Performance Plan), along with an Enclosure 3 (Letter of Intent to Perform as SBE Subcontractor).
  - e. For the "construction phase", Contractor will be conditioned on meeting the requirements of section 49 CFR Part 26.53 and Appendix A of 49 CFR Part 26 which shall serve as the criteria for evaluating compliance with the good faith efforts requirements. Contractor will provide updates on the OEPP on monthly basis and perform and/or adjust the proposed schedule, as long as the Contractor continues to use good faith efforts to meet the goal.
- (iii) The bidder/proposer must submit a SBE Plan as described in Section 3 Part E of these SBE Contract Requirements explaining how the bidder/proposer intends to fulfill their SBE requirements and commitments throughout the duration of the Contract. Areas that need to be included in the SBE Plan include, but are not limited to: mechanisms to comply with prompt payment provisions, release of retainage, outreach efforts, outreach efforts, reporting, among other SBE requirements.
- (iv) The successful Contractor/consultant is expected to make good faith

efforts to engage and utilize SBEs on an ongoing basis throughout the duration of the Contract. It should be noted that each time a Contractor adds a SBE to the project, the RTD SBO must review the SBE's certification with RTD SBE database to ensure that the NAICS code/s coincides with the scope of work that the SBE is expected to perform on the project. The SBE utilization/good faith efforts will be reviewed to determine if they are in compliance with 49 CFR Part 26 as well as the terms of these SBE Contract Requirements. Additionally, the successful Contractor/consultant is required to make good faith efforts to fulfill their initial commitment to SBE/s participation/utilization throughout the entire Contract duration, as well to comply with the SBE Open-Ended Performance Plan, applicable for the **"construction phase"**.

**C. OTHER MULTI-YEAR SBE AND ALTERNATIVE METHODS SBE (CMGC, CM AT RISK, ETC.) PROJECT REQUIREMENTS**

In other multi-year procurement with base contract scope and base contract value as well as optional scope of work and optional additional years of performance, the Bidder/Proposer must make the good faith efforts to meet or exceed the specified project SBE Goal at the time of bid or proposal submission. To be considered a responsive bidder/proposer, when a SBE Goal is specified for these types of multi-year projects, a bidder/proposer must meet the goal referred to in the bid specification by committing to meet the SBE Goal for the base contract value and the base scope of work, specifically identifying certified SBE firms that will be performing services or providing supplies within the allotted defined base contract and submit the SBE Contract Requirements enclosures or document its good faith efforts to attain the goal.

The bidder/proposer is also expected to submit a SBE Plan as described in Section 3 Part E of these SBE Contract Requirements explaining how the bidder/proposer intends to fulfill their SBE requirements and commitments if the optional year/s and optional scopes of work are exercised/awarded in the future. The SBE Plan will be evaluated and may be accepted or required to be modified/updated to include critical missing components.

The successful Contractor/consultant is expected to make good faith efforts to engage and utilize SBEs for optional renewal years, prior to any of the optional year/s and optional scopes of work being exercised/awarded. The Contractor must also revise and submit to RTD's SBO, updated Enclosure 2A and Enclosure 3A with each optional year/s and each optional scopes of work that are exercised, prior to the start of any option year/s. Also, it should be noted that each time a Contractor adds a SBE to the project, the RTD SBO must review the SBE's certification to ensure that the NAICS code/s coincide/s with the scope of work that the SBE is expected to perform on the project. Additionally, the SBE utilization/good faith efforts will be reviewed each time an optional year/s is exercised and each time optional scopes of work are awarded to determine if they are in compliance with 49CFR Part 26 as well as the terms of these SBE Contract Requirements. The successful Contractor/consultant is required to make good faith efforts to fulfill their initial commitment to SBE/s participation/utilization throughout the entire Contract duration.

#### **D. TASK ORDER OR ON-CALL SBE CONTRACT REQUIREMENTS**

In task order or on-call procurements, the bidder/proposer must make the good faith efforts to meet or exceed the specified project SBE goal at the time of bid or proposal submission. To be considered a responsive bidder/proposer, when a SBE goal is specified for a task order or on-call project, a bidder/proposer is required to make the good faith efforts to meet the SBE goal identified in the bid solicitation by committing to meet the SBE participation goal for the project and identifying some of the certified SBE firms that will be performing services or providing supplies for the initial projects that were identified in the RFP/IFB or documenting good faith efforts to attain the goal as referenced in section 3 of this document under 'general requirements – SBE goals and good faith efforts'. 49 CFR part 26.53 and Appendix A of 49 CFR part 26 shall serve as the criteria for evaluating compliance with the good faith efforts requirements. The documentation evidencing good faith efforts shall be submitted with the bid/proposal.

The bidder/proposer should only specify the scope of work that the SBE/s will perform in the project if RTD has determined and confirmed those specific initial tasks or projects will be awarded. Otherwise, if RTD cannot confirm that a particular task or project will be awarded, then the bidder/proposer should indicate 'to be determined/TBD' under the scope of work that the SBE/s will perform. The bidder/proposer should never specify dollar values or make commitments to utilize SBEs for a specific contractual amount on a task order or on-call projects as it is not known at the time of the bid/proposal by RTD which tasks or projects will be awarded and what values will be associated with those tasks. Therefore, the bidder/proposer should indicate 'to be determined/TBD' under the agreed price to be paid to the SBE/s.

The bidder/proposer is required to submit a SBE Program Plan explaining how they will do outreach and engage SBEs, specific to each individual task, and describe how they intend to fulfill their SBE commitments throughout the life of the task order/on-call contract. Section 3 Part E of this SBE Contract Requirements shall serve as a guide of what a SBE Plan should include. Please note that your answers to specific questions related to the SBE Program Plan will be evaluated. The bidder/proposer must explain how they intend to fulfill their SBE requirements and commitments if any tasks are exercised/awarded in the future.

The successful contractor/consultant is expected to make good faith efforts to engage and utilize SBEs if any of the tasks are exercised/awarded. They will also be expected to revise and submit updated Enclosures 2A and Enclosures 3A if SBEs are added to the project or if additional scope of work are assigned to the original SBEs on the project. All good faith efforts documentations for each task order must be submitted to RTD and will be reviewed on each task awarded to determine if they are in compliance with 49 CFR Part 26 and terms of this SBE Contract Requirements. Additionally, the Contractor/consultant is required to make good faith efforts to fulfill their initial commitment to SBE/s participation/utilization throughout the entire Contract duration.

#### **E. SBE PLAN**

The SBE Plan is the Proposer's written approach and strategy to the overall administration of their SBE commitment on this project (including the expectations of the lower tier SBE

Subcontractors). Proposers will be required on all turnkey, Multi-Year Design/Build projects, other multi-year /Alternative Delivery Method projects, On-Call or Task-Order Contracts as well as other specified projects to submit a comprehensive detailed SBE Plan with their proposal. For design/build contracts, Contractor will also be required to explain how its SBE Open-Ended Performance Plan (OEPP) will be updated and submitted to comply with the monthly update's requirement. SBE Plan is subject to the RTD's SBO's approval and must comply with several provisions as defined under 49 CFR Part 26 requirements. The SBE Plan must minimally incorporate the first two years of the Contract and will be required to cover each phase (i.e. design and construction phases, base contract) of the project.

If the Proposer is selected, upon NTP the successful Contractor/Consultant will be required to formalize and use as basis the proposed SBE plan submitted with their RFP to implement their official Contractor SBE Plan & Program. The SBE Plan & Program must be reviewed and approved by the RTD SBO. Thereafter, the Contractor/consultant is required to prepare and submit to the SBO an updated SBE Plan & Program, on an annual basis throughout the project duration.

As it relates to the Proposer/Contractor, the SBE Plan & Program should be innovative and comprehensive and include the following program fundamentals listed below. It should be noted that the following is not an exhausted list as creativity, diversity and originality may cause change within the plan.

- i) Submitting their overall subcontracting process and program including how they will communicate and coordinate the scheduling with the SBEs;
- ii) Describing how SBE participation will be solicited and incorporated into the Proposer's overall procurement process;
- iii) Describing the SBE project goal and the Proposer's SBE commitment/utilization;
- iv) Promoting a level playing field and non-discrimination, by providing an open and transparent process;
- v) Identifying how the SBE Liaison Officer will be incorporated into the procurement process;
- vi) Incorporating mandatory federal non-discrimination clauses into each subcontract regardless of the tier (Must include the entire clauses included in Part A of these SBE Contract Requirements and cannot simply be a reference to another document);
- vii) Describing a positive approach to business initiatives, support services, bonding assistance, mentoring programs, joint ventures, etc.;
- viii) Defining Good Faith Efforts requirements and evaluation criteria for post award solicitation process;
- ix) Identifying the SBE Plan Annual Update Process, as well SBE OEPP monthly updates submission plan (when applicable);
- x) Describing the debriefing process, how bid selections are made and keeping record of each;
- xi) Describing Contract's proactive prompt payment and release of retainage provisions and ensure compliance with RTD requirements regardless of tier;
- xii) Describing compliance with the removal, replacement, substitution and termination of SBEs as it relates to SBE regulations defined under 49 CFR Part 26.53 (f) and the commitment to not include termination for convenience clauses in any subcontract agreements, regardless of the tier, as this is inconsistent with

- the DBE federal regulations;
- xiii) Ensuring that the SBE Plan is Signed and dated by the Prime contractor; and
- xiv) Describing the monthly reporting relationship with RTD's SBO and compliance with overall reporting requirements.

**F. CONTRACTOR'S/CONSULTANT'S SBE LIAISON OFFICER/COMPLIANCE OFFICER/DIVERSITY MANAGER/COMPLIANCE MANAGER, ETC.**

On a Multi-year project such as Design Build projects and other larger projects, RTD will require in the RFP that a Contractor designate a SBE Liaison. In lower value or shorter duration contracts, the SBE Liaison responsibilities may be a collateral responsibility. The SBE Liaison shall be responsible for the following:

- i) Day-to-day operational components of the SBE Program;
- ii) Effectively responding to and reporting to the RTD SBO on the status of any SBE contractor/supplier;
- iii) Submitting executed SBE subcontracts/purchase orders and any subsequent material amendments thereto to the SBO within thirty (30) days of the Subcontractor Agreement Execution (however, no SBE shall commence any work or provide any material/supply without an executed subcontract/purchase order);
- iv) Submitting a written monthly report detailing the activities and documentation of good faith efforts of the previous month;
- v) Interfacing with the RTD SBO regarding SBEs' issues and obtaining approvals for all SBE replacements, substitutions or terminations;
- vi) Preparing, completing and submitting all required compliance documentation, inclusive of subcontract agreements, schedule of participation enclosure, monthly payment entries in RTD's Diversity and Compliance solution, B2GNow, as well as submitting any SBE Participation Reports;
- vii) Ensuring that all SBE subcontracts regardless of tier include flow-down provisions as described in the SBE Contract Requirements which contains non- discrimination clause, prompt payment provisions, termination/substitution/replacement/reduction of scope, changes, etc.;
- viii) Carrying out or implementing technical assistance activities;
- ix) Implementing, managing and reporting on achievement of the SBE Goal/commitment, communicating subcontracting, business development and supportive services activity at all tiers, ensuring compliance with the non-discrimination provisions and the affirmative action and equal employment opportunity provisions;
- x) Monitoring lower tier subcontractors and suppliers to ensure that they comply with the SBE Program requirements and the SBE Plan submitted by the prime contractor; and
- xi) Scheduling monthly meetings between the Contractor and the RTD SBO to provide status updates and address goal attainment, issues or concerns.

## **G. COUNTING SBE PARTICIPATION**

The SBE participation goal applies to the total value of all work performed under the Contract which includes the value of all change orders, amendments and modifications. Any partial waiver determination will be made at or near the conclusion of the Contract when the totality of the circumstances can be taken into consideration and the Contractor's efforts can be objectively evaluated. To count SBE participation toward the goal established for the Contract, the proposed SBE(s) must be certified as a SBE with RTD under the appropriate NAICS code(s) that coincides with the scope of work that they will execute on the project/contract. Additionally, the SBE firm must be certified as a SBE and perform a "commercially useful function" as defined in this SBE Contract Requirements. SBE certification does not, however, constitute a representation or warranty by RTD as to the qualification of any listed firm. In accordance with DBE federal regulations as defined under 49 CFR Part 26, RTD will require the total SBE participation commitment to be achieved in accordance with the following:

- i) SBE proposers can count themselves for self-performance toward meeting the SBE goal, but only for the scope of work that they are certified in as a SBE and at a percentage level they will be actually performing themselves with their own forces;
- ii) Work performed by SBEs is deemed to include the cost of materials and supplies purchased and equipment leased by the SBE/s from non-SBE sources. Work subcontracted can only count if the subcontractor is another SBE;
- iii) The entire fee or commission charged by a SBE, if reasonable and not excessive, will be counted;
- iv) Each SBE must perform a "commercially useful function" to be counted toward the goal and at least 30% of the work must be performed by a SBE of the total cost of its contract for the SBE to be presumed to be performing a "commercially useful function";
- v) Use the following factors in determining whether a SBE trucking company is performing a commercially useful function:
  - (1) The SBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting SBE goals.
  - (2) The SBE must itself own and operate at least one fully licensed, insured, and operational truck used on the Contract.
  - (3) The SBE 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 SBE may lease trucks from another SBE firm, including an owner-operator who is certified as a SBE. The SBE who leases trucks from another SBE receives credit for the total value of the transportation services the lessee SBE provides on the Contract.

- (5) The SBE may also lease trucks from a non-SBE firm, including from an owner-operator. The SBE that leases trucks equipped with drivers from a non-SBE is entitled to credit for the total value of transportation services provided by non-SBE leased trucks equipped with drivers not to exceed the value of transportation services on the Contract provided by SBE-owned trucks or leased trucks with SBE employee drivers.
- vi) Count expenditures with SBEs for materials or supplies toward SBE goals as provided in the following:
- (1) If the materials or supplies are obtained from a SBE manufacturer, count 100 percent of the cost of the materials or supplies.
- (A) For purposes of this paragraph (c)(1), a manufacturer is a firm that owns (or leases) and operates 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. Manufacturing includes blending or modifying raw materials or assembling components to create the product to meet contract specifications. When a SBE makes minor modifications to the materials, supplies, articles, or equipment, the SBE is not a manufacturer. Minor modifications are additional changes to a manufactured product that are small in scope and add minimal value to the final product.
- (2) For materials and supplies supplied by a regular dealer or a distributor, as those terms are defined below:
- (A) If the materials or supplies are purchased from a SBE regular dealer, which is consistent with the DBE Regulation [§26.55\(e\)\(2\)\(iv\)\(A\)](#), [\(B\)](#), and [\(C\)](#), count 60 percent of the cost of the materials or supplies (including transportation costs).
- (i) For purposes of this section, a regular dealer is a firm that owns (or leases) and operates, a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in sufficient quantities, and regularly sold or leased to the public in the usual course of business.
- (ii) Items kept and regularly sold by the SBE are of the "general character" when they share the same material characteristics and application as the items specified by the Contract.
- (ii) SBE regular dealers, per paragraph (c)(2)(iv)(A) of this section, must operate over a reasonable period of time, keeps sufficient quantities, and regularly sells the items in question. Regular dealer of bulk items per (c)(2)(iv)(B) of this section must own/lease and operates distribution equipment for the products it sells.
- (a) To be a regular dealer, the firm must be an established business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A SBE supplier performs a CUF as a regular dealer and receives credit for 60 percent of the cost of materials or supplies (including transportation cost) when all, or at least 51 percent of, the



items under a purchase order or subcontract are provided from the SBE's inventory, and when necessary, any minor quantities delivered from and by other sources are of the general character as those provided from the SBE's inventory.

(b) A SBE may be a regular dealer in such bulk items as petroleum products, steel, concrete or concrete products, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in paragraph (c)(2)(ii) of this section if the firm both owns and operates distribution equipment used to deliver the products. Any supplementing of regular dealers' own distribution equipment must be by a long-term operating lease and not on an ad hoc or contract-by-contract basis.

(c) A SBE supplier of items that are not typically stocked due to their unique characteristics (e.g., limited shelf life or items ordered to specification) should be considered in the same manner as a regular dealer of bulk items per paragraph (c)(2)(iv)(B) of this section. If the SBE supplier of these items does not own or lease distribution equipment, as described above, it is not a regular dealer.

(d) Packagers, brokers, manufacturers' representatives, or other persons who arrange, facilitate, or expedite transactions are not regular dealers within the meaning of paragraph (c)(2) of this section.

- (B) If the materials or supplies are purchased from a SBE distributor, which is consistent with the DBE Regulation [§26.55\(e\)\(3\)](#), that neither maintains sufficient inventory nor uses its own distribution equipment for the products in question, count 40 percent of the cost of materials or supplies (including transportation costs).

(i) A SBE distributor is an established business that engages in the regular sale or lease of the items specified by the Contract. A SBE distributor assumes responsibility for the items it purchases once they leave the point of origin (e.g., a manufacturer's facility), making it liable for any loss or damage not covered by the carrier's insurance. A SBE distributor performs a CUF when it demonstrates ownership of the items in question and assumes all risk for loss or damage during transportation, evidenced by the terms of the purchase order or a bill of lading (BOL) from a third party, indicating Free on Board (FOB) at the point of origin or similar terms that transfer responsibility of the items in question to the SBE distributor. If these conditions are met, SBE distributors may receive 40 percent for drop-shipped items. Terms that transfer liability to the distributor at the delivery destination (e.g., FOB destination), or deliveries made or arranged by the manufacturer or another seller do not satisfy this requirement.

- (C) With respect to materials or supplies purchased from a SBE that is neither a manufacturer, a regular dealer, nor a distributor, count the entire amount of fees or commissions charged that you deem to be reasonable, including transportation charges for the delivery of materials or supplies. Do not count any portion of the cost of the materials and supplies themselves.

- vii) RTD will 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,

distributor, or a transaction facilitator) on a contract-by-contract basis.

- viii) RTD will not count the participation of a SBE subcontractor toward a Contractor's final compliance with its SBE obligations on a contract until the amount being counted has actually been paid to the SBE.

#### **H. JOINT VENTURES**

- i) A Joint Venture is an association of a SBE firm and one 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 SBE is responsible for a distinct, clearly defined portion of the work of the Contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.
- ii) RTD will count toward its SBE goal a portion of the total dollar value of a contract with a joint venture equal to the distinct, clearly defined portion of the work of the Contract that the SBE performs with its own forces toward the SBE goal(s) and such services/supplies/NAICS codes are approved for SBE participation credit. The joint venture agreement **MUST** specify the services, dollar value, reporting structure and details of the SBEs' performance requirements associated with the percentage of the joint venture ownership.

#### **4. FLOW-DOWN PROVISIONS**

**While no subcontractor will be considered a third-party beneficiary to the Contract between RTD and the prime Contractor, RTD considers all subcontractors of every tier to be agents of the Contractor. Therefore, every contractor of every tier will be held to all the requirements of the Contract. With that understanding, the Contractor is well advised to conform all subcontracts to the terms and conditions found in the RTD Contract. Also, it would be wise to make the RTD Contract available to all subcontractors wanting to review it. At the very least, the Contractor must include the following provisions in their subcontract agreements with their SBE subcontractors as well as ensure that all tiered-subcontractors comply with this Section and insert the provisions of Part A - the Non-discrimination clause, Sections 5., Prompt Payment provisions; 6., Joint Check Utilization; 7., SBE Removal/Termination/Substitution/Reduction of Scope provisions; and 8., Changes.**

The Contractor will be required to submit to the RTD Small Business Opportunity Office all SBE subcontracts/purchase orders within 30 days of the execution of its contract with RTD or issuance of the notice to proceed (whichever occurs first). Throughout any contract or after the award of any RTD contract, including the Contract, if the Contractor makes good faith efforts and engages or subcontracts with additional SBEs, the Contractor must get approval from RTD if the Contractor intends to count SBE participation from those additional SBEs. To count SBE participation toward the goal established for the Contract or commitments made by the Contractor for SBE utilization, the RTD SBO must ensure that those additional SBEs are properly certified as a SBE(s) with the RTD SBO under the

appropriate NAICS code that coincides with the scope of work that they will execute on the project/contract. Notwithstanding, RTD SBO shall also request any appropriate documents it deems necessary including subcontract agreements for review. The Contractor shall ensure that this information flows down to all tier contractors that intends to subcontract or subcontracts with SBEs.

**5. PROMPT PAYMENT OF SBE SUBCONTRACTORS**

The Contractor agrees that:

i) It shall pay its SBE subcontractor(s) any undisputed amounts for the satisfactory performance of their work within 30 days of the Contractor's receipt of the subcontractor's invoice, regardless of whether RTD has paid the Contractor for such invoice;

ii) Its approval of SBE subcontractor invoices shall not be unreasonably delayed, and it shall approve or reject them with written notice of deficiency or dispute to the payee SBE subcontractor within ten days of the Contractor's receipt of invoice;

iii) Within 30 days after a SBE subcontractor's work has been satisfactorily completed and accepted by the Contractor or by RTD's Project Manager, whichever is earlier, the Contractor shall make full payment to the subcontractor of any retainage the Contractor has kept related to such work, unless a claim is filed against the subcontractor related to such work. In the case of a dispute regarding satisfactory completion between a Contractor and its subcontractor, within the first ten (10) days after work has been completed, the Contractor must notify RTD in writing of the dispute; RTD, in its sole discretion, shall review the dispute submitted and make a final determination with respect to whether the work was satisfactorily completed.

iv) Failure to comply with the above may give RTD just cause to impose one or more of the following penalties, until the required payment(s) to the Contractor's SBE subcontractor(s) is satisfied, unless RTD has given prior written approval to the Contractor for the delay or postponement of payment(s): (1) withhold payments to the Contractor; (2) assess sanctions against the Contractor; (3) assess the SBE subcontractor's indirect or consequential damages against the Contractor; (4) disqualify the Contractor from future bidding on RTD contracts *as non-responsible*; (5) enforce the payment bond against the Contractor; (6) pay the SBE subcontractor(s) directly and deduct this amount from any retainage owed to the Contractor; (7) *provide notice of default to the Contractor, stating the potential for termination or suspension of the Contract*, in whole or in part; (8) issue a stop-work order until the SBE subcontractor(s) is paid, which order shall constitute an unauthorized delay under the Contract that could result in liquidated damages against the Contractor. Unless approved by RTD, the Contractor's failure to comply with this Section is a material breach of the Contract;

v) It shall ensure that tiered subcontractors comply with this Section and that they insert provisions (i), (ii), and (iii) of this Section into all lower-tiered subcontractor agreements with SBE firms; and

- i) vi) On a monthly basis, it shall submit a report of its payments to its SBE subcontractors using RTD's Diversity and Compliance solution, B2GNow. The Contractor shall ensure that its SBE subcontractors at every tier also report monthly payments made or received through B2GNow.

All payments made will be entered in B2GNow by or before the 5<sup>th</sup> of every month. If Contractor has issues accessing B2GNow, Contractor must immediately request support from the B2GNow support line, and notify by email the RTD SBO's designated Compliance Officer/Specialist for the contract. RTD's Diversity and Compliance Solution (B2GNow) can be accessed through this link <https://rtd-denver.gob2g.com/>

## **6. JOINT CHECK UTILIZATION**

A joint check is a two-party check between an SBE, a prime contractor and a regular dealer of materials/supplies. All joint check arrangements with SBE subs must be pre-approved by the RTD SBO and must strictly adhere to the joint check requirements set forth in USDOT guidance regarding same. At a minimum, the request must be initiated by the SBE to remedy a financial hardship for a specific period. There are monthly reporting requirements that must be complied with to receive SBE participation credit. The SBO will closely monitor the use of joint checks to ensure that the independence of the SBE firm is not compromised. Joint check usage will not be approved merely for the convenience of the prime contractor. Please note, if Joint Checks are applicable, monthly reporting as defined by the RTD SBO will also be required.

## **7. SBE REMOVAL/TERMINATION/SUBSTITUTION/REDUCTION OF SCOPE FROM CONTRACT**

A Contractor must have good cause to remove/terminate/substitute/replace a SBE contractor and such removal/termination/substitution requires the consent and approval of RTD's SBO. This section also includes reductions to the SBEs scope of services and/or commitment values. No SBE subcontract agreement may contain a "termination for convenience" clause/provision because any termination for convenience provision/clause is contrary to the objectives of this part and the objectives of the DBE Program requirements as defined under 49 CFR Part 26. To initiate the termination, substitution, removal or replacement process with a SBE contractor/supplier (regardless of the tier), the Contractor or lower tier contractor/subcontractor must do the following:

- i) Before transmitting to RTD's SBO its request to terminate and/or substitute a SBE contractor, the Contractor must give notice in writing to the SBE contractor and RTD SBO. The notice must include its request to terminate and/or substitute, replace and/or remove the SBE, the reason for the request and all documentation to support its claim. The Contractor must submit a copy of the notice and support documentation to RTD's SBO at the time the original letter is sent to the SBE contractor.
- ii) The Contractor must give the SBE contractor five (5) business days to respond to the notice and provide the SBO with reasons, if any, why it objects to the proposed termination of its SBE contract and why the SBO should not consent the Contractor's action.
- iii) RTD's SBO will then open a formal investigation inclusive of review of all documentation, conduct interviews and site visits, if necessary. The Contractor carries the burden of proof to demonstrate good cause for the termination and/or substitution.
- iv) If RTD's SBO determines the Contractor has good cause to terminate the SBE firm,

the SBO will provide written consent of SBE removal and the requirements to substitute work to another SBE firm. If RTD's SBO finds that good cause does not exist to terminate the SBE firm, the SBO will provide a written denial of the request to terminate/replace the SBE contractor and will immediately request a corrective action plan from the Contractor. Please note that if a contractor elects to terminate, substitute and or reduce the scope of work initially committed to a SBE without the approval or consent of the RTD SBO, this constitutes a material breach of a contract as set forth in the DBE Regulation as defined under 49 C.F.R. §26.13. This legal remedy may include but is not limited to withholding monthly progress payments, assessing sanctions, liquidated damages, and/or disqualifying the Contractor from future bidding as non-responsible.

- v) For purposes of good cause to remove, replace or terminate a SBE the following circumstances should exist: (1) failure or refusal by the SBE subcontractor to execute a written contract without good cause, (2) failure or refusal by the SBE subcontractor to perform the work of its subcontract in a way consistent with normal industry practice and the Contractor has not acted in bad faith, (3) failure by the SBE subcontractor to meet the Contractor's reasonable bonding or insurance requirements, (4) insolvency, bankruptcy or credit unworthiness by the SBE subcontractor that creates a risk for the Contract, (5) ineligibility by the SBE subcontractor to work on public works project because of suspension or debarment proceedings, (6) a determination by RTD that the SBE is not a responsible contractor, (7) voluntary withdrawal from the project by written notification that has been verified, (8) ineligibility to receive SBE participation credit for the type of work to be performed, (9) other documented good cause that compels the replacement of the SBE.
- vi) When a SBE subcontractor is terminated with the approval of RTD SBO or fails to complete its work on the Contract for any reason, prime contractors are required to make good faith efforts to find another SBE subcontractor to substitute for the original SBE.
- vii) Prime contractors must show that it took all necessary and reasonable steps to find another SBE to perform at least the same amount of work under the Contract as the SBE that was terminated, to the extent needed to meet the Contract goal RTD SBO has established for this project. The DBE regulations as defined under 49 CFR Part 26.53 shall serve as the criteria for evaluating compliance with the good faith efforts requirements. Additionally, bidders/proposers are required to solicit the support and assistance of RTD's SBO if they are unable to meet the SBE participation goal assigned to the Contract.
- viii) The good faith efforts shall be documented by the Contractor. If RTD SBO requests documentation under this provision, the Contractor shall submit the documentation to RTD SBO Compliance Officer/Specialist within 7 days, which may be extended for an additional 7 days if necessary, at the request of the Contractor, and RTD SBO shall provide a written determination to the Contractor stating whether good faith efforts have been demonstrated.
- ix) Prime contractors are required to comply with Good Faith Efforts procedures as defined in the DBE regulation under 49 CFR Part 26.53 and detailed under this SBE Program Requirements. Prime contractors are required to comply with this section

of the SBE requirements or any SBE program requirements and failure by the Contractor to carry out the requirements of this part as they administer the Contract is a material breach of contract, which may result in the termination of the Contract or such other remedy as RTD deems necessary as set forth in the BE regulations under 49 C.F.R. §26.13. The legal remedies include but is not limited to: withholding monthly progress payments, assessing sanctions, liquidated damages, and/or disqualifying the Contractor from future bidding as non-responsible.

The Contractor shall ensure that SBE tiered subcontractors comply with this Section and insert the provisions of this Section into all SBE lower tiered subcontractor agreements, regardless of their certification status.

## **8. CHANGES**

- i) The SBE participation goal shall apply to the performance/dollar value of all obligations under the Contract, including any Changes, Modifications, Amendments and Change Orders whether initiated by the Contractor or RTD. Post award requests for partial waivers may be considered by RTD's SBO, but a final determination shall not be rendered until the contract has been substantially completed and the Contractor demonstrates lack of ability to satisfy the SBE participation goal.
- ii) Changes to the value or scope of work committed to a SBE must be pre-approved by the RTD SBO and must be for good cause as set forth in the termination, substitution, replacement provisions set forth in this SBE Contract Requirements.

## **9. REQUIREMENTS OF SBE CONTRACT REQUIREMENTS ENCLOSURES**

The Contractor must complete and return all applicable Enclosures in the forms set out in this SBE Contract Requirements with bid/proposal. All enclosures must also be submitted with the bid/proposal.

- i) The Enclosure 2, Schedule of SBE Participation must be submitted with the initial bid/proposal. Subsequent to the award of the contract, the prime contractor will be responsible for revising the initial Schedule of SBE Participation any time a new SBE is added to the project. The prime Contractor must also submit a copy of the SBE certification letter to RTD SBO with any new SBE(s) added to the project. RTD will only accept and approve new SBE(s) that are currently certified with RTD under the NAICS code(s) that coincides with the scope of work that they will execute in this project.
- ii) The Enclosure 3, SBE Letter of Intent (LOI) must be submitted with the initial bid/proposal. Subsequent to the award of the Contract, the prime contractor will also be responsible for submitting to RTD SBO individual SBE Letters of Intent for each new SBE that is added to the project after the award of the Contract.
- iii) The Contractor completing the SBE Contract Requirements Enclosures is advised to contact the RTD's SBO main office at (303) 299-2111 if they have any questions or concerns prior to submitting bid/proposal documentation, unless otherwise specified in the bid/proposal that all questions must be submitted through RTD designated Procurement Officer. Additional SBE Contract Requirements

documentation will not be accepted after the Contractor submits their bid/proposal to RTD, unless otherwise stated in the bid or proposal.

**As a condition of the award, the Contractor must use those SBEs listed to perform the specific work items or supply the materials as committed in the Enclosure 2 Schedule of SBE Participation and Enclosure 3 SBE Letter(s) of Intent (LOI) and the Contractor is not entitled to any payment for work or materials performed by its own or any other forces if the work or supplies were committed to a SBE, unless it receives prior written consent by RTD Small Business Opportunity Office for a replacement of the SBE for good cause.**

**Failure to submit all required SBE Enclosures may result in your bid or proposal being deemed non-responsive. Failure to submit all completed Enclosures within the SBE Contract Requirements may result in your proposal being deemed non-responsive. Modification of any SBE Contract Requirements Enclosures prior to the official award of the Contract will result in your proposal being deemed non-responsive. Inconsistencies within the following Enclosures: Enclosure 1A, Enclosure 1B, Enclosure 2A and Enclosure 3A may also result in your proposal being deemed non-responsive. All Enclosures must be submitted with the bid/proposal. Modification of any SBE Enclosure documentation after the bid due date without prior approval or consent from the RTD SBO may result in your bid/proposal being deemed non-responsive.**

**Periodically, after award of the Contract, RTD's SBO in conjunction with the Contractor may determine that an enclosure is more beneficial with modifications or that an additional enclosure is necessary to more effectively report the status of SBE participation or performance and resolution of SBE concerns/issues. RTD has the right to ask for a modification. Such a revised enclosure shall be incorporated into the Contract as an additional requirement.**

#### **10. REPORTING, AUDITS, REVIEWS AND ORIENTATION REQUIREMENTS**

- i) The Contractor(s) are required to submit a report to RTD SBO on a monthly basis, on a form designated as the SBE Participation Report. The Contractor shall submit each completed SBE Participation Report to RTD's SBO.
- ii) The Contractor acknowledges that the RTD SBO has the right to independently confirm the information contained in the submitted SBE Participation Reports by soliciting such information from each SBE Subcontractor as may be required to verify payments received, distribution of payments received, subcontracting practices, participation credit, and sharing of resources/personnel. The Contractor shall not attempt to dissuade any such SBE contractor from disclosing any such information or cooperating in any investigation initiated by the SBO.
- iii) The Contractor shall submit to RTD's SBO a Subcontractors' Participation and Payment Form documenting all payments made to all SBEs and non-SBEs on a form provided/approved by RTD's SBO.
- iv) The SBE contractor shall submit to RTD's SBO a summary of payments received from its contractor, regardless of their lower tier, on a form approved by RTD's SBO.

- v) By committing to working on this RTD project which is subjected to SBE requirements set forth in the DBE regulations as defined under 49 CFR Part 26, all SBE subcontractors participating in this project are therefore required to undergo a commercially useful function review or a SBE compliance review before their contract can be closed by RTD SBO. SBEs are required to fully cooperate with RTD's SBO or its designee in the compliance review process. The commercially useful function review process will be initiated with a request for documents relating to contract performance and management of the actual work performed on the Contract. The scope and intensity of each commercially useful function review will depend on the specific facts and circumstances. The commercially useful function is purposed to verify the amount of SBE participation credit, to ensure that work is performed by the SBE consistent with the SBE Program requirements and/or to ensure that there is no activity engaged in by the SBE that would be inconsistent with the intent and objectives of the SBE Program. The commercially useful function review is more formal and will be initiated with an orientation/explanation process and closed out with a briefing and determination. The SBE subcontractor may be subjected to an informal compliance review by RTD's SBO or its designee with or without notice. The informal compliance review will generally be conducted at the work site where RTD observes and assesses the services/supplies being provided by the SBE.
- vi) The Prime contractor or any of its lower tier non-SBE subcontractors that is utilizing a SBE subcontractor may be selected for SBE compliance review to ensure that they are in compliance with the SBE Program requirements. This process will be initiated in a formal manner with written notice and instructions sent to the prime contractor or its major subcontractor. The process will conclude with a close-out interview or debriefing where the prime contractor or non-SBE subcontractor firm will be given an opportunity to refute the determination or add to any corrective action requested by RTD SBO. The Contractor must cooperate with any SBE Program audit or compliance review. Failure to cooperate can result in part or all of the SBE participation credit being denied / removed from counting toward the SBE participation goal for the Contract.
- vii) All SBEs are required to participate in the RTD's SBO SBE Orientation Program if awarded an RTD contract, subcontract or purchase order before commencing work or providing supplies on the Contract. Failure to participate in the SBE orientation program may result in a denial of SBE participation credit for the project/contract. For good cause, the orientation may be delayed if pre-approved by RTD. SBEs may be required to repeat the orientation if there are changes to the SBE Program requirements, changes in the SBE regulations, changes in the SBE personnel, or if the SBE is experiencing challenges in complying with the reporting requirements.
- viii) Please note, if the Contract is subject to Davis Bacon requirements and RTD SPSP Program, monthly reporting to RTD SBO will be required. The RTD SBO will communicate and describe the reporting provisions. Additionally, if Joint Checks are applicable, monthly reporting as stipulated by the RTD SBO will also be required.
- ix) All contractors that perform under the Contract are required to retain all records of participation on this project for seven (7) years from the completion of the



project. This requirement flows down to all lower tier contractors and must be within their subcontract agreements.

## **SBE CONTRACT REQUIREMENTS - SBE ENCLOSURE CHECKLIST**

This checklist will help you verify that all the required enclosures are complete and submitted as required. Submit this checklist as the front page of your SBE Contract Requirements Enclosures. SBE Contract Requirements Enclosures are to be submitted with bid/proposal. Failure to submit all completed Enclosures within the SBE Contract Requirements may result in your proposal being deemed non-responsive. Modification of any SBE Contract Requirements Enclosures prior to the official award of the contract will result in your proposal being deemed non-responsive. Inconsistencies within the following Enclosures: Enclosure 1A, Enclosure 1B, Enclosure 2A and Enclosure 3A may also result in your proposal being deemed non-responsive. All Enclosures must be submitted with the bid/proposal. If you have any questions concerning the completion of any of the Enclosures, please contact RTD's SBO main office at (303) 299-2111, unless otherwise specified in the bid/proposal that all questions must be submitted through RTD designated Procurement Officer.

SBESBE SBE

**The following Enclosures (Enclosure 1A through Enclosure 7) must be submitted with your bid or proposal as a matter of responsiveness.**

**[ ] Enclosure 1A: SBE Affidavit**

This form must be completed, signed and notarized by all Prime Contractors, whether SBE or not, to acknowledge the percentage of SBE utilization and SBE Goal commitment in this project.

**[ ] Enclosure 1B: SBE Prime Affidavit**

This form must be completed, notarized and signed only if the bidder/proposer is a SBE submitting a proposal/bid as a Prime Contractor. This form, if applicable, must be submitted with a current SBE certification letter(s) from RTD SBE Certification Program, the City & County SBE/MWBE Certification Program or the Colorado UCP to affirm SBE status.

**[ ] Enclosure 2A: Schedule of SBE Participation**

This form must be submitted by all bidders/proposers including SBE prime Contractors. This form must include a list of SBEs that the bidder/proposer intends to do business with if awarded the Contract. It must contain the following information: names and addresses of certified SBE firms, the scope of work they are to perform in the Contract, the applicable NAICS codes (found in their SBE Certification, from RTD SBE Certification Program, the City & County SBE/MWBE Certification Program or the Colorado UCP) that coincides with the scope of work they will be performing in the Contract, their projected start and finish date for work in this project as well as the dollar value of each proposed certified SBE contract. Subsequent to the award of the Contract, the prime Contractor will be responsible for revising the initial Schedule of SBE Participation any time a new SBE is added to the project. The prime Contractor must also submit a copy of the SBE certification letter to RTD SBO with any new SBE(s) added to the project. RTD will only accept and approve new SBE(s) that are currently certified with from RTD SBE Certification Program, the City & County SBE/MWBE Certification Program or the Colorado UCP, the City and County of Denver or CDOT (Colorado UCP) under the NAICS code that coincides with the scope of work that they

will execute in this project. The SBE firms listed on this schedule of SBE Participation cannot be terminated, substituted nor does RTD allow reduction of work without the final approval of RTD SBO. This form must be signed by the proposer/bidder. Subsequent to the award of the Contract, the prime Contractor must submit this form with each additional new SBEs added to the Contract.

**[ ] Enclosure 2B: SBE Open Ended Performance Plan (OEPP)**

This form must be completed by bidder/proposer only on Design/Build contracts. The OEPP will apply only to the "construction phase" of a design/build contract. Bidder/Proposers are required to include the expected total contract amount, for the "construction phase", and fill the table listing all SBE activities or scopes intended to be subcontracted to SBE firms. Next to each listed scope, bidders/proposers are required to specify the time frame when each scope is expected to be performed; NAICS code(s) applicable for each scope/task, estimated dollar value and anticipated percentage of the total "construction phase" value each task represents.

**[ ] Enclosure 3A: Letter of Intent to Perform as a SBE Subcontractor**

This form must be submitted by all bidders/proposers. It must contain the following information: names and addresses of each individual certified SBE firm listed on the SBE Schedule of Participation, the scope of work the SBE is expected to perform in the Contract, the applicable NAICS codes (found in their SBE certification with RTD SBE Certification Program, the City & County SBE/MWBE Certification Program or the Colorado UCP Colorado UCP) that coincides with the scope of work the SBE will be performing in the Contract, the SBE's projected start and finish date for work in this project and the dollar value for the proposed certified SBE contract. This form must be signed by both the proposer/bidder and the SBE subcontractor. Subsequent to the award of the Contract, the prime Contractor must submit this form with each additional new SBEs added to the Contract.

**[ ] Enclosure 4: Bidders List Information (List of Subcontractors Seeking to Work)**

This form is for statistical purposes only. All bidders/proposers along with all their proposed subcontractors, SBEs and non-SBEs must complete this form.

**[ ] Enclosure 5: Employer Certification of Workforce**

This form defines the make-up of the company's workforce broken down by job categories, race and gender. This must be completed by every bidder/proposer as well as their subcontractors.

**[ ] Enclosure 6: Small Business Outreach**

This form provides current outreach program information for contracted prime and subcontractors.

**[ ] Enclosure 7: Unavailability Certification**

Bidders/proposers that did not meet the specified SBE Goal identified in this bid/proposal or were only able to meet part of the SBE Goal in this bid/proposal are required to complete this form. In addition to this form, bidders/proposers are required to document and submit adequate and sufficient good faith efforts as required under 49 CFR Part 26.53. If the SBE Goal is met or exceed by the bidder/proposer, please indicate N/A.

**RTD's Diversity and Compliance Solution will track prompt payment and retainage to SBEs.**

Please note that Failure to comply with the prompt payment provisions of SBE subcontractors may give RTD just cause to impose one or more of the following penalties, until the required payment(s) to the Contractor's subcontractor(s) is satisfied, unless RTD has given prior written approval to the Contractor for the delay or postponement of payment(s): (1) withhold payments to the Contractor; (2) assess sanctions against the Contractor; (3) assess the SBE indirect or consequential damages against the Contractor; (4) disqualify the Contractor from future bidding on RTD contracts *as non-responsible*; (5) enforce the payment bond against the Contractor; (6) pay the SBE(s) directly and deduct this amount from any retainage owed to the Contractor; (7) *provide notice of default to the Contractor, stating the potential for termination or suspension of the Contract*, in whole or in part;

(8) issue a stop-work order until the SBE subcontractor(s) is paid, which order shall constitute an unauthorized delay under the Contract that could result in liquidated damages against the Contractor. Unless approved by RTD, the Contractor's failure to comply with this Section is a material breach of the contract;

**[ ] Enclosure 8 - Instructions on SBE Participation and Payment Reporting Requirements through RTD's Diversity and Compliance Solution (B2GNow)**

Contracting reporting requirements related to payments and release of retainage to subcontractors SBEs and non-SBEs will be accomplished through RTD's Diversity and Compliance Solution – B2GNow. After the award of the Contract, and by the 5<sup>th</sup> of every month, Contractor/s is required to report its payments to its SBE and non-SBE subcontractors, through RTD's Diversity and Compliance Solution (B2GNow). All payments should be entered by the 5<sup>th</sup> of the month, regardless of the tier of participation in the Contract and throughout the entire duration of the contract. The Contractor shall also ensure that its SBE subcontractors at every tier confirm or deny payments from the Contractor, using RTD's Diversity and Compliance Solution (B2GNow). You may access B2Gnow through this link <https://rtd-denver.gob2g.com/> **This will not be required to be submitted with your bid/proposal.**

## ENCLOSURE 1A - SBE AFFIDAVIT

**THIS PAGE MUST BE COMPLETED BY ALL PRIME PROPOSERS/BIDDERS TO INDICATE THEIR PERCENTAGE OF SMALL BUSINESS ENTERPRISE (SBE) PARTICIPATION COMMITMENT.**

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RTD has specified a \_\_\_\_% SBE Participation goal on this project.

Category 1 Recommended percentage: \_\_\_\_%

Category 2 Recommended percentage: \_\_\_\_%

Category 3 Recommended percentage: \_\_\_\_%

Category 4 Recommended percentage: \_\_\_\_%

THIS BIDDER/PROPOSER IS COMMITTED TO MEETING \_\_\_\_\_% - SBE (Small Business Enterprise) PARTICIPATION IN THE CONTRACT

Category 1 Recommended percentage: \_\_\_\_%

Category 2 Recommended percentage: \_\_\_\_%

Category 3 Recommended percentage: \_\_\_\_%

Category 4 Recommended percentage: \_\_\_\_%

Per 49 CFR Part 26 bidders/proposers must make adequate good faith efforts to meet this goal in order to be deemed as a responsive and responsible bidder. Award of the Contract will be conditioned on meeting the requirements of this section.

**The undersigned contractor hereby agrees and understands that they must comply with their SBE commitments in this project in conformity with the Requirements, Terms, and Conditions of this SBE Contract Requirements.**

Business Name: \_\_\_\_\_

Contact Name: \_\_\_\_\_

Address: \_\_\_\_\_

City, State, ZIP: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

I DO SOLEMNLY DECLARE AND AFFIRM UNDER THE PENALTIES OF PERJURY THAT THE CONTENTS OF THE FOREGOING STATEMENTS ARE TRUE AND CORRECT, AND THAT I AM AUTHORIZED, ON BEHALF OF

\_\_\_\_\_ TO MAKE THIS AFFIDAVIT.

(Name of Business Entity)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Affiant Print Name)

\_\_\_\_\_  
(Title)

(Affiant's Signature)

State of \_\_\_\_\_:

City and County of \_\_\_\_\_:

On this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, before me, the undersigned officer, personally appeared \_\_\_\_\_, known to me to be the person described in the foregoing Affidavit, and acknowledged that he (she) executed the same in the capacity therein stated and for the purposes therein contained.

In witness thereof, I hereunto set my hand and official seal.

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

(Notary Public) (SEAL)

## ENCLOSURE 1B- SBE PRIME AFFIDAVIT

THIS PAGE MUST BE COMPLETED BY THE SMALL BUSINESS ENTERPRISE PRIME CONTRACTOR  
(PROPOSER/BIDDER)

I HEREBY DECLARE AND AFFIRM that I am the \_\_\_\_\_  
(Title)

And duly authorized representative of (the firm of) \_\_\_\_\_  
(Name of Corporation or Joint Venture)

whose address is \_\_\_\_\_

\_\_\_\_\_  
(Telephone No.)

I hereby declare and affirm that I am a Small Business Enterprise (SBE) and am certified as of the date that the RTD receives this bid/proposal and as defined by the Regional Transportation District in SBE Contract Requirements for

\_\_\_\_\_ and that I will provide information  
and/or the  
(Contract number and name)

certification to document this fact with this enclosure.

I DO SOLEMNLY DECLARE AND AFFIRM UNDER THE PENALTIES OF PERJURY THAT THE CONTENTS OF THE FOREGOING STATEMENTS ARE TRUE AND CORRECT, AND THAT I AM AUTHORIZED, ON BEHALF OF THE ABOVE FIRM, TO MAKE THIS AFFIDAVIT.

\_\_\_\_\_  
(Date) (Affiant Print Name) (Title)

\_\_\_\_\_  
(Affiant's Signature)

State of \_\_\_\_\_:

City and County of \_\_\_\_\_:

On this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, before me, the

Undersigned officer, personally appeared \_\_\_\_\_, known to me to be the person described in the foregoing Affidavit, and acknowledged that he (she) executed the same in the capacity therein stated and for the purposes therein contained.

In witness thereof, I hereunto set my hand and official seal.

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

(Notary Public) (SEAL)

## ENCLOSURE 2A – SCHEDULE OF SBE PARTICIPATION

NAME OF CONTRACTOR:

RTD Contract No.

Total Proposed Contract Cost: US \$ \_\_\_\_\_

SBE FIRM NAME	ADDRESS	TYPE OF WORK (ELECTRICAL, PAVING, ETC.) AND CONTRACT ITEMS OR PART THEREOF TO BE PERFORMED	NAICS code(s)	PROJECTED START & COMPLETION DATES FOR SBE	AGREED PRICE TO BE PAID TO SBE

1. Please list all SBEs involved on the Contract including the Prime Contractor if it is a SBE. All SBEs listed on this enclosure must be properly certified under the NAICS code(s) that coincides with the scope of work they will execute in this project. Work performed by SBEs for which they are not certified to perform will not count towards the SBE participation goal. A current RTD SBE certification for each listed SBE recorded on this schedule must accompany this enclosure. Failure to provide proof of current RTD SBE certification for any or all listed SBEs will eliminate such listed SBE's participation, and work performed by such SBE will not count towards satisfaction of the SBE Goal. If additional pages are required to list all contracted SBE, photocopy this enclosure as required to make a complete list.

2. Contracts with SBEs for materials or supplies will be counted toward the SBE Goal as follows:

- (i) Materials or supplies obtained from a SBE manufacturer will be counted at 100% toward the SBE Goal;
- (ii) Materials or supplies obtained from a SBE regular dealer will be counted at 60% toward the SBE Goals. Please refer to the DBE regulations as defined under 49 CFR §26.55 for specifics with respect to how SBE participation is counted toward SBE Goal;
- (iii) Materials or supplies obtained from a SBE Distributor will be counted at 40% of the cost of materials or supplies (including transportation costs), toward the SBE Goal; and
- (iv) Materials or supplies obtained from a SBE broker firm only fees/commission will be counted toward the SBE Goal

Contractor must submit copies of all SBE subcontracts, purchase orders or change orders within 30 Days of execution of the notice to proceed. There may be exceptions to Design Build contracts, multi-year contracts and other alternative method contracts as SBEs are added throughout the course of the contracts and in some instances at different phases of the contracts. SBE subs should not commence any work on this project without an executed subcontract agreement or purchase order. Failure to submit a copy of the subcontract agreement with a SBE sub to RTD may result in RTD not counting SBE participation towards the SBE goal.

---

NAME OF CONTRACTOR

SIGNATURE OF CONTRACTOR & DATE

Page **40** of **50**



**ENCLOSURE 2B – SBE OPEN-ENDED PERFORMANCE PLAN (OEPP)  
FOR DESIGN-BUILD CONTRACTS ONLY**

NAME OF CONTRACTOR:

RTD Contract No.

Total Proposed Contract Cost (**CONSTRUCTION PHASE ONLY**): US

\$ \_\_\_\_\_

SBE OPEN ENDED PERFORMANCE PLAN (OEPP) FOR DESIGN BUILD CONTRACTS ONLY THIS SECTION WILL APPLY ONLY TO THE CONSTRUCTION PHASE ON A DESIGN-BUILD CONTRACT				
SBE PLAN WORK ACTIVITIES OR SCOPES (i.e. ELECTRICAL, PAVING, CONCRETE, ETC.)	TIME FRAME BASED ON YEAR AND QUARTER WHEN SCOPE WILL INITIATE (i.e. 2025-Q-1)	NAICS CODE(S)	ESTIMATED DOLLAR VALUE FOR DBE PARTICIPATION	ANTICIPATED SBE %
SUM				

1. Please list all work activities or scopes expected to be subcontracted to DBEs, for the **construction phase** of this contract, including the Prime Contractor if it is a SBE. All listed tasks should include the year and the quarter of the year (i.e. Q-1 for work expected to initiate between January and March of any given year) of when each task is expected to initiate. Also, identified NAICS code(s) applicable for each listed task and the estimated dollar value dedicated for each of the listed tasks. The anticipated SBE percentage expected to be credited toward the SBE goal, should be based on **49CFR Part 26.55 – How is DBE Counted Toward the Goal**. Although all expected SBE subcontracted amount should be listed under the **Estimated dollar value for SBE Participation** column, only the applicable and allowed DBE participation credit percentage should be recorded under the **Anticipated SBE %** column.

Awarded bidder or proposer will be required to submit to RTD's SBO a signed SBE Enclosure 3 (Letter of Intent to use Subcontractors SBEs), for each SBE participant, prior to the execution of each subcontract agreement. RTD's SBO will confirm whether selected firms are properly certified as a DBE and under the appropriate NAICS code(s). Also, RTD's SBO will confirm how much SBE participation could be credited toward the SBE goal.

Upon execution of each subcontract agreement, Prime Contractor will be required to submit a copy of the executed subcontract agreement to RTD's SBO, within 30 days of subcontract execution date. SBE subcontractors should not commence any work on this project without an executed subcontract agreement or

purchase order. Failure to submit a copy of the subcontract agreement with a SBE subcontractor to RTD's SBO may result in RTD not counting SBE participation towards the SBE goal.

Expected subcontracted SBEs must be certified under RTD's SBE Program (or any other allowed certification program as included in the IFB or RFP), and specifically under the appropriate NAICS code(s), at the time of subcontract execution, and based on the Open Ended SBE Performance Plan (OEPP). Please photocopy this enclosure as required to make a complete list.

2. Expected tasks to be subcontracted to SBEs for materials or supplies will be counted toward the SBE Goal as follows:

- (i) Materials or supplies obtained from SBE manufacturer will be counted at 100% toward the SBE Goal;
- (ii) Materials or supplies obtained from a SBE regular dealer will be counted at 60% toward the SBE Goal;
- (iii) Materials or supplies obtained from a SBE Distributor will be counted at 40% of the cost of materials or supplies (including transportation costs), toward the SBE Goal, and
- (iv) Materials or supplies obtained from a SBE broker firm only fees/commission will be counted toward the SBE Goal.

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NAME OF CONTRACTOR

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SIGNATURE OF CONTRACTOR & DATE

### ENCLOSURE 3 – LETTER OF INTENT TO PERFORM AS AN SBE SUBCONTRACTOR

Contract No.

The undersigned [•] (the **Contractor**) intends to engage the undersigned **SBE** to perform work in connection with the Project pursuant to a contract (the **SBE Contract**) between the Contractor and the SBE as [*check one*]:

\_\_\_\_\_an individual

\_\_\_\_\_a corporation

\_\_\_\_\_a partnership

\_\_\_\_\_a joint venture

The SBE status of the undersigned SBE is confirmed on the attached schedule of SBE participation and represents a company that is certified as of the date on which the SBE Contract is executed.

TYPE OF WORK AND CONTRACT ITEMS OR PART THEREOF TO BE PERFORMED	NAICS Codes	Projected Starting Date	Projected Completion Date	Agreed Price to be Paid to SBE

\_\_\_\_\_% of the Dollar value of the SBE Contract will be sublet and/or awarded to non-SBE contractors and/or non-SBE suppliers. The undersigned Proposer and the undersigned SBE will enter into the SBE Contract for the above work conditioned upon the Proposer's execution of the Contract with RTD.

\_\_\_\_\_  
NAME OF CONTRACTOR

\_\_\_\_\_  
NAME OF SBE FIRM

\_\_\_\_\_  
OWNER/REPRESENTATIVE

\_\_\_\_\_  
OWNER/REPRESENTATIVE

\_\_\_\_\_  
ADDRESS

\_\_\_\_\_  
ADDRESS

\_\_\_\_\_  
EMAIL ADDRESS

\_\_\_\_\_  
EMAIL ADDRESS

\_\_\_\_\_  
SIGNATURE

\_\_\_\_\_  
SIGNATURE

\_\_\_\_\_  
TITLE

\_\_\_\_\_  
DATE

\_\_\_\_\_  
TITLE

\_\_\_\_\_  
DATE

#### ENCLOSURE 4 – BIDDERS LIST INFORMATION (INFORMATION REGARDING SUBCONTRACTORS SEEKING TO WORK)

RTD is required to create and maintain bidder statistics for all firms bidding on prime contracts and bidding or quoting Subcontracts on USDOT-assisted projects per 49 CFR Part 26.11.

**Instructions:** The bidder/proposer is required to make copies of this form and have all bidders for subcontracting opportunities complete and return the form, along with their bid or quote. The form is required for all bidders or firms submitting bids or quotes, regardless of whether they are certified as SBE or not. Information required to be submitted includes Type of Scope work; NAICS code related to the type of work; firm's name; address; firm's certification status (whether SBE or non-SBE); race and gender information of majority owner; age of firm (how long firm have been in business); annual gross receipt. **Bidder/proposer is required to submit copy of all completed forms to RTD's SBO, along with other DBE Enclosures.**

RTD RFP/IFB Project Name: \_\_\_\_\_ RFP/IFB Number \_\_\_\_\_

Bid or Quote Description: \_\_\_\_\_ NAICS Code \_\_\_\_\_

Firm's Name: \_\_\_\_\_ Age of Firm \_\_\_\_\_

Firm's Address (Office Reporting): \_\_\_\_\_ Zip Code \_\_\_\_\_

Status as a SBE or Non-SBE (check one): SBE \_\_\_\_\_ Non-SBE \_\_\_\_\_

Majority Owner's Race \_\_\_\_\_ Gender \_\_\_\_\_

Annual Gross Receipts of the Firm: (check one of the brackets below):

U.S. \$0 to U.S. \$500,000 \_\_\_\_\_ U.S. \$500,000 to U.S. \$1,000,000 \_\_\_\_\_ U.S. \$1 Million to U.S. \$5 Million \_\_\_\_\_

U.S. \$5 Million to U.S. \$10 Million \_\_\_\_\_ U.S. \$10 Million to U.S. \$30.73 Million \_\_\_\_\_ Above U.S. \$30.73 Million \_\_\_\_\_

Name: \_\_\_\_\_ Signature: \_\_\_\_\_

Title: \_\_\_\_\_ Date: \_\_\_\_\_

### ENCLOSURE 5 – EMPLOYER CERTIFICATION OF WORKFORCE

Job Categories	Total Employees in Establishment			M = Male								F = Female			
	Total Employees Including Minorities	Total Male Employees Including Minorities	Total Female Employees Including Minorities	Black Americans		Hispanic Americans		Native Americans		Asian-Pacific Americans		Subcontinent Asian Americans		Other	
				M	F	M	F	M	F	M	F	M	F	M	F
Officials & Managers															
Professionals															
Technicians															
Sales															
Office & Clerical/Admin Support															
Craft Workers (skilled)															
Operatives (semi-skilled)															
Service & Maintenance															
Service Workers															
TOTAL															

## **DESCRIPTION OF JOB CATEGORIES**

*Officials and Managers* – Occupations requiring administrative personnel who set board policies, exercise full responsibility for execution of these policies, and individual departments or special phases of the operations.

*Professionals* – Occupations requiring either college education or experience of such kind and amount as to provide a comparable background.

*Technicians* – Occupations requiring a combination of specific scientific knowledge and manual skill which can be obtained through about 2 years of post-high school education, such as is offered in many technical institutes and junior colleges, or through equivalent on-the-job training.

*Sales* – Occupations engaging wholly or primarily in selling.

*Office and clerical* – Includes all clerical-type work, regardless of level of difficulty, where the activities are predominately non-manual though some manual work directly involved with altering or transporting the products is included.

*Craft Worker (skilled)* – Manual workers of relatively high skill level having a thorough and comprehensive knowledge of the processes involved in their work. Exercises considerable independent judgment and usually requires an extensive period of training.

*Operatives (semi-skilled)* – Workers who operate machines or processing equipment or perform other factory-related duties of intermediate skill level which can be mastered in a few weeks and require only limited training.

*Laborers (unskilled)* – Workers in manual occupations which generally require no special training perform rudimentary duties that may be learned in a few days and require the application of little or no independent judgment.

*Service Workers* – Workers in both protective and unprotected service occupations.

## **RACE/ETHNIC IDENTIFICATION**

*White (not Hispanic origin)* – All persons having origins in any of the original peoples of Europe, North Africa, or the Middle East

*Black Americans (not Hispanic origin)* – All persons having origins in any of the Black racial groups of Africa

*Hispanic Americans* – All persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race

*Asian-Pacific Americans* – All 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 Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong

*Subcontinent Asian Americans* – All persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka

*Native American* – All persons having origins in any of the original peoples of North America, including American Indians, Eskimos, Aleuts, or Native Hawaiians

## ENCLOSURE 6 – SMALL BUSINESS OUTREACH

As part of RTD's ongoing outreach activities to the Denver-metro Small Business community, it is our goal to identify and to establish a relationship with the Small Business outreach programs sponsored by the prime and subcontractors we partner with.

The prime and all contracted subcontractors are requested to provide the following information pertaining to their current SBE outreach efforts – additional sheets may be used if necessary:

RTD Contract Name and Number:

Contract No. (the ***Contract***).

Proposer:

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Subcontractor – if applicable:

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Disadvantaged Business Outreach Contact (if none, list contact for the Contract):

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Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

Email: \_\_\_\_\_

Website: \_\_\_\_\_

Currently Sponsored Small Business Outreach Activities:

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How can RTD assist you in your current Small Business outreach efforts?

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Would you be interested becoming involved in current and future RTD-sponsored outreach activities and committees: [ ] Yes [ ] No

If so, how? \_\_\_\_\_

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## ENCLOSURE 7– SBE UNAVAILABILITY CERTIFICATION

I, \_\_\_\_\_, \_\_\_\_\_,  
Name Title

of \_\_\_\_\_, certify that [*the Contractor*}, made the following efforts to meet the SBE Goals on Regional Transportation District Contract No. for the Project:

*[Please attach any additional efforts that do not fit on this form]*

- A Contractor representative attended the pre-bid meeting. Yes \_\_\_\_\_ No \_\_\_\_\_
- Newspaper Advertisement Log: (attach copies of ads)

Newspaper/Publication	Type of Publication Minority/General/Trade	Dates of Advertisement

- Selected portions of the work to be performed by [SBEs]

Work Categories	Type of Bid (Subcontractor or Supplier)	Contractor's Estimated Budget	Additional Comments

- Made efforts to assist interested SBEs in obtaining bonding, lines of credit, insurance or any necessary equipment, supplies, materials, etc.
- *[List any specific offers made by Contractor]*



- Solicited the following SBEs

Date Contacted	Name of SBE Firm	Contact Person	Phone #	Work Category

- Followed up with initial contacts

Date	Name of SBE	Phone #	Bidding (Yes or No)	Additional Comments

- Contacted the following other agencies, organizations in recruitment of SBE including RTD:

Date	Organization	Phone #

As shown by the documentation provided to RTD, we feel that we have made good faith effort to attain the SBE Goals.

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

## **ENCLOSURE 8 - INSTRUCTIONS ON SBE PARTICIPATION AND PAYMENT REPORTING REQUIREMENTS THROUGH RTD'S DIVERSITY AND COMPLIANCE SOLUTION (B2GNow)**

The use of RTD's Diversity and Compliance System B2GNow will be mandatory, as the system will assist in tracking SBE participation and payments requirements, specifically regarding the Prompt Payment Provisions.

The Contractor must complete a mandatory Contract Compliance Reporting training class. This training will be held via a recorded webinar. To access the system, visit <https://rtd-denver.gob2g.com/> If you have never logged on or do not know your username and password, click the Account Lookup link on the right side of the Login button.

On the left-hand side, please click on Help & Support>>>Video Library >>>>>and select – Vendor Trainings. Vendors (Primes) can also sign up for the training class without logging in. See below for a print screen that includes the title of the two classes your team needs to complete.

RTD SBO encourages Contactor/Primes to make sure all SBE are aware of and complete their training sessions. However, RTD's Small Business Opportunity Office (SBO) will directly notify to all vendors or subcontractors about the B2GNow.

