

# **DBE Contract Requirements**

**Civil Rights: Equal Employment Opportunity**

**and DBE Program Requirements**

**RFP/IFB**

*(page intentionally left blank)*

# CONTENTS

Section	Page
<b>Part A SPECIFIED FEDERAL REQUIREMENTS</b>	
<b>1. APPLICABLE CIVIL RIGHTS REQUIREMENTS.....</b>	<b>5</b>
<b>1.1 CIVIL RIGHTS - EMPLOYMENT.....</b>	<b>5</b>
<b>1.2 CIVIL RIGHTS in FEDERAL CONTRACTING.....</b>	<b>6</b>
<b>PART B DISADVANTAGED BUSINESS ENTERPRISE PROGRAM REQUIREMENTS.....</b>	<b>7</b>
<b>1. DEFINITIONS.....</b>	<b>7</b>
<b>2. OVERVIEW OF RTD’S DBE PROGRAM POLICY .....</b>	<b>10</b>
<b>3. GENERAL REQUIREMENTS .....</b>	<b>11</b>
<b>A. DBE Goals and Good Faith Efforts .....</b>	<b>11</b>
<b>B. Multi-Year Design Build .....</b>	<b>15</b>
<b>C. Other Multi-Year DBE and Alternative Methods DBE (CMGC, CM At Risk, etc.)         Project Requirements.....</b>	<b>18</b>
<b>D. Task Order or On-Call DBE Contract Requirements.....</b>	<b>19</b>
<b>E. DBE Plan .....</b>	<b>20</b>
<b>F. Contractor’s/Consultant’s DBE Liaison Officer/Compliance Officer/Diversity         Manager/Compliance Manager, etc .....</b>	<b>21</b>
<b>G. Counting DBE Participation .....</b>	<b>22</b>
<b>H. Joint Ventures.....</b>	<b>27</b>
<b>4. FLOW-DOWN PROVISIONS.....</b>	<b>27</b>
<b>5. PROMPT PAYMENT OF DBE SUBCONTRACTORS.....</b>	<b>28</b>
<b>6. PROMPT PAYMENT OF NON-DBE SUBCONTRACTORS .....</b>	<b>29</b>
<b>7. PROMPT PAYMENT MONITORING, COMPLAINTS, AND DISPUTE RESOLUTION     PROCEDURES.....</b>	<b>30</b>
<b>8. JOINT CHECK UTILIZATION.....</b>	<b>34</b>
<b>9. DBE REMOVAL/TERMINATION/SUBSTITUTION/REDUCTION OF SCOPE FROM     CONTRACT.....</b>	<b>35</b>
<b>10. CHANGES .....</b>	<b>37</b>
<b>11. REQUIREMENTS OF DBE CONTRACT REQUIREMENTS ENCLOSURES .....</b>	<b>37</b>
<b>12. REPORTING, AUDITS, REVIEWS AND ORIENTATION REQUIREMENTS.....</b>	<b>38</b>

## **APPENDICES**

### **DBE Contract Requirements – DBE Enclosure Checklist**

<b>Enclosure 1A</b>	<b>DBE Affidavit</b>
<b>Enclosure 1B</b>	<b>DBE Prime Affidavit</b>
<b>Enclosure 2A</b>	<b>Schedule of DBE Participation</b>
<b>Enclosure 2B</b>	<b>DBE Open-Ended Performance Plan (OEPP)</b>
<b>Enclosure 3A</b>	<b>Letter of Intent to Perform as a DBE Subcontractor</b>
<b>Enclosure 3B</b>	<b>DBE Regular Dealer/Distributor Affirmation Form</b>
<b>Enclosure 4</b>	<b>Bidders List Information (Information Regarding Subcontractors Seeking to Work)</b>
<b>Enclosure 5</b>	<b>Employer Certification of Workforce</b>
<b>Enclosure 6</b>	<b>Disadvantaged Business Outreach</b>
<b>Enclosure 7</b>	<b>DBE Unavailability Certification</b>
<b>Enclosure 8</b>	<b>Instruction to Access RTD's Diversity and Compliance Solution B2GNow</b>

## **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, DBE Contract Requirements and all flow-down provisions as detailed in these DBE Contract Requirements into each Subcontract regardless of the tier.

#### **1. APPLICABLE CIVIL RIGHTS REQUIREMENTS**

##### **1.1 CIVIL RIGHTS - EMPLOYMENT**

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 will not (1) fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, [religion](#), sex, or national origin; or (2) limit, segregate, or classify his [employees](#) or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an [employee](#), because of such individual's race, color, [religion](#), sex, or national origin. Contractor will comply with Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., 49 U.S.C. § 5332, FTA Circular 4704.1A "Equal Employment Opportunity (EEO) Requirements and Guidelines for Federal Transit Administration Recipients;" and other federal guidance pertaining to EEO laws, regulations, and requirements. 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) 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) The Contractor will not indicate in any solicitations or advertisements for employees placed by or on behalf of the Contractor, any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment. 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.

**1.2 CIVIL RIGHTS IN FEDERAL CONTRACTING**

Contractor shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of the Contract. The Contractor shall carry out all applicable requirements of 49 CFR Part 26 in the award and administration of the Contract. Failure by the Contractor to carry out 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, which may include, but is not limited to:

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

**PART B**  
**DISADVANTAGED BUSINESS ENTERPRISE**  
**PROGRAM REQUIREMENTS**

**1. DEFINITIONS**

Unless the context requires otherwise, capitalized terms used in these DBE 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/DBE Goal*** means a goal determined by such factors as the type of work involved, the location of the work and the availability of DBEs for the work of the particular contract.

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

***Commercially Useful Function (CUF)*** occurs when a DBE 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 contemplated by the federal regulations codified at 49 CFR Part 26. The DBE 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 a DBE to be considered as performing a commercially useful function, a DBE must perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force.

***Disadvantaged Business Enterprise (DBE)*** means an entity that meets each of the following criteria:

- (a) A firm that is at least 51% owned and controlled by one or more Socially and Economically Disadvantaged individuals or, in the case of a corporation, such individuals must own at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding; In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals; In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individual(s);
  - (i) Whose personal net worth does not exceed \$2,047,000. The personal net worth excludes the equity of the eligible principal's primary residence and the equity of the eligible principal's applicant firm,
  - (ii) Whose average annual gross receipts over the previous 3 fiscal years cannot exceed \$31.84million (the cap on statutory gross receipts),

- (iii) Who meets the ownership and control criteria as set forth under 49 CFR Part 26.
- (iv) Who meets the group membership criteria as defined under 49 CFR Part 26 or is able to prove social disadvantage,
- (v) Whose firm is certified as a "Disadvantaged Business Enterprise" in the state's Unified Certification Program.

**DBE Enclosures** means the certificates and forms provided in the enclosures included in the DBE Contract Requirements.

**DBE 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 DBE Liaison has management responsibility for implementing, managing and reporting on achievement of the DBE Goals, ensuring compliance with 49 CFR Part 26, communicating to subcontracting businesses and developing supportive services activities at all tiers. The DBE 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 related issues/matters.

**DBE 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 DBE Contract Requirements.

**Small Business Opportunity Office** or **SBO** means the RTD business unit responsible for administering the DBE and SBE Programs.





## DISADVANTAGED BUSINESS ENTERPRISE 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 Code of Federal Regulations (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

03-26-25  
Date

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

RTD's policy is to ensure nondiscrimination in the award and administration of RTD's construction contracts, professional services contracts, and in the procurement of common goods and services. The Contractor shall comply with and implement requirements of RTD's DBE Program and 49 CFR Part 26 in the award and administration of contracts under this Agreement. 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) found in Part A of this document as well as the flow-down provisions found in Section 4 of these DBE Contract Requirements are incorporated in all DBE subcontract agreements regardless of tier. It is RTD's intention to create a level playing field on which DBEs can compete fairly for federally 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 necessary. 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 DBE 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 DBE firms:**

- A. DBE size standards: The cap on statutory gross receipts of DBE firms eligible to participate in the program over the previous 3 fiscal years cannot exceed \$31.84 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 eligible principal(s) must be less than \$2,047,000 (on an individual basis) - excluding the equity of the eligible principal(s) primary residence and the equity of the eligible principal'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 DBE Program. If it comes to RTD's attention, that there has been a transfer of an owner's assets, RTD may request the certifying authority under the Colorado UCP to evaluate transfers of ownership within the past two years to determine compliance with the personal net worth requirements. Additionally, the socially disadvantaged owner may be disqualified if there is evidence that he or she is not economically disadvantaged 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 DBE regulations. (see 49 CFR Part 26.67(b))
- C. To count a DBE's participation toward the DBE Goal established for the Contract or the commitments to the percentage of certified DBE utilization made by the prime Contractor, the proposed DBE(s) must be certified as a DBE(s) with 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 the project. The DBE firm must be certified as a DBE and perform a Commercially Useful Function. Contractors should also be sure that the DBE 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 DBE is approved by RTD to be added to the Contractor's Schedule of Participation.

### **3. GENERAL REQUIREMENTS**

#### **A. DBE 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 DBE Program requirements and DBE approach/strategy). A bidder/proposer who fails or refuses to complete and return the required enclosures to these DBE Contract Requirements will be deemed non-responsive. The specified DBE participation goal applies to all post selection negotiations. Contractor's commitment to the percentage of certified DBE utilization during the term of the Contract will be stated in the DBE 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 Contractor's ability to comply with its initial commitment. However, a partial waiver of the DBE Goal will not be considered until the end of the Contract and the totality of 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 DBE availability was present, yet not solicited, not utilized or disregarded.
- ii) RTD has specified the DBE Goal on this project as found in Enclosure 1A - DBE Affidavit. Bidders/proposers must make adequate good faith efforts to meet this DBE 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 DBE 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 the DBE participation goal assigned to the Contract by demonstrating and documenting their commitments for participation by DBEs for at least the total percentage of the DBE Goal assigned to the Contract, 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 DBE(s) that are currently certified with 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. All DBEs must be certified prior to the bid/proposal submission, except in a "design-build" or "turnkey" contracting situation or some on-call or task order contracts where RTD

will explain its procedures 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 DBE firms that will participate in the Contract; (please include DBE current certification letters issued by the Colorado UCP);
  - b. Description of the work that each DBE will perform. To count toward meeting a goal, each DBE 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 2A – DBE Schedule of Participation and Enclosure 3A - DBE Letter of Intent, also please include DBE current certification letters issued by the Colorado UCP); The dollar amount of the participation of each DBE firm participating; (This is included on RTD Enclosure 2A - DBE Schedule of Participation and Enclosure 3A- DBE Letter of Intent);
  - c. Written documentation of the bidder/proposer's commitment to use a DBE Subcontractor whose participation it submitted to meet a contract goal; (this is covered under RTD Enclosure 1A or 1B – DBE Affidavit as well as Enclosure 3A - DBE Letter of Intent) and;
  - d. Written confirmation from each listed DBE 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 3A - DBE Letter of Intent).
- iv) Second, if the bidder/proposer does not meet the DBE Goal or is able to only meet part of the DBE Goal, they must document adequate good faith efforts. Appendix A to 49 CFR part 26 clearly states, "this means that the bidder 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 DBE Goal.

The following are a list of information that bidders/proposers must submit as proof of good faith efforts along with RTD Enclosure 6 – Disadvantaged Business Outreach and Enclosure 7 – DBE Unavailability Certification form. Bidders/proposers are expected to document adequate/sufficient good faith efforts to meet the DBE 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 DBEs who have the capability to perform the work of the Contract. The bidders/proposers must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidders/proposers must determine with certainty if the DBEs 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 DBEs in order to increase the likelihood that the DBE Goal will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime Contractor might otherwise prefer to perform these work items with its own forces.
- c. Whether the bidders/proposers provided interested DBEs with adequate information about the plans, specifications, and requirements of the Contract in a timely manner to assist them in responding to a solicitation.
- d. Whether the bidders/proposers negotiated in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE Subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE Subcontractors and suppliers, so as to facilitate DBE participation. 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 DBEs or not to meet the DBE participation goal assigned to a project.
- e. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.
- f. Whether the bidders/proposers made efforts to assist interested DBEs 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 DBEs 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 DBEs, including RTD's SBO.
- i. Whether other bidders/proposers on the procurement met the DBE Goals and submitted an acceptable DBE Plan demonstrating compliance with the DBE Program requirements for a turnkey, multi-year design-build project, alternative delivery method contracts, other multi-year projects, On-Call or Task-Order projects.
- j. Bidders/proposers are required to submit copies of each DBE and non-DBE

Subcontractor quotes submitted to them when a non-DBE Subcontractor was selected over a DBE for work on the Contract so RTD SBO can review whether DBE prices were substantially higher; and contact the DBEs listed on a Contractor's solicitation to inquire as to whether they were contacted by the prime. Pro forma mailings to DBEs 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 DBE simply because it is not the low bidder, or if it is unable to find a replacement DBE 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 DBE Goal, the RTD SBO Manager will decide whether the Contractor made a "good faith effort" to actively, effectively and aggressively seek DBEs to meet those goals prior to bid/proposal submission and in its commitments as set forth in their Schedule of Participation or DBE Plan to continue its efforts to meet the DBE participation goals for subsequent phases of the project. Contractors are also responsible for collecting good faith efforts documentation of all major non-DBE Subcontractors/suppliers as part of their responsibility to implement the DBE 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 DBE 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 DBE 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 Director of Contracting and Procurement 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.

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 DBE requirements have been satisfied through "good faith efforts". The reconsideration official will be a member of RTD staff who did not take part in the initial "good faith efforts" decision.

- b. 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.
- c. 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.
- d. 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.
- e. The result of the reconsideration process is not administratively appealable to the Department of Transportation.
- f. 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 DBE requirements have been satisfied through good faith efforts.

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

- (i) 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 DBE Goal at the time of bid or proposal submission. To be considered a responsive bidder/proposer, when a DBE Goal is specified for design-build, a Bidder/Proposer must meet the goal referred to in the bid specification by committing to meet the DBE Goal for each phase of the design build or other alternative delivery method project process by specifically identifying certified DBE firms that will be performing services. Bidder/Proposer is required to submit two sets of DBE Enclosures. One for "**design phase**", and one related to the "**construction phase**".
- (ii) 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 DBE requirements of this section in one of two

ways. First, and for the "design phase" only, Proposer can meet the DBE goal by demonstrating and documenting its commitments for participation by DBEs for at least the total percentage identified above or a percentage that exceeds the goal for the "design phase". The DBE Contract Requirements provided in the Attachment E to this RFP (the "DBE 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 DBE 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 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, the DBE 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 DBE Enclosures:
  - i. Enclosure 1A - DBE Affidavit
  - ii. Enclosure 1B - DBE Prime Affidavit (only when proposer is a certified DBE)
  - iii. Enclosure 2A - Schedule of DBE Participation
  - iv. Enclosure 3A - Letter of Intent to Perform as a DBE Subcontractor
  - v. Enclosure 3B - DBE Regular Dealer/Distributor Affirmation Form (for each DBE regular dealer or distributor listed in Enclosure 2A)
  - vi. Enclosure 4 - Bidders List Information (Information of Subcontractors Seeking to Work) (one for each subcontractor (DBE and non-DBE)
  - vii. Enclosure 5 - Employer Certification Workforce
  - viii. Enclosure 6 - Disadvantaged Business Outreach
  - ix. Enclosure 7 - DBE Unavailability Certification
- e. Regarding the DBE Enclosure 4 (Bidders List Information (Information of Subcontractors Seeking to Work)), Bidder/Proposer is required to submit certain information for those firms (DBEs and non-DBEs) that are interested in working on the Contract. The required information includes the names of the firms that submitting 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 DBE Enclosure 4 – (Bidders Information of Subcontractors Seeking to Work).



- f. Contractor is required to make good faith efforts to fulfill their commitment to DBE participation/utilization throughout the duration of the "design phase" contract.

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

- a. Bidder/Proposer is required to submit different sets of DBE Enclosures at different stages throughout the Contract.
- b. By the proposal due date, and for "construction phase" only, Proposer is required to submit:
  - i. DBE Enclosures 1A (DBE Affidavit);
  - ii. 1B (DBE Prime Affidavit – when bidder/proposer is a certified DBE); and
  - iii. DBE Enclosure 2B Open-Ended Performance Plan (DBE OEPP). The DBE Open-Ended Performance Plan (OEPP) must include a commitment to meet the DBE 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 DBEs to perform. The OEPP must also include an estimated time frame in which actual DBE 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 DBE Enclosures required for the "construction phase":
  - i. DBE Enclosures 2A (Schedule of DBE Participation);
  - ii. Enclosures 3A (Letters of Intent to Perform as a DBE Subcontractor);
  - iii. DBE Enclosure 4 – (Bidders List Information (Information Regarding Subcontractors Seeking to Work));
  - iv. DBE Enclosure 5 (Employer Certification of Workforce);
  - v. DBE Enclosure 6 (Disadvantaged Business Outreach); and
- d. Once each DBE have been identified and selected, Contractor will update Enclosure 2A (Schedule of DBE Participation), and provide Enclosure 3A (Letter of Intent to Perform as DBE Subcontractor) for each DBE added to the updated Enclosure 2A. Contractor will submit to RTD an update Enclosure 2A each time a DBE is added, to satisfy DBE participation committed on Enclosure 2B (Open-Ended Performance Plan), along with an Enclosure 3A (Letter of Intent to Perform as DBE 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.
- (iv) The bidder/proposer must submit a DBE Plan as described in Section 3 Part E of these DBE Contract Requirements explaining how the bidder/proposer intends to fulfill their DBE requirements and commitments throughout the duration of the Contract. Areas that need to be included in the DBE Plan include, but are not limited to: mechanisms to comply with prompt payment provisions, release of retainage, outreach efforts, outreach efforts, reporting, among other DBE requirements.
  - (v) The successful Contractor/consultant is expected to make good faith efforts to engage and utilize DBEs on an ongoing basis throughout the duration of the Contract. It should be noted that each time a Contractor adds a DBE to the project, the RTD SBO must review the DBE's certification with Colorado UCP to ensure that the NAICS code/s coincides with the scope of work that the DBE is expected to perform on the project. The DBE 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 DBE Contract Requirements. Additionally, the successful Contractor/consultant is required to make good faith efforts to fulfill their initial commitment to DBE/s participation/utilization throughout the entire Contract duration, as well to comply with the DBE Open-Ended Performance Plan, applicable for the **"construction phase"**.

**C. OTHER MULTI-YEAR DBE AND ALTERNATIVE METHODS DBE (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 DBE Goal at the time of bid or proposal submission. To be considered a responsive bidder/proposer, when a DBE 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 DBE Goal for the base contract value and the base scope of work, specifically identifying certified DBE firms that will be performing services or providing supplies within the allotted defined base contract and submit the DBE Contract Requirements enclosures or document its good faith efforts to attain the goal.

The bidder/proposer is also expected to submit a DBE Plan as described in Section 3 Part E of these DBE Contract Requirements explaining how the bidder/proposer intends to fulfill their DBE requirements and commitments if the optional year/s and optional scopes of work are exercised/awarded in the future. The DBE 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 DBEs 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 DBE to the project, the RTD SBO must review the DBE's certification with Colorado UCP to ensure that the NAICS code/s coincide/s with the scope of work that the DBE is expected to perform on the project. Additionally, the DBE 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 49 CFR Part 26 as well as the terms of these DBE Contract Requirements. The successful Contractor/consultant is required to make good faith efforts to fulfill their initial commitment to DBE/s participation/utilization throughout the entire Contract duration.

**D. TASK ORDER OR ON-CALL DBE CONTRACT REQUIREMENTS**

In a task order or on-call procurements, the bidder/proposer must make good faith efforts to meet or exceed the specified project DBE Goal at the time of bid or proposal submission. To be considered a responsive bidder/proposer, when a DBE Goal is specified for a task order or on-call project, a bidder/proposer is required to make good faith efforts to meet the DBE Goal identified in the bid solicitation by committing to meet the DBE Goal for the project and identifying some of the certified DBE 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 DBE Goal as referenced in section 3 of this document under 'General Requirements – DBE 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 DBE/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 DBE/s will perform. The bidder/proposer should never specify dollar values or make commitments to utilize DBEs 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 DBE/s.

The bidder/proposer is required to submit a DBE Plan explaining how they will do outreach and engage DBEs, specific to each individual task, and describe how they intend to fulfill their DBE commitments throughout the life of the task order/on-call contract. Section 3 Part E of these DBE Contract Requirements shall serve as a guide of what a DBE Plan should include. Please note that your answers to specific questions related to the DBE Plan will be evaluated. The bidder/proposer must explain how they intend to fulfill their DBE 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 DBEs if any of the tasks are exercised/awarded. They will also be expected to revise and submit updated Enclosures 2A and Enclosures 3A if DBEs are added to the project or if additional scope of work are assigned to the original DBEs on the project. It should be noted that each time a Contractor/consultant adds a DBE to the project, the RTD SBO must review the DBE's certification with Colorado UCP to ensure that the NAICS code/s coincide/s with the scope of work that the DBE is expected to perform 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 these DBE Contract Requirements. Additionally, the Contractor/consultant is required to make good faith efforts to fulfill their initial commitment to DBE/s participation/utilization throughout the entire Contract duration.

#### **E. DBE PLAN**

The DBE Plan is the Proposer's written approach and strategy to the overall administration of their DBE commitment on this project (including the expectations of the lower tier DBE Subcontractors). Proposers will be required on all turnkey, Multi-Year Design/Build projects, Alternative Delivery Method projects, other Multi-Year projects, On-Call or Task-Order Contracts as well as other specified projects to submit a comprehensive detailed DBE Plan with their proposal. For design/build contracts, Contractor will also be required to explain how its DBE Open-Ended Performance Plan (OEPP) will be updated and submitted to comply with the monthly updates requirement. DBE 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 DBE 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 the successful Contractor/Consultant will be required to formalize and use as basis the proposed DBE plan submitted with their RFP to implement their official DBE Plan upon Notice to Proceed from RTD. The DBE Plan must be reviewed and approved by the RTD SBO. Thereafter, the Contractor/Consultant is required to prepare and submit to the SBO an updated DBE Plan on an annual basis throughout the project duration.

As it relates to the Proposer/Contractor, the DBE Plan 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 DBEs;
- ii. Describing how DBE participation will be solicited and incorporated into the proposer's overall procurement process;
- iii. Describing the DBE project goal and the proposer's DBE commitment/utilization;
- iv. Promoting a level playing field and non-discrimination, by providing an open and transparent process;
- v. Identifying how the Contractor's/Consultant's DBE Liaison Officer/Compliance Officer/Diversity Manager, etc. 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 DBE 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 DBE Plan Annual Update Process, as well DBE 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 DBEs as it relates to 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 federal regulations;
- xiii. Ensuring that the DBE Plan is Signed and dated by the Contractor/Consultant; and
- xiv. Describing the monthly reporting relationship with RTD's SBO and compliance with overall reporting requirements.

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

On a Turnkey Multi-year project such as Design Build and other Alternative Delivery Method projects or other larger projects, RTD will require in the RFP that a Contractor designate a DBE Liaison/ Compliance Manager, etc. or such other title as designated by the Contractor. In lower value or shorter duration contracts, the DBE Liaison's/ Compliance Manager's, etc., duties may be a collateral responsibility. The DBE Liaison / Compliance Manager, etc. shall be responsible for the following:

- i. Day-to-day operational components of the DBE Program;
- ii. Effectively responding to and reporting to the RTD SBO on the status of any DBE Contractor/supplier;
- iii. Submitting executed DBE subcontracts/purchase orders and any subsequent material amendments thereto to the SBO within thirty (30) days of the Subcontractor Agreement Execution. No DBE should 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 RTD SBO regarding DBEs issues and obtaining approvals for all DBE 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 DBE Participation Reports;
- vii. Ensuring that all DBE subcontracts regardless of tier include flow-down provisions as described in the DBE 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 attainment of the DBE Goal/commitment, communicating subcontracting opportunities 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 DBE Program requirements and the DBE Plan submitted by the prime Contractor/Consultant; and
- xi. Scheduling monthly meetings between the Contractor and SBO if deemed necessary to provide status updates and address goal attainment, issues or concerns.

#### **G. COUNTING DBE PARTICIPATION**

RTD will count DBE participation toward overall and contract goals as provided in 49 CFR 26.55

The DBE 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 Contractor's efforts can be objectively evaluated. To count DBE participation toward the DBE Goal established for the Contract, the proposed DBE(s) must be certified as a DBE(s) with the City and County of Denver or Colorado Department of Transportation (Colorado UCP) under the appropriate NAICS code that coincides with the scope of work that they will execute on the project/contract. Additionally, the DBE firm must be certified as a DBE and perform a Commercially Useful Function as defined in these DBE Contract Requirements. DBE certification does not, however, constitute a representation or warranty by RTD as to the qualification of any listed firm. In accordance with 49 CFR Part 26, RTD will require the total DBE participation commitment to be achieved in accordance with the following:

- (a) When a DBE participates in a contract, only the value of the work performed by the DBE counts toward DBE Goals.
  - (1) RTD will count the entire amount of that portion of a construction contract that is performed by the DBE's own forces. That includes the cost of supplies and materials obtained by the DBE for the work of the Contract, any supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE Subcontractor purchases or leases from the prime Contractor or its affiliate);

- (2) RTD will count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of the Contract toward DBE Goals, if RTD determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
- (3) RTD will count DBE work performed by DBE Prime Contractors for self-performance toward meeting the DBE Goal, only for the scope of work that they are certified in as a DBE and at a percentage level they will be performing themselves with their own forces;
- (4) Work performed by DBEs is deemed to include the cost of materials and supplies purchased and equipment leased by the DBE from non-DBE sources. Work subcontracted can only count if the subcontractor is another eligible DBE;
- (5) When a DBE performs as a participant in a joint venture, RTD will count a portion of the total dollar value of the Contract equal to the distinct, clearly defined portion of the work of the Contract that the DBE performs with its own forces toward DBE Goals;
- (6) RTD will count expenditures to a DBE Contractor toward DBE Goals only if the DBE is performing a Commercially Useful Function on that contract;
- (7) A DBE performs a Commercially Useful Function when it is responsible for execution of the work of the Contract and is carrying out its responsibilities by performing, managing, and supervising the work involved. To perform a Commercially Useful Function, the DBE must also be responsible, with respect to materials and supplies used on the Contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a Commercially Useful Function, RTD must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the Contract is commensurate with the work it is performing and the DBE credit claimed for its performance of the work, and other relevant factors.
- (8) Each DBE must perform a Commercially Useful Function to be counted toward the DBE Goal and at least 30% of the work must be performed by a DBE of the total cost of its contract for the DBE to be presumed to be performing a Commercially Useful Function;
- (9) A DBE does not perform a Commercially Useful Function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, RTD will examine similar transactions, particularly those in which DBEs do not participate.
- (10) When a DBE is presumed not to be performing a Commercially Useful Function, the DBE may present evidence to rebut this presumption. You may

determine that the firm is performing a Commercially Useful Function given the type of work involved and normal industry practices.

(b) Use the following factors in determining whether a DBE trucking company is performing a Commercially Useful Function:

(1) The DBE 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 DBE Goals.

(2) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the Contract.

(3) The DBE receives credit for the total value of the transportation services it provides on the Contract using trucks it owns, insures, and operates using drivers it employs.

(4) The DBE may also lease trucks from non-DBE firms. RTD uses the option that permits limited DBE credit to be obtained for the use of trucks leased from non-DBE sources. This option permits counting of credit for the use of non-DBE trucks not to exceed the value of transportation services on the Contract provided by DBE trucks. The DBE that leases trucks equipped with drivers from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE leased trucks equipped with drivers not to exceed the value of transportation services on the Contract provided by DBE-owned trucks or leased trucks with DBE employee drivers. Additional participation by non-DBE owned trucks equipped with drivers receives credit only for the fee or commission it receives as a result of the lease arrangement.

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

(6) A lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

(c) Count expenditures with DBEs for materials or supplies toward DBE Goals as provided in the following:

(1) If the materials or supplies are obtained from a DBE 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 DBE makes minor modifications to the materials, supplies, articles, or equipment, the DBE 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 DBE regular dealer, [§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 DBE are of the "general character" when they share the same material characteristics and application as the items specified by the Contract.

(ii) DBE 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 DBE 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 DBE's inventory, and when necessary, any minor quantities delivered from and by other sources are of the general character as those provided from the DBE's inventory.

(b) A DBE 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 DBE 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 DBE 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 DBE distributor, [§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 DBE distributor is an established business that engages in the regular sale or lease of the items specified by the Contract. A DBE 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 DBE 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 DBE distributor. If these conditions are met, DBE 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) Bidders or proposers must submit, along with DBE Enclosures 2 (Schedule of DBE Participation) and DBE Enclosure 3 (Letter of Intent of using DBE Subcontractors), the **DBE Enclosure 3B (DBE Regular Dealer/Distributor Affirmation Form)**. This form needs to be completed by any DBE firm listed as a regular dealer or distributor in the DBE Enclosure 2. For each DBE listed as a regular dealer or distributor, RTD will make a preliminary counting determination to assess its eligibility for 60 or 40 percent credit, respectively, of the cost of materials and supplies based on its demonstrated capacity and intent to perform as a regular dealer or distributor, as defined in 49 CFR [§26.55\(e\)\(2\)\(iv\)\(A\)](#), [\(B\)](#), and [\(C\)](#) and [\(e\)\(3\)](#), under the Contract. RTD's preliminary determination will be made based on the DBE's written responses to relevant questions and its affirmation that its subsequent performance of a commercially useful function (CUF) will be consistent with the preliminary counting of such participation. Where the DBE supplier does not affirm that its participation will meet the specific requirements of either a regular dealer or distributor, RTD will make appropriate adjustments in counting such participation toward the bidder's or proposer's good faith efforts to meet the contract goal. The bidder or proposer is responsible for verifying that the information provided by the DBE supplier is consistent with the counting of such participation toward the contract goal.

(4) With respect to materials or supplies purchased from a DBE 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.

- (5) 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.
- (d) RTD will not count DBE participation towards the RTD's overall triennial goal for any dollar value of work performed under a contract with a DBE firm after it loses its DBE certification with the Colorado UCP, except as provided for in [49CFR Part 26.87\(j\)](#)
- (e) RTD will not count the participation of a DBE subcontractor toward a Contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE.
- (f) RTD will not count DBE participation if a firm is not currently certified as a DBE in accordance with the standards of 49CFR Part 26.55 ([subpart D](#)) at the time of the execution of the Contract.

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

- i. For purposes of this document, a Joint Venture is an association of a DBE 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 DBE 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 DBE 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 DBE performs with its own forces toward the DBE Goal(s) and such services/supplies/NAICS codes are approved for DBE participation credit. The joint venture agreement **MUST** specify the services, dollar value, reporting structure and details of the DBEs' 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 DBE subcontractors as well as ensure that all tiered-subcontractors comply with and insert the provisions of Part A - the Non-discrimination clause, 5-7, Prompt Payment provisions; 8., Joint Check Utilization; 9., DBE**

## **Removal/Termination/Substitution/Reduction of Scope provisions; and 10., Changes.**

The Contractor will be required to submit to the RTD Small Business Opportunity Office all DBE 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 DBEs, the Contractor must get approval from RTD if the Contractor intends to count DBE participation from those additional DBEs. To count DBE participation toward the goal established for the Contract or commitments made by the Contractor for DBE utilization, the RTD SBO must ensure that those additional DBEs are properly certified as a DBE(s) with the City and County of Denver or CDOT 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 DBEs.

### **5. PROMPT PAYMENT OF DBE SUBCONTRACTORS**

The Contractor agrees that:

It shall pay its DBE subcontractor(s) any undisputed amounts for the satisfactory performance of the subcontractor's 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;

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

ii) Within 30 days after a DBE 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.

iii) 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 DBE 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 DBE 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 DBE 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; or (8) issue a stop-work order until the DBE 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.*

- iv) 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 DBE firms; and
- v) On a monthly basis, it shall submit a report of its payments to its DBE subcontractors using RTD's Diversity and Compliance solution, B2GNow. The Contractor shall ensure that its DBE 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 for the contract. RTD's Diversity and Compliance Solution (B2GNow) can be accessed through this link <https://rtd-denver.gob2g.com/>

## **6. PROMPT PAYMENT OF NON-DBE SUBCONTRACTORS**

The Contractor agrees that:

- i) It shall pay its subcontractor(s) any undisputed amounts for the satisfactory performance of their Work within seven days of the Contractor's receipt of payment from RTD for such Work;
- ii) Within 30 days after a subcontractor's Work has been satisfactorily completed and accepted by RTD's Project Manager or by the Contractor, whichever is earlier, the Contractor shall make full payment to the subcontractor of any retainage the Contractor has kept related to such subcontractor's Work, unless a claim is filed against the subcontractor related to such Work;
- iii) For purposes of this Section, a subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented as required by RTD. When RTD has made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed.
- 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 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 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 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; or (8) issue a stop-work order until the 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) and (ii) of this Section into all lower-tiered subcontractor agreements; and
- vi) On a monthly basis, it shall submit a report of its payments to its non-DBE subcontractors, using RTD's Diversity and Compliance solution, B2GNow. The Contractor shall ensure that its non-DBE subcontractors at every tier also report monthly payments made or received through B2GNow. 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 for the contract. RTD's Diversity and Compliance Solution (B2GNow) can be accessed through this link <https://rtd-denver.gob2g.com/>

For federally funded contracts with a DBE Goal, see the DBE Contract Requirements' provisions on prompt payment of DBE subcontractors, which include monthly reporting requirements. The DBE Contract Requirements shall control in the event of a conflict with this Section.

## **7. PROMPT PAYMENT MONITORING, COMPLAINTS, AND DISPUTE RESOLUTION PROCEDURES**

**This document describes RTD's proactive process for monitoring compliance with prompt payment requirements and investigating prompt payment complaints by DBE and non-DBE subcontractors on RTD federally funded projects, as well as subrecipient contracts.**

RTD implements and carries out appropriate mechanisms to ensure compliance with 49 CFR Part 26 program requirements by all program participants, including prompt payment, and describes and sets forth these mechanisms in RTD's DBE Program. RTD includes prompt payment and release of retainage provisions in every federally funded contract, including subrecipient contracts. Additionally, every federally funded contract executed by RTD or its subrecipients that has a DBE Goal incorporates a '*DBE Contract Requirements*' document that requires Contractors and subcontractors at every tier to comply with flow-down provisions, which include, but are not limited to Non-discrimination, Prompt Payment, DBE Removal/Termination/Substitution/Reduction of Scope, etc. 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 and/or other remedies as RTD deems necessary. These legal remedies include, but are not limited to withholding monthly progress payments, assessing sanctions, liquidated damages, and/or

disqualifying the Contractor from future bidding as a non- responsible Contractor (see 49 CFR Part 26.13).

RTD is well aware that prompt payment and release of retainage concerns are prevalent in contracting and that subcontractors are usually affected and impacted significantly as a result of prompt payment issues. Therefore, RTD commits to thoroughly investigating and finding ways and means to resolve prompt payment concerns and to ensuring that subcontractors are treated fairly and paid promptly.

### **Monitoring**

RTD undertakes ongoing and proactive monitoring of Contractors' payments to subcontractors, at every tier, over the course of any covered contract through the following methods. However, in the case of subrecipient contracts, RTD and its subrecipients may agree on alternative methods/mechanisms or an established approach that is effective and is in accordance with RTD's process.

- i) After execution of a federally funded contract by RTD or its subrecipients, and on a monthly basis, Contractor must submit to RTD:
  - proactive Prompt Payment status from Contractor during the DBE Monthly Meeting, where Contractor will disclose all subcontractors expected to be paid within the current month, and any potential issue that may preclude Contractor from making the payment according to the DBE and non-DBE Prompt Payment Provisions.
  - subcontract agreements or purchase orders with all required DBE Flow-down Provisions, within 30 days of subcontract execution of any work performed by subcontractor.
  - report from the Contractor of its payments to DBE subcontractors, using RTD's Diversity and Compliance solution B2GNow.;
  - report from the Contractor of its payments to non-DBE subcontractors, using RTD's Diversity and Compliance solution B2GNow.
  - a confirmation of payment received, or non-payment received from DBE subcontractors at every tier of their receipt of payments from the Contractor or subcontractors, using RTD's Diversity and Compliance solution B2GNow.
  - a confirmation of payment received, or non-payment received report from non-DBE subcontractors at every tier of their receipt of payments from the Contractor or subcontractors, using RTD's Diversity and Compliance solution B2GNow..
- ii) Twice a month, RTD will audit payment made by the Contractor to all subcontractors, using RTD's Diversity and Compliance solution B2GNow, to make sure payments have been made within the respective DBE or non-DBE Prompt Payment Provisions.

- iii) Subcontractors are encouraged to report any issues pertaining to prompt payment or release of retainage using RTD's Diversity and Compliance solution B2GNow.
- iv) Subcontractors are also encouraged to report any issues pertaining to prompt payment or release of retainage directly to the appropriate RTD Compliance Officer, RTD Small Business Opportunity Office Manager, and/or RTD Civil Rights Director via email, phone call, or any method they deem necessary.
- v) RTD follows up with Contractors by phone and/or email on the status of outstanding payments due to subcontractors, reiterating the prompt payment provisions. RTD requires Contractors to send confirmation when such outstanding payments have been made. RTD also communicates with the unpaid subcontractors to assure them RTD is monitoring the status of their invoices and to gather additional information.
- vi) RTD requests and collects final lien waivers from subcontractors to ensure release of retainage to subcontractors have been made and will generate final report of payments using RTD's Diversity and Compliance solution B2GNow.

### **Complaints and Dispute Resolution**

Subcontractors are encouraged to try to resolve any issues pertaining to prompt payment or release of retainage directly with the Contractor (and any involved higher-tier subcontractor(s)). If such resolution is not possible, RTD may utilize the following approach when receiving a complaint from a subcontractor regarding issues pertaining to prompt payment or release of retainage:

- i) Contact the subcontractor directly to understand, validate, and collect all the applicable data associated with the complaint, which may include outstanding invoices, how long the invoices have been outstanding, steps taken by the subcontractor thus far to resolve the issues and/or obtain payment before reaching out to RTD, and any other relevant information. If such communication takes place, RTD should inform the subcontractor of its rights to file a claim against the Contractor's bond or to file a verified statement of claim with RTD and the process required to pursue the claim should there be no resolution of the complaint under these procedures.
- ii) Contact the RTD Project Manager and the Contractor (and any involved higher-tier subcontractor(s)) to discuss the complaint and request all information deemed necessary to understand the nature of the complaint and to determine steps that may be taken to address the concern. RTD should remind the Contractor of potential enforcement actions for non-compliance with the prompt payment or release of retainage provisions per the Contract with RTD.
- iii) Contact the subcontractor again to discuss the complaint in light of the information gathered from the RTD Project Manager and/or the Contractor (and any involved



higher-tier subcontractor(s)).

- iv) If deemed necessary, contact the pertinent RTD Purchasing Agent and/or RTD attorney and present all of the facts and issues relevant to the complaint.
- v) Request separate meetings with the subcontractor and the Contractor (and any involved higher-tier subcontractor(s)) with or without the RTD Purchasing Agent and/or the RTD attorney.
- vi) Host an internal meeting with all the appropriate RTD stakeholders to discuss the matter.
- vii) Conduct a settlement mediation with both the subcontractor and Contractor (and any involved higher-tier subcontractor(s)) present, with or without the RTD Purchasing Agent and/or RTD attorney.
- viii) If settlement cannot be achieved, then within five business days of completion of the unsuccessful mediation RTD shall establish a Dispute Resolution Panel of three RTD personnel, with one from the Small Business Opportunity Office/Civil Rights Division (or Capital Programs), one from Contracting & Procurement Division, and one from the General Counsel Department ("Panel"). This Panel will conduct a hearing on the matter with the subcontractor, the Contractor, and any involved higher-tier subcontractor(s) presenting evidence and arguments in an informal setting, but as controlled by the RTD attorney. The hearing shall begin within 30 days of the Panel being established.
- ix) At the hearing, the Contractor, the subcontractor, and any involved higher-tier subcontractor(s) will be required to address all outstanding issues and concerns that any of them may have, even if not directly related to the complaint. These may include, but are not limited to, discrepancies on invoice amounts, work not accepted, incomplete work, differing site conditions, delays, work inefficiencies, and any other matter that involves the parties at the hearing. Any party asserting a complaint, issue, or concern must present evidence.
- x) The Panel is empowered to interpret and enforce the Contract. It also is the trier of fact and can weigh the evidence, including witness credibility, to arrive at a binding determination. Such determinations of fact and law shall be by clear and convincing evidence. (Clear and convincing evidence is evidence indicating that the thing to be proved is highly probable or reasonably certain, a higher standard than preponderance of the evidence.) The findings and determinations of the Panel need only be by majority; they do not need to be unanimous.
- xi) By participating in the hearing, the subcontractor, the Contractor, and any involved higher-tier subcontractor(s) agree to be bound by the Panel's findings and

determinations, with one exception listed in subsection (xv) below.

- xii) The Panel may find that the Contractor has not complied with the Contract's prompt payment or release of retainage requirements and determine that the Contractor owes payment to the subcontractor. The Panel also may order any of the following actions by RTD:
- a. withhold payments to the Contractor until the Contractor and/or higher-tier subcontractor(s) pay the full amount owed to the subcontractor;
  - b. assess sanctions against the Contractor;
  - c. assess the subcontractor's indirect or consequential damages against the Contractor;
  - d. disqualify the Contractor from future bidding on RTD contracts as non-responsible;
  - e. work with the subcontractor to enforce any pertinent payment bond;
  - f. pay the subcontractor directly and deduct the amount from any retainage or monies owed by RTD to the Contractor;
  - g. provide notice of default to the Contractor, stating the potential for termination or suspension of the Contract, in whole or in part; and/or
  - h. issue a stop-work order until the subcontractor is paid, which order shall constitute an unauthorized delay under the Contract that could result in liquidated damages against the Contractor.

Should the Panel determine that it cannot make findings by clear and convincing evidence, or that RTD has a conflict of interest in the determination of the issues presented, the Panel shall rule that the Contractor, any higher-tier subcontractors, and the subcontractor should resolve the matter in the State District Court for the City and County of Denver, independent of RTD. Following this determination by the Panel, if requested by one or more of the parties, any of the Panel members can meet with any of the parties to explain what was perceived by the Panel as a lack of evidence, lack of proof, etc.

If requested, one or more Panel members can supervise a mediation of the involved parties to once again attempt to settle the issues presented. The determination of the Panel is binding on the parties and cannot be appealed. However, either party may file an action in the State District Court for the City and County of Denver to overrule the Panel's findings, but only if the plaintiff can prove by clear and convincing evidence that the Panel had discriminatory bias, that the Panel's ruling was arbitrary and capricious, or that RTD had a conflict of interest that would not allow a fair determination of the issues presented.

## **8. JOINT CHECK UTILIZATION**

May I

A joint check is a two-party check between a DBE, a prime Contractor and a regular dealer of materials/supplies. All joint check arrangements with DBE subcontractors 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 DBE to remedy a financial hardship for a specific period of time. There are monthly reporting requirements that must be complied with in order to receive DBE participation credit. The SBO will closely monitor the use of joint checks to ensure that the independence of the DBE 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.

## **9. DBE REMOVAL/TERMINATION/SUBSTITUTION/REDUCTION OF SCOPE FROM CONTRACT**

A Contractor must have good cause to remove/terminate/substitute/replace a DBE subcontractor and such removal/termination/substitution requires the consent and approval of RTD's SBO. A termination includes any reduction or underrun in work listed for a DBE not caused by a material change to the Contractor by RTD. This requirement applies to instances that include, but are not limited to, when a Contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm. No DBE 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 49 CFR Part 26. To initiate the termination, substitution, removal or replacement process with a DBE subcontractor/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, substitute a DBE subcontractor, the Contractor must give notice in writing to the DBE subcontractor, with a copy of the notice sent to RTD SBO concurrently. The notice must include its request to terminate and/or substitute, replace and/or remove the DBE, 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 DBE subcontractor;
- ii) The Contractor must give the DBE subcontractor five (5) business days to respond to the notice and provide the RTD SBO with reasons, if any, why it objects to the proposed termination of its DBE subcontract or a portions thereof and why the SBO should not consent the Contractor's action;
- iii) RTD's SBO will then assess all pertinent/applicable documentation conduct interviews and site visits if necessary, and host meetings if deemed necessary to ensure a thorough review. 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, substitute, reduce

scope or contract amount to the DBE firm, the SBO will provide written consent of DBE removal and the requirements to substitute work to another DBE firm. If RTD's SBO finds that good cause does not exist to terminate the DBE firm, the SBO will provide a written denial of the request to terminate/replace the DBE subcontractor 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 DBE subcontractor without the approval or consent of the RTD SBO, this constitutes a material breach of a contract, which may result in the termination of the Contract or such other remedy as the RTD deems necessary as set forth under 49 C.F.R. §26.13. These legal remedies 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 DBE subcontractor, the following circumstances should exist: (1) failure or refusal by the DBE subcontractor to execute a written contract without good cause, (2) failure or refusal by the DBE 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 DBE subcontractor to meet the Contractor's reasonable bonding or insurance requirements, (4) insolvency, bankruptcy or credit unworthiness by the DBE subcontractor that creates a risk for the Contract, (5) ineligibility by the DBE subcontractor to work on public works project because of suspension or debarment proceedings, (6) a determination by RTD that the DBE is not a responsible Contractor, (7) voluntary withdrawal from the project by written notification that has been verified, (8) ineligibility to receive DBE participation credit for the type of work to be performed, (9) other documented good cause that compels the replacement of the DBE.
- vi) When a DBE subcontract is terminated with the approval of RTD SBO, or a DBE subcontractor fails to complete its work on the Contract for any reason, including when work committed to a DBE subcontractor is not countable or reduced due to overestimations made prior to award, the Contractor must use good faith efforts to include additional DBE participation to the extent needed to meet the contract goal.
- vii) Contractors must show that it took all necessary and reasonable steps to find another DBE subcontractor to perform at least the same amount of work under the Contract as the DBE that was terminated, to the extent needed to meet the Contract goal RTD SBO has established for this project and or commitments made by the Contractor for DBE utilization/participation. 49 CFR Part 26.53 shall serve as the criteria for evaluating compliance with the good faith efforts requirements. Additionally, Contractors are required to solicit the support and assistance of RTD's SBO if they are unable to meet the DBE Goal/DBE commitment on 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 designated Compliance Officer 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 or not good faith efforts have been demonstrated.
- ix) Contractors are required to comply with Good Faith Efforts procedures as defined under

49 CFR Part 26.53 and detailed under these DBE Contract Requirements. Contractors are required to comply with this section of the DBE requirements or any DBE 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 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 DBE tiered subcontractors comply with this Section and insert the provisions of this Section into all DBE lower tiered subcontractor agreements, regardless of their certification status.

## **10. CHANGES**

- i) The DBE 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 DBE participation goal.
- ii) Changes to the value or scope of work committed to a DBE subcontractor must be pre-approved by the RTD SBO and must be for good cause as set forth in the termination, substitution, replacement or reduction of contract value provisions set forth in these DBE Contract Requirements.

## **11. REQUIREMENTS OF DBE CONTRACT REQUIREMENTS ENCLOSURES**

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

- i) The Enclosure 2, Schedule of DBE Participation must be submitted with the initial bid/proposal. Subsequent to the award of the Contract, the prime Contractor (Contractor) will be responsible for revising the initial Schedule of DBE Participation any time a new DBE is added to the project. The Contractor must also submit a copy of the DBE certification letter to RTD SBO with any new DBE(s) added to the project. RTD will only accept and approve new DBE(s) that are currently certified with 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.
- ii) The Enclosure 3, DBE 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 DBE Letters of Intent for each new DBE that is added to the project after the award of the Contract.
- iii) The Contractor completing the DBE 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 DBE 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 DBEs listed to perform the specific work items or supply the materials as committed in the Enclosure 2A Schedule of DBE Participation and Enclosure 3A 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 DBE, unless it receives prior written consent by RTD Small Business Opportunity Office for a replacement of the DBE for good cause.**

**Failure to submit all required DBE Enclosures may result in your bid or proposal being deemed non-responsive. Failure to submit all completed Enclosures within the DBE Contract Requirements may result in your proposal being deemed Non-Responsive. Modification of any DBE 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, unless specified on contract solicitation. Modification of any DBE 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 DBE participation or performance and resolution of DBE 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.**

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

- i) By the fifth (5<sup>th</sup>) of each month, the Contractor(s) are required to report payments to DBEs through RTD's Diversity and Compliance Solution (B2GNow), which can be accessed through the following link <https://rtd-denver.gob2g.com/>. The Contractor shall ensure that its DBE subcontractors at every tier submit a monthly report of payments received and payments made to lower tier subcontractors, through RTD's Diversity and Compliance Solution (B2GNow).
- ii) The Contractor shall submit a report of its payments to its non-DBE subcontractors, using RTD's Diversity and Compliance Solution (B2GNow). The Contractor shall ensure that its non-DBE subcontractors at every tier confirm or deny receipt of payments from the Contractor, through RTD's Diversity and Compliance Solution (B2GNow) which can only be accessed by RTD's SBO.
- iii) The Contractor acknowledges that the RTD SBO has the right to independently confirm

the information contained in the RTD's Diversity and Compliance Solution (B2GNow) by soliciting such information from each DBE subcontractor and non-DBE 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 DBE subcontractor or non-DBE subcontractor from disclosing, confirming or denying any payment information or cooperating in any investigation initiated by the SBO.

- iv) The Contractor shall report Subcontractors' Participation and all payments made to all DBEs and non-DBEs through RTD's Diversity and Compliance Solution (B2GNow).
- v) The DBE subcontractor shall confirm or deny payments received from its Contractor, regardless of their lower tier, through RTD's Diversity and Compliance Solution (B2GNow). The non-DBE subcontractor shall confirm or deny all payments received from its Contractor, regardless of their lower tier, through RTD's Diversity and Compliance Solution (B2GNow).
- vi) By committing to working on this RTD project which is subjected to DBE requirements set forth under 49 CFR Part 26, all DBE subcontractors participating in this project are therefore required to undergo a Commercially Useful Function (CUF) review and a DBE compliance review/written certification before their contract can be closed by RTD SBO. DBEs are required to fully cooperate with RTD's SBO or its designee in the compliance review process. The CUF review and a DBE compliance 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 CUF review will depend on the specific facts and circumstances. The compliance review/written certification/CUF is purposed to ensure that work committed to DBEs is actually being performed by DBEs, verify the amount of DBE participation credit to ensure that work is actually performed by the DBE consistent with the DBE Program requirements and/or to ensure that there is no activity engaged in by the DBE that would be inconsistent with the intent and objectives of the DBE Program. The CUF reviews are also to ensure that the DBEs are performing at least 30% of the work with their own workforces. The reviews are initiated with an overview/explanation process and closed out with a briefing and determination. The DBE 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 actually observes and assesses the services/supplies being provided by the DBE.
- vii) The Contractor or any of its lower tier non-DBE subcontractors that is utilizing a DBE subcontractor may be selected for DBE compliance review to ensure that they are in compliance with the DBE 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 Contractor or non-DBE 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 DBE Program audit or compliance review. Failure to cooperate can result in part or all of the DBE participation credit being denied / removed from counting toward the DBE participation goal for the Contract.
- viii) It is the recommendation of RTD that all DBE subcontractors on RTD led projects participate in the RTD's SBO DBE Orientation Program. DBEs who have attended the

orientation in the past, may be encouraged to repeat the orientation if there are changes to the DBE Program requirements, changes in the DBE regulations, changes in the DBE personnel, or if the DBE 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.



(This page intentionally left blank)

## **DBE CONTRACT REQUIREMENTS - DBE 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 DBE Contract Requirements Enclosures. DBE Contract Requirements Enclosures are to be submitted with the bid/proposal. Failure to submit all completed Enclosures within the DBE Contract Requirements may result in your proposal being deemed Non-Responsive. Modification of any DBE 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.

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

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

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

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

This form must be completed, notarized and signed only if the bidder/proposer is a DBE submitting a proposal/bid as a Prime Contractor. This form, if applicable, must be submitted with a current DBE certification letter(s) from the Colorado UCP to affirm DBE status.

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

This form must be submitted by all bidders/proposers including DBE prime Contractors. This form must include a list of DBEs that the bidder/proposer intends to do business with if awarded the Contract. It must contain the following information: names and addresses of certified DBE firms, the scope of work they are to perform in the Contract, the applicable NAICS codes (found in their DBE certification with 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 DBE contract. Subsequent to the award of the Contract, the prime Contractor will be responsible for revising the initial Schedule of DBE Participation any time a new DBE is added to the project. The prime Contractor must also submit a copy of the DBE certification letter to RTD SBO with any new DBE(s) added to the project. RTD will only accept and approve new DBE(s) that are currently certified with 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 DBE firms listed on this schedule of DBE 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 DBEs added to the Contract.

**[ ] Enclosure 2B: DBE 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 DBE activities or scopes intended to be subcontracted to DBE 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 DBE Subcontractor**

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

**[ ] Enclosure 3B: DBE Regular Dealer/Distributor Affirmation Form (FTA Form)**

This form must be completed by DBE suppliers that are intended to be used for material or supplies. Each listed supplier in Enclosure 2 (Schedule of DBE Participation) must include a signed affirmation form. DBE suppliers intended to be considered "regular dealers" or "distributors" are required to fully complete the form and provide specific details on stocked materials they are intended to provide for the Contract. Bidder/proposer is required to submit completed affirmation forms, along with all other DBE Enclosures at the time bid or proposal is submitted.

**[ ] 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, DBEs and non-DBEs 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: Disadvantaged 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 DBE Goal identified in this bid/proposal or were only able to meet part of the DBE 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 DBE Goal is met or exceeded by the bidder/proposer, please indicate N/A.

**RTD's Diversity and Compliance Solution will track prompt payment and retainage to DBEs and non-DBEs.** Please note that Failure to comply with the prompt payment provisions of DBE subcontractors and non- DBE 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 DBE and non-DBE 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 DBE and non-DBE 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 DBE 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 DBE 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 DBEs and Non-DBEs 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 DBE and non-DBE 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 DBE 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- DBE AFFIDAVIT

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

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

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

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 DBE commitments in this project in conformity with the Requirements, Terms, and Conditions of these DBE 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- DBE PRIME AFFIDAVIT

THIS PAGE MUST BE COMPLETED BY THE DISADVANTAGED 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 Disadvantaged Business Enterprise (DBE) and am certified as of the date that the RTD receives this bid/proposal and as defined by the Regional Transportation District in DBE 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)

May I

## Enclosure 2A – Schedule of DBE Participation

Name of Contractor: \_\_\_\_\_

RTD Contract No: \_\_\_\_\_

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

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

1. Please list all DBEs involved on the Contract including the Prime Contractor if it is a DBE. All DBEs 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 DBEs for which they are not certified to perform will not count towards the DBE participation and/commitments. A current DBE certification for each listed DBE recorded on this schedule from the Colorado UCP (City and County of Denver or CDOT) must accompany this enclosure. Failure to provide proof of current DBE certification for any or all listed DBEs will eliminate such listed DBE's participation, and work performed by such DBE will not count towards satisfaction of the DBE participation and/commitments. If additional pages are required to list all contracted DBEs, photocopy this enclosure as required to make a complete list.

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

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

Contractor must submit copies of all DBE 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 delivery method contracts as DBEs are added throughout the course of the contracts and in some instances at different phases of the contract. DBE 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 DBE sub to RTD may result in RTD not counting DBE participation towards the DBE Goal.

---

NAME OF CONTRACTOR

---

SIGNATURE OF CONTRACTOR & DATE



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

NAME OF CONTRACTOR:

RTD Contract No.

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

<b>DBE OPEN ENDED PERFORMANCE PLAN (OEPP) FOR DESIGN BUILD CONTRACTS ONLY</b> <b>THIS SECTION WILL APPLY ONLY TO THE CONSTRUCTION PHASE ON A DESIGN-BUILD CONTRACT</b>				
DBE 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 DBE %
<b>SUM</b>				

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 DBE. 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 DBE percentage expected to be credited toward the DBE goal, should be based on **49CFR Part26.55 – How is DBE Counted Toward the Goal**. Although all expected DBE subcontracted amount should be listed under the **Estimated dollar value for DBE Participation** column, only the applicable and allowed DBE participation credit percentage should be recorded under the **Anticipated DBE %** column.

Awarded bidder or proposer will be required to submit to RTD’s SBO a signed DBE Enclosure 3 (Letter of Intent to use Subcontractors DBEs), for each DBE 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 DBE participation could be credited toward the DBE 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. DBE 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 DBE subcontractor to RTD’s SBO may result in RTD not counting DBE participation towards the DBE goal.

Expected subcontracted DBEs must be certified under the Colorado UCP (City and County of Denver or CDOT), and specifically under the appropriate NAICS code(s), at the time of subcontract execution, and based on the Open Ended DBE Performance Plan (OEPP). Please photocopy this enclosure as required to make a complete list.

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

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

---

NAME OF CONTRACTOR

---

SIGNATURE OF CONTRACTOR & DATE



## Enclosure 3B – DBE Regular Dealer/Distributor Affirmation Form

OMB Control #2105-0586 (Exp. 5/31/2027)



U.S. Department of  
Transportation

### DBE Regular Dealer/Distributor Affirmation Form

Bidder Name:

Contract Name/Number:

Sections 26.53(c)(1) of Title 49 Code of Federal Regulations requires recipients to make a preliminary counting determination for each DBE listed as a regular dealer or distributor to assess its eligibility for 60 or 40 percent credit, respectively, of the cost of materials and supplies based on its demonstrated capacity and intent to perform as a regular dealer or distributor, as defined in section 26.55(e)(2)(iv)(A), (B), (C), and (3) under the contract at issue. The regulation requires the recipient's preliminary determination to be made based on the DBE's written responses to relevant questions and its affirmation that its subsequent performance of a commercially useful function will be consistent with the preliminary counting of such participation. The U.S. Department of Transportation is providing this form as a tool for recipients, prime contractors, regular dealers, and distributors to use to carry out their respective responsibilities under this regulation. The form may be used by each DBE supplier whose participation is submitted by a bidder for regular dealer or distributor credit on a federally-assisted contract with a DBE participation goal. The form may also be used by prime contractors in connection with DBE regular dealer or distributor participation submitted after a contract has been awarded provided such participation is subject to the recipient's prior evaluation and approval. If this form is used, it should be accompanied by the bidder's commitment, contract, or purchase order showing the materials the DBE regular dealer or distributor is supplying. Use of this tool is not mandatory. If a recipient chooses a different method for complying with Section 26.53(c)(1), it must include that method in its DBE Program Plan.

DBE Name:

Total Subcontract/Purchase Order Amount:

Authorized DBE Representative (Name and Title):

NAICS Code(s) Related to the Items to be Sold/Leased:

1. Will all items sold or leased be provided from the on-hand inventory at your establishment? ☐ YES ☐ NO

(If "YES," you have indicated that your performance will satisfy the regular dealer requirements and may be counted at 60%. STOP here. Read and sign the affirmation below. If "NO" Continue.)

- a) Are you selling bulk items (e.g., petroleum products, steel, concrete, concrete products, sand, gravel, asphalt, etc.) or items not typically stocked due to their unique characteristics (aka specialty items)? ☐ YES ☐ NO (If "YES," Go to Question 2. If "NO" Continue.)

- b) Will at least 51% of the items you are selling be provided from the inventory maintained at your establishment, and will the minor quantities of items delivered from and by other sources be of the general character as those provided from your inventory?

☐ YES ☐ NO\* (If "YES," you have indicated that your performance will satisfy the regular dealer requirements and may be counted at 60%. STOP here. Read and sign the affirmation below.

\*If 1., 1.a), and 1. b) above are "NO," your performance on the whole will not satisfy the regular dealer requirements; therefore, only the value of items to be sold or leased from inventory can be counted at 60%. (Go to Question 3. to determine if the items delivered from and by other sources are eligible for Distributor credit.)

2. Will you deliver all bulk or specialty items using distribution equipment you own (or under a long-term lease) and operate? ☐ YES ☐ NO<sup>1</sup>

(If "YES," you have indicated that your performance will satisfy the requirements for a regular dealer of bulk items and may be counted at 60%. STOP here. Read and sign the affirmation below.)

<sup>1</sup> If "NO," your performance will not satisfy the requirements for a regular dealer of bulk items; the value of items to be sold or leased cannot be counted at 60%. (Go to Question 3.)

3. Will the written terms of your purchase order or bill of lading from a third party transfer responsibility, including risk for loss or damage, to your company at the point of origin (e.g. a manufacturer's facility)? ☐ YES<sup>2</sup> ☐ NO<sup>3</sup>

- a) Will you be using sources other than the manufacturer (or other seller) to deliver or arrange delivery of the items sold or leased? ☐ YES<sup>2</sup> ☐ NO<sup>3</sup>

<sup>2</sup> If your responses to 3 and 3.a) are "YES," you have indicated that your performance will satisfy the requirements of a distributor; therefore, the value of items sold or leased may be counted at 40%.

<sup>3</sup> If you responded "NO" to either 3 or 3.a), counting of your participation is limited to the reasonable cost of fees or commissions charged, including transportation charges for the delivery of materials or supplies; the cost of materials or supplies may not be counted.

I affirm that the information that I provided above is true and correct and that my company's subsequent performance of a commercially useful function will be consistent with the above responses. I further affirm that my company will independently negotiate price, order specified quantities, and pay for the items listed in the bidder's commitment. This includes my company's responsibility for the quality of such items in terms of necessary repairs, exchanges, or processing of any warranty claims for damaged or defective materials.

Printed Name and Signature of DBE Owner/Authorized Representative:

The bidder acknowledges its responsibility for verifying the information provided by the DBE named above and ensuring that the counting of the DBE's participation is accurate. Any shortfall caused by errors in counting are the responsibility of the bidder.

Printed Name and Signature of Bidder's Authorized Representative:

For access to the fillable version of the DBE Regular Dealer/Distributor Affirmation Form please go to the U.S. Department of Transportation's Office of Civil Rights website or visit the link below:

<https://www.transportation.gov/mission/civil-rights/dbe-regular-dealer-distributor-affirmation>

**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 DBE 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 DBE or non-DBE); 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 DBE or Non-DBE (check one): DBE \_\_\_\_\_ Non-DBE \_\_\_\_\_

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 non-protective 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 – DISADVANTAGED BUSINESS OUTREACH

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

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

RTD Contract Name and Number:

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

Proposer:

---

Subcontractor – if applicable:

---

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

---

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

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

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

Currently Sponsored Disadvantaged Business Outreach Activities:

---

---

---

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

---

---

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

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

---



## ENCLOSURE 7— DBE UNAVAILABILITY CERTIFICATION

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

of \_\_\_\_\_, certify that [*the Contractor*], made the following efforts to meet the DBE 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 [DBEs]

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

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

May I

- Solicited the following DBEs

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

- Followed up with initial contacts

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

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

Date	Organization	Phone #

As shown by the documentation provided to RTD, Contractor certifies that it has made good faith effort to attain the DBE Goals.

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

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

## ENCLOSURE 8 - INSTRUCTIONS ON DBE 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 DBE 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 DBE and non-DBE 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.

