



State of Rhode Island and Providence Plantations
Rhode Island Department of Transportation

Public Notice of Proposed Rule-Making
August 8, 2014

Pursuant to the provisions of 42-35-3(a) of the General Laws of Rhode Island, and in accordance with the Administrative Procedures Act Chapter 42-35 of the General Laws, the Rhode Island Department of Transportation hereby gives notice of its intent to amend its RULES AND REGULATIONS FOR RHODE ISLAND DEPARTMENT OF TRANSPORTATION DISADVANTAGED BUSINESS ENTERPRISE PROGRAM.

The purpose of this amendment is to include federal updates to the regulations, including the inclusion of a Very Small Business program.

The proposed regulation and concise summary of non-technical requirements and proposed new rules are available for public inspection at <http://www.dot.ri.gov/> in person at The Rhode Island Department of Transportation, Contract Administration Office, or requested by e-mail at Vanessa.crum@dot.ri.gov or by calling Vanessa Crum at (401) 222-3260 Ext. 4431.

In the development of the proposed regulation, consideration was given to: (1) alternative approaches; (2) overlap or duplication with other statutory and regulatory provisions; and (3) whether the regulation, in and of itself, would have significant economic impact on small business. No alternative approach, duplication, or overlap was identified based upon available information.

All interested parties are invited to submit written or oral comments concerning the proposed regulations by September 8, 2014 to Vanessa Crum, Rhode Island Department of Transportation, Two Capitol Hill, Providence, RI – telephone number (401) 222-3260 Ext. 4431 or via e-mail at Vanessa.crum@dot.ri.gov. A public hearing to consider the proposed regulation will be held on September 12, 2014 at 10:00 a.m. at the Rhode Island Department of Transportation, Two Capitol Hill, Providence, RI, at which time and place all persons interested therein will be heard. The room is accessible to the disabled and interpreter services for the hearing impaired will be provided if requested 48 hours prior to the hearing. Requests for this service can be made in writing to Vanessa Crum at the Rhode Island Department of Transportation, Two Capitol Hill, Providence, RI 02903 or by calling (401) 222-3260 Ext. 4431.

**THE STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS**

RHODE ISLAND DEPARTMENT OF TRANSPORTATION

RULES AND REGULATIONS FOR RHODE ISLAND

DEPARTMENT OF TRANSPORTATION

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM



Rules and Regulations Concerning
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

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SECTION 1.0

PURPOSE AND AUTHORITY

1.1 Purpose

The purpose of these rules is to carry out the intent of the regulations of the United States Department of Transportation (USDOT), 49 CFR Part 26 and to ensure that certified Disadvantaged Business Enterprises (DBEs) certified in the State of Rhode Island have an equitable opportunity to compete for Rhode Island Department of Transportation (RIDOT) contracts and subcontracts; to ascertain the ability of DBEs and joint-ventures involving DBEs to perform the types of work for which they wish to contract; to set are qualified; to establish procedures to monitor DBE performance on RIDOT's contracts; and to set establish procedures to sanction and/or debar contractors and subcontractors found to have violated State and Federal that violate applicable statutes and regulations.

1.2 Authority

~~The authority for these~~ These rules is are promulgated pursuant to the provisions of "Administrative Procedures Act." R. I.G.L. Gen. Laws § 42-35-1 and, et seq.; the "Minority Business Enterprise Act." R.I. Gen. Laws § 37-14.1-1, et seq.; and in accordance with Section 106(c) of the "Surface Transportation and Uniform Relocation Assistance Act of 1987," and 49 C.F.R. Part 23-26.

SECTION 2.0

DEFINITIONS

2.1 Affirmative Action

~~Taking specific steps to eliminate Policies or programs that seek to redress past discrimination and its effects, through active measures to ensure nondiscriminatory results and practices in the future, and to involve DBEs fully in equal opportunities for Minority Business Enterprises (MBEs) or DBEs in contracts and programs funded by the Department RIDOT.~~

2.2. Certifying Agent

~~MBEs and DBEs must be certified by the Rhode Island Minority Business Enterprise Office (“MBEO”) at the Department of Economic Development or any department Administration, or any other competent entity designated by the RIDOT as its certifying authority.~~

2.3 Compliance

~~The condition existing status when a contractor or subcontractor has met meets and implements the requirements of this part these or other applicable regulations.~~

2.4 Contract

~~A mutually legally binding legal relationship or any modification thereof obligating the contractor to furnish supplies or services, including but not limited to construction and professional services, and the buyer to pay for them. For purposes of these regulations rules, a lease is considered to be a contract.~~

2.5 Contractor

~~One who participates through a contract in any RIDOT highway, transit, rail, maintenance or other public works project or any program covered by these regulations.~~

2.6 Debarment

~~Action taken after an opportunity to be heard as provided under these to deny firms violating these regulations from participation in RIDOT projects. Exclusion from contracting and subcontracting on public works projects for violation of these rules. See Section 6.0- Sanctions and Debarment.~~

2.7 Department or RIDOT

~~The Rhode Island Department of Transportation including its operating elements.~~

2.8 Disadvantaged Business Enterprise or DBE

~~A for-profit small business concern, as defined pursuant to section 3 of the Small Business:~~

~~Act and implementing regulations, which is owned and controlled by one or more minorities or women. This definition applies only to financial assistance programs. For the purpose of these regulations, owned and controlled means a business:~~

~~(a)~~

~~That is at least 51 per centum percent (51%) owned by one or more minorities or women individuals who are both socially and economically disadvantaged or, in the case of publicly owned business, at least 51 per centum a corporation, in which 51 percent (51%) of the stock of which is owned by one or more such individuals; and minorities or women; and~~

~~(b)~~

~~Whose management and daily business operations are controlled by one or more of the socially disadvantaged individuals who own it, by one or more of such individuals.~~

~~2.9 DBE Coordinator~~

~~The official designated by the head of the Department element to have overall responsibility for promotion of~~

~~2.9 DBE Administrator~~

~~The RIDOT employee assigned responsibility for coordination of the disadvantaged business enterprise. in his/her program .~~

2.10 Joint Venture

An association of ~~two~~ a DBE firm and one or more businesses other firms formed to carry out a single, for-profit business enterprise for profit for which purpose they combine their, with combined 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 are commensurate with its ownership interest of the joint venture.

2.11 Lessee

~~A business or person that leases~~ An individual or entity that rents, or is negotiating to lease property from the Department on the Department's facility for the purpose of operating a transportation-related activity, or for the provision of goods or services to facility RIDOT or to for the public on the facility provision of the United States and goods and services on a public works project.

~~2.12 Minority~~

~~A person who is a citizen or lawful permanent resident who is:~~

~~(a) Black (a person having origins in any black racial groups of Africa);~~

~~(b) Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race);~~

~~(c) Portuguese (a person of Portuguese, Brazilian, or other Portuguese~~

~~culture or origin, regardless of race);~~

~~(d) Asian American (a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands);~~

~~(e) American Indian and Alaskan Native (a person having origins in any of the original peoples of North America); or~~

~~(f) Members of other groups, or other individuals, found to be economically and socially disadvantaged by the Small Business Administration under section 8(a) of the Small Business Act, as amended (15 U.S.C. 637(a)).~~

2.43-12 Mentor/Protégé Agreement

~~A concept which allows prime contractors to enter into a formal relationship with a contract that that a contractor enters into with a DBE for the purpose of providing training and development to these firms programs to the DBE.~~

2.44-13 Non-compliance

~~The condition existing status when a contractor or subcontractor has failed to implement incorrectly implemented the requirements of these regulations.~~

2.45-14 Prime Contractor

~~The individual, firm, or corporation contracting with to whom a purchase order has been issued by the State Purchasing Agent and /or the Division of Purchases, State of the Department of Administration for the performance of prescribed work on a RIDOT contract.~~

2.4615 Set-aside

~~A technique which limits consideration of bids or proposals to those submitted by DBEs. A contracting practice restricting eligibility for the award of a contract to those submitted by Very Small Businesses (VSBs).~~

2.16 Socially and Economically Disadvantaged Individuals

Socially and economically disadvantaged individuals mean any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is:

2.16.1 Any individual who the United Certification Program (UCP) finds to be a socially and economically disadvantaged individual on a case-by-case basis pursuant to standards of the U.S. D.O.T. in 49 CFR Part 26, Subpart D- Certification Standards,

2.16.2 Any individual in the following groups, members of which are refutably presumed to be socially and economically disadvantaged:

- i. “Black Americans”, which includes persons having origins in any of the Black racial groups of Africa:
- ii. “Hispanic Americans”, which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South America, or other Spanish or Portuguese culture or origin, regardless of race:
- iii. “Native American”, which includes persons who are American Indians*, Eskimos, Aleuts, or Native Hawaiians:
- iv. “Asian-Pacific Americans”, which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa Islands, Macao, Fili, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong:
- v. “Subcontinent Asian Americans”, this includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, Maldives Islands, Nepal, or Sri Lanka
- vi. Women
- vii. Any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration (SBA), at such as time as the SBA designation becomes effective.

* “Tribally-owned concern” means any concern at least 51 percent (51%) owned by an Indian tribe as defined in 49 C.F.R. 26.5.

2.17 Subcontractor

One who participates, through a subcontract (at any tier), in any RIDOT highway, transit, airport, or other public works project or any program covered by these regulations.

2.18 Supplier

A supplier must be a regular dealer, which means being If the materials or supplies are purchased from a DBE regular dealer, sixty percent (60 %) of the cost of the materials or supplies provided is counted toward the DBE goals.

2.18.1 For purposes of this section, a regular dealer is an established supplier of bulk goods supplies a product on a regular basis to the public, not on only an ad hoc basis in relation to a particular contract. The firm must either maintain business that maintains an inventory or have possession of distributions equipment of materials and/or supplies and engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. In addition, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the

general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. A regular dealer assumes the actual and contractual responsibility for the provision of the material and/or supply. A firm may qualify as a regular dealer of materials sold in bulk (such as fuel, gravel, or sand) if the DBE owns and operates the distribution equipment for said materials.

2.19 Very Small Business

A Very Small Business (VSB) is one that does not have more than 15 employees and has annual revenue not to exceed \$1.5 million. A very small business is a business with annual gross receipts well below the SBA small business size criteria defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts (\$22.41 million) as specified in 49 CFR §26.65(b).

SECTION 3.0

DBE PROGRAM POLICIES AND GUIDELINES

3.1 Methods of Contracting

Goals: RIDOT's program goals consist of two types: (1) overall department goal and (2) individual project goals, established on a case-by-case basis. The methodology used to establish these goals is, in part, based upon projected contracting opportunities ~~This would include, which includes a review of all proposed road and, bridge, and consultant projects for the fiscal year. A committee comprised of individuals from Design, Construction Operations and Civil Rights~~ The Office of Business and Community Resources (OBCR) shall develop reasonable individual project goals based upon a review of:

(1) Contract items; (2) past DBE utilization utilizations; (3) availability of certified DBE firms; and (4) an analysis of the capabilities and capacity of the DBE firms. Prior to implementation, this the proposed plan is shall be approved by the Director of Transportation and the Federal Highway Administration. A copy of the funding source (i.e., Federal Highway Administration, Federal Transit Authority), approved plan is filed with the Department of Administration's Office of Purchases.

Set-Asides:

~~In accordance with Title 37 Chapter 2-9 and title 37 Chapter 14.1-6 and -7 (R.I.G.L.), RIDOT will solicit bids directly from DBEs VSBs for RIDOT projects identified as suitable for competitive bidding among DBEs. Pursuant to 49 C.F.R. Part 23 of the federal regulations, set VSBs. Set-asides shall be used only where at least three DBEs two VSBs exist with capabilities consistent with contract requirements, so as to permit competition, and the projects selected will be based on the criteria and analysis described in section 3.1, above.~~

3.2 DBE Stable Workforce Guidelines

~~As a DBE~~

3.2.1 ~~DBEs certified by the State of Rhode Island, a firm-MBEO, may be considering~~ consider participation, or may already have participated in some of the Department's federally assisted highway construction projects. DBE participation in these construction contracts is based on the ~~organization's~~ DBE's ability to perform a commercially useful function.

3.2.2 A DBE is considered to perform a commercially useful function when it is responsible for the execution of specific contract items by actually performing, managing, and supervising the work involved. DBEs are expected to control daily operations from start to completion of its subcontracted items. This includes managing its ~~own~~ workforce.

The use of a common workforce is ~~a normal~~ an accepted industry practice. However, ~~for obvious reasons, no DBE ought to~~ DBEs may not rely wholly upon the workforce of prime contractors. ~~Instead, the DBE and should request help from the respective trade unless and the Department's~~ assistance from the Department's trainee officer to develop work crews.

The stability of essential personnel, such as supervisors and managers, is one of the criteria ~~that we utilize~~ utilized to evaluate the stability of the DBE workforce. A stable workforce indicates that a DBE subcontractor is a viable, legitimate ~~and does~~ carry out a business entity, which performs a commercially useful function.

At pre-construction conferences, DBEs are advised to provide the Resident Engineer ~~supervising the project~~ with a list of names of employees expected to work on the contract. DBEs may also be required to submit a current listing of employees to the ~~EEO~~ Office of Business and Community Resources (OBCR). The list must contain each worker's job classification, including foremen and others serving in a supervisory capacity, and date of hire with the DBE organization. ~~This roster would be indicative of DBE's stable workforce.~~

3.3 Counting of DBE Participation and Commercially Useful Function Guidelines

~~The Department can only credit transactions with DBEs which have performed a commercially useful function in relation to~~
The total dollar value of contracts

~~A DBE is considered to perform a commercially useful function when it is responsible for execution of a distinct element of the work involved. To determine whether a DBE is performing a commercially useful function, the Department shall evaluate the amount of work subcontracted, normal industry practices, and other relevant factors. Set forth below are the guidelines for commercially useful functions in the cases of supply, trucking, and subcontracting:~~

~~(a) Suppliers:~~

~~A supplier is performing a commercially useful function when it packages, i.e. takes quotes from several manufacturers, and/or sells from its own inventory in order to provide one or more items to a contractor. A supplier may own a franchise and/or may be a factory representative to one or more manufacturers. Consistent with a contractor's probable needs,~~

~~a supplier, not a contractor, may place orders for production with manufacturers.~~

~~"Pass through" supply operators occur when the contractor decides what items shall be bought from what sources and/or agrees directly with the manufacturer or some other non-DBE party to schedule delivery and/or directly effects adjustments and/or simply routes the money and purchase orders through the DBE is not a commercially useful function and awarded to DBEs will not be counted toward contract goals the DBE requirement. Likewise, all subcontract work performed by DBEs will count toward the DBE requirement.~~

3.3.1 The allowable value of a subcontract with DBE participation will be treated as the commitment of the prime contractor toward meeting the contract goal. The specific rules for crediting DBE participation toward contract goals are as follows:

- i. When a DBE participates in a contract, RIDOT will consider only the value of the work actually performed by the DBE toward DBE goals.
- ii. RIDOT includes the entire amount of that portion of a construction contract (or other contract not covered by paragraph (iii) of this section) that is performed by the DBE's own forces. RIDOT credits the cost of supplies and materials purchased or leased by the DBE subcontractor for the work of the contract. However, supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate are not counted toward participation.
- iii. RIDOT credits the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a USDOT-assisted contract, toward DBE goals, provided the fee is determined to be reasonable and not excessive as compared with fees customarily allowed for similar services.
- iv. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.
- v. When a DBE performs as a participant in a joint venture, RIDOT 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.

3.3.2 RIDOT will count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function (CUF) on that contract.

(a) A DBE performs a CUF when it is responsible for execution of the work of the contract, and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a 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 commercially useful function, RIDOT evaluates the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors

(b) Suppliers: A supplier is considered to perform a CUF when it packages, i.e. takes quotes from several manufacturers, and/or sells from its own inventory in order to provide one or more items to a contractor. A supplier may own a franchise and/or may be a factory representative to one or more manufacturers. Consistent with a contractor's probable needs, a supplier, not a contractor, may place orders for production with manufacturers.

(c) "Pass through" supply operations occur when the contractor decides what items shall be bought from what sources and/or agrees directly with the manufacturer, or other non-DBE party, to schedule delivery and/or directs adjustments and/or routes payments and purchase orders through the DBE. Pass through operations are not commercially useful functions and will not be counted toward contract goals.

(d) Contractors may count expenditures for materials and supplies obtained from DBE suppliers and manufacturers, provided that the DBEs are regular dealers and assume the actual and contractual responsibility for the provision of the materials and supplies. The entire expenditure to a DBE manufacturer (supplier that produces good from raw materials or substantially alters them raw materials before resale) may be counted. Sixty percent (60%) of expenditures to DBE suppliers that are regular dealers and not manufacturers may be counted provided that the supplier performs a commercially useful function in the supply process. All expenditures with manufacturers and suppliers must be properly documented in writing in order to count toward a DBE obligation.

~~(e) Trucking: A DBE which owns trucks suitable for the customary hauling requirements of a construction project may provide trucking services consistent with RIDOT will consider the following~~

~~Sources—A DBE may find and hire owner/operators to supplement its own equipment. A DBE may find and hire trucks which are of another party's fleet except as limited herein. Quantities—There is no limitation on the number of units which the DBEs find~~

~~factors in the market place and deploy to meet their trucking commitments. There is a requirement that one or more trucks actually owned by the DBE be present on the very job site when the DBE is providing these services. Management—The DBE must be responsible for finding and engaging any and all trucks which it does not own and yet deploys on a Federal Aid contract. The DBE is responsible for overall scheduling. Overall scheduling does not mean hourly direction of the trucks on the projects since~~

~~this is customarily left to the contractor who has purchased these services. The DBE is responsible for repair/replacement of breakdowns.~~

~~Billing—Trucks owned by the DBE as well as any which the DBE has rented or leased from a fleet owner may not be placed on the contractor's payroll. Consistent with normal practices, owner/operator's provided by the DBE may be placed directly on the contractor's payrolls. Billing for the services of trucks owned by the DBE and those rented/leased from a fleet owner, must be performed by the DBE as an aspect of overall management. Fueling—In keeping with normal industry practice, the fueling of the trucks furnished by the DBE may be handled by the contractor with billing adjustments. This practice is not inconsistent with the requirement that the DBE exercise overall management. It is NOT~~

determining whether a DBE trucking company is performing a CUF normal.

~~for a DBE trucking company to rent trucks from the prime contractor or their subcontractor in order to service one or more projects under contract by said prime contractor or subcontractor with the Department.~~

The DBE must manage and supervise the entire trucking operation are for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.

1.

i. The DBE itself must own and operate at least one fully licensed, insured, and operational vehicle being used on the contract.

ii. The DBE must receive compensation for the total value of the services it provides on the contract using vehicles it owns, insures, and which are operated by drivers it employs.

iii. The DBE may lease vehicles from another DBE firm, including an owner-operator who is certified as a DBE. The DBE which leases vehicles from another DBE shall receive credit for the total value of the services the lessee DBE provides on the contract.

iv. The DBE may also lease vehicles from a non-DBE firm, including from an owner-operator. The DBE which leases vehicles from a non-DBE is entitled to credit for the total value of services provided by non-DBE lessees not to exceed the value of services provided by DBE-owned vehicles on the contract. Additional participation by non-DBE lessees receives credit only for the fee or commission it receives as a result of the lease arrangement.

Example to this subsection (e) (iv): DBE firm X uses two of its own trucks on a contract. It leases two trucks from DBE firm Y and six trucks from non-DBE firm Z. DBE credit would be awarded for the total value of transportation services provided by firm X and firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by firm Z. In all, full credit would be allowed for the participation of eight

trucks. With respect to the other two trucks provided by firm Z, DBE credit could be awarded only for the fees or commission pertaining to those trucks firm X receives as a result of the lease with firm Z.

v. For purposes of this subsection, a lease must indicate that the DBE has exclusive use of and control over vehicles used on the project. This does not preclude vehicles 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 the use of the leased vehicle. Leased vehicles must display the name and identification number of the DBE.

(f) RIDOT will count expenditures with DBEs for materials or supplies toward DBE goals as follows:

i. If the materials or supplies are purchased from a DBE manufacturer, RIDOT will count 100 percent of the cost of the materials or supplies.

ii. If the materials or supplies are purchased from a DBE regular dealer, RIDOT will count 60 percent of the cost the materials or supplies toward DBE goals.

iii. With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, RIDOT will count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials and supplies required on a job site, toward DBE goals, provided RIDOT determines the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. The fees will be evaluated by RIDOT after receiving the Broker's Affidavit Form from the DBE. RIDOT will not count any portion of the cost of the materials and supplies themselves toward DBE goals.

(g) Subcontractor: A subcontractor arrangement exists when a person or firm has a contractual obligation to perform a defined portion of the contract work and the following conditions are present:

i. Compensation is determined by the amount of work accomplished, rather than being paid on an hourly basis.

~~Choice of work methods, except as limited by the specifications, furnishing and controlling labor and equipment are exercised by the subcontractor with only general supervision being exercised by the prime contractor.~~

~~The subcontractor's personnel involved in the direct under the subcontractor's direct supervision and are included on the subcontractor's payroll. Special provisions can exist which, under limited conditions, allow specialized personnel not normally employed by the subcontractor to join the subcontractor's forces~~

ii. The subcontractor exercises control over work methods (except as limited by project specifications), while furnishing and managing its own labor and equipment with only minimal, general supervision being exercised by the prime contractor.

iii. The personnel involved in the DBE subcontractor's portion of the project are both under the subcontractor's direct supervision and identified on its payroll records. When warranted by unique circumstances of a project, a DBE subcontractor may be permitted to employ on a limited basis specialty trades personnel who are not normally employed by the DBE subcontractor.

iv. Second tier DBE subcontracting will only be approved in accordance with normal industry practice and when the type of work differs from work which the DBE usually performs.

(h) All factors pertaining to the ~~situation~~ unique conditions of a project shall be considered together ~~thus no one condition or factor alone will indicate~~ in determining whether or not a subcontract a DBE subcontractor relationship actually exists on the project. A DBE subcontractor may need to lease/rent equipment, ~~except for other than~~ over the road trucks, and/or augment its workforce with additional skilled personnel in order to perform certain subcontractor work, project-related work. The DBE subcontractor is required to arrange for the necessary equipment through rental/leasing agreements, ~~if applicable, as necessary.~~ (Off-the-road trucks equipment, such as "Euclids," may be rented/leased from the prime contractor even though the CUF guidelines prohibit rental/lease of over-the-road trucks from the prime contractor.) Likewise, in limited instances, the prime contractor may provide some, but not all personnel to the DBE subcontractor when the following conditions are present:

i. The personnel must have a specialized expertise which has not been mastered by the DBE's own skilled/supervising/managerial personnel.

ii. Such personnel must be placed on the DBE's payroll and come under the direct supervision of the DBE for the performance of the particular subcontract work.

iii. The ~~special~~ deployment of such personnel must be accomplished within the framework of a mentor-protégé agreement; or for emergency purposes, by contract change order. All instances of combining personnel must be for developmental purposes ~~where-in~~ which teaching/demonstration/consulting to the DBE is to must occur.

iv. Long term, continual (e.g. from one contract to another) or chronic use by a DBE firm, of a personnel normally employed by another specific firm, lacking a mentor-protégé agreement which is being carried out in good faith, is not consistent with the CUF guidelines.

v. To place entire work crews on DBE's payrolls when such personnel are normally employed by another specific firm is not consistent with the ~~commercially useful function~~ CUF guidelines.

vi. A DBE may need to lease/rent equipment, except for over-the-road trucks, in order to be properly equipped to execute the work of a mentor-protégé agreement. In such cases where the DBE has investigated several possible sources of such equipment within a reasonable geographical area to the project, the DBE may find the best offer was made by the prime contractor or another subcontractor on the project. In such cases, the DBE may rent/lease such equipment from the prime or another contractor, ~~providing also subcontractor, provided~~ that the use of such equipment is material to demonstrating/teaching objectives set forth in the mentor-protégé agreement. Thus, ~~the DBE's normal~~ DBE's regular employees, and not those temporarily furnished by the prime contractor, or another subcontractor, shall be operate such equipment for the equipment's operator for the bulk majority of the time during which the equipment is used in the work of the subcontracts embraced by the DBE subcontractor under the mentor-protégé agreement.

vii. A DBE's use of equipment owned by a prime contractor or another subcontractor or's equipment effected improperly and/or without an appropriate mentor/protégé input will not be considered program is inconsistent with the CUF guidelines and will result in noncompliance.

(i) If a contractor or subcontractor is not certified as a DBE by the MBEO at the time of the execution of the contract or issuance of the purchase order, RIDOT will not count that firm's participation toward any DBE goals, except as provided in 49 CFR 26.87(i).

(j) RIDOT will not count the dollar value of work performed by a contractor or subcontractor after it has ceased to be a certified DBE toward the contract goal.

(k) RIDOT will not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until all payments being credited have been fully paid to the DBE.

3.4 Good Faith Efforts

~~Acknowledge, sign, and submit a "Disadvantaged Business Enterprise Goal Attainment Certification Affirmative Action Certificate" with each bid.~~

~~When the goal established by the Department is met or exceeded, the apparent low bidder shall present documentation showing who and what type of DBE is being utilized, and to what extent by the 10th day local time after the bid opening, or mail it to the Department's.~~

The apparent low bidder or best value respondent on a RIDOT project solicitation shall submit to the Department's Contracts & Specifications Office within ten (10) days after bid opening appropriate documentation identifying all DBEs being utilized on the project.

If the documentation required is not provided by the apparent low bidder or best value respondent within the time specified, then the bid will shall be rejected deemed to be non-

responsive and the next lowest bidder/respondent will be notified to do the same as described above begin the post qualification process and submit its DBE documentation.

When If the goal DBE goals established by the Department is are not met by the contractor apparent low bidder/respondent, then it must demonstrate its good faith efforts to meet the DBE contract goals. The apparent low bidder/respondent must demonstrate that efforts it made were those that a contractor actively and aggressively seeking to meet the goals established by the Department would make, given all relevant circumstances.

The following are the kinds examples of efforts that may be taken but deemed to be by Contractors to recruit DBEs for a project. These examples are not exclusive, nor exhaustive The, and the Department will shall consider other factors and types of efforts that may be relevant:

Efforts made to select portions of the work proposed to be performed by DBEs in order to increase the likelihood of achieving the stated goal, including, where appropriate, but not limited to, breaking down contracts:

(a) A contractor's effort to proportion project related work into economically feasible units to which facilitate DBE participation. Selection of portions of work are required to a least equal the goal for DBE utilization specified in this contract.

(b) Written notification to DBEs at least fifteen (15) calendar days prior to the bid opening of bid soliciting individual DBEs interested in to solicit participation in the contract as a subcontractor, supplier, or service agency and for what specific identify specific project items or types of work. or type of work.

(c) Written notification to disadvantaged economic development assistance placement agencies and organizations, which provide assistance in recruitment and employment of DBEs. placement of DBEs, of the type of work, supplies or services being considered by DBEs on this contract.

Efforts made to

D.

(d) Evidence of good faith efforts to negotiate with DBEs for specific items of work:

i. The names, addresses, telephone numbers of DBEs who were contracted-contacted, the dates of initial contact, and whether initial solicitations of interest were followed-up by contacting the DBEs to determine with certainty whether the DBEs were interested. Either in-person or telephone communications are expected; interested, personnel or phone contacts are expected;

ii. A description of the information provided to DBEs regarding the plans and specifications and estimated quantities for portions of the work to be performed; of the work to be performed;

3.

iii. A statement of ~~explaining~~ why ~~additional~~ agreements with DBEs were not reached; and

iv. Documentation of each DBE contacted, but rejected and the reasons for the rejections.

(e) Absence of any ~~agreement~~ agreements between ~~a~~ the contractor and ~~a~~ DBE DBEs in which the ~~DBE~~ DBEs ~~promises~~ promise not to provide subcontracting quotations to other bidders.

Efforts made by the contractor to assist ~~the~~ DBEs that need assistance in obtaining bonding, insurance, or lines of credit required by the contractor.

Documentation that qualified DBEs are not available, or are not interested.

Notices placed by the contractor in general circulation media, trade association publications, and disadvantaged-~~focus~~ focused media of interest in ~~utilizing DBEs and area of~~ soliciting DBE participation in the project. ~~Interest~~

Efforts to effectively use the services of available disadvantaged community organizations; disadvantaged ~~contractors' group; local, State,~~ and Federal contractors' groups: local, state and federal disadvantaged business assistance offices; and other organizations that provide assistance in recruitment and placement of DBEs.

The following are examples of actions that shall ~~not be used as~~ considered justification by ~~the contractor~~ contractors for failure to meet the DBE contract goals:

- i. Failure to contract with a DBE solely because the DBE was unable to provide performance and/or payment bonds.
- ii. Rejection of a DBE bid or quotation based on price alone.
- iii. Equipment idled by contract with the DBE.
- 4
iv. Failure to contract with a DBE because the DBE will not agree to perform items of work at the unit price bid.
- v. Rejection of a DBE because of its union or non-union status.
- vi. Failure to contract with a DBE because the contractor normally would perform all or most of the work in the contract.
- ~~Restricting~~
7
vii. Limiting DBE recruitment efforts to mailing of letters.

3.5 Program Counting Participation Term (49 C.F.R. 26.55)

Any firm having participated in the DBE program for the maximum of eight years shall be "graduated" from the program and deemed ineligible for participation after this eight-year period. Said period shall begin to run at the date of original certification by the DBE's home state.

Use of the "DBE Verification of Payment Form" is required to ascertain the actual amount paid and received by the DBE. A project may not proceed to finalization without the completion of this form.

SECTION 4.0

DBE-CONTRACT APPROVAL PROCEDURES

4.1 At the time the apparent ~~successful~~ low bidder or best value respondent submits his/her its DBE participation information (including good faith effort documentation, if necessary), only RI certified DBEs will be counted toward achieving the DBE goal. Those firms which are still attempting to become certified DBEs ~~should~~ shall not be considered in any capacity when evaluating the apparent low bidder's DBE participation information ~~unless already certified in another State. In those cases, the contracting State may recognize the certification by a sister State. In the instance where a State~~. If RIDOT accepts a low bidder's the unsuccessful good faith effort it is expected that the State will require to recruit DBE's, then RIDOT shall encourage the contractor to continue his/her its efforts to increase his/her DBE participation after award of the contract.

~~These rules permit the Department of Transportation to~~ RIDOT may deny DBE approval and/or reject any proposed DBE that is not performing a commercially useful function, or reject a proposed DBE which is not in compliance with the policies and guidelines of the program stated herein.

4. ~~2~~ Required Submissions from the Contractor

~~NOTE: If the DBE is to perform as a prime contractor, the following information must be submitted to the DBE Coordinator prior to contract award.~~

~~If the DBE is to perform as a sub contractor, the following information must~~ may ~~be requested by OBCR; submitted by the prime contractor prior to contract award:~~

(a) A list of equipment in the contractor's possession and which the DBE proposes to use on the contract ~~if awarded to them~~ project. If equipment is to be ~~rented~~ leased, ~~then~~ lease agreements and paid invoices together with cancelled checks must be made available for each piece of equipment rented for each contract.

In the event that equipment is leased with operator, ~~a~~ then the ~~lease must be available showing the hourly~~ indicate the total rental rate, which includes the operator rate. In such instances, payroll records are not necessary. However, in the event that equipment is leased without an operator, and the operator is hired by the contractor DBE, payroll records must be available for ~~that~~ the individual operating the equipment.

~~Said Equipment rentals by a subcontractor shall be from a source other than the prime contractor. contractor, unless first option is stipulated by the prime contractor in the subcontract agreement.~~

- (b) The name and qualifications of the superintendent or supervisory personnel to be assigned to the major features of work.
- (c) The number of proposed trainees to be trained in each classification and training programs as stated in the required contract provisions for federal aid projects (Training Special Provisions, page 15 – par. 3).
- (d) The name of the individual who will act as equal employment opportunity officer for the contractor.
- (e) A copy of necessary licenses, if any required. In the event a license is not in hand, state when licenses will be obtained (i.e. arborists, asbestos removal, trucking/transporting, etc.).
- (f) A copy of the bid submission given to the prime contractor.

4.3 Mentor/Protégé

~~A DBEs involved in a mentor-protégé agreement with a contractor must be submitted to the External Equal Opportunity Office independent business entities, which meet the requirements for certification as defined in subpart D of 49 C.F.R. Part 26. A protégé firm must be certified before it begins participation in a mentor-protégé arrangement. RIDOT must submit said agreement to the operating administration (FHWA/FTA) for approval prior to the award, if applicable. executing an individual contractor/ subcontractor mentor-protégé agreement.~~

4.4 Review Procedure

The DBE Administrator will review information submitted in ~~reference to the~~ regards to proposed DBEs, as follows: following questions:

- (a) ~~Is the firm a qualified proposed DBE which is defined as one that is currently firm certified by the Rhode Island Department of Economic Development? MBEO?~~
- (b) What is the actual value of the proposed DBE contract?
- (c) What is the nature of the work to be performed by the proposed DBE? The commercially useful function guidelines must be adhered to. (See section 3.3 #6(a)).
- (d) Is the proposed DBE a supplier of materials and/or manufacturer? If the DBE is a regular dealer only 60% of expenditures may be counted toward the DBE goal, provided that the supplier performs a commercially useful function in the supply process. The entire expenditure may be counted toward the DBE goal only if the DBE

supplier is a manufacturer that produces the goods from raw materials or substantially alters them before resale.

- (e) Have there been complaints filed against the proposed DBE named in the subcontract?
- (f) Review the ~~DBE's~~ proposed DBE's work history on other RIDOT projects. A past history of non-performance or voluntary forfeiture of work may be the basis of non-approval.
- (g) Review the proposed DBE subcontract agreement for partial items of work, labor only contracts, etc.

4.5 Due Process Procedure

The DBE Administrator will make a recommendation to the Chief Engineer within five (5) working days of the conclusion of its investigation.

- (a) In the event of non-approval by the DBE Administrator, the contractor may appeal in writing to the Chief Engineer within five (5) working days of receipt of notice of non-approval. ~~Statement~~ The appeal must include grounds for further review.
- (b) In the event that the Chief Engineer upholds the decision not to grant approval, the contractor may write to request final review from the Director of RIDOT within ten (10) working days of receipt of notice from the Chief Engineer.
- (c) ~~The Director's decision shall be rendered~~ The Director shall issue a written determination within ten (10) working days. Appeals of the Director's decision must be in accordance with the "Administrative Procedures Act," R. I. Gen. Laws § 42-35-1, et seq.

SECTION 5.0

MONITORING AND DEBARMENT

5.1 Overview

The purpose of ~~these~~ the following procedures is to insure that contractors, subcontractors, and suppliers doing business with the ~~Rhode Island Department of Transportation~~ and about whom information has been received regarding possible violations of state and/or federal law and/or contracting provisions regarding DBEs, receive fair treatment in all RIDOT investigations and decisions regarding such information.

The procedures set forth herein are intended to provide a method outlined below will insure such fair treatment by providing a vehicle for obtaining complete accurate information as

~~well as allowing while providing all parties full an~~ opportunity to present their ~~ease position~~ to the fullest possible extent.

5.2 Violation

~~The RIDOT DBE Coordinator~~ If the DBE Administrator through field investigation, or other means, becomes aware that a DBE firm and/or prime contractor may have violated 49 C.F.R. Part 26, RI Gen. Laws § 37-14.1-1, *et seq*, ~~State DBE Certification Requirements or certification requirements, RIDOT subcontracting provisions regulations, or these rules, then an investigation shall commence.~~

5.3 Investigation

~~The DBE Coordinator~~ Administrator investigates the possible violation by interviewing all parties said to be involved, gathering documentation, etc. Based on the information received, ~~the DBE Coordinator will decide.~~ Administrator shall determine whether:

- (a) There is no violation.
- (b) There is an apparent violation:
resolvable
 - i. Resolvable through means agreeable to all parties involved.
 - ii. A formal fact finding meeting is necessary

5.4 Formal Fact Finding

~~The purpose of this step is to formally gather~~ procedure shall be to document the facts involved in a particular case. Transcripts will be made available to all parties in attendance when requested and at their own expense.

5.4.1 ~~The meeting will be scheduled and conducted by the DBE Coordinator.~~ Administrator. The DBE firm and/or prime contractor will receive a statement of the charges against it at the same time it is notified of the meeting. The parties to attend the meeting will include, inter alia, the DBE firm and/or prime contractor ~~accused of~~ defending a violation (with legal counsel, if desired), all individuals able to provide evidence regarding the alleged violation, RIDOT legal counsel, and other appropriate RIDOT officials.

5.4.2 ~~At the meeting, the RIDOT Coordinator will present evidence~~ DBE Administrator will discuss the facts concerning the violation and ask the ~~accused~~ defending party to respond and/or present information rebutting such ~~evidence.~~ facts. Within fourteen (14) working days after the conclusion of the meeting, the DBE Administrator shall determine whether:
~~the DBE Coordinator will decide~~

- (a) No violation occurred;

- (b) There is an apparent violation:
 - i. Resolvable through means agreeable to all parties involved.
 - ii. A show cause hearing is necessary

5.5 Show Cause Hearing

The purpose of this step procedure is to provide the DBE firm and/or prime contractor the opportunity to formally rebut charges of a violation of 49 C.F.R. Part 26, State DBE certification requirements, or RIDOT subcontracting ~~provisions~~ regulations, or these rules, before an impartial board.

5.5.1 All parties previously invited to the fact finding meeting will be invited to the Show Cause Hearing. Any other parties who may have additional relevant evidence will also be invited.

A board composed of RIDOT's Chief of Construction Operations, RIDOT's Chief of Contracts & Specifications, and ~~Rhode Island~~ the Department of Administration's Administrator of State EEO, or their designee will listen to the facts of the case. If necessary, RIDOT's legal counsel will present the facts of the case through witnesses and/or documentary evidence.

The defending party(s) will be given the opportunity to rebut the facts through its own witnesses and/or documentary evidence.

Within fourteen (14) ~~working-business~~ days of the conclusion of the hearing, the board ~~will~~shall take one or both of the following actions:

- (a) DBE Contractors: Render a written report to the RIDOT Director~~of RIDOT~~;
 - i. Stating there is no violation.
 - ii. Stating there is a violation and:
 - (1) Resolving the issue through means agreeable to both parties.
~~requesting~~
 - (2) Requesting that the firm be debarred (*see* Section 6.0).
 - (3) Requesting that the firm be sanctioned (*see* Section 6.0).
- (b) Requesting that the firm be debarred (*see section*Section 6.0~~of these regulations~~);
~~requesting~~
- (c) Requesting that the firm ~~is~~ be sanctioned (*see section*Section 6.0~~of these regulations~~);
- B. Render a written report to the Minority Business ~~Assistance~~ Enterprise Office:

Coordinator for the Rhode Island Department of Economic Development:

1.
 - i. Stating there is no violation.
 - ii. Stating there is a violation and:
 - (1) Resolving the issue through means agreeable to all parties involved.
 - (2) File a formal complaint with the MBE Compliance Office requesting that the certification of the DBE firm be removed. 49 CFR 26.87(c)

initiated.

II.

(c) Non-DBE Contractors: Render a written report to the RIDOT Director of RIDOT:
RIDOT:

- i. Stating there is no violation.
- ii. Stating there is a violation and:

resolving

(a)

- (1) Resolving the issue through means agreeable to both parties, or
- (2) Requesting that the firm be debarred (*see* Section 6.2. of these ~~regulations~~ rules), and/or
- (3) Requesting that the firm be sanctioned (*see* Section 6.0 of these ~~regulations~~ rules)

Within ten (10) working days of the Board's report, the RIDOT Director of RIDOT ~~will shall~~ make a final ~~decision in writing and~~ written determination copies of ~~that decision will~~ which shall be sent to all parties. ~~All decisions of the Director~~ The Director's determination may be appealed in accordance with R.I. Gen. Laws § 42-35-1.

SECTION 6.0

SANCTIONS AND DEBARMENT

6.1 Sanctions

If at any time during the life course of the ~~contract~~ a RIDOT public works project it is determined that the contractor is not making a satisfactory effort to fulfill the DBE requirements, the Department may withhold payment of monthly estimates.

6.1.1 Failure by the contractor to meet the minimum goals established in ~~II.A.(2)~~ of the contract provision will by the Department shall result in the reduction in contract payments by the amount determined by multiplying the awarded contract value by the ~~above~~contract specified percent, and subtracting the dollar value of the work actually performed by DBE contractors, unless an exception or waiver Good Faith Effort (GFE) was previously granted.

~~(c) Contractors and~~ 6.1.2—~~Failure by contractors or their subcontractors are advised that failure to carry out the fulfill project DBE requirements shall constitute a breach of contract and which, after notification by the Department, may result in termination of the agreement or contract by the Department, or such other remedy as the Department deems appropriate.~~

6.2. Debarment

The RIDOT Director ~~of RIDOT~~ may at the request of the Show Cause Board, debar a contractor and/or subcontractor. The Director shall furnish written notice to the contractor and/or subcontractor at least five (5) days before the effective date of debarment. The notice shall state:

- (a) That a debarment has been imposed.
- (b) The effective date of debarment.
- (c) The facts giving rise to the debarment.
- (d) The cause or causes relied upon for the debarment.

6.2.1 Generally, except where sections 6.2.2 and 6.2.3 of this section apply; the following periods of debarment may be imposed:

- (a) Up to three (3) years for any debarment action; or
- (b) Where the debarment is based on debarment by a federal agency, a period not to exceed the remainder of the original debarment period.

6.2.2 If a contractor or subcontractor was previously debarred:

- (a) For any cause and is again debarred pursuant to these rules, then the second subsequent debarment may be for a term of up to six (6) years; or
- (b) Because of a criminal conviction or a willful violation and is again debarred because of a criminal conviction or willful violation, the ~~second subsequent~~ debarment may be for an indefinite period; or
- (c) Twice for the same cause, any subsequent debarment may be for

an indefinite period.

6.2.3 The notice of a proposed debarment shall be given within one year of:

- (a) A criminal conviction and sentencing; or
- (b) Completion of an investigation or audit which is a basis for the debarment action; or
- (c) Discovery of the cause on which the debarment action is based, which ever occurs last.

6.3 Effect on Current Contracts

(a) The RIDOT Director may continue contracts or subcontracts in existence of the time a ~~contracting contractor~~ and/or subcontractor is debarred. A decision as to contract termination by the Director shall be made only after review of all the facts and circumstances surrounding the debarment as they affect the responsibility of the contractor and/or subcontractor.

(b) Contracts shall not be renewed or otherwise voluntarily extended by the RIDOT Director ~~of RIDOT once the~~ after debarment of a contractor and/or subcontractor. ~~has been debarred.~~

6.4 List

The RIDOT Director ~~of RIDOT~~ shall maintain a list of all persons, partnerships, corporations, or associations who have been debarred in accordance with the procedures prescribed in ~~this~~ article 6.2. This list shall be ~~made~~ available for public inspection.

SECTION 7.0

SEVERABILITY

7.1 If any provision of these rules and regulations or the application thereof to any person or circumstances shall be held invalid, such invalidity shall not effect the provisions or application of the rules and regulations which can be given effect, and to this end the provisions of these rules and regulations are declared to be severable.

SECTION 8.0

APPLICATION

8.1 These rules and regulations will take effect upon filing with the Secretary of State.
~~I CERTIFY THAT THE ABOVE IS A TRUE COPY.~~

DATE William D. Ankner, Ph.D.
DIRECTOR
Rev 12/01/01

CERTIFICATION

I hereby attest that the Rules and Regulations for the Rhode Island Department of Transportation Disadvantaged Business Enterprise Program have been adopted by the Rhode Island Department of Transportation and are true copies.

Michael P. Lewis

Date