DBE SPECIAL PROVISION

DISADVANTAGED BUSINESS ENTERPRISE AFFIRMATIVE ACTION CERTIFICATION FOR CONTRACTORS AND CONSULTANTS

With respect to the above numbered project #7652820, I hereby certify that I am the _____ and duly authorized representative of _____ _____ whose address is _____ _____.

I do hereby certify that it is the intention of the above organization, as a prime contractor, or as a prime consultant, to affirmatively seek out and consider Disadvantaged Business Enterprises (DBEs) to participate in this contract as subcontractors, subrecipients, and/or as suppliers of materials and services. I agree to comply with the requirements of the U.S. Department of Transportation's regulations 49 CFR Part 26.

I understand and agree that any and all contracting in connection with this contract, whether undertaken prior to or subsequently to award of contract, will be in accordance with this provision. I also understand and agree that no contracting will be approved until the Rhode Island Department of Transportation (RIDOT), including the Office of Civil Rights, has reviewed and approved the affirmative actions taken by the above organization. I understand and agree to contact the RIDOT Office of Civil Rights (OCR) DBE Liaison Officer (DBELO) or his/her OCR staff representative, for questions related to the implementation of contracting obligations related to the 49 CFR 26, and this provision, and follow the guidance and instructions given. The OCR DBELO and staff will analyze each situation on a case-by-case basis, and will issue findings, including resolving any vagueness and/or ambiguities in RIDOT policies and procedures, and/or standard specifications, based on the 49 CFR 26, its published guidance, and the guidance given by the FHWA and FTA liaisons to RIDOT, considering the language, purpose, and intent of the 49 CFR 26.

I. DBE Goal (%)

The Department has established, in connection with this contract, a DBE goal, as specified in the proposal of the original contract amount, for the utilization of firms owned and controlled by socially and/or economically disadvantaged individuals certified as DBEs by the Rhode Island Unified Certification Program (RIUCP). This DBE goal remains in effect for the life of the project. Therefore, throughout the life of the contract, the contractor must proactively make, document, and submit good faith efforts to meet the contract goal and its commitments to each DBE approved in the contractor's DBE Utilization Plan.

DBE regulations require RIDOT to track both race-conscious DBE participation (i.e., via individual contract goals), and race-neutral DBE participation (i.e., participation beyond contract goals). Both race-conscious and race-neutral DBE participation directly impact RIDOT's overall 3-year DBE participation goals. There is a direct correlation between the amount of race-neutral DBE participation and individual DBE contract goals. Increased race-neutral DBE participation could ultimately result in fewer and lower contract goals assigned to future contracts. Therefore, if a contract has a 0% DBE goal, RIDOT and/or the contractor should make an effort to identify, use DBEs, and report the DBE participation to RIDOT's DBELO for calculation as race-neutral participation.

Contract Assurance As a recipient of federal funds, the U.S. Department of Transportation (USDOT) requires RIDOT to include the following paragraph in contracts for federally funded projects. It applies to the bidder, and the bidder must also include it in each subcontract it in each subcontract agreement executed for this contract:

> The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these applicable requirements is a material breach of contract, which may result in the termination of this contract of such other remedy as the recipient (RIDOT) deems appropriate, which may include, but is not limited to: 1) withholding monthly progress payments, 2)assessing sanctions, 3) liquidated damages, 4) disqualifying the contract from future bidding as non-responsible.

II. DEFINITIONS:

Administrator. Administrator, Civil Rights Program (RIDOT).

Commercially Useful Function. A DBE performs a Commercially Useful Function (CUF) when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a CUF, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, installing (where applicable), and paying for the material itself.

Contractor. Prime Contractor on construction contracts. Prime consultant on professional services contracts.

DBE Liaison Officer (DBELO). Department employee responsible for developing the DBE Program Plan manual, and monitoring and reporting on its implementation, and recommending corrective actions to bring RIDOT, contractors, subcontractors, and subrecipients into compliance with DBE requirements.

DBE Participation. DBE Participation and Commitment that is documented on the DBE Utilization Form. (See, also, "Race-conscious measures (goals) or programs" and Race-neutral measures (goals) or programs," defined below.)

Disadvantaged Business Enterprise (DBE). A for-profit small business concern:

1. An entity certified by the Rhode Island Unified Certification Program (RIUCP), administered by the Department of Administration Office of Diversity, Equity, and Opportunity (ODEO)/Minority Business Enterprise Compliance Office (MBECO), as listed on http://odeo.ri.gov/.

2. That meets the ownership and control requirements of the DBE certification program.

3. That meets the Personal Net Worth requirements of the DBE certification program.

Good Faith Efforts (GFE).

GFE Administrative Review (GFEAR) Group. A group of at least three (as selected and required by the DBELO representing the Office of Civil Rights DBE section) that includes the DBELO or his/her designated staff representative, and other RIDOT personnel that will perform the Administrative Reconsideration appeal review of an initial Good Faith Effort determination.

GFEAR can perform an appeal review at any phase of a contract; pre-award or post-award.

GFE Group. The group that makes the initial Good Faith Effort review. The GFE Group can perform a good faith effort review at any phase of a contract; pre-award or post-award.

Joint Venture. A "Joint Venture," for purposes of this provision, 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.

Manufacturer. A DBE that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

Race-conscious measures (goals) or programs. Are those that are focused specifically on assisting DBEs. For example, the establishment of contract goals for DBE participation is a race conscious measure.

Race-neutral measures (goals) or programs. Are those that are, or can be, used to assist all small businesses, including DBEs. Race-neutral DBE participation includes, but is not limited to, any time a DBE wins a prime contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal.

Regular Dealer. A DBE 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. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided above if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Whether a DBE firm meets the criteria for being treated as a regular dealer is a contract-by-contract determination to be made by the Department.

Subcontractor. Subcontractor on construction contracts, or subconsultant on professional services contracts. A first-tier subcontractor has an agreement directly with a prime contractor. A second-tier subcontractor has an agreement with a first-tier subcontractor. A third-tier subcontractor has an agreement with a second-tier subcontractor.

Shortfall. The difference between the dollar amount on the approved DBE Utilization Plan form(s) and the amount of payments to, and verified by, the approved DBE entities, and when the payments total less than the contract goal (i.e., the approved DBE commitments minus the verified payments).

Small Business Concern. Means, with respect to firms seeking to participate in USDOT- assisted contracts, a small business concern as defined pursuant to Section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121), and that does not also exceed the cap on average annual gross receipts specified in 49 CFR 26.65(b).

Supplier. A manufacturer, regular dealer, or transaction expeditor/broker.

Transaction Expeditor/Broker. A DBE packager, broker, manufacturers' representatives, or other persons who arrange or expedite transactions and who arrange for material drop-shipments.

III. PRE-AWARD PERIOD REQUIREMENTS FOR PROJECTS WITH A DBE GOAL.

All bidders must meet bid submission requirements at the time of bid opening, as a matter of responsiveness to the bid. Failure to be responsive to a bid will result in ineligibility for the contract award.

Prior to contract award and at the time of the opening of bids, the contractor shall, at a minimum, take the following actions to meet the race-conscious goal established by OCR, hereinafter referred to as the 'contract goal':

A. **EEO Officer. Submit the name and contact information of its** EEO Officer appointed to administer the Contractor's DBE obligations.

B. **Submission Preparation.** The prime contractor is obliged to obtain and to provide all applicable NAICS codes for each proposed first-tier, and second-tier DBE, and work item numbers and codes corresponding with RIDOT's Engineers Estimate, that it will perform on the contract. Submit to the Department for approval any subcontractor and/or supplier and submit executed subcontract agreement(s)/purchase orders, including a detailed description of the work and price, between the contractor and the qualified DBE to be utilized during the performance of work. In the case of consultant contracts, the consultant shall submit the above DBE obligation as stated in the Scope of Work. This DBE obligation shall be included in the proposal submission to the Department, and include the name of the DBE, scope of work, and the actual dollar value.

   - Any subcontract for materials or supplies provided by a DBE broker, or for other services not provided directly by a DBE firm, shall be accompanied by the RIDOT Broker Affidavit form.

C. **Submission Requirements.** To adequately demonstrate sufficient commitments to meet or exceed the DBE contract goal, each bidder is required to submit evidence of such commitments at the bid opening as presented on DBE Utilization Plan Form, and documented good faith efforts.

   When RIDOT's OCR determines that the bidder has not submitted sufficient commitments to meet the DBE contract goal established by the Department (the Department will not round up), OCR then will review the bidder's documented Good Faith Efforts (GFEs) used to attempt to meet the contract DBE goal. The bidder must demonstrate that the efforts made were those that a bidder seeking to meet the DBE goal established by the Department would make, given all relevant circumstances. All submissions must include, as a part of the GFE documentation, copies of each DBE and non-DBE subcontractor quote when a non-DBE subcontractor was selected over a DBE subcontractor for work on the contract.

D. **Good Faith Effort Requirements**. The efforts demonstrated by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain sufficient DBE participation to achieve contract DBE goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements. The following actions illustrate the types of efforts that may be taken. This list is not deemed to be exclusive or exhaustive. The DBELO and/or GFE Group will consider other factors and types of efforts that may be relevant:

- Efforts made to conduct market research to identify small business contractors and suppliers and solicit through all reasonable and available means (e.g., use of the ODEO UCP website, 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 bidder should provide written notification, at least 15 calendar days before the bid opening, to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

- Efforts made to select 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 (ie. smaller tasks or quantities) to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.

- Efforts made to provide 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.

- Efforts made to negotiate 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. 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. A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract DBE goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in and of itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a bidder to perform the work of contract with its own work force does not relieve the bidder of the responsibility to make a GFE. Bidders are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

- Bidder’s determination of a DBE as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within the industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor’s efforts to meet the contract DBE goal. Another practice considered an insufficient GFE is the rejection of a DBE because its quotation for the work was not the lowest received. However, nothing in this paragraph shall be construed to require the bidder or prime contractor to accept unreasonable quotes in order to satisfy the contract DBE goal.

- Efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance.

- Efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

- Efforts to effectively use the services of available minority/women community organizations; minority/women contractors' groups; local, State, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

A promise to use DBEs after contract award is not considered to be responsive to the contract solicitation or to constitute good faith efforts.

IV. ACTIONS TO BE TAKEN BY THE DEPARTMENT DURING POST-QUALIFICATION AND BEFORE AWARD—

a) Approval. If the apparent low bidder submits its DBE Utilization Plan Form by the bid date and meets the contract DBE goal and all other contract and DBE regulatory requirements, the Department will approve the submission.

b) Good Faith Effort Review. If the apparent low bidder fails to meet the contract DBE goal, the Department will review the GFE documentation. If, during the review of the Contractor's GFE information, the reviewers have questions, the Contractor may be contacted for clarification. The GFE steps are as follows:

1. The DBELO or GFE Group either:
   a) Determines that the GFE was met and the DBE Utilization Plan Form will be approved, or
   b) Disapproves the GFE and the DBE Utilization Plan. The bidder will be notified and may accept the DBELO's determination or request an Administrative Reconsideration appeal with the GFEAR.

2. If forwarded to them, the GFE Group meets and makes the final determination. If the GFE Group determines that the apparent low bidder met the GFE, the DBE Utilization Plan will be approved. If the GFE Group determines that the apparent low bidder has failed to make a GFE, the bid will be rejected, and the apparent low bidder will be notified, in writing, of the reasons for the rejection.

c) The Department will provide their approval or rejection in writing.

V. POST-AWARD PERIOD REQUIREMENTS:

A. Counting of Participation and Commercially Useful Function (CUF)

Utilization of certified DBEs is in addition to all other equal opportunity requirements of the contract.

Count DBE participation toward meeting the DBE goal for federal projects as follows: If a firm is a certified DBE contractor or subcontractor at the time that submission of the bids are due, the total dollar value of the contract awarded to the certified DBE is counted toward the applicable DBE goal as provided below. Any services to be performed by a DBE are required to be readily identifiable to the project.

Construction/Consultant Services. 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 a 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. Even if a DBE is performing pursuant to normal industry practices, if those practices, in fact, erode the ability of the DBE to control its work and remain independent, the practice may affect how much can be credited toward the DBE goal and may raise questions about the DBE eligibility.

Prime Contractor/Prime Consultant. The Department, per USDOT regulations, and state law, requires that all prime contractors/consultants perform at least forty percent (40%) of the work. A DBE prime contractor will receive credit for all work performed with its own forces. RIDOT strongly encourages DBE prime contractors/consultants to make additional outreach efforts to solicit DBEs to perform subcontracting work on the project.

Subcontractor. When a DBE participates in a contract directly as a subcontractor, or as a second-tier, count only the value of the work that the DBE actually performs. The Department only will allow DBE credit for work performed by first-tier and second-tier DBE subcontractors.

a) Count the entire amount of that portion of a contract that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the subcontract, including supplies purchased or equipment leased by the DBE.

b) When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count.

c) Count expenditures to a DBE subcontractor only if the DBE is performing a CUF on that contract.

d) 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:

e) 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.

f) 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.

g) Second tier DBE subcontracting will be approved only 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 unique conditions of a project shall be considered in determining whether a DBE subcontractor relationship actually exists on the project. A DBE subcontractor may need to lease/rent equipment, other than over-the-road trucks, and/or augment its workforce with additional skilled personnel in order to perform certain project-related work. The DBE subcontractor is required to arrange for the necessary equipment through rental/leasing agreements, as necessary. (Off-the-road 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) A DBE must perform or exercise responsibility for at least forty percent (40%) percent of the total cost of its contract with its own work force.

j) The DBE must not subcontract a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved.

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

l) 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.

m) Long term, continual (e.g. from one contract to another) or chronic use by a DBE firm, of personnel normally employed by another specific firm, is not consistent with the CUF guidelines.

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

o) A DBE's use of equipment owned by a prime contractor or another subcontractor is inconsistent with the CUF guidelines and will result in noncompliance.

Materials and Supplies. 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.

All expenditures with manufacturers and suppliers must be properly documented in writing in order to count toward a DBE obligation. RIDOT will count expenditures with DBEs for materials or supplies toward DBE goals as follows:

a) For a DBE contractor (furnish and install) to receive credit for supplying materials, the DBE must perform the following four functions: (1) negotiate price; (2) determine quality and quantity; (3) order the materials; and (4) pay for the material itself. If the DBE does not perform all of these functions, it has not performed a CUF with respect to obtaining the materials, and the cost of the materials may not be counted toward the DBE goal. Invoices for the material should show the payor as the DBE.

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

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

d) 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.

DBE Manufacturer. If the materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies.

DBE Regular Dealer. If the materials or supplies are purchased from a DBE regular dealer, count 60% of the cost of the materials or supplies.

DBE Broker. If the materials or supplies are purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, provided the fees are determined to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves.

Trucking Firms. Count 100% of trucking costs using the following factors to determine what can be counted:

1. Count if the DBE is 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. Count if the DBE owns and operates at least one fully licensed, insured, and operational truck used on the contract.

3. Count the total value of the transportation services the DBE provides on the contract using trucks it owns, insures, and operates using drivers it employs.

4. The DBE may lease trucks from another DBE firm, including an owner-operator who is a certified DBE. If the DBE leases trucks from another DBE, count the total value of the transportation services the lessee DBE provides on the contract.

5. The DBE may also lease trucks from a non-DBE firm, including an owner-operator. If the DBE leases trucks from a non-DBE firm and the DBE operates these leased trucks (with its own forces), count the total value of the transportation services. If the DBE leases trucks from a non-DBE owner-operator, count only the fee or commission it paid as a result of the lease arrangement. Do not count the total value of the transportation services provided by the lessee (non-DBE owner-operator), since these services are not provided by a DBE.

6. For purposes of this provision, a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from being used for work 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. A lease must explicitly state that the DBE leases trucks without operators when the counting of the total value of transportation services is desirable.

Example to this subsection (6) (d): 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.

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.

Management. The DBE must manage the work that has been contracted to its firm. The DBE owner must supervise daily operations, either personally, or with a full-time, skilled and knowledgeable superintendent employed by and paid wages by the DBE. The superintendent must be present on the job site and under the DBE owner's direct supervision. The DBE owner must make all operational and managerial decisions for the firm. Mere performance of administrative duties is not considered supervision of daily operations.

Workforce. In order to be considered an independent business, a DBE must keep a regular workforce. DBEs cannot "share" employees with non-DBE contractors, particularly the prime contractor. The DBE shall perform its work with employees normally employed by and under the DBE's control. The DBE must be responsible for payroll and labor compliance requirements for all employees performing on the contract and is expected to prepare and finance the payrolls. Direct or indirect payments by any other contractor are not allowed.

Certification. If a contractor or subcontractor is not certified as a DBE by the Minority Business Enterprise Compliance Office under the specific NAICS code of line items identified in the contract, 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). DBEs must be certified in the NAICS codes that are applicable to the work to be performed.

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

DBE Participation Credit. 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.

VI. ACTION TO BE TAKEN BY THE DEPARTMENT DURING POST-AWARD

To ensure that all obligations awarded to DBEs under this contract are met, the Department will review the Contractor's DBE involvement efforts during the performance of the project whether or not the DBE is listed on the approved DBE Utilization Plan. The review will include a CUF review and analysis.

Sanctions. Upon completion of the work the Department will review the actual DBE participation and make a determination regarding the Contractor's compliance with the applicable requirements. Sanctions may be imposed for noncompliance or unwarranted shortfalls in the approved DBE goal.

A. Failure by the Contractor to demonstrate every good faith effort in fulfilling its DBE commitment during the construction period will result in the reduction in contract payments

by the amount determined by multiplying the awarded contract value by the established DBE percentage and subtracting the dollar value of the eligible work actually performed by DBE subcontractors, for which the DBEs have verified payments received. This action will not preclude RIDOT from imposing sanctions or other remedies available as specified in paragraphs below.

B. Contractors and subcontractors are advised that failure to carry out the requirements of this provision shall constitute a breach of contract and, after notification by the Department, may result in termination of the agreement or contract by the Department, or such remedy as the Department deems appropriate.

C. Brokering of work by DBEs is not allowed and is a contract violation unless DBE is a certified DBE broker. A DBE firm involved in brokering of work may have their certification removed or suspended and shall be subject to the sanctions stated herein. Any firm that engages in willful falsification, distortion or misrepresentation with respect to any facts related to the project shall be subject to sanctions described in paragraph (B) above and referred to the U.S. Department of Transportation's Office of the Inspector General for prosecution under Title 18, USC Section 1001.

D. The Disadvantaged Business Enterprises Directory or other available resources may be obtained at the Rhode Island Department of Transportation Office of Civil Rights (OCR), 2 Capitol Hill, Providence, RI 02903, or at http://odeo.ri.gov/. Links to the 49 CFR 26 regulations, and to the USDOT published guidance on how to interpret certain sections of the regulations:

https://www.ecfr.gov/cgi-bin/text-idx?SID=ba0d6b5c8e33f26453add22334d6af4d&mc=true&node=pt49.1.26&rgn=div5

https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise

https://cms8.dot.gov/sites/dot.gov/files/2020-01/docr-20180425-001part26qa.pdf

E. The utilization of Disadvantaged Business Enterprises is in addition to all other equal opportunity requirements of this contract. The Contractor shall keep such records as are necessary to determine compliance with its Disadvantaged Business Enterprises Utilization obligations. The records kept by the Contractor shall include:

1. The number of DBE contractors, subcontractors and suppliers; and the type of work, materials or services being performed on or incorporated in this project.

2. The progress and efforts being made in seeking out DBE contractor organizations and individual DBE contractors for work on this project.

3. Documentation of all correspondence, contacts, telephone calls, etc. necessary to obtain the services of DBEs on this project.

4. Copies of canceled checks or other documentation that substantiates payments to DBE firms.

5. All such records must be maintained for a period of three (3) years following acceptance of final payment and will be available for inspection by RIDOT and the Federal Highway Administration.

F. A contractor for a construction contract will not be eligible for award of contract under this invitation for bids unless such contractor has submitted, at the time of the Bid Opening, this Certification. A Consultant will be required to sign this Certification at the time of the contract execution, or the award of contract will be nullified.

VII. ACTIONS REQUIRED BY THE CONTRACTOR DURING POST-AWARD.

a) **DBE Participation.** Must continue to make GFEs for the life of the project. When the DBE Utilization Plan is approved with DBE participation less than the contract DBE goal, continue GFE toward meeting the contract DBE goal. Ensure that the Commitment is attained. Proof of attainment is documented by verified payments to DBEs, submitted to the Department, and approved by OCR.

b) **DBE Subcontractor Approval.** The prime contractor will not receive credit towards the DBE goal for work performed by a DBE prior to the approval date of the DBE Utilization Plan by RIDOT's Office of Civil Rights DBE staff.

All firms listed on the approved DBE Utilization Plan, including those business types other than subcontractors (i.e. dealers, truckers, service providers), must be submitted for approval after the contracts are executed, and before the DBE's actual performance of work. The subcontractor request must be equal to or greater than the committed amount. Submit for subcontractor approval any other DBE whether or not they are listed on the DBE Utilization Plan. When submitting request for subcontractor approval, attach a copy of the DBE subcontract or agreement, and any contract amendments, thereafter.

c) **Termination/Replacement.** Obtain approval from RIDOT's Office of Civil Rights (OCR) before terminating or replacing (aka, substituting) a DBE or making any change to the DBE participation listed on the approved DBE Utilization Plan, including for reduction of work items, which federal USDOT regulations treat as termination. Immediately request authorization from RIDOT's OCR in writing by completing DBE Termination/Replacement Request Form. The request must include documentation supporting the termination or replacement, and written agreement from the DBE to the change. Include proof that the contractor sent a certified letter to the DBE, giving the DBE five (5) days to respond with acceptance or rejection of the termination or reduction of its work, and notification to RIDOT's OCR. Demonstrate that every effort has been made to allow the DBE to perform. RIDOT's OCR will review submitted documented efforts to determine whether the contractor has adequately demonstrated good cause, written notice, and good faith efforts

1. If DBE replacement is agreeable between the Contractor and the DBE, document the following procedures:

- Make and submit documented GFE (Actions required by the bidder at the bidding stage and prior to award for projects with a DBE Goal) to subcontract the same work with another DBE, or subcontract other work items to DBE firms, to make up the DBE shortfall. A prime contractor's inability to find a replacement DBE at the contract price is not, in and of itself, adequate to support a finding that GFEs have been made to replace the original DBE. The fact that the prime contractor has the ability and/or desire to perform the contract work with its own forces does not relieve the prime contractor

  of the obligation to make GFEs to find a replacement DBE, and it is not a sound basis for rejecting a prospective replacement DBE's reasonable quote.

- When the substitution results in meeting the DBE goal, complete a revised subcontractor approval request within seven (7) days. If the DBE performed on the project, the revised subcontractor approval request should include the total amount

paid to the DBE before the DBE substitution.

- When the substitution does not result in meeting the DBE goal, provide additional GFE documentation, including (1) a statement of efforts made to negotiate with DBEs for specific work or supplies, including the names, addresses, telephone numbers, and emails of those DBEs that were contacted; (2) the time and date each DBE was contacted; (3) a description of the information provided to DBEs regarding plans and specifications for portions of the work to be performed or the materials supplied; and (4) an explanation of why an agreement between the prime contractor and DBE was not reached. If the DBE performed on the project, the revised DBE Utilization Plan should include the total amount paid to the DBE before the DBE substitution.

- Good Faith Effort Review. RIDOT will review the GFE documentation for substitution. If, during the review of the Contractor's GFE information, the reviewers have questions, the Contractor may be contacted for clarification. The GFE steps are as follows:

1. The RIDOT reviews and makes recommendation to the GFEAR for their determination.

2. The GFEAR either:

    a. Approves recommendation that the GFE was met and the substitution will be approved, or

    b. Disapproves the GFE resulting in a shortfall requiring the contractor to continue GFEs.

The prime contractor will not be eligible to receive credits towards the DBE goal until OCR approves the substituted DBE firm.

If the projected DBE participation on an approved DBE Utilization Plan meets or exceeds the DBE goal amount for the contract without replacing the DBE, then no contract shortfall exists. However, OCR could recommend sanctions for other non-compliance issues (e.g. non-compliance with prompt payment requirements, failure of DBE to perform a commercially useful function (CUF), failure to comply with Termination/Replacement requirements, etc.).

2. If the arrangement for DBE replacement is not agreeable between the Contractor and the DBE, the following procedures are required:

- The Contractor is not eligible for credit for DBE work performed prior to OCR's approval of the DBE replacement.
- The DBELO and/or GFE Group, or GFEAR, will review and make a determination and RIDOT will notify both the Contractor and the DBE.

Additional Work. When additional work is required for any classification of work, which is identified on the DBE Utilization Plan, to be performed by the DBE, at least 50% of this additional work will be performed by the same DBE unless the DBE submits, in writing, that it cannot perform the work due to its own limitations.

Progress Payments. All contractors on RIDOT projects are required to certify their payments to subcontractors by use of RIDOT's contractor compliance software on a minimum of a monthly basis (which, at time of publishing, is Prism). A project may not proceed to finalization without

the input of this information. The 49 CFR 26 Prompt Payment requirements apply to both DBE and non-DBE subcontracts. The Contractor must maintain adequate records to document its compliance with prompt payment, and is responsible for the subcontractors' compliance with the submission of their payment reporting by way of this software.

Make payments in accordance with Section 109 of the RI Standard Specifications for Road and Bridge Construction. Document payments on the Contracting Invoice and as required in Prism and submit to RIDOT with each payment request. Contractor must issue prompt and full payment of retainage to the subcontractor within 30 days after the subcontractor's work is satisfactorily complete. For the purposes of prompt payment, a subcontractor's work is satisfactorily complete when all the tasks called for in the subcontract have been accomplished and documented as required by RIDOT. When RIDOT has made an incremental acceptance of a portion of the prime contract, the subcontractor covered by that acceptance is deemed to be satisfactorily complete.

Joint Check Procedure for DBEs: A prime contractor must receive written approval by RIDOT's DBELO before using a joint check for materials/supplies called for under a subcontract with a DBE. The prime contractor shall submit joint check requests in writing to the RIDOT's DBELO along with a Joint Check Affidavit and the subcontract agreement. The following are general conditions that must be met regarding joint check use:

1. The use of the joint check shall only be allowed by exception and shall not compromise the independence of the DBE;

2. The second party (typically the prime contractor) acts solely as a guarantor;

3. The DBE must release the check to the supplier;

4. The subcontract agreement must reflect the total contract value, including the cost of materials and installation; actual payments for work performed by the DBE may reflect labor only; and

5. The DBE remains responsible for negotiation of price, determining quality and quantity, ordering materials and installing (where applicable) and paying for the material itself.

FINAL SUBCONTRACTOR PAYMENTS AND RELEASE OF RETAINAGE

6. Prior to receiving final payment, the Contractor shall provide to the Resident Engineer certification of the dollars paid to each DBE firm using the "DBE Request for Verification Payment" form. The certification shall be dated and signed by a responsible officer of the Contractor and by the DBE. Falsification of this certification will result in sanctions including, but not limited to, those listed in Sections I. of this provision.
7. If this contract contains a DBE goal, the Contract Compliance Officer with the OCR will verify that the Contractor has attained the DBE goal specified on said project or has provided adequate documentation justifying a lesser amount. The final estimate will not be paid to the Contractor until proper certifications have been made.

8. When a subcontractor's work is satisfactorily complete (i.e., all the tasks called for in the subcontract have been accomplished and documented), and the Department has partially accepted the work and all payments have been certified by the Contractor and Subcontractor on the "Certification of Progress Payment" form, the Department will pay the Prime Contractor for all work covered by the acceptance including the relevant portion of retainage due the Subcontractor. Within thirty (30) days of receipt of such payment, the

Prime Contractor shall pay the Subcontractor for all accepted Subcontract work including all retainage owed. For any payments the Prime Contractor receives for Subcontractor work, the Contractor shall complete RIDOT's payment verification form or any other form or process (e.g., entering required information into PRISM) required by the Department and shall submit the fully executed form(s) to RIDOT within ten (10) days of the Subcontractor signing the form.

Records and Reports. Keep such project records as are necessary to determine compliance with DBE Requirements. These records can be used as GFE documentation. Design these records to indicate:

- The number of disadvantaged and non-disadvantaged subcontractors, small businesses, regular dealers, manufacturers, consultants, and service providers, and the type of work or services performed on or materials incorporated in this project.

- The progress and efforts made in seeking out DBE contractor organizations and individual DBEs for work on this project.

- Documentation of all correspondence, personal contacts, telephone calls, etc., to obtain the services of DBEs for this project. Submit reports, as required by the Department. Certify that the amounts were actually paid to the DBE for work performed on the project and keep cancelled checks on file in the home office to reflect payment for the specific project and for inspection and audit by the Department. Record the payment information on Contractor Invoice and document the following:

    - The number of contracts awarded to DBEs, the work items performed with corresponding amounts, and total amount of each contract executed with each firm, and the execution date of each contract.
    - The amount paid to each DBE during each month, the amount paid to date, and retainage withheld. If no payments are made to a DBE during the month, enter a zero ($0.00) payment.
    - Paid invoices and a certification by each DBE attesting to the actual amount paid to each firm, upon completion of each DBE's work. If the actual amount paid (as verified by each DBE) is less than the committed amount to each DBE, provide a complete explanation of the shortfall difference.

Maintain all such records for a period of three (3) years following acceptance of final payment from RIDOT to Contractor. Make these records available for inspection by the RIDOT, FTA and FHWA.

If DBE credit is being claimed for material costs included in a DBE subcontract or agreement, submit purchase orders for the material along with the Contractor Invoice to the Owner on a monthly basis.

_____ _____
Signature of Contractor or Consultant Date

_____
Printed Name of Contractor or Consultant