

**RHODE ISLAND GOVERNMENT REGISTER
PUBLIC NOTICE OF PROPOSED RULEMAKING**

AGENCY: RHODE ISLAND DEPARTMENT OF TRANSPORTATION

DIVISION: N/A

RULE IDENTIFIER: 290-RICR-10-00-1

REGULATION TITLE: *RULES AND REGULATIONS CONCERNING
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM*

RULEMAKING ACTION: *Direct Final*

Direct Final: If no formal objection is received on or before **December 20, 2017** Rhode Island Department of Transportation will file the **repeal** without opportunity for public comment.

TYPE OF FILING: *REPEAL*

TIMETABLE FOR ACTION ON THE PROPOSED RULE:

Public notice date: November 20, 2017

End of comment period: December 20, 2017

SUMMARY OF PROPOSED RULE: The regulation addresses debarment, suspensions and sanctions regarding contractors and subcontractors.

COMMENTS INVITED:

All interested parties are invited to submit written or oral comments concerning the proposed regulations by **December 20, 2017** to the addresses listed below.

ADDRESSES FOR PUBLIC COMMENT SUBMISSIONS:

Mailing Address: SIOBHAN L. STEPHENS-CATALA, ESQ.

SENIOR LEGAL COUNSEL

RIDOT

2 CAPITOL HILL, PROVIDENCE, RI 02903

Email Address: Siobhan.catala@dot.ri.gov

WHERE COMMENTS MAY BE INSPECTED:

**Mailing Address: Rhode Island Department of Transportation
2 Capitol Hill
Providence, RI 02903**

FOR FUTURE INFORMATION CONTACT:

Siobhan L. Stephens-Catala, Esq., Senior Legal Counsel
RIDOT, 2 Capitol Hill
Providence, RI 02903

SUPPLEMENTARY INFORMATION:

Regulatory Analysis Summary and Supporting Documentation:

Any changes in societal costs are de minimus. For full regulatory analysis or supporting documentation see agency contact person above.

Authority for This Rulemaking: *Federal Statute*

Regulatory Findings:

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

The Proposed Amendment:

Rhode Island Department of Transportation proposes to repeal 290-RICR-10-00-1 as follows:

(Attach Full Proposed Regulation with Mark-Ups in RICR format)



CONCISE SUMMARY OF PROPOSED NON TECHNICAL-AMENDMENTS TO THE RULES AND REGULATIONS FOR RHODE ISLAND DEPARTMENT OF TRANSPORTATION- DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

In accordance with the Administrative Procedures Act, Section 42-35-3(a) (1) of the General Laws of Rhode Island, the following is a concise summary of non-technical amendments:

PAGE	SECTION	SUMMARY OF AMENDMENT
3	1.1	Includes citation to applicable federal regulation and refines language.
3	1.2	Includes revised citation and refines language.
3	2.1	Refines language for definition of Affirmative Action.
3	2.2	Lists certifying agent and refines language.
3	2.3	Refines language for definition of Compliance.
4	2.4	Refines language for definition of Contract.
4	2.5	Clarifies and refines language for definition of Contractor.
4	2.6	Clarifies and refines language for definition of Debarment.
4	2.7	Refines language for definition of Department.
4	2.8	Clarifies and refines language for definition of DBE.
4	2.9	Refines language for definition of DBE Administrator.
5	2.10	Clarifies and refines language for definition of Joint Venture.
5	2.11	Clarifies and refines language for definition of Lessee.
5	2.12 (deleted)	Deletes definition of "minority" which is addressed later in section 2.16 under "socially and economically disadvantaged individuals."
5	2.12 (formerly 2.13)	Refines language for definition of Mentor/Protégé Agreement.
5	2.13	Refines language for definition of Non-Compliance.
6	2.14	Clarifies and refines language for definition of Prime Contractor.
6	2.15	Refines language and updates language in accordance with federal regulation for Very Small Business Set Aside.
6	2.16; 2.16.1; 2.16.2	Refines language and updates language in accordance with 49 CFR Part 26 for definition of Socially and Economically Disadvantaged Individuals.
7	2.17	Refines language for definition of Subcontractor.

7	2.18; 2.18.1	Clarifies and refines language for definition of suppliers.
7	2.19	Includes and defines new requirement for Very Small Businesses, which is a federal requirement under 49 CFR §26.65.
8	3.1	Clarifies and refines language.
8-9	3.2; 3.2.1;3.2.2	Refines language.
9	3.3	Clarifies and refines language for Commercially Useful Function guidelines; deletes definition of suppliers, which are defined in 3.3.2.
10	3.3.1	Clarifies and refines language for Commercially Useful Function guidelines in accordance with federal regulation.
10-15	3.3.2	Clarifies and refines language for Commercially Useful Function guidelines in accordance with federal regulation; revises guidelines for DBE suppliers and DBE trucking operations; modifies numerical format.
15-17	3.4	Clarifies and refines requirements for good faith efforts to meet DBE goals, including examples and evidence of good faith efforts.
17-18	3.5	Amends DBE participation in goal pursuant to 49 CFR 26.55 and implements use of DBE Verification of Payment Form to ascertain actual amount paid to verify DBE goals.
18	4.1	Clarifies and refines DBE Approval Procedures by RIDOT.
18	4.2	Refines language concerning submissions of DBEs performing as subcontractors.
19	4.3	Refines and clarifies requirements for DBEs involved in a mentor/protégé agreement in accordance with subpart D of 49 CFR Part 26.
19	4.4	Insubstantial changes to language for RIDOT's Review Procedures for proposed DBEs.
20	4.5	Minor changes to language for RIDOT's due process procedures for DBEs that are not approved for work on RIDOT projects.
20	5.1	Refines language for Overview of DBE monitoring and debarment.
21	5.2	Clarifies and refines language for DBE violation.
21	5.3	Amends DBE Coordinator to "DBE Administrator" and modifies numerical format.
21	5.4; 5.4.1; 5.4.2	Clarifies and refines language for Formal Fact Finding.
22-24	5.5;5.5.1	Minor changes to language for Show Cause Hearing, changes "provisions" to "regulations"; "working days" to "business days; and modifies numerical format.
24	6.1; 6.1.1	Minor changes to language for Sanctions and modifies numerical format.

24-25	6.2; 6.2.1; 6.2.2; 6.2.3	Minor changes to language for Debarment and modifies numerical format.
25	6.3	Minor changes to language for Effect on Current Contracts.
25	6.4	Minor changes to language for List of debarred contractors/subcontractors.
26	8.1	Revises application to state that these regulations will take effect upon filing with the Secretary of State.
26	Certification	Includes Certification by RIDOT Director.



**~~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~~

~~Table of Contents~~

Section	Title	Page
1.0	Purpose and Authority	3
2.0	Definitions	3
3.0	DBE Program Policies and Guidelines	7
4.0	DBE Approval Procedures	14
5.0	DBE Monitoring and Debarment Procedures	17
6.0	Sanctions and Debarment	19
7.0	Severability	21
8.0	Application	21
Certification		

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) 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 are qualified; to establish procedures to monitor DBE performance on RIDOT's contracts; and to establish procedures to sanction and/or debar contractors and subcontractors that violate applicable statutes and regulations.~~

1.2 — Authority

~~These rules are promulgated pursuant to the "Administrative Procedures Act," R. I. Gen. Laws § 42-35-1, *et seq.*; the "Minority Business Enterprise Act," R.I. Gen. Laws § 37-14.1-7; and in accordance with Section 106(e) of the "Surface Transportation and Uniform Relocation Assistance Act of 1987," and 49 C.F.R. Part 26.~~

SECTION 2.0

DEFINITIONS

2.1 — Affirmative Action

~~Policies or programs that seek to redress past discrimination through active measures to ensure nondiscriminatory results and equal opportunities for Minority Business Enterprises (MBEs) or DBEs in contracts and programs funded by RIDOT.~~

2.2. — Certifying Agent

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

2.3 — Compliance

~~The status when a contractor or subcontractor meets and implements the requirements of these or other applicable regulations.~~

~~2.4 — Contract~~

~~A legally binding relationship 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 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~~

~~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.~~

~~2.8 — Disadvantaged Business Enterprise or DBE~~

~~A for-profit small business~~

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

~~(b) Whose management and daily business operations are controlled by one or more of the socially disadvantaged individuals that own it.~~

~~2.9 — DBE Administrator~~

~~The RIDOT employee assigned responsibility for coordination of the disadvantaged business enterprise program.~~

~~2.10 — Joint Venture~~

~~An association of a DBE firm and one or more other firms formed to carry out a single, for-profit business enterprise 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~~

~~An individual or entity that rents, or is negotiating to lease property from the Department for the purpose of a transportation related activity, or for the provision of goods or services to RIDOT or for the provision of goods and services on a public works project.~~

~~2.12 — Mentor/Protégé Agreement~~

~~A contract that that a contractor enters into with a DBE for the purpose of providing training and development programs to the DBE.~~

~~2.13 — Non-compliance~~

~~The status when a contractor or subcontractor has incorrectly implemented the requirements of these regulations.~~

~~2.14 — Prime Contractor~~

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

~~2.15 — Set-aside~~

~~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 include 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 United States Dept. of Transportation 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

~~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 business that maintains an inventory 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, which includes a review of all proposed road bridge, and consultant projects for the fiscal year. The Office of Business and Community Resources (OBCR) shall develop reasonable individual project goals based upon a review of:~~

- ~~(1) Contract items; (2) past utilizations; (3) availability of firms; and (4) analysis of the capabilities and capacity of DBE firms.~~

~~Prior to implementation, the proposed plan shall be approved by the Director of Transportation and the Federal funding source (i.e., Federal Highway Administration, Federal Transit Authority).~~

Set Asides:

~~RIDOT will solicit bids directly from VSBs for RIDOT projects identified as suitable for competitive bidding among VSBs. Set asides shall be used only where at least 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

~~3.2.1 — DBEs certified by the MBEO, may 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 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 workforce.~~

~~The use of a common workforce is an accepted industry practice. However, DBEs may not rely wholly upon the workforce of prime contractors and should request 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 utilized to evaluate the stability of the DBE workforce. A stable workforce indicates that a DBE contractor is a viable, legitimate business entity, which performs a commercially useful function.~~

~~At pre-construction conferences, DBEs are advised to provide the Resident Engineer 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 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.~~

~~3.3 — Counting of DBE Participation and Commercially Useful Function Guidelines~~

~~The total dollar value of contracts awarded to DBEs will be counted toward 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 from raw materials or substantially alters 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: RIDOT will consider the following factors in determining whether a DBE trucking company is performing a CUF. The DBE must manage and supervise 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.~~

~~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.~~

~~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 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. ~~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 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 in which teaching/demonstration/consulting to the DBE 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 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 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 regular employees, not those temporarily furnished by the prime contractor, or another subcontractor, shall operate such equipment for the majority of the time during which the equipment is used in the work of the DBE subcontractor under the mentor protégé agreement.~~

vii. ~~A DBE's use of equipment owned by a prime contractor or another subcontractor or without an appropriate mentor/protégé 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

~~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 shall be deemed to be non-responsive and the next lowest bidder/respondent will be notified to begin the post qualification process and submit its DBE documentation.~~

~~If the DBE goals established by the Department are not met by the 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 examples of efforts that may be taken by Contractors to recruit DBEs for a project. These examples are neither exclusive, nor exhaustive and the Department shall consider other factors and types of efforts that may be relevant:~~

~~(a) A contractor's effort to proportion project related work into economically feasible units which facilitate DBE participation.~~

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

~~(c) Written notification to placement agencies and organizations, which provide assistance in recruitment and employment of DBEs.~~

~~(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 contacted, the dates of initial contact, and whether initial solicitations were followed up by contacting the~~

~~DBEs to determine with certainty whether the DBEs were interested. Either in-person or telephone communications 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;~~

~~iii.—A statement explaining why 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 agreements between the contractor and DBEs in which the DBEs promise not to provide subcontracting quotations to other bidders.~~

~~Efforts made by the contractor to assist 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 focused media soliciting DBE participation in the project.~~

~~Efforts to effectively use the services of available disadvantaged community organizations; disadvantaged 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 considered justification by 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.~~

~~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.~~

~~vii.—— Limiting DBE recruitment efforts to mailing of letters.~~

~~3.5 — Counting Participation (49 C.F.R. 26.55)~~

~~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 APPROVAL PROCEDURES~~

~~4.1.1 — At the time the apparent low bidder or best value respondent submits 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 shall not be considered in any capacity when evaluating the apparent low bidder’s DBE participation. If RIDOT accepts the unsuccessful good faith effort to recruit DBE’s, then RIDOT shall encourage the contractor to continue its efforts to increase DBE participation after award of the contract.~~

~~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 — Submissions from the Contractor~~

~~If the DBE is to perform as a sub contractor, the following information may be requested by OBCR:~~

~~(a) — A list of equipment in the contractor’s possession and which the DBE proposes to use on the project. If equipment is to be 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, then the lease must 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 DBE, payroll records must be available for the individual operating the equipment. Equipment rentals by a subcontractor shall be from a source other than the prime contractor.~~

~~(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.~~

~~(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

~~DBEs involved in a mentor-protégé agreement with a contractor must be 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 executing an individual contractor/ subcontractor mentor-protégé agreement.~~

4.4 — Review Procedure

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

~~(a) — Is the proposed DBE firm certified by the 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 3.3.2(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 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 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. 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 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 the following procedures is to insure that contractors, subcontractors, and suppliers doing business with the Department 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 for obtaining accurate information while providing all parties an opportunity to present their position to the fullest possible extent.~~

5.2 — Violation

~~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, RIDOT subcontracting regulations, or these regulations, then an investigation shall commence.~~

5.3 — Investigation

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

~~(a) — There is no violation.~~

~~(b) — There is an apparent violation:~~

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

- ~~(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 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 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.~~

~~5.5.2—A board composed of RIDOT's Chief of Construction Operations, RIDOT's Chief of Contracts & Specifications, and 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.~~

~~5.5.3—The defending party(s) will be given the opportunity to rebut the facts through its own witnesses and/or documentary evidence.~~

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

- ~~(a) — DBE Contractors: Render a written report to the RIDOT Director
 - ~~i. — Stating there is no violation.~~
 - ~~ii. — Stating there is a violation and:~~~~

- ~~(b) — Requesting that the firm be debarred (see Section 6.0)~~

- ~~(c) — Requesting that the firm be sanctioned (see Section 6.0)~~

- ~~(d) — Render a written report to the Minority Business Enterprise Office:
 - ~~i. — Stating there is no violation.~~
 - ~~ii. — Stating there is a violation and:~~~~

- ~~(e) — Resolving the issue through means agreeable to all parties involved.~~

- ~~(f) — File a formal complaint with the MBE Compliance Office requesting that the certification of the DBE be removed.49 CFR 26.87(e)~~

II.

- ~~(a) — Non-DBE Contractors: Render a written report to the RIDOT Director
 - ~~i. — Stating there is no violation.~~
 - ~~ii. — Stating there is a violation~~~~

- ~~(1) — Resolving the issue through means agreeable to both parties, or~~

- ~~(2) — Requesting that the firm be debarred (see Section 6.2), and/or~~

- ~~(3) — Requesting that the firm be sanctioned (see Section 6.0)~~

~~5.5.4 — Within ten (10) working days of the Board's report, the RIDOT Director shall make a final written determination copies which shall be sent to all parties. 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 course of 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 by the Department shall result in the reduction in contract payments by the amount determined by multiplying the awarded contract value by the contract specified percent, and subtracting the dollar value of the work actually performed by DBE contractors, unless an exception or Good Faith Effort (GFE) was previously granted.~~

~~6.1.2—Failure by contractors or their subcontractors to fulfill project DBE requirements shall constitute a breach of contract which, after notification by the Department, may result in termination of the contract by the Department, or such other remedy as the Department deems appropriate.~~

~~6.2.—Debarment~~

~~6.2.1—The RIDOT Director 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.~~

~~6.2.2—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.~~

~~6.2.3—If a contractor or subcontractor was previously debarred:~~

- ~~(a) — For any cause and is again debarred pursuant to these rules, then the 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 subsequent debarment may be for an indefinite period; or~~

~~(c) — Twice for the same cause, any subsequent debarment may be for an indefinite period.~~

~~6.2.4 — 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 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 after debarment of a contractor and/or subcontractor.~~

~~6.4 — List~~

~~The RIDOT Director shall maintain a list of all persons, partnerships, corporations, or associations who have been debarred in accordance with the procedures prescribed in Section 6.2. This list shall be 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.~~

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, Director

Date