



## EXHIBIT D DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

It is the policy of GRTC that Disadvantaged Business Enterprises (“DBEs”), as defined in U.S. Department of Transportation (“DOT”) regulations 49 C.F.R. Part 26, shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds. It is also the policy of GRTC to (1) ensure nondiscrimination in the award and administration of DOT-assisted contracts; (2) to create a level playing field on which DBEs can compete fairly for DOT-assisted contracts; (3) ensure that the DBE program is narrowly tailored in accordance with applicable law; (4) ensure that only firms that fully meet the 49 C.F.R. part 26 eligibility standards are permitted to participate as DBEs; (5) help remove barriers to the participation of DBEs in DOT-assisted contracts and procurement activities; and (6) assist in the development of firms that can compete successfully in the market-place outside the DBE program.

The Contractor is the recipient of federal transit funds authorized by Titles I, III, V, and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code or Title I, II, and V of the Teas-21, Pub. L. 105-178. Consequently, the DBE requirements of 49 C.F.R. Part 26 apply to this contract. The Contractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The requirements of 49 C.F.R. Part 26 and GRTC's DOT-approved Disadvantaged Business Enterprise (DBE) program are incorporated into this Contract by reference.

### 1. DEFINITIONS

- a) *Disadvantaged business enterprise* or *DBE* means a for-profit small business concern – (1) that is at least fifty-one 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% of the stock is owned by one or more such individuals; and (2) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.
- b) *Small business concern* means, with respect to firms seeking to participate as DBEs in DOT-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 C.F.R. Part 121) that also does not exceed the cap on average annual gross receipts or the relevant size standard as specified in 13 C.F.R. Section 121.402.
- c) Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is: (1) any individual who GRTC finds to be a socially and economically disadvantaged individual on a case-by-case basis; (2) any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged as defined in CFR Part 26.5:
  - 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 American, or other Spanish or Portuguese culture or origin, regardless of race
  - iii) "Native Americans," which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, 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, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong

- v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka
  - vi) Women
  - vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.
- d) For the purposes of this Exhibit, "GRTC" refers to Greater Richmond Transit Company.

## 2. SUBMISSION OF DBE FORMS

- a) The Contractor shall submit along with its response to this solicitation a completed Schedule C of Subcontractor Participation form ("**Schedule C**") listing all proposed subcontractors, DBE and non-DBE, and an executed Intent to Perform as a DBE Subcontractor form ("**Intent to Perform**") for each individual DBE contractor listed on the Schedule C. As required in Section 5 of this Exhibit, adequate good faith effort documentation (if necessary) must be submitted at this same time. If a prime or proposed subcontractor is in process of DBE certification at the time of submission, then the contractor must provide proof of application for Virginia DBE certification with its response to this solicitation and must provide an approved DBE certificate. If the contractor does not submit this information by the time the solicitation response is due, GRTC may deem the contractor non-responsive and such decision is non-appealable. The contractor may protest the decision in accordance with GRTC's protest procedure set forth in Exhibit C of this solicitation.
- b) The listing of a DBE by a contractor shall constitute a representation by the contractor to GRTC that it believes such DBE firm to be technically and financially qualified and available to perform the work. It shall also represent a commitment by the contractor that if it is awarded the contract, it will enter into a subcontract with such DBE (provided that the DBE is certified as provided herein) for the work described and at the price set forth in both the Schedule C and the Intent to Perform. If the price of a DBE subcontract changes after the form has been submitted but prior to award of the contract, the contractor will immediately notify GRTC's DBE Liaison Officer of the changed amount and the reason(s) for the change.
- c) In the event that the contractor wishes to modify its Schedule C and Intent to Perform forms after its offer is submitted and/or a contract awarded, the contractor must notify GRTC's DBE Liaison Officer in writing to request approval of the modification. This will include any changes to items of work, material, services, or DBE firms which differ from those identified on the Schedule C and Intent to Perform forms on file. The contractor must cooperate in supplying GRTC with additional information with respect to the requested modification. No changes may be affected without GRTC's prior written approval.

## 3. CREDIT TOWARDS GOALS

- a) Only work performed by DBE firms certified to work in the Commonwealth of Virginia by the recognized agencies listed in Section 6 herein, will count towards the overall contract goal. Out-of-state entities must certify through the Department of Small Business and Supplier Diversity and/or Metropolitan Washington Metropolitan Airport to be deemed eligible to participate in GRTC contracts in such capacities and receive credit for work performed.
- b) No credit toward meeting DBE goals will be allowed unless the DBE is determined to be eligible by GRTC's DBE Liaison Officer. The contractor is strongly encouraged to contact GRTC's DBE Liaison Officer well in advance of the date set for submission of offers in order to enable review of the proposed DBE's eligibility to participate in GRTC's DBE Program. The dollar value of work performed under a contract with a firm after it has ceased to be certified cannot count toward a contract goal. Participation of a DBE subcontractor cannot count toward the contractor's DBE achievements until the amount being counted has been paid to the DBE.
- c) Only expenditures to DBEs that perform a Commercially Useful Function may be counted towards goals. A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved

and is 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, GRTC will evaluate the amount of work subcontracted, industry practices, whether the amount the subcontractor 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. A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. If a DBE does not perform or exercise responsibility for at least thirty (30%) percent of the total cost of its contract with its own work force, or the DBE subcontracts 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, it is not performing a commercially useful function.

- d) The Contractor may count only the value of the work actually performed by the DBE toward DBE goals. This may be calculated by counting the entire amount of that portion of the Contract that is performed by a DBE's own forces. It includes the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the contractor or its affiliate). The Contractor may also count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, provided the fees are reasonable and not excessive as compared with fees customarily allowed for similar services. 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.
- e) When a DBE performs as a participant in a joint venture, the Contractor may 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.
- f) The Contractor may count one hundred percent (100%) of the cost of the materials and supplies towards the DBE goal provided that the DBE is a manufacturer. A manufacturer is a firm 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.
- g) The Contractor may count towards the DBE goal only sixty percent (60%) of the cost of the materials and supplies purchased from DBEs that are regular dealers. 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 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 if the person both owns and operates distribution equipment for the products. Any supplementing of the regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers.
- h) The Contractor may count towards its DBE goals the following costs of materials or supplies purchased from DBE firms that are not manufacturers or regular dealers:
  - i) The entire amount of fees or commissions charged by a DBE for providing bona fide services, such as professional, technical, consultant, or for providing bonds or insurance specifically required for the performance of the contract, provided GRTC determines that the fee is reasonable and not excessive as compared with fees customarily allowed for similar services.
  - ii) The entire amount of fees or commissions charged for assistance in the procurement or delivery of materials and supplies required on a job site (but not the cost of the materials and supplies themselves) when the hauler, trucker, or delivery service is not also the manufacturer of or a regular dealer in the materials and supplies.

- iii) The fees charged for providing any bonds or insurance specifically required for the performance of the contract.
- iv) The fees charged for assistance in the procurement of the materials and supplies, provided that the fees are reasonable and not excessive as compared with fees customarily allowed for similar services.
- i) If the contractor is a DBE and wishes to count its participation on the project towards the goal, it is required to perform that portion with its own work force.

#### **4. DBE GOAL AND SUBCONTRACTING OPPORTUNITIES**

- a) GRTC Transit System overall goal for DBE participation is 1.9% race neutral. A separate goal has not been established for this procurement. Race Neutral DBE participation includes anytime 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. Means to increase race-neutral participation include, but are not limited to, the following:
  - i.) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBE's and other small businesses.
  - ii.) Providing technical assistance and other services.
  - iii.) Carrying out information and communication programs on contracting procedures and specific contract opportunities.
  - iv.) Providing services to help DBEs and other small businesses improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency.
    - a. achieve eventual self-sufficiency.
  - v.) Ensuring distribution of our DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors.

#### **5. DEMONSTRATION OF GOOD FAITH EFFORT**

- a) If the Contractor does not meet the DBE goal, it shall nevertheless be eligible for award of the Contract if it can demonstrate to the satisfaction of GRTC that it has made a good faith effort to meet the DBE goal. In evaluating a Contractor's good faith effort submission, GRTC will only consider those documented efforts that occurred prior to receipt of competitive sealed bids (IFB) or competitive sealed proposals (RFP).
- b) In the event that a firm submitted by the contractor is not able to become certified by one of the certifying agencies under the Virginia Unified Certification Program the Contractor will be notified and given an opportunity to substitute that firm with another DBE firm. The Contractor will be given a deadline to accomplish the substitution. In the event the Contractor is unable to contract with a substitute DBE firm, the good faith efforts that Contractor made in attempting to contract with the substitute DBE firm must be documented and submitted to GRTC's DBE Liaison Officer. Documentation submitted in accordance with this subparagraph is the only exception to the requirements in subparagraph (a) above pertaining to the good faith efforts that GRTC will consider in determining whether the contractor shall be otherwise eligible for award of the contract.
- c) In making a determination that the Contractor has made a good faith effort to meet the DBE goals, GRTC shall consider, among other things it deems relevant, the criteria set forth below. Additionally, in determining whether the Contractor has made good faith efforts, GRTC will take into account the performance of other bidders in meeting the contract goal. The Contractor shall furnish as part of its DBE utilization information provided under this Section such specific documentation concerning the steps it has taken to obtain DBE participation, with a consideration of, by way of illustration and not limited to the following as required by *Appendix A to Part 26 – Guidance Concerning Good Faith Efforts*, as amended:

- i) Whether the Contractor conducted market research to identify small business contractors and suppliers and solicited through all reasonable and available means (e.g., attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The Contractor must solicit this interest early in the acquisition process within sufficient time to allow the DBEs to respond to the solicitation. The Contractor must determine with certainty if the DBEs are interested by taking appropriate steps to follow up on initial solicitations.
- ii) Whether the Contractor selected portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out Contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.
- iii) Whether the Contractor provided interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.
- iv) Whether the Contractor negotiated in good faith with interested DBEs. It is the Contractor'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.
- v) A Contractor 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 goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a contractor's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the contractor of the responsibility to make good faith efforts. A contractor is not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.
- vi) Whether the Contractor rejected DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its 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 DBE goal.
- vii) Whether the Contractor rejected the DBE because its quotation for the work was not the lowest received. However, nothing in this paragraph shall be construed to require the Contractor to accept unreasonable quotes in order to satisfy contract goals.
- viii) A Contractor's inability to find a replacement DBE at the original price is not alone sufficient to support a finding that good faith efforts have been made to replace the original DBE. The fact that the Contractor has the ability and/or desire to perform the contract work with its own forces does not relieve the Contractor of the obligation to make good faith efforts to find a replacement DBE, and it is not a sound basis for rejecting a prospective replacement DBE's reasonable quote.
- ix) Whether the Contractor made efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by GRTC or the Contractor.
- x) Whether the Contractor made efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

- xi) Whether the Contractor effectively used 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.
- d) In determining whether a Contractor has made good faith efforts, GRTC will scrutinize its documented efforts. At a minimum, GRTC will review the performance of other bidders in meeting the contract goal. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, GRTC may reasonably raise the question of whether, with additional efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal but meets or exceeds the average DBE participation obtained by other bidders, GRTC may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.
- e) In determining whether the Contractor has demonstrated good faith, GRTC will look not only at the different kinds of efforts that the Contractor has made, but also the quantity and intensity of those efforts. Efforts that are mere pro forma are not good faith efforts to meet the goals (even if they are sincerely motivated) if, given all relevant circumstances, the contractor's efforts could not reasonably be expected to produce a level of DBE participation sufficient to meet the goals.
- f) A promise to use DBEs after contract award is not considered to be responsive to the contract solicitation or to constitute good faith efforts.

## 6. APPEALS

If the Contractor does not meet the DBE goal or make adequate good faith efforts to do so, GRTC will so notify the Contractor in writing. The Contractor may appeal the decision within five (5) days of the date of the notice of decision by filing a written appeal for reconsideration. As part of this appeal, the Contractor has the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The reconsideration will be made by the DBE appeals officer, an individual who did not take part in the original determination that the Contractor failed to meet the goal or make adequate good faith efforts to do so. The Contractor will have the opportunity to meet with the DBE appeals officer to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. The result of the reconsideration process is final and not administratively appealable to the United States Department of Transportation.

## 7. CERTIFICATION OF DBEs

- a) GRTC is a participating entity under the Virginia Unified Certification Program (VUCP). This means that GRTC will accept certifications from any of the certifying agencies that have agreed to perform the certification of DBEs within the Commonwealth of Virginia under the VUCP. The participating agencies are:
  - **The Department of Small Business and Supplier Diversity**
  - **The Metropolitan Washington Airport Authority**
- b) The Department of Small Business and Supplier Diversity and/or The Metropolitan Washington Airport Authority will serve as the certifying agency for the Richmond region, which includes the counties of Chesterfield, Henrico and Hanover. All prospective DBEs must submit appropriate forms, available through the City of Richmond Certification Department, to prove actual ownership and control by DBEs. All such firms shall cooperate in supplying additional information as requested by the Certifying Agencies, which will determine the certification of eligible DBEs. Contractors may also contact GRTC DBE Liaison Officer, Antionette Haynes at 804-474-9357 or antionette.haynes@ridegrtc.com to obtain information.
- c) In the event GRTC determines that a firm identified by the Contractor as a potential DBE does not qualify as a DBE, the Contractor shall be informed and will be provided with an opportunity to substitute firms meeting the certifying agency's DBE eligibility criteria for GRTC's consideration. Information concerning DBEs currently certified can be obtained by contacting the Department of Small Business and Supplier Diversity. Contractors may access the DBE directory at <https://www.sbsd.virginia.gov>.

- d) **If a Contractor proposes using a DBE not currently certified the DBE Application must be approved by the certified by the Virginia Unified Certification Program, Department of Small Business and Supplier Diversity and/or The Metropolitan Washington Airport Authority no later than the date and time established for the receipt of proposals.** Any extensions to the due date by amendment to the solicitation shall automatically extend the due date of the application. If the Contractor proposes using a DBE from another state, the firm must produce evidence that it is DBE certified in the state in which the business is headquartered and certified by Virginia.

## **8. DBE PROGRAM REQUIREMENTS**

- a) The Contractor shall utilize the specific DBEs listed to perform the work and supply the materials for which each is listed in Schedule C of Subcontractor Participation and Intent to Perform as a DBE Subcontractor forms unless the contractor obtains the prior written consent of GRTC upon a showing of good cause as set forth in 49 C.F.R. Section 26.53 (f)(3).
- b) The Contractor may not terminate a DBE subcontractor without GRTC's prior written consent. This includes, but is not limited to, instances in which a Contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm. Unless GRTC provides prior written consent to terminate the DBE contract based on a showing of good cause to terminate the DBE firm, the Contractor shall not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE.
- c) At no time will the Contractor invoice GRTC for amounts pertaining to subcontractors terminated or substituted without prior approval of GRTC.

## **9. TERMINATION OR REPLACEMENT OF DBE SUBCONTRACTORS**

- a) The Contractor must notify GRTC's Office of Diversity immediately of the DBE's inability or unwillingness to perform and provide reasonable documentation thereof to seek prior written consent for termination or replacement of a DBE.
- b) The contractor may not terminate a listed DBE subcontractor (or approved substitute), replace a subcontractor previously listed, permit a subcontract to be assigned or transferred, or allow that portion of the work to be performed by anyone other than the listed subcontractor, without the prior written consent of GRTC. For termination of a DBE subcontractor, prior written consent will only be provided where there is a "good cause" for termination as established by 49 C.F.R. Section 26.53(f)(3). Good cause includes the following circumstances:
- The listed DBE fails or refuses to execute a written contract.
  - The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards; provided, however, that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the Contractor.
  - The listed DBE subcontractor fails or refuses to meet the Contractor's reasonable, nondiscriminatory bond requirements.
  - The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness.
  - The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant 2 CFR Parts 180, 215 and 1200 or applicable state law.
  - GRTC has determined that the listed DBE subcontractor is not a responsible contractor.
  - The listed DBE subcontractor voluntarily withdraws from the project and provides to the prime contractor written notice of its withdrawal.
  - The listed DBE is ineligible to receive DBE credit for the type of work required.
  - A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract.
  - Other documented good cause that GRTC determines compels the termination of the DBE subcontractor, provided that good cause does not exist if the Contractor seeks to terminate a DBE it relied

upon to obtain the contract so that the Contractor can self-perform the work for which the DBE contractor was engaged or so that the Contractor can substitute another DBE or non-DBE contractor after Contract award.

- c) Before transmitting its request to terminate and/or substitute to GRTC, the Contractor must give the DBE subcontractor written notice of its intent to terminate with a copy to GRTC, of the Contractor's intent to request to terminate and/or substitute, and the reason for the request. The DBE subcontractor shall have five (5) business days to respond to the Contractor's notice and advise GRTC and the Contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why GRTC should not approve the Contractor's action. If required in a particular case as a matter of public necessity (e.g., safety), GRTC may allow for a response period shorter than five (5) business days.
- d) When a DBE subcontractor is terminated or fails to complete its work on the contract for any reason, the Contractor must make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another certified DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal. Documentation of good faith efforts must be maintained and provided to GRTC within 7 days of a request, which may be extended for an additional 7 days, if necessary, at the request of the Contractor. GRTC will provide a written determination to the Contractor stating whether or not good faith efforts have been demonstrated.
- e) Any DBE that has been approved by GRTC to be replaced has the right to appeal the decision directly to GRTC's DBE Reconsideration Officer. Appeals should be sent to:  
  
Chief Executive Officer  
301 East Belt Boulevard  
Richmond, VA 23224  
804-358-3871
- m) Failure of the Contractor to carry out the requirements of this part is a material breach of the contract and may result in the termination of the contract as set forth in Exhibit E or such other remedies, including an order stopping all or part of payment/work until satisfactory action has been taken.

## **10. PAYMENT DOCUMENTATION**

The DBE program regulation 49 CFR § 26.37 requires that GRTC's DBE Program track and monitor every contract on which DBE participation is claimed to ensure that the work is performed by the DBEs to which the work was committed. GRTC must have written certification that it has reviewed contracting records and monitored work sites located in Virginia. GRTC utilizes Attachment S Form that must be submitted with all requests for payments and requires the Contractor and its sub-contractors to sign. GRTC will provide if Contractor identifies DBE or non-DBE subcontractor(s).

For each DBE contract, the Contractor is required to update payment and payment information on each subcontractor or vendor monthly to document in written or electronic format their compliance with the DBE participation and prompt payment regulations. Contractors are required to report, monitor, and maintain their subcontractor participation through monthly contract audits that require confirmation from the subcontractor representative.

## **11. SUBCONTRACT AGREEMENT**

The Contractor is required to submit a signed subcontractor agreement between the Contractor and each proposed subcontractor within fifteen (15) days of the Notice to Proceed (NTP). This agreement must include the following flow-down DBE federal clauses:

- a nondiscrimination clause.
- a prompt payment and return of retainage clause.
- a clause identifying options for legal remedies.



Any agreement reached between the Contractor and subcontractors may not modify or nullify federal regulations or it will be considered a breach of the contract between GRTC and the Contractor. The agreement must be signed by both the Contractor and subcontractor to be considered valid. The prime contractor must incorporate the following federal clauses into the subcontract agreement:

- a) **Non-Discrimination:** "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."

A finding by GRTC of discrimination by the contractor or subcontractor or a failure by the contractor to include the non-discrimination clause in its subcontract agreement is a material breach of this Contract which may result in the termination of this Contract or such other remedy as GRTC deems appropriate. Such remedies may include, but are not limited to:

- i) Withholding monthly progress payments
- ii) Assessing sanctions
- iii) Liquidated damages; and/or
- iv) Disqualifying the Contractor from future bidding as non-responsible.

b) **Prompt Payment and Return of Retainage:**

- i) The Contractor must pay DBE subcontractors for satisfactory performance of their contracts no later than ten (10) days from receipt of each payment GRTC makes to the Contractor. In addition, each contract the Contractor signs with a subcontractor must include a clause to require the Contractor to pay the subcontractor for satisfactory performance under the contract no later than ten (10) days from receipt of each payment GRTC makes to the prime contractor.
- ii) GRTC will ensure prompt and full payment of retainage from the Contractor to the subcontractor within ten (10) days after the subcontractor's work is satisfactorily completed. GRTC must use one of the following methods to ensure compliance with this requirement:
- iii) GRTC may decline to hold retainage from the Contractors and prohibit the Contractor from holding retainage from subcontractors;
- iv) GRTC may decline to hold retainage from the Contractor and require a contract clause obligating the Contractor to make prompt and full payment of any retainage kept by the Contractor to the subcontractor within ten (10) days after the subcontractor's work is satisfactorily completed; or
- v) GRTC may hold retainage from the Contractor and provide for prompt and regular incremental acceptance of portions of the prime contract, pay retainage to the Contractor based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within ten (10) days after GRTC's payment to the Contractor.
- vi) For purposes of this section, a subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented as required by GRTC. When GRTC has accepted an incremental portion of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed. Any delay or postponement of payment among the parties may take place only for good cause, with GRTC's prior written approval.

- c) GRTC may require any or all of the following additional mechanisms to ensure prompt payment:

- i) A contract clause that requires the Contractor to include language in their subcontract providing that prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms as outlined in the Payment Disputes section of this Exhibit to resolve payment disputes;
- ii) A contract clause providing that the Contractor will not be reimbursed for any work performed unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed; or
- iii) Other mechanisms, consistent with this Part and applicable state and local law, to ensure that DBEs and other contractors are fully and promptly paid.

## 12. Legal Remedies

GRTC will implement appropriate mechanisms to ensure compliance with 49 CFR Part 26 by all program participants by applying legal and contract remedies available under Federal, state, and local law. As required in 49 CFR Part 26.37, Prime contractors must include notice of GRTC's legal remedies in all FTA-funded subcontracts, including, but not limited to, the following:

- Breach of contract action, pursuant to the terms of the contract
- Breach of contract reporting to the Office of Inspector General
- Breach of contract reporting to the USDOT's Office of Civil Rights
- Rescission of contract awards (in whole or in part)
- Administrative fines
- Forfeiture of profits
- Debarment from bidder's list; and
- Suspensions from awards and other applicable sanctions.

In addition, the federal government has available several enforcement mechanisms that it may apply to firms participating in the DBE program, including, but not limited to, the following:

- Suspension or debarment proceedings pursuant to 49 CFR Part 29
- Enforcement action pursuant to 49 CFR Part 31
- Prosecution pursuant to 18 USC 1001

Failure of the Contractor to carry out GRTC's DBE program provisions shall constitute a breach of contract and may result in termination of the Contractor for default or such remedy as GRTC may deem appropriate. GRTC reserves the right to apply legal and contract remedies listed above.

## 13. POST SOLICITATION: DBE CONTRACT COMPLIANCE

- a) **Subcontractor Use Plan:** The Contractor must provide the subcontractor the maximum allowable opportunities to participate and perform on the contract the subcontractor has committed to. At its discretion, GRTC may require the Contractor to set forth a cohesive subcontractor utilization plan for each subcontractor or vendor that clearly identifies, outlines, and defines any requirements, including but not limited to:
  - i) Each party's responsibilities and authorities
  - ii) The minimum percentage or total dollar amount pledged to the certified DBE firm towards the overall contract goal

- iii) A list of supplies, services and/or work areas the subcontractor is responsible for to fulfill their commitment
  - iv) A description of deliverables or criteria of work performed by the subcontractor to be deemed satisfactory
  - v) A schedule for subcontractor usage and a timeframe of availability for the subcontractor to perform its required tasks
  - vi) Any other appropriate and applicable terms and conditions
  - vii) The subcontractor utilization plan, if required, must be made available to GRTC no later than fifteen (15) days following the receipt of the Notice to Proceed (NTP).
- b) **Commercially Useful Function (CUF) Certification:** GRTC's DBE program also includes a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently (e.g., as the result of modification to the contract) is actually performed by the DBEs to which the work was committed. This mechanism includes a written certification that GRTC has reviewed contracting records and monitored work sites for this purpose. The monitoring to which this paragraph refers will be conducted in conjunction with monitoring of contract performance for other purposes (e.g., close-out reviews for a contract).
- i) This mechanism provides for a running tally of actual DBE attainments (e.g., payments actually made to DBE firms), including a means of comparing these attainments to commitments. In its reports of DBE participation, GRTC will display both commitments and attainments.

#### 14. PAYMENT DISPUTES

If a payment dispute arises between the Contractor and any subcontractor or supplier related to this Contract, the Contractor shall provide a written response to the subcontractor or supplier, with a copy to the DBE Liaison Officer, specifically addressing any disputed amounts. The Contractor should resolve all disputed invoices at the earliest time to avoid a delay in the submission of required subcontractor/supplier payment certifications that could delay payment to the Contractor. In the event that the Contractor cannot resolve a subcontractor or supplier disputed invoice, the Contractor shall bring the matter to the attention of the Office of Diversity at the time of submitting the Contractor's invoice for payment. The Office of Diversity will investigate the situation and make a determination whether the Contractor's invoice should be processed for payment without the required subcontractor or supplier certification. The Office of Diversity will not mediate the dispute between the Contractor and any subcontractor or supplier in the resolution of disputed invoices. At no time will the Contractor invoice GRTC for amounts in dispute without prior notification to the Office of Diversity.

#### 15. SANCTIONS FOR NONCOMPLIANCE WITH GRTC'S DBE PROGRAM REQUIREMENTS

Failure by the Contractor to carry out GRTC's DBE Program Requirements is a material breach of the Contract, which may result in the termination of this Contract or such other remedy as GRTC deems appropriate. The willful making of false statements or providing incorrect information will be referred for appropriate legal action.

If legal remedies are deemed necessary, the DBE Liaison Officer shall notify the Contractor of the findings and justification for the applied sanctions in writing. If the Contractor believes the sanction(s) is not just, the Contractor will be allowed a five-day appeal period from the time of the notification to submit a written appeal with supporting documents to the DBE Reconsideration Office at 301 East Belt Boulevard, Richmond, VA 23224. The DBE Reconsideration Officer will evaluate documents and the DBE Liaison Officer will inform the contractor of the decision within 7 days from the receipt of appeal.