

ATTACHMENT 14

**VIRGINIA DEPARTMENT OF TRANSPORTATION
SPECIAL PROVISION FOR CONSULTANT PROJECTS**

Use of Disadvantaged Business Enterprises (DBEs) for Project Specific Consultant Projects

A. Disadvantaged Business Enterprise (DBE) Program Requirements

Any Consultant, subconsultant, DBE firm, and contract surety involved in the performance of work on a federal-aid contract shall comply with the terms and conditions of the United States Department of Transportation (USDOT) DBE Program as the terms appear in Part 26 of the Code of Federal Regulations (49 CFR as amended), the USDOT DBE Program regulations, and the Virginia Department of Transportation's (VDOT or the Department) DBE Program rules and regulations in accordance with this Special Provision.

For the purposes of this provision, Consultant is defined as any individual, partnership, corporation, or Joint Venture that formally submits a Statement of Qualification or Proposal for the work contemplated there under; Consultant is defined as any individual, partnership, or Joint Venture that contracts with the Department to perform the Work; and subconsultant is defined as any supplier, manufacturer, or subconsultant performing work or furnishing material, supplies or services to the contract. The Consultant shall physically include this same contract provision in every supply or work/service subcontract that it makes or executes with a subconsultant having work for which it intends to claim credit.

In accordance with 49 CFR Part 26 and VDOT's DBE Program requirements as outlined in this Special Provision, the Consultant, for itself and for its subconsultants and suppliers, whether certified DBE firms or not, shall commit to complying fully with the auditing, record keeping, confidentiality, cooperation, and anti-intimidation or retaliation provisions contained in those federal DBE Program and State legal requirements. By submitting a Proposal on this contract, and by accepting and executing this contract, the Consultant agrees to assume these contractual obligations and to bind the Consultant's subconsultants contractually to the same at the Consultant's expense.

The Consultant and each subconsultant shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Consultant shall carry out applicable requirements of 49 CFR Part 26 in the award, administration, and performance of this contract. Failure by the Consultant to carry out these requirements is a material breach of this contract, which will result in the termination of this contract or other such remedy, as VDOT deems appropriate.

All administrative remedies noted in this provision are automatic unless the Consultant exercises the right of appeal within the required timeframe(s) specified herein. Appeal requirements, processes, and procedures shall be in accordance with guidelines stated in **F** of this provision and current at the time of the proceedings. Where applicable, the Department will notify the Consultant of any changes to the appeal requirements, processes, and procedures after receiving notification of the Consultant's desire to appeal.

All time frames referenced in this provision are expressed in business days unless otherwise indicated. Should the expiration of any deadline fall on a weekend or holiday, such deadline will automatically be extended to the next normal business day.

B. DBE Certification

The only DBE firms eligible to perform work on a federal-aid contract for DBE contract goal credit are firms certified as Disadvantaged Business Enterprises by the Virginia Department of Small Business and Supplier Diversity (SBSD) or the Metropolitan Washington Airports Authority (MWAA) in accordance with federal and VDOT guidelines. DBE firms must be certified in the specific work listed for DBE contract goal credit. A directory listing of certified DBE firms can be obtained from the Virginia Department of Small Business and Supplier Diversity's website: <http://www.sbsd.virginia.gov>.

C. DBE Program-Related Certifications Made by Offerors/Consultants

By submitting a Proposal and by entering into any contract on the basis of that Proposal, the Offeror/Consultant certifies to each of the following DBE Program-related conditions and assurances:

1. That the Offeror/Consultant agrees to comply with the project construction and administration obligations of the USDOT DBE Program, 49 CFR Part 26 as amended, and the Standard Specifications setting forth the Department's DBE Program requirements.
2. Consultant shall comply fully with the DBE Program requirements in the execution and performance of the contract. Consultant acknowledges that failure to fulfill the DBE subcontracting commitments made may result in sanctions being invoked for noncompliance.
3. To ensure that DBE firms have been given full and fair opportunity to participate in the performance of the contract. The Consultant certifies that all reasonable steps were, and will be, taken to ensure that DBE firms had, and will have, an opportunity to compete for and perform work on the contract. The Consultant further certifies that the Consultant shall not discriminate on the basis of race, color, age, national origin, or sex in the performance of the contract or in the award of any subcontract. Any agreement between a Consultant and a DBE whereby the DBE promises not to provide quotations for performance of work to other Consultants are prohibited.
4. Consultant shall make good faith efforts to obtain DBE participation in the proposed contract at or above the goal. The Offeror shall submit a written statement as a part of its Statement of Qualifications and/or Proposal indicating the Offeror's commitment to achieve the minimum requirement related to DBE goal indicated in Request for Qualification (RFQ) and/or Request for Proposal (RFP) for the entire value of the contract. The Offeror, by signing and submitting its Proposal, certifies the DBE participation information that will be submitted within the required time thereafter is true, correct, and complete, and that the information to be provided includes the names of all DBE firms that will participate in the contract, the specific work that each listed DBE firm will perform, and the creditable dollar amounts of the participation of each listed DBE.
5. Offeror further certifies, by signing its Proposal, it has committed to use each DBE firm listed for the work specified to meet the contract goal for DBE participation. Award of the contract will be conditioned upon meeting these and other listed requirements of 49 CFR Part 26.53 and the contract documents. By signing the Proposal, the Offeror certifies that good faith efforts will be made on work that it proposes to sublet; and that it will seek out and consider DBE firms as potential subconsultants. The Consultant shall, as a continuing obligation, contact DBE firms to solicit their interest, capability, and prices in sufficient time to allow them to respond effectively, and shall retain on file proper documentation to substantiate its good faith efforts.
6. Once awarded the contract, the Consultant shall make good faith efforts to utilize DBE firms to perform work designated to be performed by DBE firms at or above the amount or percentage

of the dollar value specified in the proposal documents. Further the Consultant understands it shall not unilaterally terminate, substitute for, or replace any DBE firm that was designated in the executed contract in whole or in part with another DBE, any non-DBE firm, or with the Consultant's own forces or those of an affiliate of the Consultant without the prior written consent of Department as set out within the requirements of this Special Provision.

7. Once awarded the contract, the Consultant shall designate and make known to the Department a liaison officer who is assigned the responsibility of administering and promoting an active and inclusive DBE program as required by 49 CFR Part 26 for DBE firms. The designation and identity of this officer needs to be submitted only once by the Consultant during any 12 month period.
8. Once awarded the contract, the Consultant shall comply fully with all regulatory and contractual requirements of the USDOT DBE Program, and that each DBE firm participating in the contract shall fully perform the designated work with the DBE firm's own forces and equipment under the DBE firm's direct supervision, control, and management. Where a contract exists and where the Consultant, DBE firm, or any other firm retained by the Consultant has failed to comply with federal or Department DBE Program requirements, the Department has the authority and discretion to determine the extent to which the DBE contract regulations have not been met, and will assess against the Consultant any remedies available at law or provided in the contract.
9. In the event a bond surety assumes the completion of work, if for any reason VDOT has terminated the Consultant, the surety shall be obligated to meet the same DBE contract terms and requirements as were required of the original Consultant in accordance with the requirements of this specification.

D. DBE Program Compliance Procedures

The following procedures shall apply to the contract for DBE Program compliance purposes:

1. **DBE Goal, Good Faith Efforts Specified:** At the time of the submittal of the Expression of Interest, the Offeror will include form C-48 PSC. This form represents the Consultants solicitation of subconsultants to be used for the contract to meet the DBE goal.

If, at the time of submitting the Expression of Interest, the offeror knowingly cannot meet or demonstrate good faith efforts in meeting the required DBE contract goal, form C-49 PSC shall be submitted.

Upon completion of negotiation, Form C-111 shall be submitted electronically or may be faxed to the Department, but in no case shall the offeror's Form C-111 be received later than two business days after the negotiated contract value has been determined. A revised Form C-48 must be received within ten (10) business days after the negotiated contract value has been determined.

If, at the time of submitting its offer, the offeror knowingly cannot meet or exceed the required DBE contract goal, it shall submit Form C-111 PSC exhibiting the DBE participation it commits to attain. The offeror shall then submit Form C-49, DBE Good Faith Efforts Documentation, within two (2) business days after the negotiated contract value.

The top-ranked offeror must submit its properly executed Form C-112, Certification of Binding Agreement, with the C-111 two business days after the negotiated contract value has been determined. DBE offerors responding as prime contractors are not required to submit Form C-112 unless they are utilizing other DBE firms as subconsultants.

If, after review of the selected Offeror, the Department determines the DBE requirements have not been met, the selected Offeror must submit Form C-49, DBE Good Faith Efforts Documentation, which must be received by the Department within two (2) business days after official notification of such failure to meet the aforementioned DBE requirements.

Forms C-48, C-49, C-111, and C-112 can be obtained from the VDOT website at:
<http://vdotforms.vdot.virginia.gov/>

If the most highly qualified (top-ranked) firm does not meet the goal or demonstrate a good faith effort, the Department may terminate negotiations and initiate negotiations with the number two-ranked firm.

- 2. Good Faith Efforts Described:** Department will determine if Consultant demonstrated adequate good faith efforts, and if given all relevant circumstances, those efforts were made actively and aggressively to meet the DBE requirements. Efforts to obtain DBE participation are not good faith efforts if they could not reasonably be expected to produce a level of DBE firm participation sufficient to meet the DBE Program requirements and DBE Goal.

Good faith efforts may be determined through use of the following list of the types of actions the Consultant may make to obtain DBE participation. This is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts of similar intent may be relevant in appropriate cases:

- (a) Soliciting through reasonable and available means, such as but not limited to, ~~a~~ pre-proposal meetings, advertising, and written notices to DBE firms who have the capability to perform the work of the contract. Examples include: advertising in at least one daily/weekly/monthly newspaper of general circulation, as applicable; phone contact with a completely documented telephone log, including the date and time called, contact person, or voice mail status; and internet contacts with supporting documentation, including dates advertised. DBE firms shall have no less than five (5) business days to reasonably respond to the solicitation. Consultant shall determine with certainty if the DBE firms are interested by taking reasonable steps to follow up initial solicitations as evidenced by documenting such efforts as requested on Form C-49, DBE Good Faith Efforts Documentation.
- (b) Selecting portions of the work to be performed by DBE firms in order to increase the likelihood that the DBE Goal will be achieved. This includes, where appropriate, breaking out work items into economically feasible units to facilitate DBE firm participation, even when the Consultant might otherwise prefer to completely perform all portions of this work in its entirety or use its own forces;
- (c) Providing interested DBE firms with adequate information about the scope and requirements of the contract in a timely manner, which will assist the DBE firms in responding to a solicitation;
- (d) Negotiating for participation in good faith with interested DBE firms;
 - 1. Evidence of such negotiation shall include the names, addresses, and telephone numbers of DBE firms that were considered; dates DBE firms were contacted; a description of the information provided regarding the scope and requirements of the contract for the work selected for subconsultanting; and, if insufficient DBE participation seems likely, evidence as to why additional agreements could not be reached for DBE firms to perform the work;
 - 2. Consultant should, using good business judgment, consider a number of factors in negotiating with subconsultants, and should take a DBE firm's price, qualifications, and

capabilities, as well as contract goals, into consideration. However, the fact that there may be some additional costs involved in finding and using DBE firms is not sufficient reason for a Consultant's failure to meet the DBE goal as long as such costs are reasonable and comparable to costs customarily appropriate to the type of work under consideration. Also, the ability or desire of a Consultant to perform the work with its own organization does not relieve the Consultant of the responsibility to make diligent good faith efforts. Consultants are not, however, required to accept higher quotes from DBE firms if the price difference can be shown by the Consultant to be excessive, unreasonable, or greater than would normally be expected by industry standards;

- (e) A Consultant cannot reject a DBE firm as being unqualified without sound reasons based on a thorough investigation of the DBE firm's capabilities. The DBE firm's standing within its industry, membership in specific groups, organizations, associations, and political or social affiliations, are not legitimate causes for the rejection or non-solicitation of bids in the Consultant's efforts to meet the contract goal for DBE participation;
- (f) Making efforts to assist interested DBE firms in obtaining or related assistance or services subject to the restrictions contained in this Special Provision;
- (g) Effectively using the services of appropriate personnel from VDOT and from SBSD; available minority/women community or minority organizations; 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 utilization of qualified DBEs.

E. Documentation and Administrative Reconsideration of Good Faith Efforts

During Proposal Submission:

In the Expression of Interest, the Offeror is expected to identify those firms whose participation in the contract will achieve the DBE contract goal requirements.

During Negotiation: If the Department changes the scope of services in such a fashion as to affect the ability of the firm to meet the DBE contract goal requirements, the Civil Rights Division will reconsider the goal and inform the Offeror of the revised goal.

If a DBE, through no fault of the Consultant, is unable or unwilling to fulfill his agreement with the Consultant, the Consultant shall immediately notify the Department and provide all relevant facts.

In order to award a contract to a Offeror that has failed to meet DBE contract goal requirements, the Department will determine if the Offeror's efforts were adequate good faith efforts, and if given all relevant circumstances, those efforts were made actively and aggressively to meet the DBE requirements. Efforts to obtain DBE participation are not good faith efforts if they could not reasonably be expected to produce a level of DBE participation sufficient to meet the DBE Program and contract goal requirements.

As described in the **Contract Goal, Good Faith Efforts Specified** section of this Special Provision, if the Offeror knowingly cannot meet or exceed the required DBE contract goal, the Offeror must submit Form C-49, DBE Good Faith Efforts Documentation. The Offeror shall attach additional pages to the certification, if necessary, in order to fully detail specific good faith efforts made to obtain the DBE firm's participation in the proposed work.

If it is determined that the aforementioned documentation is insufficient or the failure to meet required participation is due to other reasons, the Consultant may request an appearance before the Department's Administrative Reconsideration Panel to establish that all feasible means were

used to meet such participation requirements. The Administrative Reconsideration Panel will be made up of Department Division Administrators or their designees, none of whom took part in the initial determination that the Consultant failed to make the DBE goal or make adequate good faith efforts to do so. After reconsideration, Department shall notify the Consultant in writing of its decision and explain the basis for finding that the Consultant did or did not meet the DBE goal or make adequate good faith efforts to do so. The decision of the Administrative Reconsideration Panel shall be administratively final.

During the Contract: If a DBE, through no fault of the Consultant, is unable or unwilling to fulfill his agreement with the Consultant, the Consultant shall immediately notify the Department and provide all relevant facts. If a Consultant relieves a DBE subconsultant of the responsibility to perform work under their subcontract, the Consultant is encouraged to take the appropriate steps to obtain another DBE firm to perform the remaining subcontracted work for the amount that would have been paid to the original DBE firm. In such instances, Consultant is expected to seek DBE participation towards meeting the goal during the performance of the contract.

Before the Consultant transmits to the Department its request to terminate and/or substitute a DBE subconsultant, the prime consultant must give notice in writing to the DBE subconsultant, with a copy to the Department, of its intent to request to terminate and/or substitute, and the reason for the request.

The prime consultant must give the DBE firm five days to respond to the prime consultant's notice. The DBE firm may respond to the Department and the prime consultant the reasons, if any, why it objects to the proposed termination of its subcontract and why the Department should not approve the prime consultant's action.

If at any point during the execution and performance of the contract it becomes evident that the remaining dollar value of allowable DBE goal credit for performing the subcontracted work is insufficient to obtain the DBE contract goal, and the Consultant has not taken the preceding actions, the Consultant and any aforementioned affiliates may be subject to disallowance of DBE credit until such time as sufficient progress toward achievement of the DBE goal is achieved or evidenced.

Project Completion: If, at final completion, the Consultant fails to meet the DBE goal, and fails to adequately document that it made good faith efforts to achieve sufficient DBE goal, then Consultant and any prime contractual affiliates, as in the case of a joint venture, may be subject to sanctions being invoked for noncompliance.

Prior to such sanctions being invoked, the Consultant may submit documentation to the Department's designee to substantiate that failure was due solely to the elimination of the scope of work subcontracted to DBEs, or to circumstances beyond the Consultant's control and that all feasible means had been used to achieve the DBE goal. The Department's designee, upon verification of such documentation shall determine whether Consultant has met the requirements of the contract.

If it is determined that the aforementioned documentation is insufficient or the failure to meet required participation is due to other reasons, the Consultant may request an appearance before the Department's Administrative Reconsideration Panel to establish that all feasible means were used to meet such participation requirements. The Administrative Reconsideration Panel will be made up of Department Division Administrators or their designees, none of who took part in the initial determination that the Consultant failed to make the DBE goal or make adequate good faith efforts to do so. After reconsideration, Department shall notify the Consultant in writing of its decision and explain the basis for finding that the Consultant did or did not meet the DBE goal or make adequate good faith efforts to do so.

The decision of the Administrative Reconsideration Panel shall be administratively final. If the decision is made to invoke sanctions for failure to perform any or all of the responsibilities contained

herein, the Department may declare the Consultant to be non-responsive with respect to renewal and future contracts to include enjoinder from responding or participating on Department procurement opportunities for a period of 180 days.

F. DBE Participation for Contract Goal Credit

DBE participation on the contract will count toward meeting the DBE contract goal in accordance with the following criteria:

1. The applicable percentage of the total dollar value of the contract or subcontract awarded to the DBE firm will be counted toward meeting the DBE goal in accordance with the **DBE Program-Related Certifications Made by Offerors/Consultant's** section of this Special Provision for the value of the work, goods, or services that are actually performed or provided by the DBE firm itself.
2. When a DBE performs work as a participant in a joint venture with a non-DBE firm, the Consultant may count toward the DBE goal only that portion of the total dollar value of the subcontract equal to the distinctly defined portion of the work that the DBE firm has performed with the DBE firm's own forces or in accordance with the provisions of this Section. The Department shall be contacted in advance regarding any joint venture involving both a DBE firm and a non-DBE firm to coordinate Department review and approval of the joint venture's organizational structure and proposed operation where the Consultant seeks to claim the goal credit.
3. When a DBE firm subcontracts part of the work to another firm, the value of that subcontracted work may be counted toward the DBE contract goal only if the DBE firm's subconsultant is a DBE firm. Work that a DBE firm subcontracts to a non-DBE firm, or to a firm that may be eligible to be a DBE firm, but has not yet been certified as a DBE firm, will not count toward the DBE. The cost of supplies and equipment a DBE subconsultant purchases or leases from the Consultant or prime contractual affiliates, as in the case of a joint venture, will not count toward the DBE goal.
4. The Consultant may count expenditures to a DBE subconsultant toward the DBE goal only if the DBE performs a Commercially Useful Function (CUF) on that subcontract, as such term is defined in subparagraph G below.

G. Performing a Commercially Useful Function (CUF)

No credit toward the DBE goal will be allowed for payments or reimbursement of expenditures to a DBE firm if that DBE firm does not perform a CUF on that contract. A DBE firm performs a CUF when the DBE is solely responsible for execution of a distinct element of the work and the DBE firm actually performs, manages, and supervises such work with the DBE firm's own forces or in accordance with the provisions of the **DBE Participation for Contract Goal Credit** section of this Special Provision. To perform a CUF the DBE firm alone must perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force. The amount the DBE firm is to be paid under the subcontract shall be commensurate with the work the DBE actually performs and the DBE goal credit claimed for the DBE firm's performance.

Monitoring CUF Performance: It shall be the Consultant's responsibility to confirm that all DBE firms selected for subcontract work on the contract, for which he seeks to claim credit toward the DBE goal, perform a CUF. Further, the Consultant is responsible for and shall confirm that each DBE firm fully performs the DBE firm's designated tasks in accordance with the provisions of the **DBE Participation for Contract Goal Credit** section of this Special Provision. For the purposes of this Special Provision the DBE firm's equipment will mean either equipment directly owned by the DBE as evidenced by title, bill of sale or other such documentation, or leased by the DBE firm,

and over which the DBE has control as evidenced by the leasing agreement from a firm not owned in whole or part by the Consultant or an affiliate of the Consultant.

Department will monitor Consultant's DBE involvement during the performance of the contract. However, Department is under no obligation to warn the Consultant that a DBE firm's participation will not count toward the goal.

DBE Firms Must Perform a Useful and Necessary Role in Contract Completion: A DBE firm does not perform a CUF if the DBE firm's 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 firm participation.

DBE Firms Must Perform The Contract Work With Their Own Workforces: If a DBE firm does not perform and exercise responsibility for at least thirty (30) percent of the total cost of the DBE firm's contract with the DBE firm's own work force, or the DBE firm 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 involve, Department will presume that the DBE firm is not performing a CUF and such participation will not be counted toward the DBE goal.

Department Makes Final Determination On Whether a CUF Is Performed: Department has the final authority to determine, in its sole discretion, whether a DBE firm has performed a CUF on the contract. To determine whether a DBE is performing or has performed a CUF, Department will evaluate the amount of work subcontracted by that DBE firm or performed by other firms and the extent of the involvement of other firms' forces and equipment. Any DBE work performed by the Consultant or by employees or equipment of the Consultant shall be subject to disallowance under the DBE Program, unless the independent validity and need for such an arrangement and work is demonstrated. When a DBE firm is presumed not to be performing a commercially useful function the DBE may present evidence to rebut the Department's finding. Department has the final authority to determine, in its sole discretion, whether a DBE firm has performed a CUF on the contract.

H. Verification of DBE Participation and Imposed Damages

Within fourteen (14) days after subcontract execution between Consultant and DBE subconsultants, the Consultant shall submit to the Department's Civil Rights Office (CRO), a copy of the fully executed subcontract agreement for each DBE firm used to claim credit in accordance with the requirements stated on Form C-111. The subcontract shall be executed by both parties stating the work to be performed, the details or specifics concerning such work, and the price which will be paid to the DBE subconsultant.

The Consultant shall also furnish, and shall require each subconsultant to furnish, information relative to all DBE involvement on the project for each quarter during the life of the contract in which participation occurs and verification is available. The information shall be indicated on Form C-63, DBE and SWAM Payment Compliance Report. The Department reserves the right to request proof of payment via copies of cancelled checks with appropriate identifying notations. Failure to provide Form C-63 to the CRO within five (5) business days after the reporting period may result in delay of approval of the Consultant's scheduled payment. The names and certification numbers of DBE firms provided by the Consultant on the various forms indicated in this Special Provision shall be exactly as shown on SBSB's latest list of certified DBEs. Signatures on all forms indicated herein shall be those of authorized representatives of the Consultant. If DBE firms are used which have not been previously documented with the Consultant's minimum DBE requirements documentation and for which the Consultant now desires to claim credit toward the contract goal, the Consultant shall be responsible for submitting necessary documentation in accordance with the procedures stipulated in this Special Provision to cover such work prior to the DBE firm beginning work. Form C-63 can be obtained from the VDOT website at: <http://vdotforms.vdot.virginia.gov/>

Prior to beginning any major component of the work to be performed by a DBE firm not previously submitted, Consultant shall furnish a revised Form C-111 showing the name(s) and certification number(s) of any such DBEs for which Consultant seeks DBE goal credit. Consultant shall obtain the prior approval of the Department for any assistance it may provide to the DBE firm beyond its existing resources in executing its commitment to perform the work in accordance with the requirements listed in the **Good Faith Efforts Described** section of this Special Provision. If Consultant is aware of any assistance beyond a DBE firm's existing resources that Consultant, or another subconsultant, may be contemplating or may deem necessary and that have not been previously approved, Consultant shall submit a new or revised narrative statement for Department's approval prior to assistance being rendered.

If the Consultant fails to correctly complete and any of the required documentation requested by this Special Provision within the specified time frames, the Department will withhold payment until such time as the required submissions are received by Department. Where such failures to provide required submittals or documentation are repeated, Department will move to enjoin the Consultant and any prime contractual affiliates, as in the case of a joint venture, from responding or participating Department projects until such submissions are received.

I. Documentation Required for Semi-final Payment

Consultant must submit Form C-63 to the CRO sixty (60) days prior to date of final completion, set forth on the Baseline Schedule (as updated from time to time in accordance with the contract). The form must include each DBE firm used on the contract and the work performed by each DBE firm. The form shall include the actual dollar amount paid to each DBE firm for the accepted creditable work. The form shall be certified under penalty of perjury, or other applicable legal requirements, to be accurate and complete. Department will use this certification and other information available to determine applicable DBE credit allowed to date by Department and the extent to which the DBE firms were fully paid for that work. The Consultant acknowledges by the act of filing the form that the information is supplied to obtain payment regarding the contract as a federal participation contract. A letter of certification, signed by both the Consultant and appropriate DBE firms, will accompany the form, indicating the amount that remains to be paid to the DBE firm(s).

J. Documentation Required for Final Payment

In anticipation of final payment, Consultant shall submit a final Form C-63 marked "Final" to the CRO, within thirty (30) days of the anticipated date of final completion, as set forth on the Baseline Schedule (as updated from time to time in accordance with the contract). The form must include each DBE firm used on the contract and the work performed by each DBE firm. The form shall include the actual dollar amount paid to each DBE firm for the creditable work. Department will use this form and other information available to determine if Consultant and DBE firms have satisfied the DBE goal and the extent to which credit was allowed. Consultant acknowledges by the act of signing and filing the form that the information is supplied to obtain payment regarding the contract as a federal participation contract.

K. Prompt Payment Requirements

In accordance with Article 4 of the Virginia Public Procurement Act (Sections 2.2-4347 through 2.2-4356 of the Code of Virginia (1950), as amended), the Consultant shall make payment to all subcontractors within seven (7) days after receipt of payment from the Department, or shall notify

the Department and subcontractor in writing of the intention to withhold all or a part of the amount due along with the reason for nonpayment. Invoices shall be submitted no more frequently than once every 30 calendar days and not less than every 60 calendar days. Sub-consultant invoices must be submitted within 60 calendar days of receipt by the Consultant.

For purposes of this Special Provision, a subconsultant's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished, documented, and accepted as required by the contract documents by Department. If Department has made partial acceptance of a portion of the contract, then Department will consider the work of any subconsultant covered by that partial acceptance to be satisfactorily completed.

Upon Department's payment of the subconsultant's portion of the work as shown on the application for payment and the receipt of payment by Consultant for such work, the Consultant shall make compensation in full to the subconsultant for that portion of the work satisfactorily completed and accepted by the Department. For the purposes of this Special Provision, payment of the subconsultant's portion of the work shall mean the Consultant has issued payment in full, to the subconsultant for that portion of the subconsultant's work that Department paid to Consultant pursuant to the applicable application for payment.

By accepting and executing this contract, the Consultant agrees to assume these obligations, and to bind the Consultant's subconsultants contractually to these obligations.

Nothing contained herein shall preclude Consultant from withholding payment to the subconsultant in accordance with the terms of the subcontract in order to protect the Consultant from loss or cost of damage due to a breach of the subcontract by the subconsultant.

L. Miscellaneous DBE Program Requirements

Loss of DBE Eligibility: When a DBE firm has been removed from eligibility as a certified DBE firm, the following actions will be taken:

1. When a Consultant has made a commitment to use a DBE firm that is not currently certified, thereby making the Consultant ineligible to receive DBE goal credit for work performed, the ineligible DBE firm's work does not count toward the DBE goal. Consultant shall meet the DBE goal with a DBE firm that is eligible to receive DBE credit for work performed, or must demonstrate to the CRO that it has made good faith efforts to do so.
2. When a Consultant has executed a subcontract with a DBE firm prior to official notification of the DBE firm's loss of eligibility, Consultant may continue to use the firm on the contract and shall continue to receive DBE credit toward DBE goal for the subconsultant's work.
3. When Department has executed a prime contract with a DBE firm that is certified at the time of contract execution but that is later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after VDOT issued the notice of its ineligibility shall be counted toward the contract goal.

Termination of DBE: If a DBE subconsultant is terminated, or fails, refuses, or is unable to complete the work on the contract for any reason, Consultant must promptly request approval to substitute or replace that DBE firm in accordance with this section of this Special Provision.

Consultant, shall notify DCRO in writing before terminating and/or replacing the DBE firm that is being used or represented to fulfill DBE-related contract obligations during the term of the contract. Written consent from the DCRO for terminating the performance of any DBE firm shall be granted only when the Consultant can demonstrate that the DBE firm is unable, unwilling, or ineligible to perform its obligations for which the Consultant sought credit toward the DBE goal.

Such written consent by the Department to terminate any DBE shall concurrently constitute written consent to substitute or replace the terminated DBE with another DBE. Consent to terminate a DBE firm shall not be based on the Consultant's ability to negotiate a more advantageous contract with another subconsultant whether that subconsultant is, or is not, a DBE firm.

1. All Consultant requests to terminate, substitute, or replace a DBE firm shall be in writing, and shall include the following information:
 - (a) The date the Consultant determined the DBE to be unwilling, unable, or ineligible to perform.
 - (b) The projected date that the Consultant shall require a substitution or replacement DBE to commence work if consent is granted to the request.
 - (c) A brief statement of facts describing and citing specific actions or inaction by the DBE firm giving rise to Consultant's assertion that the DBE firm is unwilling, unable, or ineligible to perform;
 - (d) A brief statement of the DBE firm's capacity and ability to perform the work as determined by the Consultant;
 - (e) A brief statement of facts regarding actions taken by the Consultant, that Consultant believes constitute good faith efforts toward enabling the DBE firm to perform;
 - (f) The current percentage of work completed by the DBE firm;
 - (g) The total dollar amount currently paid for work performed by the DBE firm;
 - (h) The total dollar amount remaining to be paid to the DBE firm for work completed, but for which the DBE firm has not received payment, and with which the Consultant has no dispute;
 - (i) The total dollar amount remaining to be paid to the DBE firm for work completed, but for which the DBE firm has not received payment, and over which the Consultant and/or the DBE firm have a dispute.
2. Consultant's Written Notice to DBE of Pending Request to Terminate and Substitute with another DBE.

Consultant shall send a copy of the "request to terminate and substitute" letter to the affected DBE firm and make best efforts to ensure its receipt by the DBE firm, in conjunction with submitting the request to the DCRO. The DBE firm may submit a response letter to the DCRO and Department within two (2) business days of receiving the notice to terminate from the Consultant. If the DBE firm submits a response letter, then Consultant shall, as part of its subcontract, obligate the DBE firm to explain its position concerning performance on the committed work. The Department will consider both the Consultant's request and the DBE firm's response and explanation before approving the Consultant's termination and substitution request.

If, after making its best efforts to deliver a copy of the "request to terminate and substitute" letter, the Consultant is unsuccessful in notifying the affected DBE firm, the Department will verify that the DBE firm is unable or unwilling to continue performing its subcontract let with respect to the contract. Department will timely approve the Consultant's request for a substitution.

3. Proposed Substitution of Another Certified DBE

Upon termination of a DBE firm, Consultant shall use reasonable good faith efforts to replace the terminated DBE firm. The termination of such DBE firm shall not relieve Consultant of its obligations under this Special Provision, and the unpaid portion of the terminated DBE firm's subcontract will not be counted toward the DBE goal.

When a DBE substitution is necessary, the Consultant shall submit an amended Form C-111 to the DCRO for approval with the name of another DBE firm, the proposed work to be performed by that DBE firm, and the dollar amount of the work to replace the unfulfilled portion of the work of the original DBE firm.

Should Consultant be unable to commit the remaining required dollar value to the substitute DBE firm, the Consultant shall provide written evidence of good faith efforts made to obtain the substitute value requirement. Department will review the quality, thoroughness, and intensity of those efforts. Efforts that are viewed by Department as merely superficial or pro-forma will not be considered good faith efforts to meet the DBE goal. Consultant must document the steps taken that demonstrated its good faith efforts to obtain participation as set forth in the **Good Faith Efforts Described** section of this Special Provision.

M. Suspect Evidence of Criminal Behavior

Failure of Consultant or any subconsultant to comply with the Standard Specifications, this Special Provision, or any other contract document wherein there appears to be evidence of criminal conduct shall be referred to the Attorney General for the Commonwealth of Virginia and/or the FHWA Inspector General for criminal investigation and, if warranted prosecution.

Suspected DBE Fraud

In appropriate cases, Department will bring to the attention of the United States Department of Transportation any appearance of false, fraudulent, or dishonest conduct in connection with the DBE program, so that USDOT can take the steps, e.g., referral to the Department of Justice for criminal prosecution, referral to the USDOT Inspector General, action under suspension and debarment or "Program Fraud and Civil Penalties" rules provided in 49 CFR Part 31.

N. Availability of Records

Requests for information concerning any aspect of the DBE Program, the Department complies with provisions of the Federal and Virginia Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a) and Code of Virginia § 2.2 -3700.