

Berkeley-Charleston-Dorchester Council of Governments

## **Disadvantaged Business Enterprise Program**


June 2016



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COUNCIL OF GOVERNMENTS  
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**Disadvantaged Business Enterprise Program**  
Berkeley-Charleston-Dorchester Council of Governments  
(BCDCOG)

In an effort to encourage participation of Disadvantaged Business Enterprises (DBE) in the award and administration U.S. DOT-assisted contracts, BCDCOG Board of Directors approved the following DBE Program on this date, pursuant to regulations set forth under Title 49 CFR Part 26.



\_\_\_\_\_  
Mr. Teddie Pryor, Chairman  
BCDCOG Board of Directors

Adopted: June 20th, 2016

This report was prepared by the Berkeley-Charleston-Dorchester Council of Governments, in cooperation with the South Carolina Department of Transportation, and the U.S. Department of Transportation - Federal Highway Administration and Federal Transit Administration.

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**Attachments**

Attachment 1: Organizational Chart

Attachment 2: DBE Directory (included in this document below)

Attachment 3: Goal Setting Methodology

Attachment 4: Good Faith Efforts Forms

Attachment 5: DBE Regulation, 49 CFR Part 26 (included in this document below)

**Berkeley-Charleston-Dorchester Council of Governments  
(BCDCOG)**

**RESOLUTION**

Adopting the Disadvantaged Business Enterprise Program (DBE)

**WHEREAS**, local agencies receiving Federal Aid grants must adopt a DBE Program and establish an annual DBE Usage Goal; and

**WHEREAS**, the BCDCOG continues to supplement its programs activities with Federal grants; and

**WHEREAS**, the BCDCOG has drafted its DBE Program and Usage Goal pursuant to regulations set forth under Title 49 CFR Part 26; and

**WHEREAS**, the Plan seeks to remove barriers to the participation of DBEs in U.S. DOT-assisted contracts; and

**WHEREAS**, the Plan sets policies to achieve non-discrimination in the award and administration of U.S. DOT assisted contracts in the BCDCOG's highway and transit financial assistance programs;

**THEREFORE, BE IT RESOLVED:** that the BCDCOG Board of Directors does hereby approve the Disadvantaged Business Enterprise Program and DBE usage goal.

PASSED AND ADOPTED this \_\_ day of \_\_\_\_ 2016.



\_\_\_\_\_  
Mr. Teddie Pryor, Chairman  
BCDCOG Board of Directors

**POLICY STATEMENT**  
**DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**

It is the policy of the BCDCOG to ensure that DBEs, as defined in 49 Code of Federal Regulations (CFR) Part 26, effective March 4, 1999, as may be amended, have an equal opportunity to receive and participate in United States Department of Transportation (U.S. DOT) assisted contracts. It is also our policy:

1. To ensure non-discrimination in the award and administration of U.S. DOT assisted contracts in the Department's highway and transit financial assistance programs;
2. To create a level playing field on which DBEs can compete fairly for U.S. DOT-assisted contracts;
3. To ensure that the DBE Program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet 49 CFR 26 eligibility standards are permitted to participate as DBEs;
5. To help remove barriers to the participation of DBEs in U.S. DOT-assisted contracts; and
6. To assist the development of firms that can compete successfully in the marketplace outside the DBE Program.

The Board of Directors is responsible for establishing the DBE policy of the BCDCOG. The Executive Director of the BCDCOG is responsible for ensuring adherence to this policy. The DBE Program Administrator, in coordination with all BCDCOG Directors and Managers, is responsible for the development, implementation and monitoring of the Program for Contracts in accordance with the BCDCOG's nondiscrimination policy. It is the expectation of the Board of Directors and the Executive Director that all BCDCOG personnel shall adhere to the spirit, as well as the provisions and procedures, of this Program.

This policy will be circulated to all BCDCOG personnel and to members of the community that perform or are interested in performing work on BCDCOG contracts. The complete DBE Program and the annual overall DBE goals analysis are available for review at the: Berkeley-Charleston-Dorchester Council of Governments, 1362 McMillan Ave., Suite 100, North Charleston, SC 29405

If you have any questions or would like further information regarding this Program, please contact the DBE Program Administrator, by telephone at 843.529.0400 or by fax at 843.529.0305.

Signed By:

\_\_\_\_\_  
Ronald Mitchum, Executive Director

\_\_\_\_\_  
Date

## **I. POLICY**

### **A. Applicability** (Sections 26.3 and 26.21)

The BCDCOG, a recipient of federal financial assistance from the Federal Transit Administration (“FTA”) and the Federal Highway Administration (“FHWA”) of the U.S. DOT, is required to implement a DBE Program in accordance with 49 CFR Part 26, which is incorporated herein by this reference. The Program outlined herein applies to all BCDCOG contracts that are funded, in whole or in part, by U.S. DOT federal financial assistance. In the event of any conflicts or inconsistencies between the Regulations and this DBE Program with respect to U.S. DOT-assisted contracts, the Regulations shall prevail.

### **B. Objectives** (Section 26.1)

The objectives of this Program are the following:

1. To remove barriers to DBE participation in the bidding, award and administration of BCDCOG contracts;
2. To assist DBEs to develop and compete successfully outside of the Program;
3. To ensure that the Program is narrowly tailored in accordance with 49 CFR Part 26;
4. To ensure that only DBEs meeting the eligibility requirements are permitted to participate as DBEs;
5. To identify business enterprises that are eligible as DBEs to provide the BCDCOG with required materials, equipment, supplies and services; and to develop a good rapport with the owners, managers and sales representatives of those enterprises;
6. To develop communication programs and procedures which will acquaint prospective DBEs with the BCDCOG’s contract procedures, activities and requirements and allow DBEs to provide the BCDCOG with feedback on existing barriers to participation and effective procedures to eliminate those barriers.

### **C. Prohibited Discrimination** (Section 26.7)

The BCDCOG shall not exclude persons from participation in, deny benefits to, or otherwise discriminate against any persons in connection with the award and performance of any contract governed by 49 CFR Part 26 on the basis of race, color, sex or national origin.

The BCDCOG shall not directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of this Program with respect to individuals of a particular race, color, sex or national origin.

## **II. DEFINITIONS** (Section 26.5)

Any terms used in this Program that are defined in 49 CFR § 26.5 or elsewhere in the Regulations shall have the meaning set forth in the Regulations. Some of the most common terms are defined below:

- A. **Disadvantaged Business Enterprise (DBE)** (Section 26.5): A DBE is 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 fifty-one percent (51%) of the stock is owned by one or more socially and economically disadvantaged 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** (Section 26.5): A small business concern is an existing small business, as defined by Section 3 of the Small Business Act and the Small Business Administration regulations implementing it (13 CFR Part 121), whose average annual gross receipts for the previous three (3) years does not exceed \$22.41 million (or as adjusted for inflation by the Secretary of U.S. DOT) pursuant to 49 CFR § 26.65(b).
- C. **Socially and Economically Disadvantaged Individuals (Section 26.5)**: There is a rebuttable presumption that an individual is both socially and economically disadvantaged if s/he is a citizen or lawfully admitted permanent resident of the United States and is:
1. African American (including persons having origins in any of the Black racial groups of Africa). This term has the same meaning as the term “Black American” as that term is used in 49 CFR Part 26;
  2. Hispanic American (including persons of Central or South American, Cuban, Dominican, Mexican, Puerto Rican, or other Spanish or Portuguese culture or origin, regardless of race);
  3. Native American (including persons who are Aleuts, American Indians, Eskimos, or Native Hawaiians);
  4. Asian-Pacific American (including persons whose origins are from Brunei, Burma (Myanmar), Cambodia (Kampuchea), China, the Commonwealth of the Northern Marianas Islands, the Federated States of Micronesia, Fiji, Guam, Hong Kong, Indonesia, Japan, Juvalu, Kirbati, Korea, Laos, Macao, Malaysia, Nauru, the Philippines, Samoa, Taiwan, Thailand, Tonga, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), or Vietnam;
  5. Subcontinent Asian American (including persons whose origins are from Bangladesh, Bhutan, India, the Maldives Islands, Nepal, Pakistan, or Sri Lanka);
  6. A Woman; or
  7. A member of any additional group that is designated as socially and economically disadvantaged by the Small Business Administration.

Additionally, any individual can demonstrate, by a preponderance of evidence, that he is socially and economically disadvantaged on a case-by-case basis. The BCDCOG will follow the guidelines in 49 CFR Part 26.

An individual cannot be presumed or determined on a case-by-case basis to be economically disadvantaged if s/he has a personal net worth exceeding \$750,000 (excluding the individual’s ownership interests in the small business concern and his or her primary residence).



- D. **Race-Neutral** (Section 26.5): A procedure or program that is used to assist all small businesses. For the purposes of this Program, race-neutral includes ethnic and gender neutrality.
- E. **Race-Conscious** (Section 26.5): A measure or program that is specifically focused on assisting only DBEs, including women-owned DBEs.
- F. **Personal Net Worth** (Section 26.5): The net value of the assets of an individual remaining after total liabilities is deducted. An individual's personal net worth does not include the individual's ownership interest in an applicant or participating DBE firm, or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of community property with the individual's spouse.

### **III. RESPONSIBILITY FOR DBE PROGRAM IMPLEMENTATION AND DUTIES OF DBE PROGRAM ADMINISTRATOR (Section 26.25)**

The BCD Council of Governments has designated the following individual as its DBE Liaison Officer (DBELO):

Robin Mitchum  
1362 McMillan Avenue Suite #100  
North Charleston, SC 29464  
(843) 529-0400 ext. 213  
robinm@bcdco.com

In that capacity, the DBELO is responsible for implementing all aspects of the DBE program and ensuring that the BCDCOG complies with all provision of 49 CFR Part 26. The DBELO has direct, independent access to the Chief Executive Officer of BCDCOG concerning DBE program matters. An organization chart displaying the DBELO's position in the organization is found in Attachment 1 to this program.

The DBELO is responsible for developing, implementing and monitoring the DBE program, in coordination with other appropriate officials. The DBELO has a staff of two to assist in the administration of the program. The duties and responsibilities include the following:

1. Analyzing and assessing the available resources and evidence for the establishment, achievement, and further improvement of annual overall DBE goals for U.S. DOT-assisted contracts each fiscal year;
2. Developing, monitoring and evaluating the Diversity Program for Contracts, and preparing supplemental written procedures and guidelines to implement the Program;
3. Coordinating with South Carolina Department of Transportation (SCDOT) in updating the Unified DBE Database in accordance with 49 CFR § 26.31;
4. Maintaining and updating the Bidders List in accordance with 49 CFR § 26.11;
5. Conducting race-neutral and gender-neutral measures to facilitate the participation of small business concerns, including DBEs, through outreach and other community

programs, training and business development programs, restructuring contracting opportunities, informing and assisting with preparing bids, simplifying bonding, surety and insurance requirements or other race-neutral and gender-neutral means;

6. Participating in the contract bid and award process, including recommending specific contract goals where appropriate, reviewing contract specifications, attending pre-bid conferences and evaluating bids for contractor responsiveness, responsibility and good faith efforts;
7. Monitoring specific contract performance, actual DBE participation, contract payments, and purchase requisitions;
8. Identifying contracts and procurements so that DBE goals are included in solicitations (both race neutral methods and contract specific goals) and monitors results.
9. Participating with legal counsel and project director to determine contractor compliance with good faith efforts;
10. Monitoring overall DBE participation, adjusting overall goals and means of achievement, assessing areas of over-concentration of DBE participation, and reporting to the Executive Director, the BCDCOG Board of Directors, FTA and SCDOT on behalf of FHWA, as needed;
11. Determining all certification actions including initial certifications, recertification, denials and removals;
12. Participating in the statewide Unified Certification Program in accordance with 49 CFR § 26.81;
13. Assisting the BCDCOG's DBE for contracts review;
14. Participating in the Regional Minority Affairs Committee;
15. Participating in other transit organizations on common issues pertaining to diversity programs for contracts; and
16. Maintaining all appropriate records and documentation of the Program.

#### **IV. ADMINISTRATIVE REQUIREMENTS**

##### **A. DBE Financial Institutions (Section 26.27)**

It is the policy of the BCDCOG to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions and to encourage prime contractors on U.S. DOT-assisted contracts to make use of these institutions.

The Administrator has researched the website for The Federal Reserve Board at [www.federalreserve.gov/releases/mob/](http://www.federalreserve.gov/releases/mob/) to identify minority-owned banks derived from the Consolidated Reports of Condition and Income filed quarterly by banks (FFIEC 031 through 034) and from other information on the Board's National Information Center database. The Administrator will continue to use this source to solicit minority-owned banks to participate in the DBE Program.

To date, the Administrator has identified no minority-owned financial institutions that offer services in the Charleston Area (as of December 31, 2015). Together with the BCDCOG's Manager, Finance and Administration, the Administrator shall explore the full extent of services offered by banks and other financial institutions that qualify as DBEs in the Charleston Area and determine areas in which the BCDCOG may reasonably utilize their services. The BCDCOG shall also encourage its prime contractors to use the services of DBE financial institutions.

#### **B. DBE Database (Section 26.31)**

The BCDCOG will refer interested persons to the DBE directory available from the SCDOT Disadvantaged Business Enterprise Program website at [http://www.scdot.org/doing/businessDevelop\\_SCUnified.aspx#dbe](http://www.scdot.org/doing/businessDevelop_SCUnified.aspx#dbe)

#### **C. Bidders List (Section 26.11)**

The BCDCOG will create a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on DOT-assisted contracts. The purpose of this requirement is to allow use of the bidders list in calculating overall goals. The bidder list will include the name, address, DBE non-DBE status, age, and annual gross receipts of firms. This information will be collected as follows:

- The BCDCOG will require all prime contractors bidding or proposing on U.S. DOT-assisted contracts to submit the following information about the prime contractor and all subcontractors who provide a bid, proposal or quote to the prime contractor: the firm's name, address, status as a DBE or non-DBE, number of years in business, annual gross receipts, scope of work to be performed, on the contract, and dollar amount of that work.
- This information must be received by the BCDCOG before a recommendation is made to the Board of Directors before award of contract. If the information is not received within the time specified, the bidder/proposer will be deemed non-responsive.
- Data gathering will be conducted by requiring firms bidding on contracts with subcontracting opportunities to submit a form entitled, Prime Contractor and Subcontractor/Subconsultant/ Supplier Report. In the case of firms bidding on contracts without subcontracting opportunities, data gathering will be conducted by requesting firms to complete a survey entitled, Bidder Information Survey. The Administrator will maintain the confidentiality of any proprietary information in accordance with applicable South Carolina law. This information will be requested of all bidders as further described in Section IX.

#### **D. Over-Concentration (Section 26.33)**

If the Administrator determines that DBE participation is so over-concentrated in certain types of work or contracting opportunities assisted by FTA or FHWA that it unduly burdens the participation of non-DBEs in that type of work, the Administrator will develop appropriate measures to address the over-concentration. The Administrator will seek approval of such measures from FTA or SCDOT on behalf of FHWA and, at that time, the measures will become

a part of this Program. Currently, the BCDCOG is unaware of any types of work that have a burdensome over-concentration of DBE participation.

#### **E. Business Development Programs (Section 26.35)**

The BCDCOG works with the U.S Small Business Administration to foster business development. The BCDCOG participates extensively in transportation industry associations, including the America Planning Association, Transit Association of South Carolina, and Association of Metropolitan Planning Organizations to publicize business opportunities. Additionally, advertisements for contractor opportunities with the BCDCOG are circulated through the South Carolina Business Opportunities Publication and the Charleston Chronicle, a minority newspaper publication. Through those associations, the BCDCOG purchasing and project management staff is available for and communicate with representatives of small businesses to become acquainted with the owners and to identify qualified businesses that may furnish services and products. BCDCOG staff will provide information on how to do business with the BCDCOG, technical assistance on specified contracts, and other topics of interest to small business concerns.

#### **F. Dissemination of Policy Statement (Section 26.23)**

The Administrator shall issue a signed and dated Policy Statement throughout the BCDCOG and to the business community, including DBEs and non-DBEs that perform work on U.S. DOT-assisted contracts for the BCDCOG. The Policy Statement shall be disseminated as follows:

1. Through interoffice mail to Managers, and buying staff; and
2. Through the BCDCOG's website and upon request by the interested public, including the business community.

Additionally, to ensure that potential bidders are aware of the DBE policy, the BCDCOG makes reference to this policy in its contract specifications and advertisements of all U.S. DOT-assisted contracts.

#### **G. Fostering Small Business Participation (Section 26.39)**

The BCDCOG has incorporated the following non-discriminatory element into its DBE program, in order to facilitate competition on DOT-assisted public works projects by small business concerns, both DBEs and non-DBE small businesses. BCDCOG is committed to taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors. Small Business Initiatives conducts the following outreach to encourage small business participation.

- BCDCOG will continue to participate in vendor outreach seminars offered in different parts of South Carolina, similar to the one offered by the Small Business Development Center in Charleston. The purpose of these seminars is to provide established vendors the tools they need to conduct business with government agencies and for the small business community to build relationships and expand their vendor base. During these seminars,

efforts will be made to obtain information on small business vendors to ensure that future solicitations may be sent to the small businesses in the community.

- BCDCOG will coordinate to provide its DBE program to the Center for Women in Charleston, the City of Charleston Minority Business Enterprise, the Charleston Count Minority Business Development Office, and the Small Business Development Center in Charleston.
- BCDCOG will notify small businesses or other individuals of the availability of counseling services from the Small Business Development Center.

In addition the small business provision developed and implemented by BCDCOG includes the following strategies:

- BCDCOG will evaluate each contract separately and decide, based on the scope of work and availability of small businesses to perform work activities, whether to set a goal for race-neutral small business participation.
- A Request for Proposals (RFP) with a specific small business goal will require bidders to explain how they propose to achieve the specific goal. Bidders must show a good faith effort in achieving the goal, and include documentation of efforts if they are unable to achieve the goal. The RFP will clearly state the small business goal is race/gender neutral.
- When feasible, BCDCOG will unbundle larger contracts into a series of manageable projects to facilitate participation by small businesses. To be eligible to participate in strategies designed and implemented for small businesses, the firm must:
  - a. Meet the small businesses definition as defined by U.S. DOT 49 CFR Part 26.5. This will ensure that all small businesses participating in the BCDCOG DBE program (DBEs and non-DBEs alike) are subject to the same size standards and, consequently, compete with similarly-sized businesses.
  - b. Submit a notarized affidavit attesting to meeting the definition of a small business.
  - c. Provide a listing of contracts on which the firm has performed either as a prime or subcontractor or sub-consultant.
  - d. If participation in the small business program will result in a tangible benefit for the firm, additional verification may occur to avoid program fraud.

As a component of the Small Business element, BCDCOG will track information on the certified small businesses and gather statistical data. The DBE Liaison Officer will ensure that the Small Business Element will be implemented and monitored as part of the overall DBE program within nine (9) months from FTA approval, using the following mechanisms:

- a. BCDCOG will begin reviewing future contracts to implement the Small Business Element strategies, as appropriate.
- b. Updating the small business list of projects on a quarterly basis.
- c. BCDCOG will track and report any race-neutral participation by certified DBEs achieved through its Small Business Element or program in the same way the race-neutral DBE participation is obtained and reported through other methods.

The Small Business Participation will be implemented as part and parcel of the overall DBE program. The above listed strategies will be the responsibility of the Liaison Officer, who will report to the Executive Director activities on an ongoing basis. A correspondence will be developed to inform the partner agencies of the Agency's new initiative. Periodic updates to that correspondence will be distributed. The Liaison Officer will attend meetings and events to apprise those with Small Business interests of BCDCOG's program. Lastly, the Liaison Officer will ensure that organizations supporting Small Businesses are informed of procurement opportunities and provide the needed support to facilitate their participation in those procurements.

#### **H. Monitoring Actual DBE Participation (Sections 26.37 and 26.55)**

The Administrator shall monitor and track the actual DBE participation through contractor and subcontractor reports of payments. The Administrator will maintain a running tally of payments actually made to DBE firms and may require prime contractors and DBE subcontractors and suppliers to provide appropriate documentation to verify such payments.

The Administrator shall ensure that DBE participation is counted toward contract goals and the annual overall goal in accordance with the Regulations. Credit toward overall or contract goals will only be given upon satisfactory evidence that payments were actually made to DBEs.

BCDCOG will take the following monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 26:

1. We will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 26.109.
2. We will keep a running tally of actual payments to DBE firms for work committed to them at the time of contract award.

### **V. GOALS, GOOD FAITH EFFORTS, AND COUNTING**

#### **A. No Quotas or Set-Asides (Section 26.43)**

The BCDCOG does not, and will not, use quotas nor set-asides in any way in the administration of this Program.

#### **B. Transit Vehicle Manufacturers Goals (26.49)**

BCDCOG will require each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, to certify that it has complied with the requirements of this section. Alternately, BCDCOG may at its discretion and with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of the Transit Vehicle Manufacturer complying with this element of the program.

### C. Achieving the Annual Overall Goals (Section 26.51)

The BCDCOG shall achieve the annual overall goals for DBE participation through a combination of race-neutral and gender-neutral measures and contract goals for particular contracts with subcontracting opportunities.

1. *Race-Neutral and Gender-Neutral Methods.* The BCDCOG intends to use race-neutral and gender-neutral methods to the maximum extent feasible to achieve its annual overall goals. DBE participation that is obtained on contracts that have no specific DBE goal, or where prime contractors use a strictly competitive bidding process that did not consider the DBE's status as a DBE in awarding a subcontract shall be considered race-neutral and gender-neutral DBE participation. In addition, the BCDCOG will use the following measures as appropriate:
  - Identifying components of the work that represent subcontracting opportunities and identifying the availability of DBE subcontractors. Contractors will be encouraged to consider small businesses for components of the work for which there is a known supply of ready, willing, and able small businesses, including DBEs, in preparing their bids;
  - Assisting in overcoming limitations in bonding and financing;
  - Providing technical assistance in orienting small businesses to public contract procedures, use of the Internet, and facilitating introductions to the BCDCOG's and other U.S. DOT recipients' contracting activities;
  - Providing outreach and communication programs on contract procedures and contract opportunities to ensure the inclusion of DBEs;
  - Ensuring the distribution of the DBE Database to the widest feasible universe of potential prime contractors; and
  - Providing business development assistance.
2. *Contract-Specific Goals.* The Board of Directors shall establish contract-specific DBE participation goals on particular prime contracts with subcontracting opportunities to the extent that the BCDCOG cannot achieve its annual overall goals with race-neutral and gender-neutral measures. Where a contract-specific DBE goal has been established, the bidder or proposer must meet the contract-specific goal or demonstrate that it made sufficient good faith efforts to do so. A bidder shall be ineligible for contract award if it does not meet the goal or demonstrate sufficient good faith efforts.

The goal shall be established by the Executive Director based upon a recommendation from the Administrator. The contract-specific goal shall apply to the percentage participation of DBEs in the total contract work and be set forth in the Special Provisions of the contract specifications. The BCDCOG is not required to establish a contract-specific goal for every prime contract with subcontracting opportunities. For each contract involving subcontracting opportunities, the factors outlined below will be considered to determine whether a contract-specific goal should be established for the particular contract and, if so, what the percentage goal shall be:

- The projected portion of the annual overall goals that will be met by establishing contract-specific goals;
  - The progress toward achieving the annual overall goals;
  - The full range of activities in the proposed contract;
  - The availability of DBEs as prime contractors or subcontractors in the types of work involved in the performance of the proposed contract;
  - The unique conditions of the project that might affect the ability of the prime contractor to coordinate, utilize, or incorporate subcontractors or suppliers into the project. (Projects consisting of only one or two subtrades may not be appropriate for a contract-specific goal due to the fact that establishing a goal could result in restrictive bidding.);
  - The effect that the contract-specific goal might have on the time of completion; and
  - Any other relevant criteria
3. *Awarding Contracts with Contract-Specific Goals.* The BCDCOG shall award contracts to the lowest responsible bidder as required by the procurement guidelines, where applicable. For such contracts, as well as for contracts awarded pursuant to a Request for Proposal procedure where the lowest responsible bidder standard does not apply, a bidder that fails to demonstrate that it achieved the contract-specific DBE participation goal and fails to demonstrate that it made sufficient good faith efforts to do so shall not be deemed “responsive” and, therefore, shall be ineligible for award of the contract.
- a. Evaluation of Bids or Proposals. After the bid opening, or submission deadline for proposals, the Administrator shall evaluate all bids/proposals to determine whether the bidders/proposers submitted all of the information required by 49 CFR §26.53(b). The responsible bidder with the lowest apparent bid price, or the most highly ranked proposer, who also meets the contract-specific DBE goal or demonstrates sufficient good faith efforts shall be recommended for the contract award. In the event that the bidder with the lowest monetary bid price fails to meet the contract-specific goal or fails to demonstrate sufficient good faith efforts, or is otherwise unresponsive or not responsible, the Administrator shall evaluate the bidder with the next lowest bid price. Should the Administrator determine that additional information is needed to evaluate a bidder’s or proposer’s submission with regard to the DBE requirements, the Administrator shall request said bidder or proposer to submit the required information, or may contact the listed DBEs directly.
  - b. Evaluation of DBE Certification Status. The BCDCOG shall require that any DBEs listed by bidders for participation in the contract be certified DBEs as of the time of bid opening. The Administrator shall review the Bidder’s DBE Report to confirm each DBE firm’s certification status. The BCDCOG shall accept current certifications by SCDOT, U.S. DOT and its agencies, the Small Business Administration, or other U.S. DOT federal financial assistance recipients.
  - c. Determination of Amount of DBE Participation. The Administrator shall review the total dollar value of the work and the total contract bid price reported on the Prime



Contractor and Subcontractor/Subconsultant/Supplier Report for accuracy and shall compare it to the contract-specific goal established for the contract.

- d. Determination of Good Faith Efforts. If the amount of DBE participation does not meet the contract-specific goal, the Administrator shall review the good faith efforts report submitted by the bidder. The Administrator shall determine whether the bidder has performed the quality, quantity and intensity of efforts that demonstrates a reasonably active and aggressive attempt to meet the contract-specific goal in accordance with 49 CFR Part 26, Appendix A, which is incorporated herein.
- e. Bidder's Right to Administrative Reconsideration. In the event that the Administrator determines that the apparent low bidder has not met the contract-specific goal and has not demonstrated good faith efforts, the Administrator will notify the bidder in writing. The notification shall include the reasons for the determination and that the bidder has the right to submit further written documentation or appear before the Executive Director for reconsideration prior to the time that a recommendation for award of contract is presented to the Board of Directors.

Within two (2) working days of being informed by the BCDCOG that it is not responsive/responsible because it has not documented sufficient good faith efforts, a bidder may request administrative reconsideration. Bidder should make this request in writing to the following reconsideration official: Finance Manager, Berkeley-Charleston-Dorchester Council of Governments, 1362 McMillan Ave., Suite 100, North Charleston, SC 29405, and telephone number (843) 529-0400. The Executive Director shall provide the bidder with a written decision on reconsideration, explaining the basis for its determination. In the event that the Executive Director finds that the bidder has not met the contract goal or demonstrated good faith efforts, the Administrator will deem said bidder not responsive and evaluate the bidder submitting the next lowest bid.

- f. Recommendation for Award. Following the determination of the lowest responsive and responsible bidder, the Administrator shall prepare a report on the lowest responsive and responsible bidder's compliance with the DBE requirements for review by the Executive Director and for presentation to the Board of Directors, if applicable, at the time the contract award is considered. If the Board or the Executive Director disagrees with the recommendation, it shall reject all bids or refer the matter back to staff for further evaluation and recommendation. The decision of the Board of Directors or the Executive Director on the award of contract, if such a decision is made, shall be final and binding on all parties, subject to compliance with the BCDCOG's bid protest procedures.

### **XIII. Good Faith Efforts Procedures (Section 26.53; 26.53f)**

1. *Administrative Reconsideration (Section 26.53d)*. Within 10 days of being informed by BCDCOG that it is not responsive because it has not documented sufficient good faith efforts, a bidder/offeror may request administrative reconsideration. Bidder/offerors should make this request in writing to the following reconsideration official: Robin Mitchum, Finance Manager,

BCDCOG, 1362 McMillan Ave., Suite 100, North Charleston, SC 29405, phone number (843) 529-0400, email address robinm@bcdco.com.

As part of this reconsideration, the bidder/offeror will have 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 bidder/offeror will have the opportunity to meet in person with our reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do. We will send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

2. BCDCOG requires that prime contractors not terminate a DBE subcontractor listed on a bid/contract with a DBE contract goal without BCDCOGs prior written consent. Prior written consent will only be provided where there is “good cause” for termination of the DBE firm, as established by Section 26.53(f)(3) of the DBE regulation.

Before transmitting to BCDCOG its request to terminate, the prime contractor must give notice in writing to the DBE of its intent to do so. A copy of this notice must be provided to BCDCOG prior to consideration of the request to terminate. The DBE will then have five (5) days to respond and advise BCDCOG of why it objects to the proposed termination.

In those instances where “good cause” exists to terminate a DBE’s contract, BCDCOG will require the prime contractor to make good faith efforts to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal. BCDCOG will require the prime contractor to notify the DBE Liaison officer immediately of the DBE’s inability or unwillingness to perform and provide reasonable documentation.

In this situation, the BCDCOG will require the prime contractor to obtain our prior approval of the substitute DBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts.

If the contractor fails or refuses to comply in the time specified, our contracting office will issue an order stopping all or part of payment/work until satisfactory action has been taken. If the contractor still fails to comply, the contracting officer may issue a termination for default proceeding.

## **VII. Counting and Tracking DBE Participation (Section 26.55)**

Only the work actually performed by a DBE will be counted towards the DBE goal. The cost of supplies and materials obtained by the DBE or equipment leased (except from the prime contractor or its affiliate) may also be counted.

Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals. Expenditures may only be counted if the DBE is performing a commercially useful function. A

DBE should perform at least thirty percent (30%) of the total cost of its contract with its own work force.

If materials or supplies are obtained from a DBE manufacturer, 100 percent (100%) of the cost will be counted. If the materials and supplies are purchased from a DBE regular dealer, 60 percent (60%) of the cost will be counted.

DBE achievement will not be counted toward the overall goal until the DBE has been paid. The Administrator will track the participation of DBEs in contract-specific goal contracts separately from the participation of DBEs that is considered race-neutral. Additionally, the Administrator will not count that portion of a DBE's participation that is achieved after the certification of the DBE has been removed during the performance of a contract.

The contractor must request, in writing to the Contract Manager for approval, the substitution of a DBE firm. The letter must include the names and addresses of the firms, the dollar amounts, and the reasons for the substitution. If the Contract Manager approves the substitution, the BCDCOG will notify both the contractor and the DBE firm being substituted the substitution and a procedure for written objection from the DBE subcontractor. If the contractor is meeting the contract goal with this substitution, the contractor must provide the required good faith effort to the Contract Manager for consideration.

### **VIII. REQUIRED CONTRACT PROVISIONS** (Sections 26.13, 26.23, 26.27, 26.29, 26.31, 26.37, 26.39, 26.55)

Each financial assistance agreement the BCDCOG signs with FTA or SCDOT on behalf of FHWA will include a nondiscrimination assurance from the BCDCOG. U.S. DOT-assisted contracts that the BCDCOG lets will include, as appropriate, the model contract provisions that are set forth in the current edition of the BCDCOG's Standard Disadvantaged Business Enterprise Language/Forms Manual, available from the Administrator. The Administrator shall have discretion to modify the provisions for particular contracts as needed, in consultation with the Attorney. These required contract provisions consist of:

#### **The BCDCOG's DBE Program Policy**

A nondiscrimination assurance from the contractor (and each subcontract the prime contractor signs with a subcontractor). The contractor 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 29 CFR Part 26 in the award and administration of U.S. DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as recipient deems appropriate. BCDCOG encourages prime contractors to use financial institutions owned and controlled by socially and economically disadvantaged individuals in the community.

- The website address for the DBE directory identifying all firms eligible to participate as DBEs in the BCDCOG's program
- The DBE participation goal (where applicable)
- A section that provides the DBE certification standards

- A section that provides how DBE participation is counted toward goal
- A section on reporting requirements, including a provision ensuring that DBE participation is credited toward overall or contract goals only when payments are actually made to DBE firms
- A section on administrative remedies to ensure compliance with the DBE program.

## **IX. CERTIFICATION**

The BCDCOG ensures that only DBE firms currently certified on the SCDOT directory will participate as DBEs in our program.

## **X. MONITORING AND RECORD KEEPING (Sections 26.11(a), 26.11(c), and 26.37)**

### **A. Uniform Report of DBE Awards or Commitments and Payments (Section 26.11(a))**

BCDCOG will report DBE participation to the relevant operating administration [FAA, FHWA and/or FTA] using the Uniform Report of DBE Awards or Commitments and Payments, found <https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/new-dbe-uniform-report>.

### **B. Bidders List (Section 26.11(c))**

The BCDCOG will require all prime contractors bidding on U.S. DOT-assisted contracts to return, at the time of bid opening (options apply as to the time this information is required so long as it is prior to the award of the contract), the following information about the prime contractor and all subcontractors who provided a bid:

- Firm name
- Firm address
- Firm's status as a DBE or non-DBE
- Age of the firm
- Annual gross receipts

The BCDCOG will use this information to maintain and update its Bidders List.

### **C. Monitoring Payments to DBEs (Section 26.37)**

It is the contractor's responsibility to maintain records and documents for three (3) years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of the BCDCOG or U.S. DOT. This reporting requirement is also extended to any certified DBE subcontractor. The BCDCOG will maintain a running tally of payments actually made to DBE firms and may require prime contractors and DBE subcontractors and suppliers to provide appropriate documentation to verify such payments. Credit toward overall or contract goals will only be given upon satisfactory evidence that payments were actually made to DBEs.

The BCDCOG may perform interim audits of contract payments to DBEs. The audit will review payments to DBE subcontractors to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the report of proposed DBE participation.

**D. Reporting to U.S. DOT (Section 26.11)**

The BCDCOG will continue to report DBE participation and annual overall goal setting methods to FTA and SCDOT on behalf of FHWA as directed. Statistical data will be maintained as prescribed on a semi-annual basis to provide reports to U.S. DOT agencies reflecting the DBE participation on the BCDCOG's federally-assisted procurement activities. These reports will provide DBE participation information on the BCDCOG's race-neutral and gender-neutral contracts; race-conscious contracts; and the combined DBE participation on all federally-assisted procurement activities.

**E. Record Keeping Requirements (Section 26.11)**

The BCDCOG will submit annually U.S. DOT Form 4630, as modified for use by FAA recipients. The BCDCOG will report DBE participation on a quarterly basis, using U.S. DOT Form 4630. These reports will reflect payments actually made to DBEs on U.S. DOT-assisted contracts. The BCDCOG will report DBE participation on a quarterly basis, using U.S. DOT form 4630.

**F. Federal Financial Assistance Agreement (Section 26.13)**

BCDCOG has signed the following assurances, applicable to all U.S. DOT-assisted contracts and their administration:

*1. Assurance (Section 26.13a)*

BCDCOG shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any U.S. DOT assisted contract or in the administration of its DBE Program or the requirements of 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of U.S. DOT assisted contracts. The recipient's DBE Program, as required by 49 CFR part 26 and as approved by U.S. DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the BCDCOG of its failure to carry out its approved program, the Department may impose sanction as provided for under part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

This language will appear in financial assistance agreements with sub-recipients.

*2. Contract Assurance (Section 26.13b)*

BCDCOG will ensure that the following clause is placed in every U.S. DOT-assisted contract and subcontract:

*“The contractor, sub-recipient, or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.”*

#### **G. Contract Remedies (Section 26.37)**

The BCDCOG will monitor compliance of its contractors on federally-assisted contracts with the requirements of the Regulations and the DBE Program. The BCDCOG may impose such contract remedies as are available under federal, state and local law and regulations for non-compliance. Such remedies may include, but are not limited to, withholding of progress payments and contract retentions, imposition of liquidated damages, and termination of the contract in whole or in part.

#### **H. Prompt Payment Mechanisms (Section 26.29a)**

The BCDCOG will include the following clause in each U.S. DOT-assisted prime contracts:

*“The prime contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than 30 days from the receipt of each payment the prime contract receives from BCDCOG. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of BCDCOG. This clause applies to both DBE and non-DBE subcontracts.”*

#### **I. Retainage Mechanisms (Section 26.29b)**

The BCDCOG will include the following clause in each U.S. DOT-assisted prime contracts:

*“The prime contractor agrees further to return retainage payments to each subcontractor within 30 days after the subcontractors work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the BCDCOG. This clause applies to both DBE and non-DBE subcontracts.”*

#### **XI. PUBLIC PARTICIPATION AND OUTREACH EFFORTS (Sections 26.45 and 26.51)**

The BCDCOG’s activities, managing public participation and outreach efforts, are directed at assisting the BCDCOG to solicit public input to set annual overall DBE participation goals and meet BCDCOG annual overall DBE goals.

In establishing annual overall DBE goals, the BCDCOG will conduct public participation process. This will include:

- Prior to finalizing the Annual Overall Goals Analysis Report, the BCDCOG will consult with U.S. DOT agencies, other U.S. DOT grantees, minority, women’s and general contractor groups, community organizations, or other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs,

and the BCDCOG's efforts to establish a level playing field for the participation of DBEs.

- The BCDCOG will publish an annual notice announcing its proposed annual overall goals, informing the public that the BCDCOG's Annual Overall Goals Analysis Report is available for inspection during normal business hours at the DBE Program Office for a period of thirty (30) days, and that the BCDCOG and the U.S. DOT will accept comments on the proposed goals for forty-five (45) days from the date of the notice. The notice will be distributed in general circulation media, local minority-focused media, and trade association publications.
- The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any U.S. DOT-assisted contract or in the administration of its DBE Program or the requirements of 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of U.S. DOT-assisted contracts. The recipient's DBE Program, as required by 49 CFR Part 26 and as approved by U.S. DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and / or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).
- If the awards and commitments shown on [Recipient's] Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall applicable to that fiscal year, BCDCOG will:
  - a. Analyze in detail the reason for the difference between the overall goal and the actual awards/commitments;
  - b. Establish specific steps and milestones to correct the problems identified in the analysis.

## **XI. CERTIFICATION PROCEDURES (SECTION 26.81)**

BCDCOG is the member of a Unified Certification Program (UCP) administered by the South Carolina Department of Transportation. BCDCOG will use and count for DBE credit only those certified by the South Carolina Department of Transportation. The UPC will meet all of the requirements of this section.

## **ATTACHMENTS**

- Attachment 1: Organizational Chart
- Attachment 2: DBE Directory (included in this document below)
- Attachment 3: Goal Setting Methodology
- Attachment 4: Good Faith Efforts Forms
- Attachment 5: DBE Regulation, 49 CFR Part 26 (included in this document below)

## **ATTACHMENT 2**

DBE Directory

The DBE Directory can be found at:

[http://www.scdot.org/doing/businessDevelop\\_SCUnified.aspx](http://www.scdot.org/doing/businessDevelop_SCUnified.aspx)

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## **ATTACHMENT 5**

Regulation: 49 CFR Part 26

[http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26\\_main\\_02.tpl](http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26_main_02.tpl)