EXHIBIT 16

DEVELOPER'S DBE PERFORMANCE PLAN

DBE PLAN

The following, together with appendices, is submitted as an individual Disadvantaged Business Enterprise (DBE) Plan to address the applicable requirements in TxDOT's Disadvantaged Business Enterprise (DBE) Program adopted pursuant to 49 CFR Part 26, the Texas Administrative Code and the Comprehensive Development Agreement for a Concession for the IH 635 Managed Lanes Project (CDA):

1. GOALS

A. Percentage Goals

The following realistic percentage goals are presented below to reflect the Developer's good faith effort to employ Disadvantaged Business Enterprises whenever possible in accordance with the regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26.

i. 12.12 percent of the total design work and other professional services subcontracting/procurement dollars shall be offered to subcontractors and/or suppliers owned and controlled by socially and economically disadvantaged individuals.

ii. 12.12 percent of the total planned construction subcontracting/procurement dollars shall be offered to subcontractors and/or suppliers owned and controlled by socially and economically disadvantaged individuals.

2. PRINCIPAL TYPES OF SUPPLIES AND SERVICES TO BE SUBCONTRACTED

The principal products and/or services the Developer anticipates subcontracting and identification of DBEs for performance of design work, other professional services and construction will be determined as work progresses and submitted to TxDOT on the DBE commitment agreement form SMS 4901.

3. METHOD FOR DEVELOPING GOALS

The work activities to be self-performed by the Developer's workforce will be identified by human resource managers and project management personnel based on best value assessment of each work activity and labor resource. The Developer's labor and materials sourcing strategy embodies preferences in offering subcontractor-designated work to qualified DBE's, as feasible.

The goals listed herein reflect internal policy objectives and procedures that require a careful review and evaluation process of the services and/or products to be subcontracted. The subcontracting data accumulated by the Developer through our

sourcing/evaluation process for this project will be based on an aggressive outreach program targeted at maximizing the utilization of qualified DBE's whenever practicable by using a broad base of resources to identify and source potential DBE's.

4. SOURCES FOR SOLICITATION

The following sources have been identified by the Developer as available resources to locate and solicit appropriate disadvantaged business enterprises and will be utilized as needed:

i. Owner provided subcontractor listings

ii. Texas Unified Certification Program (TUCP) directory

iii. Procurement Marketing and Access Network (PRO-Net) of the Small Business Administration (SBA);

iv. The Developer's Internal Vendor Database – created from letters of introduction, pre-qualification documents, and personal interviews with small, small disadvantaged, women-owned, HUB Zone, and service disabled veteran enterprise representatives;

v. ***The Blue Book of Building and Construction,*** regional directories of building and construction vendors;

vi. ***MBE Contractor Directory*** – compiled and maintained by the Associated General Contractors of America;

vii. Office of Small and Disadvantaged Business Utilization Specialist;

viii. National Directories
- *National Directory of Women-Owned Businesses*
- *National Directory of Minority-Owned Business Firms*
- *Smoke Signals*
- *The Business Women's Network Directory*
- *National Center of American Indian-Owned Businesses*

ix. Databases
- *Minority Business Development Agency (MBDA)*
- *GSA's Office of Enterprise Development Vendor Profile Database*
- *Databases Established by Various Government Agencies*

x. Publications
- *Small Business Resource Guide*
- *Federal Acquisition Report*
- *Washington Business Journal's Book of Lists*
- *Minorities in Business Daily*
- *Local Newspaper and Trade Publications*

xi. Trade and Professional Associations

- *National Foundation for Women Business Owners (NFWBO)*
- *National Minority Supplier Development Council, Inc.*
- *National Association of Minority Contractors*
- *National Center for American Indian Enterprise Development*
- *National Business League*
- *Latin American Management Association*
- *The National Black Business Council, Inc.*
- *Hispanic Business Professional Women Association*

All subcontractors considered for Invitations to Bid by the Developer, including DBEs are asked to complete a Prequalification Form. This form is reviewed internally by The Developer to evaluate the following areas of concern such as:

- Quality of services and/or products;
- Pricing structure;
- Delivery schedule;
- Financial stability;
- Safety record;
- Insurance/Bonding information;
- Experience;
- Personnel;
- Equipment.

Additional information, if required, may be obtained from Dun and Bradstreet reports, personal interviews and contact with business references.

5. INVITATION TO BID

Following the identification and prequalification of a potential subcontractor/supplier, an **Invitation to Bid** is formulated and electronically issued to the subcontractor. A log is maintained by the Procurement Department to track the subcontractors contacted and their response. Sample subcontract and/or purchase orders agreements are included with the Invitation as a resource document for the subcontractor's information and pricing consideration. All plans and specifications are made available for review. Applicable addenda to the contract are also transmitted to the subcontractor as necessary.

6. SELECTION PROCESS AND AWARD

The responsive subcontractor quotes are evaluated based on price, qualifications of bid, inclusions/exclusions, Prequalification information, etc. After careful consideration with input from Subcontracting, Estimating, and Management, the Project Team makes a selection of the successful subcontractors for each work scope subcontracted. If a DBE is not selected the reasons for this decision is documented on the vendor log for the particular work order. Appropriate agreements are drafted and forwarded to the subcontractor for execution.

7. PLAN ADMINISTRATION

The following individual will administer the subcontracting program:

NAME: Alfonso Orol
DBE Liaison Officer

ADDRESS: LBJ Infrastructure Group
7700 Chevy Chase Dr. Bldg ONE, Suite 500C
Austin, TX 78752

PHONE: 512 637-8545
FAX: 512 637-1431

The specific duties, as they relate to this subcontracting plan, include general overall responsibility for the subcontracting program, and the development, preparation and execution of individual subcontracting plans, and the monitoring of performance relative to the contractual subcontracting requirements contained in this plan including, but not limited to:

- The duties described in Paragraph 4 above.
- Preparing and submitting periodic governmental required subcontracting reports including a monthly DBE Plan assessment report.
- Coordinating activities during compliance reviews by Federal agencies.
- Coordinating activities involving small, small disadvantaged, women-owned, HUB Zone, and service disabled veteran enterprises, as related to the subcontracting program.
- Monitoring attainment of proposed goals.

8. OUTREACH EFFORTS

A. Efforts will be taken to assure that small, small disadvantaged, women-owned, HUB Zone, and service disabled veteran business concerns will have an equitable opportunity to compete, along with large businesses, for subcontract work. Outreach efforts will be made through:

i. Contacts with minority and small business trade associations.

ii. Contacts with business development organizations.

iii. Contacts with the TxDOT General Service Division, Business Opportunities Program (BOP) Branch.

iv. Attendance at SBA procurement conferences and trade fairs.

v. Mentor-Protégé relationships.

B. Internal efforts will be made to guide and encourage purchasing agents, buyers, etc., to utilize small, small disadvantaged, women-owned, HUB Zone, and service disabled veteran enterprises, as follows:

i. By notifying appropriate internal purchasing agents and buyers of small, small disadvantaged, women-owned, HUB Zone, and service disabled veteran business sources.

ii. By monitoring efforts to achieve the goals of the subcontracting plan.

9. PLANS FOR SUBCONTRACTORS FOR THE DEVELOPER

A. The Developer shall include in all subcontracts subject to this plan the following language incorporated by reference in accordance with all applicable FAR regulations:

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 49 CFR Part 26 in the award and administration of DOT-assisted contracts and subcontracts. 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 DEVELOPER deems appropriate.

The Contractor shall pay the subcontractor or subprovider under this prime contract for satisfactory work performed within ten (10) days after the Contractor receives payment for the work performed by the subcontractor. Also, any retained monies on a subcontractor's work shall be paid to the subcontractor within ten (10) days after satisfactory completion of all the subcontractor's work. Completion of all the subcontractor's work shall include testing, maintenance and other similar periods that are the responsibility of the subcontractor.

SUBCONTRACTOR hereby specifically agrees to be bound and to comply with the subcontracting requirements of the terms and conditions of the CDA including but not limited to, the requirement that SUBCONTRACTOR, except small business concerns, adopt and comply with a plan similar to this plan and submit such plan for review and acceptance by the DEVELOPER.

10. COMPLIANCE WITH REPORTING REQUIREMENTS

A. The Developer agrees to submit monthly reports and to cooperate in any studies or surveys, as may be required by the Contracting Agency, in order to determine the extent of the compliance by the Owner to achieve the goal of the DBE plan. These reports will be due within 15 days after the end of a calendar month and will be submitted until all DBE subcontracting or material supply activity is completed.

B. The Developer agrees to submit all applicable Standard Forms. SMS 4901, SMS 4901-M/S, SMS 4901-T, SMS 4903 and SMS 4904 located on the TxDOT website at www.txdot.state.tx.us/forms/bop

C. To ensure that DBE requirements are complied with, TxDOT will monitor The Developer's efforts by reviewing monthly reports submitted to TxDOT by The Developer indicating progress in achieving the DBE contract goal and by compliance reviews conducted on the project site by TxDOT.

11. RECORDS

A. The Developer agrees to maintain the following types of records to document compliance with the DBE plan:

i. Small, small disadvantaged, women-owned, HUB Zone, and service disabled veteran business concern source lists, guides, and the other data identifying these suppliers, subcontractor, etc.

ii. Organizations contacted for providing small, small disadvantaged, women-owned, HUB Zone, and service disabled veteran business sources.

iii. Records on each subcontract solicitation resulting in an award showing whether or not small and small disadvantaged business concerns were contacted, and if not, why not; whether or not small, small disadvantaged, women-owned, HUB Zone, and service disabled veteran business concerns were contacted, and if not, why not; and, if applicable the reason the award was not made to a small or small disadvantaged business concern.

iv. Records of any outreach efforts to contact trade associations, business development, business development organizations, and conferences and trade fairs, to locate DBEs.

v. Records of internal guidance and encouragement provided to buyers through workshops, seminars, training, etc., and performance monitoring to evaluate compliance with program requirements.

vi. Records on a contract-by-contract basis to support award data submitted by the offeror to the government, including name, address, and business size of each subcontractor.

12. TRAINING

The Developer will ensure that all applicable training requirements will be accomplished with each subcontractor through orientation and/or acknowledgement of safety requirements included in all subcontract agreements.

13. EEO

All Federal employment requirements to include EEO, affirmative action, labor, and all other applicable requirements will be posted at project site and reference to these requirements attached to all subcontract agreements.

14. IMPLEMENTATION

In order to effectively implement this plan to the extent consistent with efficient contract performance, The Developer shall perform the following functions:

A. Assist disadvantaged business concerns by arranging solicitations time for the preparation of bids, quantities, specifications and delivery schedules, so as to facilitate the participation of such concerns. Where the lists of potential DBE subcontractors are excessively long, reasonable effort shall be made to give all such business concerns an opportunity to compete over a period of time.

B. Provide adequate and timely consideration of the potentialities of DBE subcontractors in all "make-or-buy" decisions.

C. Counsel and discuss subcontracting opportunities with representatives of DBE's.

D. Provide notice to subcontractors concerning penalties and remedies for misrepresentations of business status as DBE's for the purpose of obtaining a subcontract that is to be included as part or all of a goal contained in The Developer's subcontracting plan.

SPECIAL PROVISION

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Disadvantaged Business Enterprise in Federal-Aid Construction for Comprehensive Development Agreements

1. **Description**. The purpose of this Special Provision is to carry out the U. S. Department of Transportation's (DOT) policy of ensuring nondiscrimination in the award and administration of DOT assisted contracts and creating a level playing field on which firms owned and controlled by individuals who are determined to be socially and economically disadvantaged can compete fairly for DOT assisted contracts. If the Disadvantaged Business Enterprise (DBE) goal is greater than zero, Article A, "Disadvantaged Business Enterprise in Federal-Aid Construction", of this Special Provision shall apply to this contract. If there is no DBE goal, Article B, "Race-Neutral DBE Participation", of this Special Provision shall apply to this contract. The percentage goal for DBE participation in the work to be performed under this contract will be shown on the proposal. For purposes of this Special Provision, the term "contract" means Comprehensive Development Agreement or CDA, the term "Bidder" means the selected Proposer for the CDA project, and the term "Contractor" means the Developer under the CDA.

A. Article A. Disadvantaged Business Enterprise in Federal-Aid Construction.

1. **Policy**. It is the policy of the DOT and the Texas Department of Transportation (henceforth the "Department") that DBEs, as defined in 49 CFR Part 26, Subpart A and the Department's DBE Program, shall have the opportunity to participate in the performance of contracts financed in whole or in part with Federal funds. The DBE requirements of 49 CFR Part 26, and the Department's DBE Program, and the Contractor's approved DBE Performance Plan apply to this contract as follows:

   a. The Contractor will solicit DBEs through reasonable and available means, as defined in 49 CFR Part 26, Appendix A and the Department's DBE Program, or show a good faith effort to meet the DBE goal for this contract.

   b. The Contractor, subrecipient 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.

c. The requirements of this Special Provision shall be physically included in any subcontract.

d. By signing the contract proposal, the Bidder is certifying that the DBE goal as stated in the proposal will be met by obtaining commitments from eligible DBEs or that the Bidder will provide acceptable evidence of good faith effort to meet the commitment, and that, if selected for the CDA, the Bidder will submit a DBE Performance Plan meeting the requirements set forth in Section 1.A.2.m, below.

2. Definitions.

a. "Department" means the Texas Department of Transportation.

b. "DOT" means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

c. "Federal-Aid Contract" is any contract between the Texas Department of Transportation and a Contractor which is paid for in whole or in part with DOT financial assistance.

d. "DBE Joint Venture" means an association of a DBE firm and 1 or more other firm(s) to carry out a single business enterprise for profit for which purpose they combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

e. "Disadvantaged Business Enterprise" or "DBE" means a firm certified through the Texas Unified Certification Program in accordance with 49 CFR Part 26.

f. "Good Faith Effort" means efforts to achieve a DBE goal or other requirement of this Special Provision which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

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

h. "Regular Dealer" is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the firm must be

an established, regular business that engages in, as its principal business and under its own name, the purchase and sale or lease of the products in question.

A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock if it owns and operates distribution equipment for the products. Any supplementing of regular dealers own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Brokers, packagers, manufacturers' representatives, or other persons who arrange or expedite transactions shall not be regarded as a regular dealer.

i. "Broker" is an intermediary or middleman that does not take possession of a commodity or act as a regular dealer selling to the public.

j. "Race-neutral DBE Participation" means any participation by a DBE through customary competitive procurement procedures.

k. "Race-conscious" means a measure or program that is focused specifically on assisting only DBEs, including women-owned businesses.

l. "Texas Unified Certification Program" or "TUCP" provides one-stop shopping to applicants for certification, such that applicants are required to apply only once for a DBE certification that will be honored by all recipients of federal funds in the state. The TUCP by Memorandum of Agreement established six member entities to serve as certifying agents for Texas in specified regions.

m. **"DBE Performance Plan"** means the plan submitted by the selected Bidder for a CDA project describing the methods to be employed for achieving TxDOT's DBE participation goals for the Project, including Bidder's exercise of good faith efforts. The selected Bidder's DBE Performance Plan is subject to TxDOT review, comment and approval prior to execution of the CDA. Each DBE Performance Plan must at a minimum include the following:

- Specific categories of services and work anticipated for DBE participation on the project
- Identification of DBEs for performance of design work and other professional services, to the extent known at the date of submission of the DBE Performance Plan
- Identification of DBEs for construction subcontracts, to the extent known at the date of submission of the DBE Performance Plan
- Schedule for submission of DBE commitment agreements (using Form No. SMS. 4901), based on Bidder's initial project schedule; provided, however, that:

(1) DBE commitment agreements for design work and other professional services must be submitted at least 30 days prior to commencement of design work or other professional services for the applicable segment or phase of the work under the CDA;

(2) DBE commitment agreements for construction subcontracts must be submitted at least 30 days prior to commencement of construction for the applicable segment or phase of the work under the CDA.

- Detailed description of (1) good faith efforts the Bidder has exercised to identify DBEs and obtain commitment agreements prior to the date of submission of the DBE Performance Plan, and (2) good faith efforts that will be exercised by the Contractor following execution of the CDA to achieve the DBE participation goal for the project.

- The name, experience, qualifications and responsibilities of the Bidder's Civil Rights/DBE Compliance Manager

3. **Contractor's Responsibilities**. These requirements must be satisfied by the Contractor.

a. After conditional award of the contract, the Contractor shall, in consultation with the Department's Business Opportunity Programs (BOP) Office, develop and submit a DBE Performance Plan meeting the requirements set forth in Section 1.A.2.m, above, and shall also submit a completed Form No.SMS.4901, "DBE Commitment Agreement" for each DBE he/she intends to use to satisfy the DBE goal, to the extent known at the date of submission of the DBE Performance Plan. The DBE Performance Plan must be submitted to the Department's Business Opportunity Programs (BOP) Office in Austin, Texas not later than 5:00 p.m. on the 30th business day, excluding national holidays, after the conditional award of the contract. The DBE Performance Plan is subject to review, comment and approval by TxDOT prior to and as a condition of execution of the CDA.

b. DBE prime Contractors may receive credit toward the DBE goal for work performed by his/her own forces and work subcontracted to DBEs. A DBE prime must make a good faith effort to meet the goals. In the event a DBE prime subcontracts to a non-DBE, that information must be reported on Form No. SMS.4902.

c. A Contractor who cannot meet the contract goal, in whole or in part, shall make adequate good faith efforts to obtain DBE participation as so stated and defined in 49 CFR Part 26, Appendix A. The following is a list of the types of action that may be considered as good faith efforts. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or

exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

- Soliciting through all reasonable and available means (e.g. attendance at prebid meetings, advertising, and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The solicitation must be done within sufficient time to allow the DBEs to respond to it. Appropriate steps must be taken to follow up initial solicitations to determine, with certainty, if the DBEs are interested.
- Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the Contractor might otherwise prefer to perform the work items with its own forces.
- Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.
- Negotiating in good faith with interested DBEs to make a portion of the work available to DBE subcontractors and suppliers and select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiations includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.
- A Bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional cost involved in finding and using DBEs is not in itself sufficient reason for a bidders failure to meet the Contract DBE goal as long as such cost are reasonable. Also, the ability or desire of the Contractor to perform the work of the Contract with its own organization does not relieve the Bidder of the responsibility to make good faith effort. Contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.
- Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The Contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate cause for the rejection or non-solicitation of bids and the Contractors efforts to meet the project goal.
- Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or Contractor.
- Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
- Effectively using the services of available minority/women community organizations; minority/women Contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

- If the Program Manager of the BOP Office determines that the Contractor has failed to meet the good faith effort requirements, the Contractor will be given an opportunity for reconsideration by the Director of the BOP Office.

d. Should the Bidder to whom the contract is conditionally awarded refuse, neglect or fail to submit an acceptable DBE Performance Plan, the proposal guaranty filed with the bid shall become the property of the state, not as a penalty, but as liquidated damages to the Department.

e. The preceding information shall be submitted directly to the Business Opportunity Programs Office, Texas Department of Transportation, 125 E. 11th Street, Austin, Texas 78701-2483.

f. The Contractor shall not terminate for convenience a DBE subcontractor named in the commitment submitted under Section 1.A.3.a. of this Special Provision. Prior to terminating or removing a DBE subcontractor named in the commitment, the Contractor must have a written consent of the Department.

g. The Contractor shall also make a good faith effort to replace a DBE subcontractor that is unable to perform successfully with another DBE, to the extent needed to meet the contract goal. The Contractor shall submit a completed Form No.4901, "DBE Commitment Agreement," for the substitute DBE firm(s). Any substitution of DBEs shall be subject to approval by the Department. Prior to approving the substitution, the Department will request a statement from the DBE concerning it being replaced.

h. The Contractor shall designate a DBE liaison officer who will administer the Contractor's DBE program and who will be responsible for maintenance of records of efforts and contacts made to subcontract with DBEs.

i. Contractors are encouraged to investigate the services offered by banks owned and controlled by disadvantaged individuals and to make use of these banks where feasible.

4. Eligibility of DBEs.

a. The member entities of the TUCP certify the eligibility of DBEs and DBE joint ventures to perform DBE subcontract work on DOT financially assisted contracts.

b. The Department maintains the Texas Unified Certification Program DBE Directory containing the names of firms that have been certified to be eligible to participate as DBE's on DOT financially assisted contracts. This Directory is available from the Department's BOP Office. An update of the Directory can be found on the Internet at http://www.dot.state.tx.us/business/tucpinfo.htm.

c. Only DBE firms certified at the time commitments are submitted are eligible to be used in the information furnished by the Contractor as required under Section 1.A.3.a. and 3.g. above. For purposes of the DBE goal on this project, DBEs will only be allowed to perform work in the categories of work for which they are certified.

d. Only DBE firms certified at the time of execution of a contract/subcontract/purchase order, are eligible for DBE goal participation.

5. **Determination of DBE Participation**. When a DBE participates in a contract, only the values of the work actually performed by the DBE, as referenced below, shall be counted by the prime contractor toward DBE goals:

a. The total amount paid to the DBE for work performed with his/her own forces is counted toward the DBE goal. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

b. A Contractor may count toward its DBE goal a portion of the total value of the contract amount paid to a DBE joint venture equal to the distinct, clearly defined portion of the work of the contract performed by the DBE.

(1) A Contractor may count toward its DBE goal only expenditures to DBEs that perform a commercially useful function (CUF) in the work of a contract or purchase order. A DBE is considered to perform a CUF when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a CUF, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself.

In accordance with 49 CFR Part 26, Appendix A, guidance concerning Good Faith Efforts, contractors may make efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services. Contractors may not however, negotiate the price of materials or supplies used on the contract by the DBE, nor may they determine quality and quantity, order the materials themselves, nor install the materials (where applicable), or pay for the material themselves. Contractors however, may share the quotations they receive from the material supplier with the DBE firm, so that the DBE firm

may negotiate a reasonable price with the material supplier.

In all cases, prime or other subcontractor assistance will not be credited toward the DBE goal.

(2) A DBE does not perform a CUF if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation.

Consistent with industry practices and the DOT/Department's DBE program, a DBE subcontractor may enter into second-tier subcontracts, amounting up to 70% of their contract. Work subcontracted to a non-DBE does not count towards DBE goals. If a DBE does not perform or exercise responsibility for at least 30% of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, it will be presumed that the DBE is not performing a CUF.

(3) A DBE trucking firm (including an owner operator who is certified as a DBE is considered to be performing a CUF when the DBE is responsible for the management and supervision of the entire trucking operation on a particular contract and the DBE itself owns and operates at least 1 fully licensed, insured, and operational truck used on the contract.

(a) The Contractor receives credit for the total value of the transportation services the DBE provides on a contract using trucks it owns, insures, and operates using drivers it employs.

(b) The DBE may lease trucks from another DBE firm, including an owner operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the Contract.

(c) The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by the DBE-owned trucks on the contract. Additional participation by non-DBE lessees receive credit

only for the fee or commission it receives as result of the lease arrangement.

(d) A lease must indicate that the DBE has exclusive use of and control over the trucks giving the DBE absolute priority for use of the leased trucks. Leased trucks must display the name and identification number of the DBE.

(4) When a DBE is presumed not to be performing a CUF the DBE may present evidence to rebut this presumption.

c. A Contractor may count toward its DBE goals expenditures for materials and supplies obtained from a DBE manufacturer, provided that the DBE assumes the actual and contractual responsibility for the materials and supplies. Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

(1) If the materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies toward DBE goals. (Definition of a DBE manufacturer found at Section 1.A.5.c.(1) of this provision.)

For purposes of this Section 1.A.5.c.(1), a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

(2) If the materials or supplies are purchased from a DBE regular dealer, count 60% of the cost of the materials or supplies toward DBE goals.

For purposes of this Section 1.A.5.c.(2), a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business:

(A) To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.

(B) A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone or asphalt without owning, operating, or maintaining a place of business as provided in the first paragraph under Section 1.A.5.c.(2), if the person both owns and operates

distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

(C) Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of Section 1.A.5.c.(2).

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

(4) Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, provided you determine the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

d. If the Contractor chooses to assist a DBE firm, other than a manufacturing material supplier or regular dealer, and the DBE firm accepts the assistance, the Contractor may act solely as a guarantor by use of a two-party check for payment of materials to be used on the project by the DBE. The material supplier must invoice the DBE who will present the invoice to the Contractor. The Contractor may issue a joint check to the DBE and the material supplier and the DBE firm must issue the remittance to the material supplier. No funds shall go directly from the Contractor to the material supplier. The DBE firm may accept or reject this joint checking arrangement.

The Contractor must obtain approval from the Department prior to implementing the use of joint check arrangements with the DBE. Submit to the Department, Joint Check Approval Form 2178 for requesting approval. Provide copies of cancelled joint checks upon request. No DBE goal credit will be allowed for the cost of DBE materials that are paid by the Contractor directly to the material supplier.

e. No DBE goal credit will be allowed for supplies and equipment the DBE subcontractor leases from the contractor or its affiliates.

f. No DBE goal credit will be allowed for the period of time determined by the Department that the DBE was not performing a CUF. The denial period of time may occur before or after a determination has been made by the department. In case of the denial of credit for non-performance of a CUF of a DBE, the Contractor will be required to provide a substitute DBE to meet the contract goal or provide an adequate good faith effort when applicable.

6. **Records and Reports.**

a. The Contractor shall submit monthly reports, after work begins, on DBE payments to meet the DBE goal and for DBE or HUB race-neutral participation. Report payments made to non-DBE HUBs. The monthly report is to be sent to the Area Engineer. These reports will be due within 15 days after the end of a calendar month. These reports will be required until all DBE subcontracting or material supply activity is completed. Form No. SMS.4903, "DBE or HUB Progress Report," is to be used for monthly reporting. Form No. SMS.4904, "DBE or HUB Final Report," is to be used as a final summary of DBE payments submitted upon completion of the project. The original final report must be submitted to the Business Opportunity Programs Office and a copy must be submitted to the Area Engineer. These forms may be obtained from the Department or may be reproduced by the Contractor. The Department may verify the amounts being reported as paid to DBEs by requesting copies of cancelled checks paid to DBEs on a random basis. Cancelled checks and invoices should reference the Department's project number.

b. DBE subcontractors and/or material suppliers should be identified on the monthly report by Vendor Number, name, and the amount of actual payment made to each during the monthly period. Negative reports are required when no activity has occurred in a monthly period.

c. All such records must be retained for a period of 3 years following completion of the contract work, and shall be available at reasonable times and places for inspection by authorized representatives of the Department or the DOT. Provide copies of subcontracts or agreements and other documentation upon request.

d. Prior to receiving final payment, the Contractor shall submit Form SMS.4904, "DBE or HUB Final Report". If the DBE goal requirement is not met, documentation supporting Good Faith Efforts, as outlined in Section 1.A.3.c. of this Special Provision, must be submitted with the "DBE or HUB Final Report."

e. Provide a certification of prompt payment, the Prompt Payment Certification Form 2177, to certify that all subcontractors and suppliers were paid from the previous months payments and retainage was released for those whose work is complete. Submit

the completed form each month and the month following the month when final acceptance occurred at the end of the project.

7. **Compliance of Contractor**. To ensure that DBE requirements of this DOT assisted contract are complied with, the Department will monitor the Contractor's efforts to involve DBEs during the performance of this contract. This will be accomplished by a review of monthly reports submitted to the Area Engineer by the Contractor indicating his progress in achieving the DBE contract goal, and by compliance reviews conducted on the project site by the Department.

   The Contractor shall receive credit toward the DBE goal based on actual payments to the DBE subcontractor. The Contractor shall notify the Area Engineer if he/she withholds or reduces payment to any DBE subcontractor. The Contractor shall submit an affidavit detailing the DBE subcontract payments prior to receiving final payment for the contract.

   Contractors' requests for substitutions of DBE subcontractors shall be accompanied by a detailed explanation which should substantiate the need for a substitution. The Contractor may not be allowed to count work on those items being substituted toward the DBE goal prior to approval of the substitution from the Department.

   The prime Contractor is prohibited from providing work crews and equipment to DBEs. DBE Goal credit for the DBE subcontractors leasing of equipment or purchasing of supplies from the prime contractor or its affiliates is not allowed.

   When a DBE subcontractor, named in the commitment under Section 1.A.3.a. of this Special Provision, is terminated or fails to complete its work on the contract for any reason, the prime contractor is required to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal.

   A Contractor's failure to comply with the requirements of this Special Provision shall constitute a material breach of this contract. In such a case, the Department reserves the right to terminate the contract; to deduct the amount of DBE goal not accomplished by DBEs from the money due or to become due the Contractor, or to secure a refund, not as a penalty but as liquidated damages to the Department or such other remedy or remedies as the Department deems appropriate.

B. **Article B. Race-Neutral Disadvantaged Business Enterprise Participation**. It is the policy of the DOT that Disadvantaged Business Enterprises (DBE) as defined in 49 CFR Part 26 Subpart A, be given the opportunity to compete fairly for contracts and subcontracts financed in whole or in part with Federal funds and that a maximum feasible portion of the Department's overall DBE goal be

met using race-neutral means. Consequently, if there is no DBE goal, the DBE requirements of 49 CFR Part 26, apply to this contract as follows:

The Contractor will offer DBEs as defined in 49 CFR Part 26, Subpart A, the opportunity to compete fairly for contracts and subcontractors financed in whole or in part with Federal funds. Race-Neutral DBE and non-DBE HUB participation on projects with no DBE goal shall be reported on Form No. SMS.4903, "DBE or HUB Progress Report" and submitted to the Area Engineer each month and at project completion. Payments to DBEs reported on Form SMS.4903 are subject to the requirements of Section 1.A.5, "Determination of DBE Participation."

The Contractor, subrecipient 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.

SPECIAL PROVISION

009---009
Measurement and Payment

For this project, Item 009, "Measurement and Payment," of the Standard Specifications, is hereby amended with respect to the clauses cited below, and no other clauses or requirements of this Item are waived or changed hereby.

Article 9.6. Progress Payments, Section A, Retainage is voided and replaced by the following:

A. Retainage. Retainage will not be withheld on this project.

Article 9.6. Progress Payments, Section B, Payment Provisions for Subcontractors is voided and replaced by the following:

B. Payment Provisions for Subcontractors. For the purposes of this Article only, the term subcontractor includes suppliers and the term work includes materials provided by suppliers at a location approved by the department. Pay the subcontractors for work performed within 10 days after receiving payment for the work performed by the subcontractor. Also, pay any retainage on a subcontractor's work within 10 days after satisfactory completion of all of the subcontractor's work. Completed subcontractor work includes vegetative establishment, test, maintenance, performance, and other similar periods that are the responsibility of the subcontractor.

For the purpose of this Section, satisfactory completion is accomplished when:

- the subcontractor has fulfilled the Contract requirements of both the Department and the subcontract for the subcontracted work, including the submittal of all information required by the specifications and the Department; and
- the work done by the subcontractor has been inspected, approved, and paid by the Department.

The inspection and approval of a subcontractor's work does not eliminate the Contractor's responsibilities for all the work as defined in Article 7.14, "Contractor's Responsibility for Work."

The Department may pursue actions against the Contractor, including withholding of estimates and suspending the work, for noncompliance with the subcontract requirements of this Section upon receipt of written notice with sufficient details showing the subcontractor has complied with contractual obligations as described in this Article.

These requirements apply to all tiers of subcontractors. Incorporate the provisions of this Article into all subcontract or material purchase agreements.