

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TRANSPORTATION
CONSTRUCTION DIVISION MEMORANDUM

GENERAL SUBJECT: UTILIZATION OF DBES **NUMBER:** CD-2000-6

SPECIFIC SUBJECT: NEW SPECIAL PROVISION FOR SECTION 110.04 AND ADMINISTRATIVE REVIEW AND PANEL HEARING GUIDELINES **DATE:** JANUARY 18, 2000

Original w/Signature on file in Construction Division

C. F. GEE
CONSTRUCTION ENGINEER

DIRECTED TO - DISTRICT ADMINISTRATORS

Attached is a copy of the above captioned provision and associated administrative review and panel hearing procedures. These will be effective beginning with contracts using the Special Provision for 110.04 dated January 5, 2000. A brief discussion of the major changes is as follows:

- (1) An enhanced policy statement is included.
- (2) An expanded list of definitions for key words and terms used in this document is included.
- (3) Signatures on all forms indicated herein shall be those of authorized representatives of the bidder as shown on [Form C-32](#) or [C-32A](#), or authorized by letter from the bidder.
- (4) Adds a provision for prompt payment
- (5) Adds a section regarding DBE Participation counted toward goals. This section covers:
 - (a) DBE bidders on prime contracts are required to meet goals and make good faith efforts on the same DBE basis as other prime Contractors.
 - (b) When a DBE participates in a contract, only the value of the work actually performed by the DBE is counted toward DBE goals. Such work may include:
 - (i) Credit for cost of supplies and materials; fees or commissions; providing bonds or insurance.
 - (ii) Subcontracts by DBEs and joint ventures.
 - (iii) Commercially useful function as performed by a DBE.
 - (iv) DBE trucking company regulations.
 - (c) Materials or supplies obtained from a DBE manufacturer.
 - (d) Materials or supplies purchased from a DBE regular dealer.
 - (e) Materials or supplies purchased from a DBE not a regular dealer
 - (f) Prime Contractor made commitment to firm not currently certified and a subcontract has not been executed.
 - (g) Prime Contractor has executed a subcontract with a firm before it has been notified of its ineligibility.
 - (h) VDOT same as (f) above.
 - (i) VDOT same as (g) above.
 - (j) Exception regarding the certification standard.
 - (k) Expanded good faith efforts are included.

GCW/HD: rg

VIRGINIA DEPARTMENT OF TRANSPORTATION
SPECIAL PROVISION FOR
SECTION 110.04

January 5, 2000

Section 110.04 of the Specifications is replaced by the following:

Section 110.04 Use of Disadvantaged Business Enterprises:

Policy

It is the policy of the Virginia Department of Transportation (VDOT) that Disadvantaged Business Enterprises (DBEs) shall have the maximum opportunity to participate in VDOT contracts, and that the Contractor shall take all necessary steps to ensure that DBEs have such opportunity. The Contractor shall comply with the requirements of 49 CFR Part 26 and other applicable specifications.

Definitions

Disadvantaged business enterprise or DBE means a for-profit small business concern as defined in Section 3 of the Small Business Act and relevant regulations that is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

Socially and economically disadvantaged individuals mean those individuals whom are citizens of the United States or lawfully admitted permanent residents and who are:

Women;

Black Americans - persons having origins in any of the black racial groups of Africa;

Hispanic Americans - persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

Native Americans - persons who are American Indians, Eskimos, Aleuts, Native Hawaiians, or Alaskan Natives;

Asian-Pacific Americans - persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong.

Subcontinent Asian Americans - persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka;

Any additional groups whose members are designated as socially and economically disadvantaged by the SBA.

Any individual who VDOT finds to be socially and economically disadvantaged on a case-by-case basis.

General

Upon request the Department will furnish a list of certified DBEs. This list is not an endorsement of the quality or performance of the business, but is only a listing of firms who are certified by the Department as DBEs.

Cost plus subcontracts will not be considered to be in accordance with normal industry practice and will not normally be allowed for credit.

By signing the bid, the bidder certifies that on work proposed to be sublet, the bidder has taken or will take affirmative action to seek out and consider DBEs as potential subcontractors. The Contractor shall contact DBEs to solicit their interest, capability, and prices in sufficient time to allow them to respond effectively, and shall retain, on file, proper documentation to substantiate its good faith efforts. Sufficient time for this provision will be determined by individual projects and business needs. However, five business days are usually enough.

VDOT will monitor the Contractor's DBE involvement during performance of the contract. The level of effort by the Contractor in meeting or exceeding the requirements in the contract, or his attempts to do so; or, his efforts in soliciting such involvement if no requirement is established, will be a relevant factor in determining the Contractor's performance rating for future prequalification.

The Contractor shall furnish, and shall require each subcontractor to furnish, information relative to all DBE involvement on the project for each month during the life of the contract in which participation occurs and verification is available. The information shall be indicated on Form C-63 and certified on Form C-63A or by copies of cancelled checks with appropriate identifying notations. Failure to provide the forms to the Engineer by the Contractor's monthly progress estimate date may result in delay of approval of the Contractor's monthly progress estimate for payment. The names and certification numbers of DBE firms provided by the Contractor on various forms indicated herein shall be exactly as shown on the Department's latest list of certified DBEs. Signatures on all forms indicated herein shall be those of authorized representatives of the Bidder as shown on [Form C-32](#) or [C-32A](#), or authorized by letter from the Bidder. If certified DBE firms are used which have not been previously documented, including those on projects with no requirements established, the Contractor shall be responsible for submitting necessary documentation to cover such work prior to the DBE beginning work.

Any agreement between a bidder and a DBE whereby the DBE promises not to provide quotations for performance of work to other bidders is prohibited.

The Contractor shall designate and make known to the Engineer a liaison officer who is assigned the responsibility of administering and promoting an active program for use of DBEs.

The Contractor is encouraged to use the services of banks owned or controlled by disadvantaged individuals; however, use of their services will not be credited toward attainment of the participation established for the contract. The Department has on file, and will make available on request, the names and addresses of known disadvantaged owned banks in Virginia.

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

All sanctions noted in this provision are automatic unless the Contractor exercises the right of appeal within the required time frame(s). Panel hearing requirements, processes, and procedures shall be in accordance with guidelines current at the time of proceedings.

DBE Participation Counted Toward Goals

DBE bidders on prime contracts shall make the same outreach efforts as non-DBE bidders and to document good faith efforts in situations where they do not fully meet contract goals.

When a DBE participates in a contract, only the value of the work actually performed by the DBE is counted toward DBE goals.

The entire amount of that portion of a construction contract that is performed by the DBE's own forces is counted. The cost of supplies and materials obtained by the DBE for the work of the contract, including

supplies purchased or equipment leased by the DBE except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate is included.

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 contract, toward DBE goals, provided the fee is determined to be reasonable and not excessive as compared with fees customarily allowed for similar services, is counted.

When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is, a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

When a DBE performs as a participant in a joint venture, only the portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals is counted.

Expenditures to a DBE contractor toward DBE goals are counted only if the DBE is performing a commercially useful function on that contract.

A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE shall also be responsible, with respect to materials and supplies used on the contract, for negotiating prices, determining quality and quantity, ordering the material, and installing where applicable and paying for the material itself. To determine whether a DBE is performing a commercially useful function, the amount of work subcontracted, industry practices, a fair price for the value of the work actually performed and the DBE credit claimed for its performance of the work, and other relevant factors, will be evaluated.

A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. If it is determined that the DBE is an extra participant, similar transactions, particularly those in which DBEs do not participate will be examined. When a DBE is determined to not be performing a commercially useful function, the DBE may present evidence to support his position of performing a commercially useful function.

If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its Contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, it will be determined that the DBE is not performing a commercially useful function.

A DBE Trucking Company will be determined to be performing a commercially useful function by using the following factors:

The DBE will be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.

The DBE will itself own and operate at least one fully licensed, insured, and operational truck used on the contract.

The DBE will receive credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.

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.

The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a DBE.

For purposes of this provision a lease shall indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks shall display the name and identification number of the DBE.

Materials or Supplies shall be counted toward DBE goals as provided in the following:

If the materials or supplies are obtained from a DBE manufacturer, 100 percent of the cost of the materials or supplies will be counted toward DBE goals.

If the materials or supplies are purchased from a DBE regular dealer, 60 percent of the cost of the materials or supplies is counted toward DBE goals.

When a contractor has made a commitment to use a firm that is not currently certified (ineligible), and a subcontract has not been executed, the ineligible firm does not count toward the contract goal or overall goal. The prime Contractor shall meet the contract goal with an eligible DBE firm or demonstrate to the Engineer that he has made a good faith effort to do so.

When a contractor has executed a subcontract with a firm before it has been notified of its ineligibility, the prime contractor may continue to use the firm on the contract, and may continue to receive credit toward its DBE goal for the firm's work. The portion of the ineligible firm's performance remaining after VDOT has issued the notice of ineligibility shall not count toward the overall goal, but may count toward the contract goal.

When VDOT has executed a prime contract to a DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after VDOT has issued the notice of its ineligibility shall not count toward the overall goal, but may count toward the contract goal except that if the DBE's ineligibility is caused solely by its having exceeded the certification size standard during the performance of the contract, its total participation on that contract may be counted toward overall and contract goals.

Award Documentation and Procedures

Within 28 days after the opening of bids in accordance with the requirements of Section 102.12 of the Specifications, the apparent low bidder as read at the bid opening shall furnish a fully completed [Form C-111](#). The Bidder shall also submit evidence of a binding agreement on [Form C-112](#), Certification of Binding Agreement, for each DBE within 28 days of the bid opening. If the Bidder is aware of any assistance beyond the DBE's existing resources which are required for the performance of the work, a narrative statement outlining the assistance shall be attached to the appropriate C-112, in order that VDOT might make a reasonable judgement as to the allowance of credit. Any award made by the CTB prior to receipt of the information required will be conditional, pending receipt of such information.

If it is determined subsequent to the bid opening that the apparent low bidder has changed, the new apparent low bidder will be advised by letter and shall submit the information required herein within 28 days after the date of the letter.

In order to award a contract to a bidder that has failed to meet DBE contract requirements the Department will determine if the bidder's efforts were "reasonable good faith efforts, and were those that given all relevant circumstance, a bidder actively and aggressively seeking to meet the requirements would make. Efforts to obtain DBE participation are not good faith efforts if they could not reasonable be expected to produce a level of DBE participation sufficient to meet the requirements.

Good Faith Efforts may be determined through use of the following list of the types of actions the bidder may make to obtain DBE participation. 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 such as but not limited to attendance at pre-bid meetings, advertising and written notices to all certified DBEs who have the capability to perform the work of the contract. Examples may include advertising in at least one daily newspaper of general circulation, phone contact with completely documented telephone log including date and time called, contact person or voice mail status, and internet contacts with supporting documentation, including dates advertised. The bidder shall solicit this interest no less than 5 business days before the bids are due so that the DBEs have enough time to respond to the solicitation. The bidder shall determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

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 these work items with his 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: It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers, and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

A bid cannot reject a DBE for being unqualified without sound reasons based on a thorough investigation of their capabilities. The DBE's standing within its industry, membership in specific groups, organizations, associations and political or social affiliations, and union vs. non-union employee status are not legitimate causes for the rejection or non-solicitation of bids in the bidder's efforts to meet the project goal.

Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the Department or contractor;

Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services;

Effectively using the services of appropriate personnel in the Department and Virginia Department of Minority Business Enterprises, (VDMBE); available minority/women community or minority organizations; contractors' groups; local, state, and Federal minority/ women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

If the bidder fails to meet the participation requirements or fails to submit the required information within the specified 28 days, the bid may be rejected and the bidder and any affiliated company, which shall include any company having essentially the same management or directors and all members of a joint venture, will be enjoined from bidding for 90 days. The bidder and any affiliated company will also be ineligible to bid on this project or any project embracing this same work, should readvertisement occur. Award may then be made to the next lowest responsible bidder or the work may be readvertised and constructed under contract or otherwise, as determined by the CTB.

Prior to such action, the bidder will be given 7 days in which to request an appearance before the panel to present such evidence as is necessary to establish that failure to meet requirements is through no fault of his own, and that a reasonable good faith effort has been made to meet the established requirements. The decision of the panel shall be administratively final. The enjoinder period will begin upon failure of the bidder to request the hearing within the designated time frame, or upon the panel's decision to enjoin, as applicable.

If sufficient evidence is presented to demonstrate that a good faith effort was made, the contract may be awarded, and the DBE requirement reduced to the actual commitment at the time of contract execution.

If the apparent low bidder fails to establish and use reasonable good faith efforts, the Engineer may make a determination and recommendation to the Commissioner and CTB that it is in the Commonwealth's best interest to award such contract. The CTB may, upon such basis, elect to award the contract. However, such action will not relieve the Contractor of the responsibility for complying with 100 percent of the required DBE participation during the life of the contract or the sanction of enjoinder,

Post Award Documentation and Procedures

On contracts awarded on the basis of good faith efforts or in the Commonwealth's best interest, progress schedule information requirements and subsequent progress determination shall be based on the commitment information shown on the latest [C-111](#) as compared with the appropriate [C-63](#).

Within 30 days after the notice to proceed and prior to the first estimate, the Contractor shall submit, for approval, a schedule of DBE participation which will occur during the contract and which will result in 100 percent of the participation required in the contract, except as provided hereinbefore. The schedule shall show the DBE participation as a percentage of the contract value that will occur at the completion of each major component of work shown on the Contractor's progress schedule. If the contract does not require a progress schedule, the schedule of DBE participation shall be submitted prior to beginning operations, and shall show the DBE participation that will occur at the quarter points of the contract dollar amount, the specific items of work, and the total amount of allowable credit per item for the DBEs performing work shown on the progress schedule or during each quarter of work of the contract as applicable. The contractor shall also submit prior to commencement of work copies of the actual subcontract agreements and associated documentation for each DBE firm being used. The Contractor can be given the option to submit the schedule showing participation at the completion of each component, should it be deemed beneficial. The Contractor shall also submit, prior to commencement of work, copies of the actual subcontract agreement(s) and associated documentation for each DBE firm being used.

Prior to beginning each component or quarter of the work, as applicable, in which DBE work is to be performed, the Contractor shall furnish a revised Form C-111 showing the name(s) and certification number(s) of any currently certified DBEs not previously submitted who will perform the work during that component or quarter. If the Contractor is aware of any assistance beyond a DBE's existing resources which has not been previously approved, the Contractor shall submit a new or revised narrative statement for the Engineer's approval prior to assistance being rendered.

If the Contractor fails to comply with any of the required submissions within the specified time frame, the Contractor and any aforementioned affiliates may be enjoined from bidding on future work until such time as the submissions are received by the Department.

If a DBE, through no fault of the Contractor, is unable or unwilling to perform as indicated on [Form C-111](#), or materially defaults in the performance of obligations, the Contractor shall immediately notify the Engineer and provide documentation of all relevant circumstances. If the Contractor requests to be relieved of the obligation to use the named DBE, and the Engineer relieves the Contractor of that obligation, the Contractor shall immediately make good faith efforts to obtain another currently certified DBE to perform an equal or greater dollar value of allowable credit. The DBE name(s) and certification number(s) shall be submitted to VDOT on a revised Form C-111 prior to the DBE beginning the work.

Failure on the part of the DBE will not relieve the Contractor of responsibility for obtaining required participation on the contract, but will be taken into consideration prior to action against the Contractor for non-compliance with the approved schedule of DBE participation.

Unless otherwise specified herein, failure to conform to the schedule of DBE participation at the completion of any component of work or quarter point of contract amount as shown on the progress schedule, or at any point at which it is clearly evident that the remaining dollar value of allowable credit for performing work is insufficient to obtain the scheduled participation, may result in the Contractor and any aforementioned affiliates being enjoined from bidding for 60 days or until such time as conformance with the schedule of DBE participation is achieved; or, in the instance of credit disallowance, evidence is presented demonstrating the means by which an amount of replacement credit equal to or greater than that disallowed is to be achieved, whichever is the lesser.

If the Contractor fails upon completion of the project to meet the required participation, the Contractor and any aforementioned affiliates will be enjoined from bidding for a 90-day period.

Prior to enjoinder from bidding for failure to comply with participation requirements, as provided hereinbefore, the Contractor may submit documentation to the Engineer to substantiate that failure was due solely to quantitative underrun(s) or elimination of items subcontracted to DBEs, and that all feasible means have been used to obtain the required participation. The Engineer upon verification of such documentation may make a determination that the Contractor has met the requirements of the contract.

If it is determined that the aforementioned documentation is insufficient or the failure to meet required participation is due to other reasons, the Contractor may request an appearance before the panel to establish that all feasible means were used to meet such participation requirements. The panel's decision shall be administratively final. The injunction period will begin upon the Contractor's failure to request a hearing within the designated time frame or upon the panel's decision to enjoin, as applicable.

ADMINISTRATIVE REVIEW AND PANEL HEARING PROCESS

January 18, 2000

There are three instances in which a Bidder/Contractor may face sanctions for failure to comply with contract participation requirements. These instances and associated procedures are outlined as follows:

- A. Failure to show, during the award process, how 100% of the required participation will be achieved - the apparent low bidder may request a panel hearing in accordance with established procedures to demonstrate the use of reasonable good faith in their efforts to meet such requirements.
- B. Failure to conform to the approved DBE progress schedule.
 - (1) If it can be demonstrated that such failure is due solely to quantitative underruns or elimination of items subcontracted to DBEs, the Contractor may present such evidence in accordance with established administrative review procedures.
 - (2) If the failure is for any other reason, the Contractor may request a panel hearing in accordance with established procedures to demonstrate that such failure was through no fault of their own and all feasible means were used to achieve such participation.
- C. Failure to obtain the required participation at project completion.
 - (1) If it can be demonstrated that such failure is due solely to quantitative underruns or elimination of items subcontracted to DBEs, the Contractor may present such evidence in accordance with established administrative review procedures.
 - (2) If the failure is for any other reason, the Contractor may request a panel hearing in accordance with established procedures to demonstrate that such failure was through no fault of their own and all feasible means were used to achieve such participation.

All time frames referenced hereinafter are expressed in calendar days. Should the expiration of any deadline fall on a weekend or holiday, such deadline will automatically be extended to the next normal workday.

ADMINISTRATIVE REVIEW

January 18, 2000

This review process is based solely upon documentation submitted by the Contractor concerning the underrun or elimination of items subcontracted to DBEs, and will require independent verification by the District involved. Additional documentation may be requested from the Contractor, and must be submitted within the time frames established in order to be considered.

Construction Division staff will analyze such documentation and a recommendation made to the Construction Engineer. After review and consultation with the EO manager, the Contractor will be notified of the final decision regarding the administrative review.

The following procedures will govern the Administrative Review Process:

Failure to conform with approved DBE progress schedule or failure to obtain the required participation at project completion.

- (1) If the Contractor can document that such failure is due solely to quantitative underruns or elimination of items subcontracted to DBEs, he/she may submit a request for administrative review to the Construction Engineer with all relevant documentation attached. The Construction Engineer must receive such request within 14 days of the date of the letter notifying the Contractor that it is being recommended that he/she be enjoined from bidding. Documentation shall include, but is not limited to: comparison of original and actual contract quantities and allowable credit; when the Contractor became aware of such underrun(s) or elimination(s); items remaining at that time which are, or may have been subcontractable; and, efforts, if any, to replace the lost credit.
- (2) The Department will review such documentation, seek verification from the District involved, and request any additional information that might be helpful in reaching a determination. The Contractor will have 7 days from Department notification to submit such additional information.
- (3) The Construction Engineer will notify the Contractor of the final determination regarding administrative review. Should the determination be made that the documentation is insufficient to conclusively establish that the failure was solely due to such underruns or elimination of items, the Contractor may request a panel hearing in accordance with established procedures to appeal such decision and/or demonstrate that such failure was through no fault of his/her own and that all feasible means were used to achieve such participation.

PANEL HEARINGS

Procedure for Hearings Held Pursuant to Section 110.04 of the 1997 Road and Bridge Specifications and Amendments Thereto

Preface

The Department of Transportation, in its procurement activities, owes its primary responsibility to the general public. While the Department desires to afford to Contractors (hereinafter termed "respondents") reasonable procedures in the hearing of Section 110.04 matters, it must place paramount importance on seeing to it that its vital procurement activities involving road construction, maintenance, and repair are conducted with dispatch. This is so because there is a direct relationship between the safety of all highway users and the modernity and good repair of the roads upon which they must travel.

It is intended that the hearing shall be of an informal nature in order that necessary evidence may be reviewed in a comfortable atmosphere.

GENERAL

Panel Organization

This panel is to be a standing body, appointed by the Commissioner, and is to consist of a presiding officer and 5 voting members. Counsel for the Department will be present for panel hearings, but will not have voting rights.

Time Limits

- A. Failure to show, during the award process, how 100% of the required participation will be achieved.
 - (1) The apparent low bidder must submit a request for a panel hearing to the Construction Engineer, in writing. Such request must be received within 7 days of the expiration of the 28-day time limit for submission of participation documentation.
 - (2) The panel will notify the apparent low bidder as to the time, date, and place of the hearing; said hearing to be held within 7 days of receipt of the request.
 - (3) The panel will render its decision within 7 days of the close of the hearing; such decision being administratively final.

- B. Failure to conform with approved DBE progress schedule, or failure to obtain the required participation at project completion.
 - (1) The Contractor must submit a request for a panel hearing to the Construction Engineer in writing; such request must be received within 14 days of the date of the letter notifying the Contractor that it is being recommended that he/she be enjoined from bidding, or the letter advising them of a negative administrative review determination, as applicable.
 - (2) The panel will notify the Contractor as to the time, date, and place of the hearing; said hearing to be held within 14 days of receipt of the request.
 - (3) The panel will render its decision within 7 days of the close of the hearing; such decision being administratively final.

Continuances

Postponements should be granted only for the most compelling of reasons. While respondents may have the assistance of counsel at these hearings, the unavailability of a particular attorney of the respondent's choosing cannot be permitted to delay or postpone these hearings. This particular circumstance is all too common, and unless the postponements were ruled out on such a ground, it is believed that the substantial and costly delay would be "built in," so to speak, to the hearings ab initio.

Such delays would also occupy a considerable amount of time of the panel with procedural matters. The panel members are all individuals with important governmental responsibilities with this Department or other branches of state government, who have been selected on the basis of their intelligence, knowledge of the Virginia highway construction industry, and/or minority business enterprise programs and concerns. In addition to the considerable time each will have to employ in these hearings, it is anticipated that each panel member will continue to pursue, as well, their normal duties in state government. It is, therefore, vital that the panel members be able to devote their full time and energies to the pursuit of substantive, as opposed to procedural, issues.

Subpoenas and Evidentiary Rules

There is no provision of law that grants to the Department subpoena power. Thus, it would be unreasonable for the Department to be expected in every instance to produce witnesses in support or rebuttal of every matter to which respondents may be asked to respond. By the same token, the Department has determined that it would be unfair and unreasonable to expect respondents to produce firsthand evidence in every instance. For these reasons, it is provided that the rules of evidence shall not apply. However, where it appears from the circumstances that the quality of evidence produced by a respondent is inferior to that which was reasonably available to them, the panel may, in weighing an item of evidence, consider that, e.g., with the exercise of reasonable diligence, the respondent could have produced a more authoritative or original source for testimony or evidence offered.

The panel may take notice of any matter that has come before any member of the panel in the ordinary course of their official duties including, of course, their duties as a panel member. However, such matter may not be used as a basis for decision until and unless the respondent is first confronted with the matter and given an opportunity to respond thereto.

Documentary Evidence

Any documentary evidence a respondent wishes considered should be forwarded to the Department along with the request for hearing. Documentary evidence not forwarded at such time will be subject to exclusion at the panel Chairman's discretion.

Hearing Procedure

1. The Chairman shall call the hearing to order.
2. A respondent may, but need not, be represented by counsel.
3. A quorum of the normally voting panel members (5) shall be three or more of such members. Vote shall be a majority vote of such members. In the event of a tie vote of such members, the Chairman shall cast a vote breaking the tie. Except to break a tie vote, the Chairman shall not vote.
4. **Opening Statements** – The respondent or their counsel may, if they desire, make an opening statement. The respondent shall be required to swear to the best of their knowledge and belief to the truth of the averments stated in the attorney's statement or, in lieu thereof, to state which, if any, are not true while swearing to the truth of the remainder in the aforementioned manner. Where a respondent is not represented by counsel, or where they may otherwise so choose, they may make their own opening statement. In that event, such opening statement shall be proceeded by an oath administered by the court stenographer to the effect that the statement to be made and all

responses to questions thereafter propounded by members of the panel shall be true and correct to the best of the respondent's knowledge and belief. The opening statement shall contain all of the matters, which the respondent believes are worthy of the panel's consideration in deciding whether the Contractor has employed the level of effort called for by Section 110.04.

The respondent and/or their counsel may, if they choose, offer a written opening statement in lieu of an oral one, or, offer written remarks supplementary to an oral opening statement. Before such written statement may be accepted by the panel, it shall be required that the respondent swear to the best of their knowledge and belief to the truth of the averments contained therein. If an opening statement is presented to the panel, it will be read by the Chairman and entered into record.

The opening statement of the respondent should identify any person(s) present at the hearing that can verify or corroborate a claim of the respondent made therein.

5. **Exclusion of witnesses** - The panel Chairman may, on his own motion or motion of a panel member, exclude witnesses from the hearing room before commencing with its questions to a witness, or may do so on such motions at any stage of the proceedings where he believes that such exclusion will be of assistance in determining the truth of any matter.
6. **Questioning of Witnesses by Panel** - Immediately following the opening statement of counsel or the respondent, the panel may question the respondent and their witnesses in any order it chooses, and may recall a witness at any time it chooses. At this stage of the proceeding, neither the respondent nor counsel for the respondent may propound questions to the respondent or other witnesses without the consent of the panel Chairman.
7. **Direct Examination by Respondent** - Upon conclusion of the direct examination of a respondent or each of his witnesses by members of the panel, counsel for the respondent may direct additional questions to the respondent or each witness for the purpose of clarifying any matter covered by the examination by the panel, or any matter, while not covered by the panel, that was covered in the opening statement. Questions will not be permitted which exceed the scope of the opening statement and/or the panel's direct examination.

The panel may, if it so chooses, hear evidence from persons other than those produced by the respondent. The panel will not hear evidence from any person that is not first sworn.

8. **Suspension of Proceedings** – By a majority vote, panel members may suspend the proceedings on their own motion or on motion of the respondent, but are cautioned to exercise this power sparingly and only for the most compelling reasons to the end that the Department's vital procurement activities not be thereby hindered or delayed.
9. **Burden of Respondent** – Because the proceeding is not adversarial in nature, and because, further, by force circumstances, most evidence bearing on the issue before the panel generally will be solely within knowledge of the respondent, the burden shall be on the respondent to prove they have used reasonable good faith efforts or prove they have employed all feasible means, as the case may be, by a clear and decisive preponderance of the evidence.
10. **Executive Sessions** – The panel may, if it so chooses, meet in executive session to consider the evidence.
11. **The Panel Decision** – The panel shall render its decision within the indicated time frame.
12. **Written Opinions** – Where it is thereafter requested to do so in writing by the respondent within five days following the date of its decision, the panel shall, within ten days following receipt of such written request, reduce to an informal written opinion a statement as to the basis for its decision.