

# DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

April 2018

Grantee ID 5143  
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## **1. General Information**

### **Applicability:**

Capital Metro is a recipient of U.S. Department of Transportation (DOT) funds and has a Disadvantaged Business Enterprise (DBE) Program that meets the requirements of the Federal Transit Administration (FTA) for federally funded projects under 49 CFR Part 26.

### ***Definitions of Terms***

The terms used in this program have the meanings defined in 49 CFR 26.5.



DISADVANTAGED BUSINESS  
ENTERPRISES  
OOD-005

Office of Diversity

Issued: October 1999  
Revised: March 2018

Approved by: Randy Clarke  
President/CEO

### PURPOSE

Capital Metro has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26. Capital Metro has received Federal financial assistance from the Department of Transportation, and as a condition of receiving this assistance, Capital Metro has signed an assurance that it will comply with 49 CFR Part 26 including new provisions as approved in the final rule change approved by Congress in January of 2011. Federal regulations require that Capital Metro have an approved DBE policy in this form under Sections 49 CFR Part 26.1 and Part 26.23.

### POLICY STATEMENT

It is the policy of Capital Metro to ensure that DBEs, as defined in part 26, have an equal opportunity to receive and participate in DOT-assisted contracts. It is also our policy –

1. To ensure nondiscrimination in the award and administration of DOT assisted contracts;
2. To create a level playing field on which DBEs can compete fairly for DOT assisted contracts;
3. To ensure that the DBE Program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
5. To help remove barriers to the participation of DBEs in DOT assisted contracts;
6. To assist the development of firms that can compete successfully in the marketplace outside the DBE Program; and
7. To have a Small Business provision for DOT assisted contracts without regard to DBE certification.

Diponker Mukherjee of the Office of Diversity is designated as the DBE Liaison Officer for Capital Metro. In that capacity, Mr. Mukherjee is responsible for overseeing all aspects of the DBE program and is responsible for implementing the program. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by Capital Metro in its financial assistance agreements with the Department of Transportation.

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

03/22/18

### ***3. Nondiscrimination. (26.7)***

Capital Metro will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex, or national origin.

In administering its DBE program, Capital Metro will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the DBE program with respect to individuals of a particular race, color, sex, or national origin.

### ***4. DBE Program Updates (26.21)***

Capital Metro will continue to carry out this program until all funds from DOT financial assistance have been expended. Capital Metro will provide to DOT updates representing significant changes in the program.

### ***5. Quotas (26.43)***

Capital Metro does not use quotas in any way in the administration of this DBE program.

### ***6. DBE Liaison Officer (26.25)***

Capital Metro has designated the following individual as our DBE Liaison Officer:

**Diponker Mukherjee**, 2910 E. 5<sup>th</sup> Street, Austin, Texas 78702; (512) 369-6255;

Diponker.Mukherjee@capmetro.org. In that capacity, Mr. Mukherjee is responsible for overseeing all aspects of the DBE program and ensuring that Capital Metro complies with all provisions of 49 CFR Part 26. He has direct, independent access to the Chief Executive Officer concerning DBE program matters. Capital Metro's DBE staff includes two positions: DBE Liaison Officer (DBELO), who is responsible for implementing all aspects of the DBE program and a Diversity Specialist, who assists in coordinating outreach in the business community, and monitoring compliance through B2Gnow vendor payment software. An organization chart displaying the DBELO's position in the organization is found in *Attachment 1* to this program.

The DBELO is responsible for developing and monitoring the DBE program, in coordination with other appropriate officials. Duties and responsibilities include the following:

- i. Analyzes Capital Metro's progress toward goal attainment and identifies ways to improve progress;
- ii. Advises the Chief Executive Officer and Capital Metro Board of Directors on

DBE matters and achievement;

- iii. Develops outreach programs and maintains public relations with businesses and other agencies to increase participation with DBE businesses.
- iv. Affects and monitors compliance throughout the contracting process through presentations at pre-proposal and pre-bid conferences, advising on evaluation/review panels, reviewing and approving contract language and monitoring contracts for compliance.
- v. Tracks actual payments to DBE vendors and reports to the FTA and the President/CEO.
- vi. Maintains and utilizes working relationships with DBE Program counterparts in an effort to remain current on techniques and to share resources.
- vii. Monitors changes to the DBE regulations by Internet research and interaction with Federal Transit Administration and DBE Program counterparts.
- viii. Maintains DBE records and ensures compliance with established policies and procedures.
- ix. Performs database management activities including the entering, retrieving, and manipulating of DBE record information; prepares reports as requested.
- x. Tracking actual payments to DBE vendors.
- xi. Compiles materials or other information needed for vendors and assists with pre-proposal and pre-bid conferences as directed.
- xii. Prepares of reports to the FTA and the President/CEO.

The duties and responsibilities of the Diversity Specialist:

- a. Prepares materials to inform the public: special reports, newsletter, and other publications.
- b. Establish goals, monitor contracts, and ensure compliance with all aspects of the DBE program.
- c. Ensure that applicable federal laws that pertain to DBE are adhered to.
- d. Communicate with prime and subcontractors to ensure contractor is DBE certified and the certification is valid.
- e. Engage in monitoring activities to ensure DBE compliance.
- f. Initiates community outreach programs through Capital Metro sponsored workshops, meeting presentations and participation in various events and meetings that enhance DBE utilization and that increase Capital Metro DBE visibility and commitment at various events.

## **7. Federal Financial Assistance Agreement Assurance (26.13)**

Capital Metro has signed the following assurance, applicable to all DOT-assisted contracts and their administration:

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

Additionally, Capital Metro will ensure that the following language is included in financial assistance agreements with sub recipients and require the prime contractor to impose the same requirement on each subcontract the prime contractor signs with a subcontractor.

“The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of the contract. The contractor shall carry out the applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure to carry out these requirements is a material breach of this contract, which may result in the termination of the contract or such other remedy as recipient deems appropriate, which may include, but is not limited to: (1) withholding monthly (or periodic) payments; (2) assessing sanctions; (3) liquidated damages; and/or (4) disqualifying the contractor from future bidding as non-responsible.”

## **8. DBE Financial Institutions (26.27)**

It is the policy of Capital Metro to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions, and to encourage prime contractors on DOT-assisted contracts to make use of these institutions. Capital Metro has researched and collected information on the availability of DBE owned financial institutions in our area at

<http://www.federalreserve.gov/releases/mob/>. The list will be available at the Office

Diversity and Capital Metro will also re-evaluate the availability of DBE financial institutions every year.

#### **9. *Directory (26.31) and Bidder's List (26.11)***

Capital Metro uses a directory identifying all firms eligible to participate as DBEs from the Texas Unified Certification website directory. The directory lists the firm's name, address, phone number, date of most recent certification, and the type of work the firm has been certified to perform as a DBE. The Directory is updated frequently. Capital Metro makes the link to the Directory available to all interested parties electronically and in hard copy upon request. The link to the Directory may be found in **Attachment 2** to this program document.

Capital Metro uses Onvia DemandStar as well as the information captured on the Schedule C Form, and bid tabs on all submitted solicitation proposals to generate the Bidders List. Capital Metro provides all vendors wishing to do business with Capital Metro a free subscription of Onvia DemandStar to be added to our list of vendors. The information collected by Capital Metro meets the requirements as outlined in part 26.11 (c) 2; a) The name of the firm; b) the firm's address c) firm's status as a DBE/Non-DBE; d) age of the firm; and (e) annual gross receipts of the firm. A current copy of our bidders list may be received upon request.

#### **10. *Overconcentration (26.33)***

Capital Metro has not identified that overconcentration exists in the types of work that DBEs perform.

#### **11. *Prompt Payment Mechanisms (26.29)***

##### Prompt Payment (26.29(a)):

Capital Metro will include the following clause in each DOT-assisted prime contract and it will apply to payments made to both DBE and non-DBE subcontractors:

Subcontractor and Supplier Payments: In accordance with Texas Government Code, Title 10 Chapter 2251 Sec. 2251.022, the Contractor shall provide payment to each Subcontractor and Supplier within ten (10) calendar days after receiving payment from Capital Metro for amounts previously invoiced for work performed or materials furnished under the Contract. Subcontract payment provisions shall require payments to subcontractors within ten (10) calendar days after the prime Contractor received payment from Capital Metro. Interest on late payments is subject to the provisions of Texas Government Code, Title 10, Chapter 2251, regarding payments to subcontractors. Under Sec. 2251.023, subcontractors are also required to make payments to their subcontractors no later than the 10<sup>th</sup> day after the date the subcontractor receives payment from Contractor. Failure to pay



subcontractors within 10 days and/or failure to submit appropriate certification of subcontractor payment will be considered in the review of the Contractor's performance of the contract and may result in the withholding of payment to the Contractor.

Retainage (26.29(b)): The Contractor agrees further to return retainage payments to each subcontractor within 10 days after the subcontractor's work is satisfactorily completed.

Monitoring and Enforcement: 26.29 (d) Capital Metro has also established the following additional mechanisms to ensure prompt payment and will include it in all contractual agreements.

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

Subcontractors: The Contractor shall not, without the written consent of Capital Metro, terminate a subcontractor, or replace a subcontractor previously listed or permit such subcontract to be assigned or transferred, or allow that portion of the work to be performed by anyone other than the listed subcontractor, except the Contractor may perform a previously subcontracted portion of the work itself with qualified personnel upon written approval from Capital Metro. After award, the Contractor shall not enter into a subcontract for work to be performed without prior notification to Capital Metro. At no time will the Contractor invoice Capital Metro for amounts pertaining to subcontractors terminated or substituted without prior approval.

## ***12. Monitoring and Enforcement Mechanisms (26.37)***

Capital Metro will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 26.109. Capital Metro also will consider similar action under our own legal authorities, including responsibility determinations in future contracts.

Capital Metro has put in place various monitoring and enforcement mechanisms to ensure that work committed to DBE's at contract award or subsequently (e.g. as a result of modification to the contract) is actually performed by the DBEs to which work was committed. Capital Metro uses a third-party vendor payment verification system to ensure that DBEs are receiving their payments for work in accordance with the prompt payment rules. The DBEs must log into the system, and verify the prime contractors reported payment to the DBE. We will keep a running tally of actual payments to DBE firms for work committed to them at the time of contract award. DBE's have the ability to report any issue directly with the DBE staff who monitor the system.

We will also provide a monitoring and enforcement mechanism to verify that work committed to DBEs at contract award is actually performed by the DBEs. In addition to the payment verification system, Capital Metro DBE staff, conducts periodic site visits to ensure that the DBE is carrying out its responsibilities by actually performing, managing, and supervising the work involved; and it furnishes the supervision, labor, and equipment necessary to perform its work. Capital Metro DBE staff tracks these visits using a form that is signed by the DBE contractor's representative on site, and kept with the contract file.

*Attachment 3* lists the regulations, provisions, and contract remedies available to us in the events of non-compliance with the DBE regulation by a participant in our procurement activities.

## ***13. Small Business Participation (26.39)***

Capital Metro has taken active, effective steps to ensure small business participation as part of Capital Metro's procurement process. Capital Metro has incorporated the following non-discriminatory elements to its DBE program, in order to facilitate competition on DOT-assisted public works projects by small business concerns (both DBEs and non- DBE small businesses).

Capital Metro's small business participation program uses the following elements:

- (1) Establishing a race-neutral small business set-aside for prime contracts above \$25,000 and under \$50,000.
- (2) On prime contracts over \$50,000 not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved. A Small Business Goal will be assigned. The SBE program procedures are designed to operate as an amendment to Capital Metro's current overall DBE program. An implementation schedule is incorporated as part of the plan to ensure that our program is fully operational within nine months after final approval is given by the FTA.

The intent of Capital Metro's SBE program is to provide full and fair opportunities for equal participation by small businesses at Capital Metro. Therefore, the program is broad in order to create opportunities, require competitiveness and assist SBEs in overcoming potential barriers to participating in contracting opportunities.

Outreach and technical assistance are key to enhancing opportunities for small businesses. To that end, Capital Metro will also focus efforts on outreach and technical assistance.

In determining whether a firm is eligible to compete as a small business, Capital Metro defines small business as any business whose annual gross income averaged over the past three (3) years does not exceed the Small Business Administration's (SBA) size standards as set forth in 13 CFR, part 121. A size standard is the largest that a firm can be and still qualify as a small business.

**Objectives:**

1. To ensure opportunities for small businesses to participate in all phases of Capital Metro's contracting activities;
2. To encourage small businesses to seek work as a prime or sub-contractor when qualified and work is available;
3. To ensure nondiscriminatory practices in the utilization of small businesses for Capital Metro contracts;
4. To formalize existing practices and implement new procedures to more effectively assist small business participation.

## **Implementation:**

1. Establishing a race-neutral small business set-aside for prime contracts above \$25,000 and under \$50,000.
2. On prime contracts over \$50,000 not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved. A Small Business Goal will be assigned.

The small business must meet competition requirements to be considered for contract award. Capital Metro's Procurement Department has implemented strategies to reduce the complexity and potential scope of large multiple-award contracts to a level that helps small businesses participate as prime contractors.

As part of this approach, Capital Metro has taken steps to preserve small business opportunities to increase competitiveness and to prevent contract bundling. To that end, the Procurement Department encourages communication between contract administrators, project managers, and agency staff responsible for monitoring the use of small businesses to identify work that small businesses can perform.

Capital Metro carefully reviews all scopes of work to determine if there are sections where there are definitely separable elements that can be unbundled.

3. The Procurement Department will continue to closely review proposed changes to existing contracts to ensure that small businesses are given the opportunity to bid on any new work that is out of the scope of the existing contract;
4. The DBE staff collaborates with the City of Austin's Small & Minority Business Resources Department as well as the Texas Department of Transportation's Disadvantaged Business Enterprise and Small Business Enterprise Section to pool resources and create an ongoing joint program that will provide technical assistance and other services for small businesses;
5. The DBE staff will provide assistance in overcoming limitations such as inability to obtain bonding or financing, by such means as providing services to help small businesses obtain bonding and financing through the US Department of Transportation Office of Small and Disadvantaged Business Utilization's Financial Assistance Division Short-Term Lending Program and Bonding Assistance Program and;
6. Generate awareness of Capital Metro's procurement opportunities to small businesses by utilizing our vendor database system DemandStar to post

- notices, broader advertisement circulation to small business associations and leverage existing partnerships to encourage small business participation on Capital Metro projects. Additionally, the Procurement Department has recently started using the State of Texas' Electronic State Business Daily vendor files to identify new potential small business enterprises;
7. Capital Metro currently has a Micro and Small Purchasing program to continue to encourage small business participation in the bidding process.

### **Outreach and Technical Assistance:**

Relationship building is a key element in this program and business outreach and technical assistance help to foster this process. Business development outreach efforts include attending and co-sponsoring focused events to reach other potential small businesses desiring to participate on Capital Metro's projects.

The DBE staff will work closely with small business associations and advocacy groups to ensure that procurement opportunities are known to SBEs.

Outreach efforts will include advertising in print and electronic media regarding upcoming small business events, forums and special events. Capital Metro's Business Center web site will also be used for outreach. Upcoming events will be posted on the web for easy access.

The DBE staff will work closely with small businesses to provide technical assistance including hands on assistance, referral to chambers, trade associations, economic development groups and other small business advocacy agencies, training.

Responsible Capital Metro staff will provide information on contractual requirements and projected procurement opportunities.

Information on the SBE program will be disseminated through written materials, seminars, workshops, and specialized assistance to individual firms.

The DBE staff plans to utilize available resources such as working with other entities to develop a small business development guide to include information on procedures outlining specific steps on how to bid such as; prerequisites for bidding on contracts; information on how plans and specifications can be obtained; Names of persons to contact concerning questions on bid documents; names of procurement officers and office hours; types of supplies and services purchased; and explanations of standard contract implementation procedures and requirements, concerning such matters as timely performance of work, contract changes, and payment schedules.

## **Accountability:**

The effectiveness of the SBE program will be measured by a review of data indicating prime and subcontract awards to small businesses. FTA currently does not require the submission of project goals for the SBE program. However, the DBE team plans to use the data Capital Metro track to set a baseline after the program has been implemented for one year in order to determine an accurate goal setting methodology for this program.

Upon request, DBE staff will be prepared to submit progress assessment reports to the Board of Directors that may include:

1. The number of contracts awarded to small businesses;
2. A description of the general categories of contracts awarded to small businesses;
3. The dollar value of contracts awarded to small businesses;
4. The dollar value and number of contracts awarded to small businesses as prime contractors.

## ***14. Overall Goals (26.45)***

### **Amount of Goal**

Capital Metro will calculate its triennial overall DBE goal and publish it to show what percentage of the Federal financial assistance in DOT-assisted contracts Capital Metro will expend, exclusive of FTA funds to be used for the purchase of transit vehicles.

Capital Metro will meet its overall goal through race-neutral participation and race-conscious measures. In addition, Capital Metro will meet the annual goal by setting project goals for procurements \$50,000 or larger and assigning Small Business requirements through the Small Business Enterprise provisions to obtain Race-Neutral participation.

### **Methodology**

The following is a summary of the method to be used to calculate this goal:

1. Total dollars per major NAICS Code area budgeted will be identified for future three years;
2. Base Figures for each major NAICS Code area will be identified by dividing the number of DBEs by the total number of firms in order to obtain the relative availability of DBEs per NAICS Code area;
3. By multiplying the relative availability of DBEs by the total dollars budgeted for each corresponding NAICS Code area, an estimated dollar amount for DBE participation in each area will be obtained.

4. The sum of the estimated dollar amount will be calculated and it will be divided by the total dollars budgeted for award in three future years to derive an estimated overall goal.
5. This overall goal will then be adjusted taking into account the **median** of the previous five-year DBE participation and the base figure. Then, this goal will be adjusted taking into account the past **Race Neutral** participation and changes with regard to what work can be counted towards a DBE goal, the nature of the projects Capital Metro expects to award, and the relative availability of firms in those NAICS code areas.

### **Process**

Before establishing the overall goal Capital Metro will consult with area business and community organizations to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and Capital Metro's efforts to establish a level playing field for the participation of DBEs.

Additionally, Capital Metro will publish a notice of the proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at our principal office for 30 days following the date of the notice, and informing the public that Capital Metro and DOT will accept comments on the goals for 45 days from the date of the notice. This notice shall be posted in various newspaper that may include the following publications: The Austin American Statesman, The Villager, El Mundo, and Arriba. Normally, Capital Metro will issue this notice by June 1 of each year. The notice will include addresses to which comments may be sent and addresses (including office addresses and websites) where the proposal may be reviewed.

Our overall goal submission to FTA will include a summary of information and comments received during this public participation process and our responses.

Capital Metro will begin using our overall goal on October 1 of each year, unless Capital Metro has received other instructions from FTA.

### **Breakout of Estimated Race-Neutral and Race-Conscious Participation**

Capital Metro will meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating DBE participation. Capital Metro uses the following race-neutral means to increase DBE participation:

- Setting Small Business Goals and having a Small Business set-aside for small contracts as outlined in the Small Business provision (§26.39)

- Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE and other small business participation (e.g., unbundling large contracts to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces);
- Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs and other small businesses on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; providing information in languages other than English, where appropriate);
- Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;
- Ensuring distribution of TUCP DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors;

If it appears that participation through "race neutral" means is exceeding or not meeting this level, Capital Metro will adjust the estimated breakout of race-neutral and race-conscious participation as needed to reflect actual DBE participation (see 26.51(f)) and track and report race-neutral and race-conscious participation separately. For reporting purposes, race-neutral DBE participation includes, but is not necessarily limited to, the following: DBE participation through a prime contract a DBE obtains through customary competitive procurement procedures; DBE participation through a subcontract on a prime contract that does not carry a DBE goal; DBE participation in a prime contract which exceeds a contract goal; and DBE participation through a subcontract from a prime contractor that did not consider a firm's DBE status in making the award.

#### Consultative Process (26.45 (g))

Capital Metro conducts a consultative process the Greater Austin Black Chamber of Commerce, Greater Austin Hispanic Chamber of Commerce, Austin Gay and Lesbian Chamber of Commerce, Greater Austin Asian Chamber of Commerce, Women's Business Council-Southwest, Network of Asian American Organizations, and other entities. Each organization will host a "three-year DBE goal round table discussion" with the Office of Diversity Staff. At each event a presentation will be shown to attendees on how the DBE goal methodology is established. Following the DBE goal



methodology presentation there may be a discussion about the proposed goal, the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and about what efforts Capital Metro can take to create a level playing field for the participation of DBEs.

#### Transit Vehicle Manufacturers (26.49)

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

#### ***15. Contract Goals (26.51)***

Capital Metro will use contract goals to meet any portion of the overall goal Capital Metro does not project being able to meet using race-neutral means. Contract goals are established so that, over the period to which the overall goal applies, they will cumulatively result in meeting any portion of our overall goal that is not projected to be met through the use of race-neutral means.

Capital Metro will establish contract goals only on those DOT-assisted contracts that have subcontracting possibilities. Capital Metro need not establish a contract goal on every such contract, and the size of contract goals will be adapted to the circumstances of each such contract (e.g., type and location of work, availability of DBEs to perform the particular type of work). Capital Metro will express its contract goals as a percentage of the total amount of a DOT-assisted contract.

## 16. Good Faith Efforts (26.53)

Capital Metro treats bidder/offeror compliance with good faith efforts requirements as a matter of responsiveness.

Each solicitation for which a contract goal has been established will require the bidders/offerors to submit, by the time/date the bid or proposal is due, the following forms:

1. "Schedule C" form (See *Attachment 5*), reflecting:

- The names and addresses of DBE firms that will participate in the contract;
- A description of the work that each DBE will perform;
- The dollar amount of the participation of each DBE firm participating;
- Written and signed documentation of commitment to use a DBE subcontractor whose participation it submits to meet a contract goal; and

2. Intent(s) to Perform as a DBE Subcontractor (See *Attachment 6*) serving as a

- Written and signed confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment.

If the contract goal is not met, evidence of good faith efforts must be submitted by the bidder/offeror by the time/date the bid or proposal is due. The following section outlines what a demonstration of good faith efforts consists of.

If the bidder/offeror does not submit this information by the time/date the bid or proposal is due, Capital Metro has grounds to deem the bidder/offeror non-responsive to the DBE requirements of the particular solicitation. The decision to deem the bidder/offeror non-responsive for failure to submit this information by the time/date the bid or proposal is due is administratively appealable to the Capital Metro Appeals Officer. (See Administrative Reconsideration section below)

### Demonstration of Good Faith Efforts

The obligation of the bidder/offeror is to make good faith efforts. The bidder/offeror can demonstrate that it has done so either by meeting the contract goal or documenting good faith efforts.

The following personnel are part of the three-person Good Faith Efforts Determination Committee and are responsible for determining whether a bidder/offeror who has not met the contract goal has documented sufficient good faith efforts to be regarded as responsive: Senior Vice President/Chief of Staff, DBE Liaison Officer, and DBE Specialist.

Capital Metro will ensure that all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before it commits to the performance of the contract by the bidder/offeror.

Administrative Reconsideration: (26.53(d))

Within 5 days of being informed by Capital Metro that it is not responsive because the bidder/offeror has not documented sufficient good faith efforts, Capital Metro will notify the bidder/ offeror in writing. The bidder/offeror may appeal the decision within five (5) business days of the date of the notice of the decision by filing a written appeal for reconsideration to the following reconsideration official: Capital Metro's Chief Counsel, 2910 E. Fifth Street, Austin, TX 78702. As part of this reconsideration, the bidder/offeror will have the opportunity to provide written documentation or argument concerning the issue of whether the bidder/offeror met the goal or made adequate good faith efforts to do so. The reconsideration will be made by a reconsideration official that will not have played any role in the original determination that the bidder/offeror failed to meet the goal or make adequate good faith efforts to do so.

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

Good Faith Efforts When a DBE is terminated on a Contract with Contract Goals  
(26.53(f))

Capital Metro will require the prime contractor to notify the Office of Diversity immediately of the DBE's inability or unwillingness to perform and provide reasonable documentation.

Capital Metro requires that prime contractors not terminate a DBE subcontractor listed on a bid/contract with a DBE contract goal without Capital Metro's prior written consent. Prior written consent will only be provided where there is a "good cause" termination of the DBE subcontractor as established by Section 26.53(f)(3). Capital Metro will require a prime contractor to make good faith efforts to replace a DBE subcontractor.

Before transmitting to Capital Metro its request to terminate, the prime contractor must give notice in writing to the DBE subcontractor of its intent to do so. A copy of this

notice must be provided to Capital Metro prior to consideration of the request to terminate. The DBE subcontractor shall have five (5) days to respond and advise Capital Metro of why it objects to the proposed termination (except the five (5) period may be reduced if the matter is one of public necessity (e.g. safety)).

In those instances, where “good cause” exists to terminate a DBE’s contract, Capital Metro will require the prime contractor to make good faith efforts to replace a DBE subcontractor that is terminated or otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal.

In this event, Capital Metro will require the prime contractor to obtain its prior approval of the substitute DBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts. If the contractor fails or refuses to comply in the time specified, Capital Metro’s contracting office will issue an order stopping all or part of payment/work until satisfactory action has been taken. If the contractor still fails to comply, the Contracting Officer may issue a termination for default proceeding.

Any DBE that has been approved by Capital Metro to be replaced has the right to appeal the decision directly to the DBELO if the DBE disagrees with the decision. Appeals must be submitted to the DBELO in writing or by email within five (5) business days of being notified. If the DBELO concurs with the Prime Contractor, the DBE may use the “Administrative Reconsideration” process noted in this section and submit an appeal of the decision to the Agency’s reconsideration official.

### ***17. Counting DBE Participation (26.55)***

Capital Metro will count DBE participation toward overall and contract goals as provided in 49 CFR 26.55. For example:

- When a DBE participates in a contract, only the value of the work actually performed by the DBE will count toward the goal (whether a prime or a subcontractor).
- When a DBE performs as a participant in a joint venture, Capital Metro will count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.
- Capital Metro will count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.
- If a firm is not currently certified as a DBE in accordance with the standards of this part at the time of the execution of the contract, Capital Metro will not count

the firm's participation toward any DBE goals, except as provided for in 49 CFR Part 26 Section 26.87(i)).

- Capital Metro will not count the participation of a DBE subcontractor toward the prime contractor's DBE achievements or overall goal until the amount being counted toward the goal has been paid to the DBE.

### ***18. Certification (26.61 - 26.91)***

Under the Texas Unified Certification Program, Capital Metro is not a certifying agency but is a participant.

#### Unified Certification Program

Capital Metro participated with fellow DOT recipients in Texas to organize and develop a Unified Certification Program and is a participant of the Texas Unified Certification Program. Capital Metro is a program participant. The City of Austin is the current certifying agency for our region and Capital Metro are working closely with their certification department.

### ***19. Information Collection and Reporting (26.109)***

#### Bidders List

Capital Metro will create a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on DOT-assisted contracts. The purpose of this requirement is to allow use of the bidders list approach to calculating overall goals. The bidders list will include the name, address, DBE/non-DBE status, age, and annual gross receipts of firms.

Capital Metro will collect this information in the following way:

- Through a tracking software system, (<https://capmetro.diversitycompliance.com/>), this system tracks pertinent information to the maintenance of the DBE program such as;
  - Vendors;
  - Contracts;
  - Payments to DBE Firms;
  - DBE firm certification information;
  - And other relevant information needed to abide by USDOT's regulations.
- Use the information obtained from the Schedule C form submitted with every proposal.

- Monitoring Payments to DBEs

Prime contractors will be required to maintain records and documents of payments to DBEs for three years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of Capital Metro or DOT. This reporting requirement also extends to any certified DBE subcontractor.

A running tally of actual payments to DBE firms for work committed to them at the time of contract award will be kept.

Interim audits of contract payments to DBEs will be conducted. The audit will review payments to DBE subcontractors to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the schedule of DBE participation.

#### Reporting to DOT

DBE participation will be reported to DOT on a semi-annual basis. These reports will reflect payments actually made to DBEs on DOT assisted contracts.

#### Confidentiality

Capital Metro will safeguard from disclosure to third party's information that may reasonably be regarded as confidential business information, consistent with Federal, state, and local law.

## **Attachments**

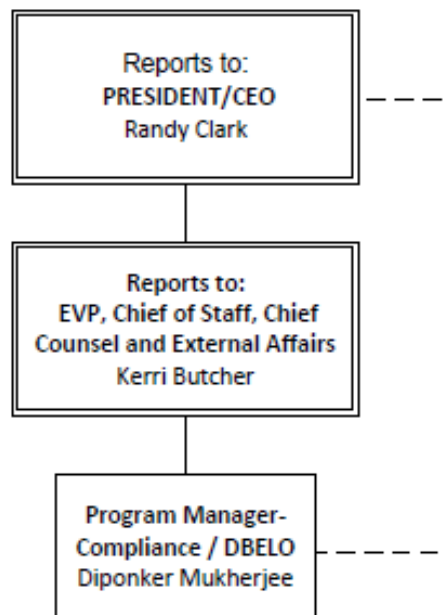
1. Organizational Chart
2. Copy of DBE Directory
3. Monitoring and Enforcement Mechanisms
4. Confidentiality
5. Schedule C DBE Subcontractor Form
6. Intent to Perform as a DBE Subcontractor

**Attachment 1: Organizational Chart**

# Capital Metro

Diversity and Compliance

Dept. 119





## **Attachment 2: Copy of DBE Directory**

Live Link to TxDOT UCP Directory:

<https://txdot.txdotcms.com/FrontEnd/VendorSearchPublic.asp?TN=txdot&XID=8786>

### **Attachment 3: Monitoring and Enforcement Mechanisms/Legal Remedies**

In accordance with 49 CFR Part 26 Section 26.107, firms participating in Capital Metro's DBE program face the following enforcement action:

- The Department may initiate suspension or debarment proceedings against a firm under 49 CFR part 29 if it does not meet the eligibility criteria of subpart D of Part 26 and attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty.
- If a firm that, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D of this part, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.
- In a suspension or debarment proceeding brought under the previous paragraphs, FTA may consider the fact that a purported DBE has been certified by a recipient. Such certification does not preclude the Department from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended or debarred.
- The Department may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under 49 CFR part 31.
- The Department may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program or otherwise violates applicable Federal statutes.

Regarding the prompt payment of subcontractors, articulated in Section 11 of this program,

*"Failure to pay subcontractors within 10 days and/or failure to submit appropriate certification of subcontractor payment will be considered in the review of the Contractor's performance of the contract and may result in the withholding of payment to the Contractor."*

Regarding good faith efforts when a DBE is replaced on a contract, articulated in Section 15 of this program,

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

Regarding compliance with the DBE requirements of a solicitation containing a DBE goal articulated in Section 15 of this program,

*If the bidder/offeror does not submit this information by the time/date the bid or proposal is due, Capital Metro has grounds to deem the bidder/offeror non-responsive to the DBE requirements of the particular solicitation. The decision to deem the bidder/offeror non-responsive for failure to submit this information by the time/date the bid or proposal is due is not administratively appealable. Vendors should follow the regular protest procedures available through the Contracts and Procurement Policy and Procedures Manual*

#### **Attachment 4: Confidentiality**

Federal Law: 49 CFR Part 26 Section 26.67 paragraph (a) (2) (iv) prohibits disclosure of an individual's personal net worth statement or any documents pertaining to it to any third party without the written consent of the submitter. The only exception to this rule is that such information must be submitted to DOT in any certification appeal proceeding under 49 CFR Part 26 Section 26.89 or to any other State to which the individuals' firm has applied for certification under 49 CFR Part 26 Section 26.85.

State Law: Section 552.128 (a) of the Texas Public Information Act states, "Information submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program is excepted from [required public disclosure], except as provided by this section."

**Attachment 5: Schedule C CAPITAL METRO**

**Schedule C of Subcontractors to be utilized by DBE Subcontractors of the Prime Offeror**

Instructions: The DBE first Tier Subcontractor shall complete this form by listing 1) Names of all proposed DBE subcontractors to be **used by the DBE at any tier**. 2) Contact information, 3) Description of work to be performed/product to be provided, 4) Status as a DBE or non-DBE, 5) Ethnic Code of firm 6) Age of the firm, 7) Annual gross receipts of the firm, 8) % or \$ amount of the Subcontract to be contracted out. Those subcontractors which are listed on this form as DBEs must have current certification as a DBE with a participating TUCP certifying agency (see Exhibit D paragraph 6). The DBE certification must be complete by the time the proposals are submitted. Additionally, those subcontractors which are listed on this form as DBEs must complete an Intent to Perform as a DBE Subcontractor agreeing to the information listed here. **Note: All subcontractors utilized by a DBE Subcontractor must be DBE certified by a TUCP Agency.**

**Name of Prime Contractor (Offeror):** \_\_\_\_\_

**Project Name:** \_\_\_\_\_

**IFB/RFP Number:** \_\_\_\_\_

Ethnic Code: **A)** African-American Male **B)** African American Female **C)** Asian- Indian Male **D)** Asian-Indian Female **E)** Asian –Pacific Male **G)** Asian-Pacific Female **H)** Hispanic Male **I)** Hispanic Female **J)** Native American Male **K)** Native American Female **L)** White Female **M)** Other

1) Name of Subcontractor	2) Address, Telephone # of DBE Firm (Including name of contact person)	3) Description of Work, Services Provided. Where applicable, specify "supply" or "Install" or both.	4) DBE or non-DBE	5) Ethnic Code	6) Age of Firm	7) Annual Gross Receipts	8) DBE % or \$ amount of Total Contract

**This schedule must be completed as instructed above and include every subcontractor the first-tier subcontractor proposed to use on this project.** The undersigned will enter into a formal agreement with DBE contractors for work listed in this schedule upon execution of a contract with the prime contractor. The contractor agrees to the terms of this schedule by signing below and submitting the Intent to Perform as completed by the DBE subcontractors

\_\_\_\_\_  
Signature of Authorized Representative of Offeror

\_\_\_\_\_  
Date of Signed

**Attachment 6: Intent to Perform as a DBE Subcontractor**

**CAPITAL METRO**  
**Intent to Perform as a Subcontractor**  
**IFB/RFP/SOQ # \_\_\_\_\_**

1. TO: (name of Offeror/Prime Contractor) \_\_\_\_\_
2. The undersigned is either currently certified under the Texas Unified Certification Program (TUCP) as a DBE or will be at the time this solicitation is due.
3. The undersigned is prepared to perform the following described work with their own workforce and/or supply the material listed in connection with the above project (where applicable specify "supply" or "install" or both) \_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_ and at the following price \$\_\_\_\_\_ and/or \_\_\_\_\_% of the total contract amount (should be the same \$ or % found on Schedule C Subcontractor Participation).

With respect to the proposed subcontract described above, the undersigned DBE anticipates that \_\_\_\_\_% of the dollar value of this subcontract will be sublet and/or awarded to other contractors. Any and all subcontractors that a DBE subcontractor uses must be listed in Schedule C and must also be DBE certified. (The DBE subcontractor should complete this section only if the DBE is subcontracting any portion of its subcontract.)

_____	_____	_____	_____
(Name of DBE Firm)	(Signature of Authorized Representative)	(Phone Number)	(Date Signed)
_____	_____	_____	_____
(Name of Offeror/Prime Contractor)	(Signature of Authorized Representative)	(Phone Number)	(Date Signed)