REGULATORY REQUIREMENTS FOR FEDERAL AID PROJECTS REGARDING DISADVANTAGED BUSINESS ENTERPRISES (DBEs)

I. **GENERAL** - The following shall be incorporated as part of the contract documents for compliance. If any requirements herein are in conflict with the general provisions or special provisions applicable to this project, the requirements herein shall prevail unless specifically superseded or amended in the special provisions or by addendum.

II. **DISADVANTAGED BUSINESS ENTERPRISE** - This project is subject to Title 49, Code of Federal Regulations, Part 26, entitled "Participation by Disadvantaged Business Enterprise in Department of Transportation Programs," hereinafter referred to as the ("DBE Regulation") and is incorporated and made a part of this contract herein by this reference.

A. Policy. It is the policy of the U.S. Department of Transportation ("U.S. DOT") and the State of Hawaii, Department of Transportation and all of its political subdivisions ("Department") that Disadvantaged Business Enterprises ("DBE"), as defined in the DBE Regulation, have an equal opportunity to receive and participate in federally assisted projects. Consequently, the requirements of the DBE Regulation, apply to this project.

B. DBE Obligation. The contractor shall take all necessary and reasonable steps in accordance with the DBE Regulation, to ensure that DBEs have an equal opportunity to compete for and perform on contracts. The contractor shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of contracts financed in whole or in part with Federal funds.

C. DBE Assurances. This agreement is subject to the requirements of the DBE Regulation. The contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in connection with the award or performance of this contract.

The contractor agrees to include the above statements in any subsequent contracts that it enters into with other contractors, and shall cause those contractors to include similar statements in further agreements.

D. Failure to Comply with DBE Requirements. All contractors and subcontractors are hereby advised that failure to carry out all DBE requirements specified herein constitutes a material breach of contract that may result in termination of the contract or such other remedy as deemed appropriate by the Department.

E. Bidders Responsibilities. Bidders shall fully inform themselves with respect to the requirements of the DBE Regulation. Particular attention is directed to the following matters:

1. A DBE may participate as a consultant, prime contractor, subcontractor, joint venture, partnership, trucker, or vendor of materials or supplies.

2. A DBE must perform a commercially useful function ("CUF"). This means that a DBE:

a. must be responsible for the execution of a distinct element of the work,

b. must carry out its responsibility by actually performing, managing, and supervising the work involved by using its own employees and equipment,

c. must negotiate price, determine quality and quantity, order and install material (when applicable), and

d. must pay for the material itself.

3. A DBE must be certified by HDOT in order for credit to be allowed.

4. Information regarding the current certification status of DBEs is available on the Internet at www.state.hi.us/dot/administration/dbe/index.htm

F. Prompt Payment Certification. The successful bidder shall sign and submit the "Prompt Payment Certification" form concurrently with its invoice to the Project Manager. The Department will not process any invoices without this completed form.

III. PROPOSAL REQUIREMENTS.

A. The bidder should complete the DBE contract goal percentage in the proposal. The Department shall verify this percentage, and correct the amount if necessary. In order to receive DBE credit to calculate the Bidder's DBE contract goal, the Bidder shall comply with the following:

1. DBEs must be certified by the bid opening date.
2. DBE Manufacturers, Suppliers and any second tier subcontractors, must be listed in the proposal.
3. Copies or faxes of all "Confirmation by DBE" forms signed by the DBE for each DBE listed in the proposal submitted to the Project Manager listed in the proposal within five (5) working days after bid opening.
4. The dollar amount of each subcontract (both DBE and non-DBE firms) for all subcontractors, manufacturers and suppliers listed in the proposal shall also be submitted to the Project Manager listed in the proposal within five (5) working days after bid opening.

D. The DBE contract goal for this project (expressed in percentage terms) is the proportionate contract dollar value of work performed, materials, and goods to be supplied by DBEs. This DBE contract goal is applicable to all the contract work performed for this project. The bidder shall indicate in the appropriate space provided in the Proposal form furnished by the Department, the DBE contract goal percentage that the bidder will achieve in this contract, as well as the name of and the nature of work to be performed by, or materials and goods to be supplied by each DBE.

1. The DBE Percentage is determined as follows:

a. A bidder's DBE contract goal percentage shall be calculated as follows: DBE contract goal percentage = Contract Dollar Value of the work to be performed by DBE subcontractors and manufacturers, plus 60% of the contract dollar value of DBE suppliers, divided by the sum of all contract items, less mobilization, force account items, and allowance items.

b. The credit to be allowed a prime bidder for each DBE vendor of materials or supplies listed in the proposal, will depend upon whether such vendor is:

i. only a supplier of such commodities,
ii. a supplier who is also the manufacturer of such commodities, or
iii. a supplier who is not a manufacturer, but who is required to perform substantial alteration to such commodities before delivery to the prime contractor.

The percentage of a vendor's quoted price to the prime bidder which will be credited toward the DBE goal, will be 100% for vendors in the (ii) and (iii) categories, and 60% for vendors in the (i) category.

2. The following is a list of appropriate DBE credit to be allowed for work to be performed by a DBE subcontractor.

a. The bidder may receive DBE credit for the entire amount of the subcontract if the work is performed by the DBE's own forces, if supplies and materials are obtained by the DBE for the work, and if leased equipment is leased by the DBE for the work.

b. The bidder may receive DBE credit for the entire amount of fees or commissions charged by a DBE firm for performing professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required by the project.

c. The bidder may receive DBE credit for the work of a second tier subcontractor if the second tier subcontractor is a DBE and is listed on the Subcontractor Listing form in the Proposal.

3. The following is a list of appropriate DBE credit to be allowed when using trucking firms.

a. The total value of the transportation services of a certified DBE trucker if the DBE trucker uses trucks it owns, insures, and operates using drivers it employs.

b. The total value of the transportation services if a DBE trucker leases trucks from another DBE firm.

c. The value of the fees, commission or mark up from a lease arrangement if a DBE trucker leases trucks from a non-DBE firm and credit is not allowed for the lease amount.

d. The total value of the transportation services provided by a non-DBE lessee, not to exceed the value of transportation services provided by DBE-owned trucks on the contract. For additional participation by non-DBE lessees, credit will be awarded only for the fee or commission the DBE firm receives as a result of the lease arrangement.

EXAMPLE: DBE firm X uses two of its own trucks on a contract, leases two trucks from DBE Firm Y and six trucks from non-DBE

Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. With respect to the other two trucks provided by Firm Z, DBE credit could be awarded only for the fees or commissions pertaining to those trucks Firm X receives as a result of the lease with Firm Z.

4. The bidder may be a joint venture or partnership that has a certified DBE as a partner. A "Joint Venture" means an association between a DBE firm and one or more other firms to carry out a single, for-profit, business enterprise for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract, and whose share in the capital contribution, control, management, risks and profits are commensurate with its ownership interest.

IV. **AWARD OF CONTRACT** - The Department reserves the right to reject any or all bids. The award of contract, if it is awarded, will be to the lowest responsible bidder who meets or exceeds the DBE project goal, or who makes good faith efforts to meet or exceed the DBE project goal, as determined by the Department.

A. If the lowest responsible bidder meets or exceeds the DBE project goal, such bidder will be awarded the contract.

B. If the lowest responsible bidder does not meet the total DBE project goal, such bidder shall submit all information that the bidder believes is relevant, and which demonstrates to the Department, that the bidder made good faith efforts to meet the DBE project goal. The Department must receive all documents, and other information that the bidder believes supports its claim that it made good faith efforts to meet the DBE project goal. The documents and information must be received, no later than five (5) working days after requested by the Department. After a thorough review and investigation of the bidder's actions, such bidder will be awarded the contract if the Department is satisfied that such bidder has made sufficient good faith efforts to meet the DBE project goal.

C. If the lowest responsible bidder does not meet the DBE project goal and does not demonstrate to the satisfaction of the Department that it made good faith efforts to meet the DBE project goal, such bid shall be rejected as non-responsive. The Department will then consider the next lowest responsible bidder for award in accordance with paragraph A or B above.

V. **ADMINISTRATIVE RECONSIDERATION.** Under the provisions of 49 CFR, Part 26.53(d), if it is determined by the Department that the apparent low bidder has failed to meet the provisions of this subsection, the bidder may submit a request for an administrative reconsideration. The bidder must file this request with the Office of Civil Rights within five (5) working days of notification by the Department that the bidder failed to meet the requirements of this subsection. As part of this reconsideration request, it is the bidder's responsibility to provide to Department, any and all written documentation, correspondence, logs, and any other documents or evidence the bidder believes relates to the issue of whether it met the DBE project goal or made good faith effort to do so.

A. The Department's DBE Liaison Officer ("Liaison Officer") will be responsible for resolving the reconsideration dispute.

B. Upon request by the bidder, the bidder will be allowed an opportunity to meet in person with the Liaison Officer to discuss the issue of whether it met the DBE project goal, or made good faith effort to do so. If a meeting is requested, the bidder must be ready, willing, and able to meet with the Liaison Officer within 5 working days of the bidder's receipt of written notification that the bidder failed to meet the requirements of this subsection.

C. The Liaison Officer will render a written decision on the reconsideration, and notify the bidder in writing of the decision. The written decision will explain the basis for the Liaison Officer's findings and the decision.

D. The decision is not appealable to the U.S. DOT, but is appealable in accordance with Section 103D-709, HRS.

VI. SUBCONTRACTING

A. All bidders should be registered with the Office of Civil Rights, DBE Section, prior to submitting a bid.

B. No substitution of a DBE subcontractor shall be made at any time without the prior written consent of the Department.

C. If a DBE subcontractor is unable to perform work under the contract, and is to be replaced, the contractor's failure to obtain a substitute, certified DBE for said work, or to make good faith effort to obtain such a substitute DBE subcontractor to perform said work, may constitute a breach of this contract for which the Department may terminate the contract or pursue such remedy as deemed appropriate by the Department.

D. Agreements between a bidder and a DBE in which a DBE promises not to provide subcontracting quotations to other bidders are strictly prohibited.

VII. PAYMENT

A. The Department will make an estimate in writing each month based on the items of work performed and materials incorporated in the work and the value therefore at the unit prices or lump sum prices set forth in the contract. All progress estimates and payments will be approximate only and shall be subject to correction at any time prior to or in the final estimate and payment. The Department will not withhold any amount from any payment to the bidder.

B. The bidder shall pay all subcontractors within ten (10) calendar days after receipt of any progress payments from the Department. This clause applies to both DBE and non-DBE subcontractors, and all tiers of subcontracts.

C. The bidder shall submit the "Prompt Payment Certification" form with its payment request to the Department.

D. When any subcontractor has satisfactorily completed its work as specified in the subcontract, and there are no bona fide disputes, the bidder shall make prompt and full payment to the subcontractor of all monies due, including retainage,

within ten (10) calendar days after the subcontractor's work is satisfactorily completed. A subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented, as required by the Department. The bidder must obtain the prior written approval from the Department before it can continue to withhold retainage from any subcontractor who has completed its portion of the work. This clause applies to both DBE and non-DBE subcontractors, and all tiers of subcontracts.

E. Final Payment - A completed "Final Report of DBE Participation" and "Prompt Payment Certification" must be submitted with the final payment request. Final payment will not be processed without the completed forms.