

(July 31, 2015)

Disadvantaged Business Enterprise Condition of Award Participation

The Disadvantaged Business Enterprise (DBE) requirements of 49 CFR Part 26 applies to this Agreement/Task Order. Demonstrating compliance with these specifications is a Condition of Award (COA) of this Agreement/Task Order. Failure to comply with the requirements of this specification may result in your Statement of Qualification (SOQ) or response to a Request For Additional Information (RFAI) being found to be nonresponsive and may be rejected.

DBE COA Goal

The Contracting Agency has established a COA Agreement/Task Order goal percentage of:

DBE Eligibility / Selection of DBEs

A Directory of Certified DBE Firms denoting the Description of Work the DBE Consultants are certified to perform is available at:

www.omwbe.wa.gov/certification/index.shtml

The directory provides plain language on the Description of Work that the listed DBE's have been certified by the Office of Minority and Women's Business Enterprises (OMWBE) to perform. The Prime Consultant shall use the Directory of Certified DBE Firms to confirm if a DBE is certified for the "Description of Work" the Prime Consultant lists in their SOQ or RFAI and therefore qualifies for credit towards the COA goal.

Crediting DBE Participation**Joint Venture**

When a DBE performs as a participant in a joint venture, only that portion of the total dollar value of the Agreement/Task Order equal to the distinct, clearly defined portion of the Work that the DBE performs with its own forces shall be credited.

DBE Prime Consultant

A DBE Prime Consultant may only take credit for that portion of the total dollar value of the Agreement/Task Order equal to the distinct, clearly defined portion of the Work that the DBE Prime performs with its own forces.

DBE Sub-consultant

When a DBE firm participates as a Sub-consultant only that portion of the total dollar value of the Agreement/Task Order equal to the distinct, clearly defined portion of the Work that the DBE performs with its own forces shall be credited.

- Include the cost of supplies and materials obtained by the DBE for the Work in the Agreement/Task Order including supplies purchased or equipment leased by the DBE.
 - However, you may not take credit for supplies, materials, and equipment the DBE Sub-consultant purchases or leases from the Prime Consultant or its affiliate. In



addition, Work performed by a DBE, utilizing resources of the Prime Consultant or its affiliates shall not be credited.

- In very rare situations, a DBE firm may utilize equipment and/or personnel from a non-DBE firm other than the Prime Consultant or its affiliates. Should this situation arise the arrangement must be short-term and have prior written approval from the Office of Equal Opportunity (OEO). The arrangement must not impact the DBE firm's ability to perform a Commercially Useful Function (CUF).)
- Count the entire value of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services.
- If a firm is not certified as a DBE at the time of the execution of the Agreement/Task Order, their participation cannot be counted toward any DBE goals.

Commercially Useful Function (CUF)

The Prime Consultant has a responsibility and must treat the working relationship with the DBE such that the DBE is performing a CFU. The Prime Consultant may only take credit for Work performed by a DBE that is determined to be performing a CFU.

- A DBE performs a CFU when it is responsible for execution of a distinct element of Work and is carrying out its responsibilities by performing, managing and supervising the Work involved.
- A DBE does not perform a CFU if its role is limited to that of an extra participant in a transaction, agreement, or project through which funds are passed.

Disadvantaged Business Enterprise (DBE) Utilization Plan

To be eligible for award of the Agreement/Task Order, the Prime Consultant shall properly complete and submit a DBE Utilization Plan. The Prime Consultant's DBE Utilization Plan must clearly demonstrate how the Prime Consultant intends to meet the DBE COA goal. A DBE Utilization Plan form is included in the Request For Qualifications (RFQ) or RFAI.

In the event of arithmetic errors in completing the DBE Utilization Plan the amount listed to be applied towards the goal for each DBE shall govern and the DBE total amount shall be adjusted accordingly.

Note: The Contracting Agency shall consider as nonresponsive and shall reject any SOQ or response to an RFAI submitted that does not contain a Disadvantaged Business Enterprise Utilization Plan that accurately demonstrates how the Prime Consultant intends to meet the COA goal.

Disadvantaged Business Enterprise (DBE) Written Confirmation

The Prime Consultant shall submit a complete and accurate DBE Written Confirmation form for each firm listed in their SOQ or response to an RFAI and with the DBE Sub-consultants clearly identified in the Prime Consultant's DBE Utilization Plan as submitted with their SOQ or response to an RFAI. Failure to do so will result in the associated participation being disallowed, which may result in the Prime Consultant's SOQ or response to an RFAI being deemed non-responsive. A DBE Written Confirmation form is included in this RFQ/RFAI.

It is prohibited for the Prime Consultant to require a DBE to submit a DBE Written Confirmation form with any part of the form left blank. Should the Contracting Agency determine that a DBE Written Confirmation form was signed by a DBE that was not complete; the validity of the document comes into question and the associated DBE Participation may not receive credit.

Selection of Successful Prime Consultant Faith Efforts (GFE)

The successful Prime Consultant shall be selected on the basis of qualifications and DBE goal responsiveness, which demonstrates a GFE to achieve the DBE COA goal. Achieving the goal may be accomplished in one of two ways, as follows:

1. By meeting the goal

The best indication of GFEs is to document, through submission of the DBE Utilization Plan and supporting DBE Written Confirmation form that the Prime Consultant has obtained enough DBE participation to meet or exceed the assigned DBE COA Agreement/Task Order goal. That being the case no additional GFE documentation is required. Or;

2. By documentation that it made adequate GFE to meet the goal

The Prime Consultant may demonstrate a GFE in whole or part through GFE documentation ONLY IN THE EVENT a Prime Consultant's efforts to solicit sufficient DBE participation have been unsuccessful. In this case, the Prime Consultant must supply GFE documentation in addition to the DBE Utilization Plan, and supporting DBE Written Confirmation form(s).

Note: In the case where the Prime Consultant was awarded the Agreement/Task Order based on demonstrating adequate GFE the announced DBE goal will not be reduced to the Prime Consultant's partial commitment. The Prime Consultant shall demonstrate a GFE during the life of the Agreement/Task Order to attain the DBE COA Goal as assigned to the Agreement/Task Order.

Good Faith Efforts (GFE) Documentation

GFE documentation shall be received, as specified in the RFQ/RFAI.

Based upon all the relevant documentation submitted in the Prime Consultants SOQ or response to an RFAI, the Contracting Agency shall determine whether the Prime Consultant has demonstrated a sufficient GFE to achieve DBE participation. The Contracting Agency will make a fair and reasonable judgment of whether a Prime Consultant that did not meet the goal through participation, made adequate GFE as demonstrated by the GFE documentation.

The following is a list of types of actions, which would be considered as part of the Prime Consultant's GFE to achieve 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:

1. Attendance by the Prime Consultant at any pre-solicitation meetings that were scheduled by the Contracting Agency to inform DBEs of sub-consulting opportunities available on the project;
2. Contacting local Tribes, Tribal Employment Rights Offices (TERO) concerning the sub-consulting opportunities in sufficient time to allow the enterprises to participate effectively;
3. Selection by the Prime Consultant of specific economically feasible units of the project to be performed by DBEs in order to increase the likelihood of participation by DBEs even if the Prime Consultant preferred to perform these Work items as the Prime Consultant;
4. Advertising by the Prime Consultant in general circulation, trade association minority and trade oriented, women focus publications, concerning the sub-consulting opportunities;
5. Providing written notice from the Prime Consultant's to a reasonable number of specific DBEs, identified from the OMWBE Directory of Certified DBE Firms for the selected sub-consulting Work, in sufficient time to allow the enterprises to participate effectively;
6. Follow-up by the Prime Consultant of initial solicitations of interest by contacting the DBEs to determine with certainty whether they were interested. Documentation of this kind of action shall include the information outlined below:
 - a) The names, addresses, telephone numbers of DBEs who were contacted, the dates of initial contact, and whether initial solicitations of interest were followed-up by contacting the DBEs to determine with certainty whether the DBEs were interested;



- b) A description of the information provided to the DBEs regarding the scope of Work to be performed; and
 - c) Documentation of each DBE contacted but rejected and the reason(s) for that rejection.
7. Providing, to interested DBEs, adequate information about the scope of Work, and requirements for the selected sub-consulting Work;
 8. Negotiating in good faith with the DBE firms, and not, without justifiable reason, rejecting as unsatisfactory, any interest by any DBE. The DBE's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations - union vs. non-union employee status - are not legitimate causes for the rejection or non-solicitation of DBE's in the Prime Consultant's efforts to meet the project goal;
 9. Advertising and making efforts to obtain DBE participation that were reasonably expected to produce a level of participation sufficient to meet the goal or requirements of the Contracting Agency;
 10. Making any other efforts to obtain DBE participation that were reasonably expected to produce a level of participation sufficient to meet the goal or requirements of the Contracting Agency;
 11. Using the services of minority community organizations, minority consulting groups, local, State, and federal minority business assistance offices and other organizations identified by WSDOT and advocates for disadvantaged, minority, and women businesses that provide assistance in the recruitment and placement of disadvantaged, minority, and women business enterprises; and
 12. Using the WSDOT OEO DBE Supportive Services to assist you. For more information please contact the OEO by calling toll free at (888) 259-9143 or emailing dbess@wsdot.wa.gov.

Administrative Reconsideration of GFE Documentation

Any Prime Consultant has the right to reconsideration but only for the purpose of reassessing their GFE documentation that was determined to be inadequate.

- The Prime Consultant must request and schedule a reconsideration hearing within seven calendar days of notification of being nonresponsive or forfeit the right to reconsideration.



- The reconsideration decision on the adequacy of the Prime Consultant's GFE documentation shall be made by an official who did not take part in the original determination.
- The Prime Consultant shall have the opportunity to meet in person with the official for the purpose of setting forth the Prime Consultant's position as to why the GFE documentation demonstrates a sufficient effort.
- The reconsideration official shall provide the Prime Consultant with a written decision on reconsideration within five business days of the hearing explaining the basis for their finding.

Procedures between Award and Execution

After Award and prior to Execution, the Prime Consultant shall provide the additional information described below:

1. Additional information for all successful firms that are utilized on the Agreement/Task Order, clearly identifying all successful DBE's as shown on the Disadvantaged Business Enterprise Utilization Plan:
 - a) A completed Consultant Information form.
 - b) List of all work items assigned to each successful firm with corresponding dollar value.

Total amounts shown for each DBE shall not be less than the amount shown on the Disadvantaged Business Enterprise Utilization Plan. A breakdown that does not conform to the Disadvantaged Business Enterprise Utilization Plan or that demonstrates a lesser amount of DBE participation than that included in the Disadvantaged Business Enterprise Utilization Plan will be returned for correction.

2. A list of all firms who submitted interest in an attempt to participate in this project whether they were successful or not. Include the business name, mailing address, contact name and phone number.

Note: The firms identified by the Prime Consultant may be contacted by the Contracting Agency to solicit general information as follows: age of the firm and average of its gross annual receipts over the past three-years.

Procedures after Execution

Crediting DBE Participation toward Meeting the Goal

Reporting:

All DBE work whether COA or race neutral participation is reported. The Prime Consultant shall submit a Monthly Report of Amounts Credited as DBE Participation to WSDOT Consultant Services Office each month between Execution of the Agreement/Task Order and Physical Completion of the Agreement/Task Order using the application available at:

<https://remoteapps.wsdot.wa.gov/mapsdata/tools/dbeparticipation/>

The monthly report is due twenty (20) calendar days following the end of each month. A monthly report shall be submitted for every month between Execution of the Agreement/Task Order and Physical Completion regardless of whether payments were made or work occurred. After Execution of the Agreement/Task Order, the Prime Consultant shall send an e-mail to DBEPAdmin@wsdot.wa.gov containing the following information: the first and last name, e-mail address, title and phone number of the person that will be submitting the above documents for their company. The e-mail shall include the WSDOT Agreement number and Task Order number (if applicable) they will be reporting on. After receipt of this information by WSDOT, the Prime Consultant will receive an e-mail containing their username and password for the application and a link to the application. Reporting instructions are available in the application.

Payment:

Compensation for all costs involved with complying with the conditions of this specification and any other associated DBE requirements is included in payment for the associated Agreements items of Work.

Prompt Payment:

Prompt payment to all Sub-consultants shall be in accordance with the Prompt Payment terms under section “VI. Sub-Consulting” of the Agreement/Master Agreement.

Counting payments:

Payments to a DBE firm will count toward DBE goals only if the participation is in accordance with these specifications.

Changes in DBE COA participation

Owner initiated Change Orders

The Prime Consultant shall demonstrate a GFE to substitute COA DBE participation when the Contracting Agency deletes Work items by supplement or amendment that impact a COA DBE's Work.

When the Agreement/Task Order allows alternate Work methods which serve to delete or create under-runs in COA DBE Work then the Prime Consultant must provide documentation of negotiating the change with the DBE that was to perform the reduced Work and demonstrate a GFE to substitute other DBE COA participation.

Original Under runs:

In the event that Work committed to a DBE firm as part of the COA under runs the original agreed upon amount the Prime Consultant shall demonstrate a GFE to substitute other DBE COA participation.

Contractor-Initiated Proposals—General:

The Prime Consultant cannot reduce the amount of work committed to a DBE firm at Agreement/Task Order award without good cause and only with written concurrence from the OEO. Reducing a COA DBE's Work is viewed as a partial DBE termination, subject to the procedures below.

DBE Termination:

A COA DBE Sub-consultant may only be terminated in whole or part with the approval of the Contracting Agency (in coordination with OEO.) Approval will be granted provided the Prime Consultant demonstrates that the termination is based on good cause.

Good cause typically includes situations where the DBE Sub-consultant is unable or has failed to perform the work of its sub-consultant contract in accordance with normal industry standards. While not all inclusive, some examples of good cause include the following circumstances:

Good cause may exist if:

- The listed DBE Sub-consultant fails or refuses to execute a written sub-consultant contract with the Prime Consultant;
- The listed DBE Sub-consultant fails or refuses to perform the work of its sub-consultant contract in a way consistent with normal industry standards;



- The listed DBE Sub-consultant becomes bankrupt, insolvent, or exhibits credit unworthiness;
- The listed DBE Sub-consultant is ineligible to work on public works projects because of suspension and debarment proceedings pursuant 2 CFR Parts 180, 215 and 1,200 or applicable state law;
- The listed DBE Sub-consultant voluntarily withdraws from the project and provides to you written notice of its withdrawal;
- The listed DBE is ineligible to receive DBE credit for the type of work required; or
- A DBE owner dies or becomes disabled with the result that the listed DBE is unable to complete its work on the sub-consultant contract.

Good cause does not exist if:

- The Prime Consultant seeks to terminate a COA DBE so that the Prime Consultant can self-perform the Work;
- The Prime Consultant seeks to terminate a COA DBE so the Prime Consultant can substitute another DBE or non-DBE after Agreement/Task Order award; or
- The failure or refusal of the DBE Sub-consultant to perform its work on the sub-consultant contract results from the bad faith or discriminatory action of the Prime Consultant (e.g., the failure of the Prime Consultant to make timely payments or the unnecessary placing of obstacles in the path of the DBE's Work.)

Prior to requesting termination, the Prime Consultant must give notice in writing to the DBE Sub-consultant with a copy to the Contracting Agency, of its intent to request to terminate DBE work and the reasons for doing so. The DBE Sub-consultant shall have five (5) days to respond to the Prime Consultant's notice. The DBE's response shall either support the termination or advise the Contracting Agency and the Prime Consultant of the reasons it objects to the termination of its sub-consultant contract.

When a COA DBE firm is "terminated" from an Agreement/Task Order (or fails to complete its Sub-consultant contract for any reason), the Prime Consultant shall make every GFE to substitute another DBE Firm (ref.to 49 CFR 26.53(g)).

Graduation:

When a DBE firm “graduates” from the DBE program (during the course of an executed sub-consultant contract), the DBE participation of that firm “may” continue to count towards the Agreement/Task Order DBE goal.

Decertification:

When a COA DBE firm, who has a signed sub-consultant contract in place with a Prime Consultant, later becomes “decertified” (during the course of that sub-consultant contract) – the DBE participation of that firm “may” continue to count towards the Agreement/Task Order DBE goal.

Damages for Noncompliance

The Prime Consultant shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement/Task Order. The Prime Consultant shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of Agreements/Task Orders, which contain funding assistance from the United States Department of Transportation. Failure by the Prime Consultant to carry out these requirements is a material breach of this Agreement/Master Agreement, which may result in the Termination of this Agreement/Task Order or such other remedy as the Contracting Agency deems appropriate.

If the Prime Consultant does not comply with any part of its Agreement/Master Agreement as required under 49 CFR part 26, and/or any other applicable law or regulation regarding DBE, the Contracting Agency may withhold payment, suspend the ability of the Prime Contractor to participate in future Contracting Agency Agreements/Master Agreements, impose sanctions or Terminate the Agreement/Master Agreement/Task Order, and subject the Prime Consultant to civil penalties of up to ten percent of the amount of the Agreement/Task Order for each violation.

The apparent Prime Consultant must be in compliance with these Agreement/Master Agreement Provisions as a condition precedent to the granting of a notice of award by the Contracting Agency. The Prime Consultant is entitled to request an adjudicative proceeding with respect to the Contracting Agency’s determination of Agreement/Master Agreement violation and assessed penalties by filing a written application within thirty days of receipt of notification. The adjudicative proceeding, if requested, will be conducted by an administrative law judge pursuant to the procedures set forth in RCW 34.05 and Chapter 10.08 of the Washington Administrative Code.