

1 **(October 3, 2022)**

2 ***Disadvantaged Business Enterprise Participation***

3 The Disadvantaged Business Enterprise (DBE) requirements of 49 CFR Part 26 and
4 USDOT's official interpretations (i.e., Questions & Answers) apply to this Contract. As
5 such, the requirements of this Contract are to make affirmative efforts to solicit DBEs,
6 provide information on who submitted a Bid or quote and to report DBE participation
7 monthly as described elsewhere in these Contract Provisions. No preference will be
8 included in the evaluation of Bids/Proposals, no minimum level of DBE participation
9 shall be required as a Condition of Award and Bids/Proposals may not be rejected or
10 considered non-responsive on that basis.

11
12 **DBE Abbreviations and Definitions**

13 **Broker** – A business firm that provides a bona fide service, such as
14 professional, technical, consultant or managerial services and assistance in
15 the procurement of essential personnel, facilities, equipment, materials, or
16 supplies required for the performance of the Contract, or, persons/companies
17 who arrange or expedite transactions.

18
19 **Certified Business Description** – Specific descriptions of work the DBE is
20 certified to perform, as identified in the Certified Firm Directory, under the
21 Vendor Information page.

22
23 **Certified Firm Directory** – A database of all Minority, Women, and
24 Disadvantaged Business Enterprises. The on-line Directory is available to
25 Contractors for their use in identifying and soliciting interest from DBE firms.
26 The database is located under the Firm Certification section of the Diversity
27 Management and Compliance System web page at:
28 <https://omwbe.diversitycompliance.com>.

29
30 **Commercially Useful Function (CUF)**

31 49 CFR 26.55(c)(1) defines commercially useful function as: *"A DBE performs*
32 *a commercially useful function when it is responsible for execution of the work*
33 *of the contract and is carrying out its responsibilities by actually performing,*
34 *managing, and supervising the work involved. To perform a commercially*
35 *useful function, the DBE must also be responsible, with respect to materials*
36 *and supplies used on the contract, for negotiating price, determining quality*
37 *and quantity, ordering the material, and installing (where applicable) and*
38 *paying for the material itself. To determine whether a DBE is performing a*
39 *commercially useful function, you must evaluate the amount of work*
40 *subcontracted, industry practices, whether the amount the firm is to be paid*
41 *under the contract is commensurate with the work it is actually performing and*
42 *the DBE credit claimed for its performance of the work, and other relevant*
43 *factors."*

44
45 **Contract** – For this Special Provision only, this definition supplements Section
46 1-01.3. 49 CFR 26.5 defines contract as: "... a legally binding relationship
47 obligating a seller to furnish supplies or services (including, but not limited to,
48 construction and professional services) and the buyer to pay for them. For
49 purposes of this part, a lease is considered to be a contract."
50

1 **Disadvantaged Business Enterprise (DBE)** – A business firm certified by the
2 Washington State Office of Minority and Women's Business Enterprises, as
3 meeting the criteria outlined in 49 CFR 26 regarding DBE certification.
4

5 **Force Account Work** – Work measured and paid in accordance with Section
6 1-09.6.
7

8 **Manufacturer (DBE)** – A DBE firm that operates or maintains a factory or
9 establishment that produces on the premises the materials, supplies, articles,
10 or equipment required under the Contract. A DBE Manufacturer shall produce
11 finished goods or products from raw or unfinished material or purchase and
12 substantially alters goods and materials to make them suitable for construction
13 use before reselling them.
14

15 **Regular Dealer (DBE)** – A DBE firm that owns, operates, or maintains a store,
16 warehouse, or other establishment in which the materials or supplies required
17 for the performance of a Contract are bought, kept in stock, and regularly sold
18 to the public in the usual course of business. To be a Regular Dealer, the DBE
19 firm must be an established regular business that engages in as its principal
20 business and in its own name the purchase and sale of the products in
21 question. A Regular Dealer in such items as steel, cement, gravel, stone, and
22 petroleum products need not own, operate or maintain a place of business if it
23 both owns and operates distribution equipment for the products. Any
24 supplementing of regular dealers' own distribution equipment shall be by long-
25 term formal lease agreements and not on an ad-hoc basis. Brokers,
26 packagers, manufacturers' representatives, or other persons who arrange or
27 expedite transactions shall not be regarded as Regular Dealers within the
28 meaning of this definition.
29

30 **DBE Goals**

31 No DBE goals have been assigned as part of this Contract.
32

33 **Affirmative Efforts to Solicit DBE Participation**

34 The Contractor shall not discriminate on the grounds of race, color, sex, national
35 origin, age, or disability in the selection and retention of subcontractors, including
36 procurement of materials and leases of equipment. DBE firms shall have an equal
37 opportunity to compete for subcontracts in which the Contractor enters into
38 pursuant to this Contract.
39

40 Contractors are encouraged to:
41

- 42 1. Advertise opportunities for subcontractors or suppliers in a timely and
43 reasonably designed manner to provide notice of the opportunity to DBEs
44 capable of performing the Work. All advertisements should include a
45 Contract Provision encouraging participation by DBE firms. This may be
46 accomplished through general advertisements (e.g. newspapers, journals,
47 etc.) or by soliciting Bids/Proposals directly from DBEs.
48
- 49 2. Establish delivery schedules that encourage participation by DBEs and
50 other small businesses.
51
- 52 3. Participate with a DBE as a joint venture.

1
2 **DBE Eligibility/Selection of DBEs for Reporting Purposes Only**

3 Contractor may take credit for DBEs utilized on this Contract only if the firm is
4 certified for the Work being performed, and the firm performs a commercially useful
5 function (CUF).
6

7 Absent a mandatory goal, all DBE participation that is attained on this project will
8 be considered as "race neutral" participation and shall be reported as such.
9

10 **Crediting DBE Participation**

11 All DBE subcontractors shall be certified before the subcontract on which they are
12 participating is executed.
13

14 Be advised that although a firm is listed in the directory, there are cases where the
15 listed firm is in a temporary suspension status. The Contractor shall review the
16 OMWBE Suspended DBE Firms list. A DBE firm that is included on this list may
17 not enter into new contracts that count towards participation.
18

19 DBE participation is only credited upon payment to the DBE.
20

21 The following are some definitions of what may be counted as DBE participation.
22

23 **DBE Prime Contractor**

24 Only take credit for that portion of the total dollar value of the Contract equal to
25 the distinct, clearly defined portion of the Work that the DBE Prime Contractor
26 performs with its own forces and is certified to perform.
27

28 **DBE Subcontractor**

29 Only take credit for that portion of the total dollar value of the subcontract
30 equal to the distinct, clearly defined portion of the Work that the DBE performs
31 with its own forces. The value of work performed by the DBE includes the cost
32 of supplies and materials purchased by the DBE and equipment leased by the
33 DBE, for its work on the contract. Supplies, materials or equipment obtained by
34 a DBE that are not utilized or incorporated in the contract work by the DBE will
35 not be eligible for DBE credit.
36

37 The supplies, materials, and equipment purchased or leased from the
38 Contractor or its affiliate, including any Contractor's resources available to
39 DBE subcontractors at no cost, shall not be credited.
40

41 DBE credit will not be given in instances where the equipment lease includes
42 the operator. The DBE is expected to operate the equipment used in the
43 performance of its work under the contract with its own forces. Situations
44 where equipment is leased and used by the DBE, but payment is deducted
45 from the Contractor's payment to the DBE is not allowed.
46

47 If a DBE subcontracts a portion of the Work of its contract to another firm, the
48 value of the subcontracted Work may be credited only if the DBE's Lower-Tier
49 subcontractor is also a DBE. Work subcontracted to a non-DBE shall not be
50 credited.
51

Count expenditures toward race/gender-neutral participation only if the DBE is performing a CUF on the contract.

DBE Subcontract and Lower Tier Subcontract Documents

There must be a subcontract agreement that complies with 49 CFR Part 26 and fully describes the distinct elements of Work committed to be performed by the DBE. The subcontract agreement shall incorporate requirements of the primary Contract. Subcontract agreements of all tiers, including lease agreements shall be readily available at the project site for the Engineer review.

DBE Service Provider

The value of fees or commissions charged by a DBE Broker, a DBE behaving in a manner of a Broker, or another service provider for providing a bona fide service, such as professional, technical, consultant, managerial services, or for providing bonds or insurance specifically required for the performance of the contract will only be credited as DBE participation, if the fee/commission is determined by the Contracting Agency to be reasonable and the firm has performed a CUF.

Temporary Traffic Control

If the DBE firm is being utilized in the capacity of only "Flagging", the DBE firm must provide a Traffic Control Supervisor (TCS) and flagger, which are under the direct control of the DBE. The DBE firm shall also provide all flagging equipment (e.g. paddles, hard hats, and vests).

If the DBE firm is being utilized in the capacity of "Traffic Control Services", the DBE firm must provide a TCS, flaggers, and traffic control items (e.g., cones, barrels, signs, etc.) and be in total control of all items in implementing the traffic control for the project. In addition, if the DBE firm utilizes the Contractor's equipment, such as Transportable Attenuators and Portable Changeable Message Signs (PCMS) no DBE credit can be taken for supplying and operating the items.

Trucking

DBE trucking firm participation may only be credited as DBE participation for the value of the hauling services, not for the materials being hauled unless the trucking firm is also certified as a supplier. In situations where the DBE's work is priced per ton, the value of the hauling service must be calculated separately from the value of the materials in order to determine DBE credit for hauling.

The DBE trucking firm must own and operate at least one licensed, insured and operational truck on the contract. The truck must be of the type that is necessary to perform the hauling duties required under the contract. The DBE receives credit for the value of the transportation services it provides on the Contract using trucks it owns or leases, licenses, insures, and operates with drivers it employs.

The DBE may lease additional trucks from another DBE firm. The Work that a DBE trucking firm performs with trucks it leases from other certified DBE trucking firms qualify for 100% DBE credit

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2 The trucking Work subcontracted to any non-DBE trucking firm will not receive
3 credit for Work done on the project. The DBE may lease trucks from a non-
4 DBE truck leasing company, but can only receive credit as DBE participation if
5 the DBE uses its own employees as drivers.
6

7 DBE credit for a truck broker is limited to the fee/commission that the DBE
8 receives for arranging transportation services.
9

10 Truck registration and lease agreements shall be readily available at the
11 project site for the Engineer review.
12

13 **DBE Manufacturer and DBE Regular Dealer**

14 One hundred percent (100%) of the cost of the manufactured product obtained
15 from a DBE Manufacturer can count as DBE participation.
16

17 Sixty percent (60%) of the cost of materials or supplies purchased from a DBE
18 Regular Dealer may be credited as DBE participation. If the role of the DBE
19 Regular Dealer is determined to be that of a pass-through, then no DBE credit
20 will be given for its services. If the role of the DBE Regular Dealer is
21 determined to be that of a Broker, then DBE credit shall be limited to the fee or
22 commission it receives for its services. Regular Dealer status and the amount
23 of credit is determined on a Contract-by-Contract basis.
24

25 Regular Dealer DBE firms must be approved before being used on a project.
26 The WSDOT Approved Regular Dealer list published on WSDOT's Office of
27 Equal Opportunity (OEO) web site must include the specific project for which
28 approval is being requested. The Regular Dealer must submit the Regular
29 Dealer Status Request form a minimum of five days prior to being utilized on
30 the specific project.
31

32 Purchase of materials or supplies from a DBE which is neither a manufacturer
33 nor a regular dealer, (i.e. Broker) only the fees or commissions charged for
34 assistance in the procurement of the materials and supplies, or fees or
35 transportation charges for the delivery of materials or supplies required on a
36 job site, can count as DBE participation provided the fees are not excessive as
37 compared with fees customarily allowed for similar services. Documentation
38 will be required to support the fee/commission charged by the DBE. The cost
39 of the materials and supplies themselves cannot be counted toward as DBE
40 participation.
41

42 Note: Requests to be listed as a Regular Dealer will only be processed if the
43 requesting firm is a material supplier certified by the Office of Minority
44 and Women's Business Enterprises in a NAICS code that falls within
45 the 42XXXX NAICS Wholesale code section.
46

47 **Procedures Between Award and Execution**

48 After Award and prior to Execution, the Contractor shall provide the additional
49 information described below. Failure to comply shall result in the forfeiture of the
50 Bidder's Proposal bond or deposit.
51

- 1 1. A list of all firms who submitted a Bid or quote in attempt to participate in
2 this project whether they were successful or not. Include the business
3 name and mailing address.
4

5 Note: The firms identified by the Contractor may be contacted by the
6 Contracting Agency to solicit general information as follows:
7 age of the firm and average of its gross annual receipts over
8 the past three-years.
9

10 **Procedures After Execution**

11 **Commercially Useful Function (CUF)**

12 The Contractor may only take credit for the payments made for Work
13 performed by a DBE that is determined to be performing a CUF. Payment
14 must be commensurate with the work actually performed by the DBE. This
15 applies to all DBEs performing Work on a project, whether or not the DBEs are
16 COA, if the Contractor wants to receive credit for their participation. The
17 Engineer will conduct CUF reviews to ascertain whether DBEs are performing
18 a CUF. A DBE performs a CUF when it is carrying out its responsibilities of its
19 contract by actually performing, managing, and supervising the Work involved.
20 The DBE must be responsible for negotiating price; determining quality and
21 quantity; ordering the material, installing (where applicable); and paying for the
22 material itself. If a DBE does not perform "all" of these functions on a furnish-
23 and-install contract, it has not performed a CUF and the cost of materials
24 cannot be counted toward DBE COA Goal. Leasing of equipment from a
25 leasing company is allowed. However, leasing/purchasing equipment from the
26 Contractor is not allowed. Lease agreements shall be readily available for
27 review by the Engineer.
28

29 In order for a DBE traffic control company to be considered to be performing a
30 CUF, the DBE must be in control of its work inclusive of supervision. The DBE
31 shall employ a Traffic Control Supervisor who is directly involved in the
32 management and supervision of the traffic control employees and services.
33

34 The DBE does not perform a CUF if its role is limited to that of an extra
35 participant in a transaction, contract, or project through which the funds are
36 passed in order to obtain the appearance of DBE participation.
37

38 The following are some of the factors that the Engineer will use in determining
39 whether a DBE trucking company is performing a CUF:
40

- 41 • The DBE shall be responsible for the management and supervision of
42 the entire trucking operation for which it is responsible on the
43 Contract. The owner demonstrates business related knowledge,
44 shows up on site and is determined to be actively running the
45 business.
46
- 47 • The DBE shall with its own workforce, operate at least one fully
48 licensed, insured, and operational truck used on the Contract. The
49 drivers of the trucks owned and leased by the DBE must be
50 exclusively employed by the DBE and reflected on the DBE's payroll.
51

- Lease agreements for trucks shall indicate that the DBE has exclusive use of and control over the truck(s). This does not preclude the leased truck from working for others provided it is with the consent of the DBE and the lease provides the DBE absolute priority for use of the leased truck.
- Leased trucks shall display the name and identification number of the DBE.

Joint Checking

A joint check is a check between a subcontractor and the Contractor to the supplier of materials/supplies. The check is issued by the Contractor as payer to the subcontractor and the material supplier jointly for items to be incorporated into the project. The DBE must release the check to the supplier, while the Contractor acts solely as the guarantor.

A joint check agreement must be approved by the Engineer and requested by the DBE involved using the DBE Joint Check Request Form (form # 272-053) prior to its use. The form must accompany the DBE Joint Check Agreement between the parties involved, including the conditions of the arrangement and expected use of the joint checks.

The approval to use joint checks and the use will be closely monitored by the Engineer. To receive DBE credit for performing a CUF with respect to obtaining materials and supplies, a DBE must "be responsible for negotiating price, determining quality and quantity, ordering the material and installing and paying for the material itself." The Contractor shall submit DBE Joint Check Request Form for the Engineer approval prior to using a joint check.

Material costs paid by the Contractor directly to the material supplier is not allowed. If proper procedures are not followed or the Engineer determines that the arrangement results in lack of independence for the DBE involved, no DBE credit will be given for the DBE's participation as it relates to the material cost.

Prompt Payment

Prompt payment to all subcontractors shall be in accordance with Section 1-08.1. Prompt Payment requirements apply to progress payments as well as return of retainage.

Reporting

The Contractor and all subcontractors/suppliers/service providers that utilize DBEs to perform work on the project, shall maintain appropriate records that will enable the Engineer to verify DBE participation throughout the life of the project.

Refer to Section 1-08.1 for additional reporting requirements associated with this Contract.

Decertification

When a DBE is "decertified" from the DBE program during the course of the Contract, the participation of that DBE shall continue to count as DBE participation as long as the subcontract with the DBE was executed prior to the

1 decertification notice. The Contractor is obligated to substitute when a DBE
2 does not have an executed subcontract agreement at the time of
3 decertification.
4

5 **Consequences of Non-Compliance**

6 Each contract with a Contractor (and each subcontract the Contractor signs
7 with a subcontractor) must include the following assurance clause:
8

9 The Contractor, subrecipient, or subcontractor shall not discriminate on the
10 basis of race, color, national origin, or sex in the performance of this contract.
11 The Contractor shall carry out applicable requirements of 49 CFR Part 26 in
12 the award and administration of DOT-assisted contracts. Failure by the
13 Contractor to carry out these requirements is a material breach of this contract,
14 which may result in the termination of this contract or such other remedy as the
15 recipient deems appropriate, which may include, but is not limited to:
16

17 (1) Withholding monthly progress payments;

18 (2) Assessing sanctions;

19 (3) Liquidated damages; and/or
20

21 (4) Disqualifying the Contractor from future bidding as non-responsible.
22
23
24

25 **Payment**

26 Compensation for all costs involved with complying with the conditions of this
27 Specification and any other associated DBE requirements is included in
28 payment for the associated Contract items of Work, except otherwise provided
29 in the Specifications.