

1 (October 3, 2022)

2 **Federal Small Business Enterprise Participation**

3 The Federal Small Business Enterprise (FSBE) Program is an element of the  
4 Disadvantaged Business Enterprise (DBE) in accordance with the requirements of 49  
5 CFR Part 26.39. Failure to comply with the requirements of this Specification may result  
6 in sanctions as provided by the Contract.

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8 **FSBE Abbreviations and Definitions**

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

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15 **Certified Business Description** – Specific descriptions of work the FSBE is  
16 certified to perform, as identified in the Certified Firm Directory, under the  
17 Vendor Information page.

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19 **Certified Firm Directory** – A database of all Minority, Women, and  
20 Disadvantaged Business Enterprises, including those identified as a FSBE,  
21 currently certified by Washington State. The on-line Directory is available to  
22 Bidders for their use in identifying and soliciting interest from FSBE firms. The  
23 database is located under the Firm Certification section of the Diversity  
24 Management and Compliance System web page at:  
25 <https://omwbe.diversitycompliance.com>.

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27 Firms certified by OMWBE as SBE, DBE can be used to fulfill the FSBE  
28 mandatory goal on a project.

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

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44 **FSBE** – A firm certified by OMWBE as meeting Federal requirements of a  
45 small business enterprise. All firms on the OMWBE Certified Firm Directory  
46 with the designation of SBE or DBE are FSBEs.

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48 **Good Faith Efforts** – Efforts to achieve the FSBE Goal or other requirements  
49 of this part which, by their scope, intensity, and appropriateness to the  
50 objective, can reasonably be expected to fulfill the program requirement.  
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**Manufacturer (FSBE)** – A FSBE firm that operates or maintains a factory or establishment that produces on the premises the materials, supplies, articles, or equipment required under the Contract. A FSBE Manufacturer shall produce finished goods or products from raw or unfinished material or purchase and substantially alters goods and materials to make them suitable for construction use before reselling them.

**Reasonable Fee (FSBE)** – For purposes of Brokers or service providers a reasonable fee shall not exceed 5% of the total cost of the goods or services brokered.

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

#### **FSBE Goal**

The Contracting Agency has established a FSBE Goal for this Contract in the amount of: \*\*\* \$\$1\$\$ \*\*\*

#### **Crediting FSBE Participation**

All FSBE subcontractors shall be certified before the subcontract on which they are participating is executed.

FSBE participation is only credited upon payment to the FSBE.

The following are some definitions of what may be counted as FSBE participation.

#### **FSBE Prime Contractor**

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

#### **FSBE Subcontractor**

Only take credit for that portion of the total dollar value of the subcontract that is equal to the distinct, clearly defined portion of the Work that the FSBE performs with its own forces and is certified to perform. The value of work performed by the FSBE includes the cost of supplies and materials purchased by the FSBE and equipment leased by the FSBE, for its work on the contract. Supplies, materials or equipment obtained by a FSBE that are not utilized or incorporated in the contract work by the FSBE will not be eligible for FSBE credit.

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

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

When the subcontractor is a FSBE, the following apply:

1. If a FSBE subcontracts a portion of the Work of its contract to another firm, the value of the subcontracted Work may be counted toward the FSBE Goal only if the lower-tier subcontractor is also a FSBE.
2. Work subcontracted to a non-FSBE does not count towards the FSBE Goal nor FSBE participation.

#### **FSBE 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 FSBE.

#### **FSBE Service Provider**

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

If the FSBE firm is being utilized in the capacity of "Traffic Control Services", the FSBE 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.

#### **Trucking**

FSBE trucking firm participation may only be credited as FSBE participation for the value of the hauling services, not for the materials being hauled unless the trucking firm is also certified as a supplier of those materials. In situations where the FSBE'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 FSBE credit for hauling

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

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9 The FSBE may lease additional trucks from another FSBE firm. The FSBE  
10 who leases additional trucks from another FSBE firm receives credit for the  
11 value of the transportation services the lessee FSBE provides on the Contract.

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13 The trucking Work subcontracted to any non-FSBE trucking firm will not  
14 receive credit for Work done on the project.

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16 The FSBE may lease trucks from a truck leasing company (recognized truck  
17 rental center), but can only receive credit towards FSBE participation if the  
18 FSBE uses its own employees as drivers.

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20 **FSBE Manufacturer and FSBE Regular Dealer**

21 One hundred percent (100%) of the cost of the manufactured product obtained  
22 from a FSBE manufacturer can count as FSBE participation. If the  
23 manufacturer is a FSBE, participation may count towards the FSBE Goal.

24  
25 Sixty percent (60%) of the cost of materials or supplies purchased from a  
26 FSBE Regular Dealer may be credited as FSBE Participation. If the role of the  
27 FSBE Regular Dealer is determined to be that of a Broker, then FSBE credit  
28 shall be limited to the fee or commission it receives for its services. Regular  
29 Dealer status and the amount of credit is determined on a Contract-by-  
30 Contract basis. If the regular dealer is a FSBE, participation may count  
31 towards the FSBE Goal.

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33 FSBE firms proposed to be used as a Regular Dealer must be approved  
34 before being used on a project. The WSDOT Approved Regular Dealer list  
35 published on WSDOT's Office of Equal Opportunity (OEO) web site must  
36 include the specific project for which approval is being requested. For  
37 purposes of FSBE Goal participation, the Regular Dealer must submit the  
38 Regular Dealer Status Request form and receive approval prior to providing  
39 any equipment or materials or the signing of a purchase order, invoice, or  
40 subcontract.

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42 Purchase of materials or supplies from a FSBE which is neither a  
43 manufacturer nor a regular dealer, (i.e. Broker) only the fees or commissions  
44 charged for assistance in the procurement of the materials and supplies, or  
45 fees or transportation charges for the delivery of materials or supplies required  
46 on a job site, can count as FSBE participation provided the fees are not  
47 excessive as compared with fees customarily allowed for similar services.  
48 Documentation will be required to support the fee/commission charged by the  
49 FSBE. The cost of the materials and supplies themselves cannot be counted  
50 toward as FSBE participation.  
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## Good Faith Effort Documentation

GFE is evaluated prior to Physical Completion when determining whether the Contractor has satisfied its FSBE Goal.

The Contracting Agency will measure GFE using the guidance in 49 CFR Part 26, Appendix A. The following is a list of the types of actions which may be considered as part of the Contractor's GFE to achieve FSBE 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. Solicited through all reasonable and available means the interest of all certified FSBEs who had the capability to perform the Work of the Contract. The Contractor must have solicited this interest within sufficient time to allow the FSBEs to respond to the solicitation. The Contractor must have determined with certainty that the FSBEs were interested by taking appropriate steps to follow up initial solicitations with potential FSBEs.
2. Selected portions of the Work to be performed by FSBEs in order to increase the likelihood that the FSBE Goal would be achieved. This includes, where appropriate, breaking out contract Work items into economically feasible units to facilitate FSBE participation, even when the Contractor might otherwise prefer to perform these Work items with its own forces.
3. Provided interested FSBEs with adequate information about the Plans, Specifications, and requirements of the Contract in a timely manner to assist them in responding to a solicitation.
  - a. Negotiated in good faith with interested FSBEs. It is the Contractor's responsibility to make a portion of the Work available to FSBE subcontractors and suppliers and to select those portions of the Work or material needs consistent with the available FSBE subcontractors and suppliers, so as to facilitate FSBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of FSBEs that were contacted; a description of the information provided regarding the Plans and Specifications for the Work selected for subcontracting; and evidence as to why additional agreements could not be reached for FSBEs to perform the Work.
  - b. A Contractor using good business judgment would consider a number of factors in negotiating with subcontractors, including FSBE subcontractors, and would take a firm's price and capabilities as well as the FSBE Goal into consideration. The fact that there may be some additional costs involved in finding and using FSBEs is not in itself sufficient reason for a Bidder's failure to meet the FSBE Goal, as long as such costs are reasonable. Also, the ability or desire of a Contractor to perform the Work of a Contract with its own organization does not relieve the Contractor of the responsibility to make Good Faith Efforts. Contractors are not, however, required to accept higher quotes from FSBEs if the price difference was excessive or unreasonable.

4. Not rejecting FSBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The Contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the Contractor's efforts to meet the FSBE Goal.
5. Made efforts to assist interested FSBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or Contractor.
6. Made efforts to assist interested FSBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
7. Effectively used the services of available minority/women community organizations; minority/women contractors' groups; local, State, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of FSBEs.
8. Documentation of GFE must include copies of each FSBE and non-FSBE subcontractor quotes submitted to the Bidder when a non-FSBE subcontractor is selected over a FSBE for Work on the Contract.

#### **Procedures after Execution**

##### **Commercially Useful Function (CUF)**

The Contractor may only take credit for the payments made for Work performed by a FSBE that is determined to be performing a CUF. Payment must be commensurate with the work actually performed by the FSBE. This applies to all FSBEs performing Work on a project, if the Contractor wants to receive credit for their participation. The Engineer will conduct CUF reviews to ascertain whether FSBEs are performing a CUF. A FSBE performs a CUF when it is carrying out its responsibilities of its contract by actually performing, managing, and supervising the Work involved. The FSBE must be responsible for negotiating price; determining quality and quantity; ordering the material, installing (where applicable); and paying for the material itself. If a FSBE does not perform "all" of these functions on a furnish-and-install contract, it has not performed a CUF and the cost of materials cannot be counted toward FSBE Goal. Leasing of equipment from a leasing company is allowed. However, leasing/purchasing equipment from the Contractor is not allowed. Lease agreements shall be provided prior to the Subcontractor beginning Work. Any use of the Contractor's equipment by a FSBE may not be credited as countable participation.

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

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

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

- The FSBE shall be responsible for the management and supervision of the entire trucking operation for which it is responsible on the contract. The owner demonstrates business related knowledge, shows up on site and is determined to be actively running the business.
- The FSBE itself shall own and operate at least one fully licensed, insured, and operational truck used on the Contract. The drivers of the trucks owned and leased by the FSBE must be exclusively employed by the FSBE and reflected on the FSBE's payroll.
- Lease agreements for trucks shall indicate that the FSBE 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 FSBE and the lease provides the FSBE absolute priority for use of the leased truck.
- Leased trucks shall display the name and identification number of the FSBE.

#### **Truck Unit Listing Log**

In addition to the subcontracting requirements of Section 1-08.1, each FSBE trucking firm shall submit supplemental information consisting of a completed Primary UDBE/DBE/FSBE Truck Unit Listing Log (WSDOT Form 350-077) and all Rental/Lease agreements (if applicable). The supplemental information shall be submitted in an electronic format to the Engineer prior to any trucking services being performed for FSBE credit. Incomplete or incorrect supplemental information will be returned for correction. The corrected Primary Truck Unit Listing Log and any Updated Primary Truck Unit Listing Logs shall be submitted and accepted by the Engineer no later than ten calendar days of utilizing applicable trucks. Failure to submit or update the DBE Truck Unit Listing Log may result in trucks not being credited as FSBE participation.

Each FSBE trucking firm shall complete a Daily Truck Unit Listing Log for each day that the FSBE performs trucking services for FSBE credit. The Daily Truck Unit Listing Log forms shall be submitted by Friday of the week after the Work was performed by email to the following email address for the region administering the Contract:

Eastern Region - ERRegionOEO@wsdot.wa.gov  
North Central Region - NCRegionOEO@wsdot.wa.gov  
Northwest Region - NWRegionOEO@wsdot.wa.gov  
Olympic Region - ORegionOEO@wsdot.wa.gov  
South Central Region - SCRegionOEO@wsdot.wa.gov  
Southwest Region - SWRegionOEO@wsdot.wa.gov  
Washington State Ferries - FerriesOEO@wsdot.wa.gov

## **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 FSBE 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 FSBE involved using the DBE Joint Check Request Form (WSDOT Form #272-053) prior to its use. The form must accompany the FSBE 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 FSBE credit for performing a CUF with respect to obtaining materials and supplies, a FSBE must "be responsible for negotiating price, determining quality and quantity, ordering the material, 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 are not allowed. If proper procedures are not followed or the Engineer determines that the arrangement results in lack of independence for the FSBE involved, no FSBE credit will be given for the FSBE'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.

## **Subcontracts**

Prior to a FSBE performing Work on the Contract, an executed subcontract between the FSBE and the Contractor shall be submitted to the Engineer. The executed subcontracts shall be submitted by email to the following email address for the region administering the Contract:

Eastern Region – ERRegionOEO@wsdot.wa.gov

North Central Region – NCRegionOEO@wsdot.wa.gov

Northwest Region – NWRegionOEO@wsdot.wa.gov

Olympic Region – ORegionOEO@wsdot.wa.gov

South Central Region – SCRegionOEO@wsdot.wa.gov

Southwest Region – SWRegionOEO@wsdot.wa.gov

Washington State Ferries – FerriesOEO@wsdot.wa.gov

## **Reporting**

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



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

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4 **Decertification**

5 When a FSBE is “decertified” from the FSBE program during the course of the  
6 Contract, the participation of that FSBE shall continue to count as FSBE  
7 participation as long as the subcontract with the FSBE was executed prior to  
8 the decertification notice. The Contractor is obligated to substitute when a  
9 FSBE does not have an executed subcontract agreement at the time of  
10 decertification.

11  
12 **Sanctions**

13 If it is determined that the Contractor's failure to meet all or part of the FSBE Goal  
14 is due to the Contractor's inadequate good faith efforts throughout the life of the  
15 Contract, including failure to submit timely, required Good Faith Efforts information  
16 and documentation, the Contractor may be required to pay FSBE penalty equal to  
17 the amount of the unmet Goal, in addition to the sanctions outlined in Section 1-  
18 07.11(5).

19  
20 **Payment**

21 Compensation for all costs involved with complying with the conditions of this  
22 Specification and any other associated FSBE requirements is included in payment  
23 for the associated Contract items of Work, except otherwise provided in the  
24 Specifications.