

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.
5 Demonstrating compliance with these Specifications is a Condition of Award (COA) of
6 this Contract. Failure to comply with the requirements of this Specification may result in
7 your Bid being found to be nonresponsive resulting in rejection or other sanctions as
8 provided by Contract.
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10 **DBE Abbreviations and Definitions**

11 **Broker** – A business firm that provides a bona fide service, such as
12 professional, technical, consultant or managerial services and assistance in
13 the procurement of essential personnel, facilities, equipment, materials, or
14 supplies required for the performance of the Contract; or, persons/companies
15 who arrange or expedite transactions.
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17 **Certified Business Description** – Specific descriptions of work the DBE is
18 certified to perform, as identified in the Certified Firm Directory, under the
19 Vendor Information page.
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21 **Certified Firm Directory** – A database of all Minority, Women, and
22 Disadvantaged Business Enterprises currently certified by Washington State.
23 The on-line Directory is available to Contractors for their use in identifying and
24 soliciting interest from DBE firms. The database is located under the Firm
25 Certification section of the Diversity Management and Compliance System
26 web page (<https://wsdot.diversitycompliance.com>).
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28 **Commercially Useful Function (CUF)**

29 49 CFR 26.55(c)(1) defines commercially useful function as: *"A DBE performs*
30 *a commercially useful function when it is responsible for execution of the work*
31 *of the contract and is carrying out its responsibilities by actually performing,*
32 *managing, and supervising the work involved. To perform a commercially*
33 *useful function, the DBE must also be responsible, with respect to materials*
34 *and supplies used on the contract, for negotiating price, determining quality*
35 *and quantity, ordering the material, and installing (where applicable) and*
36 *paying for the material itself. To determine whether a DBE is performing a*
37 *commercially useful function, you must evaluate the amount of work*
38 *subcontracted, industry practices, whether the amount the firm is to be paid*
39 *under the contract is commensurate with the work it is actually performing and*
40 *the DBE credit claimed for its performance of the work, and other relevant*
41 *factors."*
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43 **Contract** – For this provision only, this definition supplements Section 1-01.3.
44 49 CFR 26.5 defines contract as: "... a legally binding relationship obligating a
45 seller to furnish supplies or services (including, but not limited to, construction
46 and professional services) and the buyer to pay for them. For purposes of this
47 part, a lease is considered to be a contract."
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49 **Disadvantaged Business Enterprise (DBE)** – A business firm certified by the
50 Washington State Office of Minority and Women's Business Enterprises, as
51 meeting the criteria outlined in 49 CFR 26 regarding DBE certification.
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DBE Commitment – The dollar amount the Contractor indicates they will be subcontracting to be applied towards the DBE Condition of Award Goal as shown on the DBE Utilization Certification Form for each DBE subcontractor. This DBE Commitment amount will be incorporated into the Contract and shall be considered a Contract requirement. Any changes to the DBE Commitment shall require Engineer’s approval.

DBE Condition of Award (COA) Goal – An assigned numerical percentage of the Bid amount of the Contract. This is the minimum amount that the Bidder must commit to by submission of the Utilization Certification Form and/or by Good Faith Effort (GFE). The DBE COA Goal will also be applied to change orders associated with this Contract.

Force Account Work – Work measured and paid in accordance with Section 1-09.6.

Good Faith Efforts – Efforts to achieve the DBE COA Goal or other requirements of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

Manufacturer (DBE) – A DBE 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 DBE 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.

Regular Dealer (DBE) – A DBE 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 DBE 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.

DBE COA Goal
The Contracting Agency has established a COA Contract Goal in the amount of: ***
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DBE Eligibility/Selection of DBEs
In order to determine the distinct element(s) of work for which a DBE is certified, Contractors should refer to the Certified Business Description. The Contractor shall not use NAICS codes on the DBE Utilization Certification.

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Crediting DBE Participation

Subcontractors proposed as COA must be certified prior to the due date for bids on the Contract. All non-COA DBE subcontractors shall be certified before the subcontract on which they are participating is executed.

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

DBE participation cannot be counted toward the Contractor's contract goal until the amount being counted has actually been paid to the DBE including return of retainage.

In all cases the DBE must be certified in advance for the work being considered and performing a CUF during the execution of the Work. The following are some examples of what may be counted as DBE participation.

DBE 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 DBE Prime Contractor performs with its own forces and is credited to perform.

DBE 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 DBE performs with its own forces. The value of work performed by the DBE includes the cost of supplies and materials purchased by the DBE and equipment leased by the DBE, for its work on the contract. Supplies, materials or equipment obtained by a DBE that are not utilized or incorporated in the contract work by the DBE will not be eligible for DBE credit unless the DBE is certified as a supplier or equipment leasing company.

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

DBE credit will not be given in instances where the equipment lease includes the operator. The DBE 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 DBE, but payment is deducted from the Contractor's payment to the DBE is not allowed.

If a DBE subcontracts a portion of the Work of its contract to another firm, the value of the subcontracted Work may be counted toward the DBE COA Goal only if the DBE's lower-tier subcontractor is also a DBE. Work subcontracted to a non-DBE does not count towards the DBE COA Goal.

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

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agreements shall be readily available at the project site for the Engineer's 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 towards meeting the DBE COA Goal if the fee/commission is determined by the Contracting Agency to be reasonable and the firm has performed a CUF. Documentation will be required to support the fee/commission charged by the DBE.

Force Account Work

When the Contractor elects to utilize force account Work to meet the DBE COA Goal, as demonstrated by listing this force account Work on the DBE Utilization Certification Form, for the purposes of meeting DBE COA Goal, only 50% of the Proposal amount shall be credited toward the Contractors Commitment to meet the DBE COA Goal.

One hundred percent of the actual amounts paid to the DBE for the force account Work shall be credited towards DBE COA Goal or DBE participation.

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 to the DBE COA Goal 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.

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The DBE may lease additional trucks from another DBE firm.

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

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

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

DBE Manufacturer and DBE Regular Dealer

One hundred percent (100%) of the cost of the manufactured product obtained from a DBE manufacturer may count toward the DBE COA Goal. The DBE Manufacturer shall be certified as such by OMWBE.

Sixty percent (60%) of the cost of materials or supplies purchased from a DBE Regular Dealer may be credited toward meeting the DBE COA Goal. If the role of the DBE Regular Dealer is determined to be that of a pass-through, then no DBE credit will be given for its services. If the role of the DBE Regular Dealer is determined to be that of a Broker, then DBE credit shall be limited to the fee or commission it receives for its services. Regular Dealer status and the amount of credit is determined on a Contract-by-Contract basis.

Regular Dealer DBE firms must be approved before being used on a project. The WSDOT Approved Regular Dealer list published on WSDOT’s Office of Equal Opportunity (OEO) web site must include the specific project for which approval is being requested. For purposes of the DBE COA Goal participation, the Regular Dealer must submit the Regular Dealer Status Request form a minimum of five days prior to bid opening.

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

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

Disadvantaged Business Enterprise Utilization

To be eligible for award of the Contract, the Bidder shall properly complete and submit a Disadvantaged Business Enterprise Utilization Certification with the Bidder’s sealed Bid Proposal, as specified in Section 1-02.9 Delivery of Proposal.

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The Bidder's Disadvantaged Business Enterprise Utilization Certification must clearly demonstrate how the Bidder intends to meet the DBE COA Goal. A Disadvantaged Business Enterprise Utilization Certification (WSDOT Form 272-056) is included in your Proposal package for this purpose as well as instructions on how to properly fill out the form.

The Bidder is advised that the items listed below when listed in the Utilization Certification must have their amounts reduced to the percentages shown and those reduced amounts will be the amount applied towards meeting the DBE COA Goal.

- Force account at 50%
- Regular dealer at 60%

In the event of arithmetic errors in completing the Disadvantaged Business Enterprise Utilization Certification the amount listed to be applied towards the DBE COA Goal for each DBE shall govern and the DBE total amount shall be adjusted accordingly.

Note: The Contracting Agency shall consider as non-responsive and shall reject any Bid Proposal submitted that does not contain a Disadvantaged Business Enterprise Utilization Certification Form that accurately demonstrates how the Bidder intends to meet the DBE COA Goal.

Disadvantaged Business Enterprise Written Confirmation Document(s)

The Bidder shall submit a Disadvantaged Business Enterprise Written Confirmation Document (completed and signed by the DBE) for each DBE firm listed in the Bidder's completed Disadvantaged Business Enterprise Utilization Certification submitted with the Bid. Failure to do so will result in the associated participation being disallowed, which may cause the Bid to be determined to be nonresponsive resulting in Bid rejection.

The Confirmation Documents provide confirmation from the DBEs that they are participating in the Contract as provided in the Contractor's Commitment. The Confirmation Documents must be consistent with the Utilization Certification.

A Disadvantaged Business Enterprise Written Confirmation Document (form No. 422-031) is included in your Proposal package for this purpose.

The form(s) shall be received as specified in the special provisions for Section 1-02.9 Delivery of Proposal.

It is prohibited for the Bidder to require a DBE to submit a Written Confirmation Document with any part of the form left blank. Should the Contracting Agency determine that an incomplete Written Confirmation Document was signed by a DBE, the validity of the document comes into question. The associated DBE participation may not receive credit.

Selection of Successful Bidder/Good Faith Efforts (GFE)

The successful Bidder shall be selected on the basis of having submitted the lowest responsive Bid, which demonstrates a good faith effort to achieve the DBE COA Goal. The Contracting Agency, at any time during the selection process, may

1 request a breakdown of the bid items and amounts that are counted towards the
2 overall contract goal for any of the DBEs listed on the DBE Utilization Certification.

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4 Achieving the DBE COA Goal may be accomplished in one of two ways:

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6 1. By meeting the DBE COA Goal

7 Submission of the DBE Utilization Certification and supporting DBE
8 Written Confirmation Document(s) showing the Bidder has obtained
9 enough DBE participation to meet or exceed the DBE COA Goal.

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11 2. By documentation that the Bidder made adequate GFE to meet the DBE
12 COA Goal

13 The Bidder may demonstrate a GFE in whole or part through GFE
14 documentation ONLY IN THE EVENT a Bidder's efforts to solicit sufficient
15 DBE participation have been unsuccessful. The Bidder must supply GFE
16 documentation in addition to the Disadvantaged Business Enterprise
17 Utilization Certification, and supporting Disadvantaged Business
18 Enterprise (DBE) Written Confirmation Document(s).

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20 Note: In the case where the Bidder was awarded the contract based on
21 demonstrating adequate GFE the advertised DBE COA Goal will not
22 be reduced. The Bidder shall demonstrate a GFE during the life of the
23 Contract to attain the advertised DBE COA Goal.

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25 GFE documentation shall be received, as specified in the special provisions for
26 Section 1-02.9 Delivery of Proposal.

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28 The Contracting Agency will review the GFE documentation and will determine if
29 the Bidder made an adequate good faith effort.

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31 **Good Faith Effort (GFE) Documentation**

32 GFE is evaluated when:

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34 1. Determining award of a Contract that has COA goal,
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36 2. When a COA DBE is terminated and substitution is required, and
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38 3. Prior to Physical Completion when determining whether the Contractor
39 has satisfied its DBE commitments.

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41 49 CFR Part 26, Appendix A is intended as general guidance and does not, in itself,
42 demonstrate adequate good faith efforts. The following is a list of types of actions,
43 which would be considered as part of the Bidder's GFE to achieve DBE
44 participation. It is not intended to be a mandatory checklist, nor is it intended to be
45 exclusive or exhaustive. Other factors or types of efforts may be relevant in
46 appropriate cases.

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48 1. Soliciting through all reasonable and available means (e.g. attendance at
49 pre-bid meetings, advertising and/or written notices) the interest of all
50 certified DBEs who have the capability to perform the Work of the
51 Contract. The Bidder must solicit this interest within sufficient time to allow
52 the DBEs to respond to the solicitation. The Bidder must determine with

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certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

2. Selecting portions of the Work to be performed by DBEs in order to increase the likelihood that the DBE COA Goal will be achieved. This includes, where appropriate, breaking out contract Work items into economically feasible units to facilitate DBE participation, even when the Contractor might otherwise prefer to perform these Work items with its own forces.
3. Providing interested DBEs 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. Negotiating in good faith with interested DBEs. It is the Bidder's responsibility to make a portion of the Work available to DBE subcontractors and suppliers and to select those portions of the Work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; 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 DBEs to perform the Work.
 - b. A Bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as the DBE COA Goal into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a Bidder's failure to meet the DBE COA 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 Bidder of the responsibility to make Good Faith Efforts. Contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.
4. Not rejecting DBEs 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 DBE COA Goal.
5. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or Contractor.
6. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

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- 7. Effectively using 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 DBEs.

- 8. Documentation of GFE must include copies of each DBE and non-DBE subcontractor quotes submitted to the Bidder when a non-DBE subcontractor is selected over a DBE for Work on the Contract. (ref. updated DBE regulations – 26.53(b)(2)(vi) & App. A)

Administrative Reconsideration of GFE Documentation

Any Bidder has the right to reconsideration but only for the purpose of reassessing the GFE documentation that was originally submitted with their Bid, and determined to be inadequate.

- The Bidder must request within 48 hours of notification of being nonresponsive or forfeit the right to reconsideration.

- The reconsideration decision on the adequacy of the Bidder's GFE documentation shall be made by an official who did not take part in the original determination.

- Only original GFE documentation submitted as a supplement to the Bid shall be considered. The Bidder shall not introduce new documentation at the reconsideration hearing.

- The Bidder shall have the opportunity to meet in person with the official for the purpose of setting forth the Bidder's position as to why the GFE documentation demonstrates a sufficient effort.

- The reconsideration official shall provide the Bidder with a written decision on reconsideration within five working days of the hearing explaining the basis for their finding.

Procedures between Award and Execution

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

- 1. A DBE Bid Item Breakdown is required which shall contain the following information for all DBEs as shown on the Disadvantaged Business Enterprise Utilization Certification:
 - a. Correct business name, federal employee identification number (if available), and mailing address.

 - b. List of all Bid items assigned to each DBE with a clear description of Work to be performed for each Bid item and the dollar value of the Work to be performed by the DBE.

- 1 c. Description of partial items (if any) to be sublet to each DBE
2 specifying the Work committed under each item to be performed and
3 including the dollar value of the DBE portion.
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5 d. Total amounts shown for each DBE shall match the amount shown on
6 the Disadvantaged Business Enterprise Utilization Certification. A
7 DBE Bid Item Breakdown that does not conform to the
8 Disadvantaged Business Enterprise Utilization Certification or that
9 demonstrates a different amount of DBE participation than that
10 included in the Disadvantaged Business Enterprise Utilization
11 Certification will be returned for correction.
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13 2. A list of all firms who submitted a bid or quote in attempt to participate in
14 this project whether they were successful or not. Include the business
15 name and mailing address.
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17 Note: The firms identified by the Contractor may be contacted by the
18 Contracting Agency to solicit general information as follows: age of the
19 firm and average of its gross annual receipts over the past three-
20 years.
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22 **Procedures after Execution**

23 **Commercially Useful Function (CUF)**

24 The Contractor may only take credit for the payments made for Work
25 performed by a DBE that is determined to be performing a CUF. Payment must
26 be commensurate with the work actually performed by the DBE. This applies to
27 all DBEs performing Work on a project, whether or not the DBEs are COA, if
28 the Contractor wants to receive credit for their participation. The Engineer will
29 conduct CUF reviews to ascertain whether DBEs are performing a CUF. A DBE
30 performs a CUF when it is carrying out its responsibilities of its contract by
31 actually performing, managing, and supervising the Work involved. The DBE
32 must be responsible for negotiating price; determining quality and quantity;
33 ordering the material, installing (where applicable); and paying for the material
34 itself. If a DBE does not perform "all" of these functions on a furnish-and-install
35 contract, it has not performed a CUF and the cost of materials cannot be
36 counted toward DBE COA Goal. Leasing of equipment from a leasing
37 company is allowed. However, leasing/purchasing equipment from the
38 Contractor is not allowed. Lease agreements shall be readily available for
39 review by the Engineer.
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41 In order for a DBE traffic control company to be considered to be performing a
42 CUF, the DBE must be in control of its work inclusive of supervision. The DBE
43 shall employ a Traffic Control Supervisor who is directly involved in the
44 management and supervision of the traffic control employees and services.
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46 The DBE does not perform a CUF if its role is limited to that of an extra
47 participant in a transaction, contract, or project through which the funds are
48 passed in order to obtain the appearance of DBE participation.
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50 The following are some of the factors that the Engineer will use in determining
51 whether a DBE trucking company is performing a CUF:
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- The DBE 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 DBE shall with its own workforce, operate at least one fully licensed, insured, and operational truck used on the Contract. The drivers of the trucks owned and leased by the DBE must be exclusively employed by the DBE and reflected on the DBE's payroll.
- 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.

DBE Utilization Plan

The DBE Bid Item Breakdown is the initial plan for Bid Item work committed to DBE firms. When a Contractor identifies a change in the plan, an update shall be submitted within 7 calendar days between Execution and Physical Completion. Plan updates shall not make changes to the Commitment or the DBE Utilization Certification.

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, 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 DBE involved, no DBE credit will be given for the DBE's participation as it relates to the material cost.

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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.

Changes in COA Work Committed to DBE

The Contractor shall utilize the COA DBEs to perform the work and supply the materials for which each is committed unless a change is approved by the Engineer. The Contractor shall not be entitled to any payment for work or material completed by the Contractor or subcontractors that was committed to be completed by the COA DBEs.

Owner Initiated Changes

Where the Engineer makes changes that result in changes to Work that was committed to a COA DBE. The Contractor may be directed to substitute for the Work in such instances.

Contractor Initiated Changes

The Contractor cannot reduce the amount of work committed to a COA DBE without good cause. Reducing DBE Commitment is viewed as partial DBE termination, and therefore subject to the termination procedures below.

Original Quantity Underruns

In the event that Work committed to a DBE firm as part of the COA underruns the original planned quantities the Contractor may be required to substitute the remaining applicable Work to another DBE.

Contractor Proposed DBE Substitutions

Requests to substitute a COA DBE must be for good cause (see DBE termination process below), and requires prior written approval of the Engineer. After receiving a termination with good cause approval, the Contractor may only replace a DBE with another certified DBE. When any changes between Contract Award and Execution result in a substitution of COA DBE, the substitute DBE shall be certified prior to the bid opening on the Contract.

DBE Termination

Termination of a COA DBE (or an approved substitute DBE) is only allowed in whole or in part with prior written approval of the Engineer. If the Contractor terminates a COA DBE without the written approval of the Engineer, the Contractor shall not be entitled to credit towards the DBE COA Goal for any payment for work or material performed/supplied by the COA DBE. In addition sanctions may apply as described elsewhere in this specification.

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The Contractor must have good cause to terminate a COA DBE.

Good cause typically includes situations where the DBE subcontractor is unable or unwilling to perform the work of its subcontract. Good cause may exist if:

- The DBE fails or refuses to execute a written contract.
- The DBE fails or refuses to perform the Work of its subcontract in a way consistent with normal industry standards.
- The DBE fails or refuses to meet the Contractor's reasonable nondiscriminatory bond requirements.
- The DBE becomes bankrupt, insolvent, or exhibits credit unworthiness.
- The DBE is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to federal law or applicable State law.
- The DBE voluntarily withdraws from the project, and provides written notice of its withdrawal.
- The DBE's work is deemed unsatisfactory by the Engineer and not in compliance with the Contract.
- The DBE's owner dies or becomes disabled with the result that the DBE is unable to complete its Work on the Contract.

Good cause does not exist if:

- The Contractor seeks to terminate a COA DBE so that the Contractor can self-perform the Work.
- The Contractor seeks to terminate a COA DBE so the Contractor can substitute another DBE contractor or non-DBE contractor after Contract Award.
- The failure or refusal of the COA DBE to perform its Work on the subcontract results from the bad faith or discriminatory action of the Contractor (e.g., the failure of the Contractor to make timely payments or the unnecessary placing of obstacles in the path of the DBE's Work).

Prior to requesting termination, the Contractor shall give notice in writing to the DBE with a copy to the Engineer of its intent to request to terminate DBE Work and the reasons for doing so. The DBE shall have five (5) days to respond to the Contractor's notice. The DBE's response shall either support the termination or advise the Engineer and the Contractor of the reasons it objects to the termination of its subcontract.

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When a COA DBE is terminated, or fails to complete its work on the Contract for any reason, the Contractor shall substitute with another DBE or provide documentation of GFE. A plan to achieve the COA DBE Commitment shall be submitted to the Engineer within 2 days of the approval of termination or the Contract shall be suspended until such time the substitution plan is submitted.

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 towards the DBE COA Goal as long as the subcontract with the DBE was executed prior to the decertification notice. The Contractor is obligated to substitute when a DBE does not have an executed subcontract agreement at the time of decertification.

Consequences of Non-Compliance

Breach of Contract

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

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

- (1) Withholding monthly progress payments;
- (2) Assessing sanctions;
- (3) Liquidated damages; and/or
- (4) Disqualifying the Contractor from future bidding as non-responsible.

Notice

If the Contractor or any subcontractor, Consultant, Regular Dealer, or service provider is deemed to be in non-compliance, the Contractor will be informed in writing, by certified mail by the Engineer that sanctions will be imposed for failure to meet the DBE COA Commitment and/or submit documentation of good faith efforts. The notice will state the specific sanctions to be imposed which may include impacting a Contractor or other entity’s ability to participate in future contracts.

Sanctions

If it is determined that the Contractor’s failure to meet all or part of the DBE COA Commitment is due to the Contractor’s inadequate good faith efforts throughout the life of the Contract, including failure to submit timely, required Good Faith Efforts information and documentation, the Contractor may be required to pay DBE penalty

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equal to the amount of the unmet Commitment, in addition to the sanctions outlined in Section 1-07.11(5).

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 Contract items of Work, except otherwise provided in the Specifications.