

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.  
9

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.  
16

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.  
20

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>).  
27

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."  
42

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."  
48

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.  
52

**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: \*\*\*  
\$\$1\$\$ \*\*\*

#### **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.

## **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

1 agreements shall be readily available at the project site for the Engineer's  
2 review.

#### 3 4 **DBE Service Provider**

5 The value of fees or commissions charged by a DBE Broker, a DBE behaving  
6 in a manner of a Broker, or another service provider for providing a bona fide  
7 service, such as professional, technical, consultant, managerial services, or for  
8 providing bonds or insurance specifically required for the performance of the  
9 contract will only be credited towards meeting the DBE COA Goal if the  
10 fee/commission is determined by the Contracting Agency to be reasonable and  
11 the firm has performed a CUF. Documentation will be required to support the  
12 fee/commission charged by the DBE.

#### 13 14 **Force Account Work**

15 When the Contractor elects to utilize force account Work to meet the DBE COA  
16 Goal, as demonstrated by listing this force account Work on the DBE  
17 Utilization Certification Form, for the purposes of meeting DBE COA Goal, only  
18 50% of the Proposal amount shall be credited toward the Contractors  
19 Commitment to meet the DBE COA Goal.

20  
21 One hundred percent of the actual amounts paid to the DBE for the force  
22 account Work shall be credited towards DBE COA Goal or DBE participation.

#### 23 24 **Temporary Traffic Control**

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

29  
30 If the DBE firm is being utilized in the capacity of "Traffic Control Services", the  
31 DBE firm must provide a TCS, flaggers, and traffic control items (e.g., cones,  
32 barrels, signs, etc.) and be in total control of all items in implementing the  
33 traffic control for the project. In addition if the DBE firm utilizes the Contractor's  
34 equipment, such as Transportable Attenuators and Portable Changeable  
35 Message Signs (PCMS) no DBE credit can be taken for supplying and  
36 operating the items.

#### 37 38 **Trucking**

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

45  
46 The DBE trucking firm must own and operate at least one licensed, insured  
47 and operational truck on the contract. The truck must be of the type that is  
48 necessary to perform the hauling duties required under the contract. The DBE  
49 receives credit for the value of the transportation services it provides on the  
50 Contract using trucks it owns or leases, licenses, insures, and operates with  
51 drivers it employs.  
52

1 The DBE may lease additional trucks from another DBE firm.

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

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

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

13  
14 **DBE Manufacturer and DBE Regular Dealer**

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

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

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

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

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

48  
49 **Disadvantaged Business Enterprise Utilization**

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

1 The Bidder's Disadvantaged Business Enterprise Utilization Certification must  
2 clearly demonstrate how the Bidder intends to meet the DBE COA Goal. A  
3 Disadvantaged Business Enterprise Utilization Certification (WSDOT Form 272-  
4 056) is included in your Proposal package for this purpose as well as instructions  
5 on how to properly fill out the form.  
6

7 The Bidder is advised that the items listed below when listed in the Utilization  
8 Certification must have their amounts reduced to the percentages shown and those  
9 reduced amounts will be the amount applied towards meeting the DBE COA Goal.  
10

- 11 • Force account at 50%
- 12 • Regular dealer at 60%
- 13

14 In the event of arithmetic errors in completing the Disadvantaged Business  
15 Enterprise Utilization Certification the amount listed to be applied towards the DBE  
16 COA Goal for each DBE shall govern and the DBE total amount shall be adjusted  
17 accordingly.  
18

19 Note: The Contracting Agency shall consider as non-responsive and shall  
20 reject any Bid Proposal submitted that does not contain a  
21 Disadvantaged Business Enterprise Utilization Certification Form that  
22 accurately demonstrates how the Bidder intends to meet the DBE  
23 COA Goal.  
24

#### 25 **Disadvantaged Business Enterprise Written Confirmation Document(s)**

26 The Bidder shall submit a Disadvantaged Business Enterprise Written Confirmation  
27 Document (completed and signed by the DBE) for each DBE firm listed in the  
28 Bidder's completed Disadvantaged Business Enterprise Utilization Certification  
29 submitted with the Bid. Failure to do so will result in the associated participation  
30 being disallowed, which may cause the Bid to be determined to be nonresponsive  
31 resulting in Bid rejection.  
32

33 The Confirmation Documents provide confirmation from the DBEs that they are  
34 participating in the Contract as provided in the Contractor's Commitment. The  
35 Confirmation Documents must be consistent with the Utilization Certification.  
36

37 A Disadvantaged Business Enterprise Written Confirmation Document (form No.  
38 422-031) is included in your Proposal package for this purpose.  
39

40 The form(s) shall be received as specified in the special provisions for Section 1-  
41 02.9 Delivery of Proposal.  
42

43 It is prohibited for the Bidder to require a DBE to submit a Written Confirmation  
44 Document with any part of the form left blank. Should the Contracting Agency  
45 determine that an incomplete Written Confirmation Document was signed by a  
46 DBE, the validity of the document comes into question. The associated DBE  
47 participation may not receive credit.  
48

#### 49 **Selection of Successful Bidder/Good Faith Efforts (GFE)**

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

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

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

1. By meeting the DBE COA Goal

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

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

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

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

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

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

**Good Faith Effort (GFE) Documentation**

GFE is evaluated when:

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

49 CFR Part 26, Appendix A is intended as general guidance and does not, in itself, demonstrate adequate good faith efforts. The following is a list of types of actions, which would be considered as part of the Bidder'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. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the Work of the Contract. The Bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The Bidder must determine with

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

- 3
- 4 2. Selecting portions of the Work to be performed by DBEs in order to  
5 increase the likelihood that the DBE COA Goal will be achieved. This  
6 includes, where appropriate, breaking out contract Work items into  
7 economically feasible units to facilitate DBE participation, even when the  
8 Contractor might otherwise prefer to perform these Work items with its  
9 own forces.
- 10
- 11 3. Providing interested DBEs with adequate information about the Plans,  
12 Specifications, and requirements of the Contract in a timely manner to  
13 assist them in responding to a solicitation.
- 14
- 15 a. Negotiating in good faith with interested DBEs. It is the Bidder's  
16 responsibility to make a portion of the Work available to DBE  
17 subcontractors and suppliers and to select those portions of the Work  
18 or material needs consistent with the available DBE subcontractors  
19 and suppliers, so as to facilitate DBE participation. Evidence of such  
20 negotiation includes the names, addresses, and telephone numbers  
21 of DBEs that were considered; a description of the information  
22 provided regarding the Plans and Specifications for the Work selected  
23 for subcontracting; and evidence as to why additional agreements  
24 could not be reached for DBEs to perform the Work.
- 25
- 26 b. A Bidder using good business judgment would consider a number of  
27 factors in negotiating with subcontractors, including DBE  
28 subcontractors, and would take a firm's price and capabilities as well  
29 as the DBE COA Goal into consideration. However, the fact that there  
30 may be some additional costs involved in finding and using DBEs is  
31 not in itself sufficient reason for a Bidder's failure to meet the DBE  
32 COA Goal, as long as such costs are reasonable. Also, the ability or  
33 desire of a Contractor to perform the Work of a Contract with its own  
34 organization does not relieve the Bidder of the responsibility to make  
35 Good Faith Efforts. Contractors are not, however, required to accept  
36 higher quotes from DBEs if the price difference is excessive or  
37 unreasonable.
- 38
- 39 4. Not rejecting DBEs as being unqualified without sound reasons based on  
40 a thorough investigation of their capabilities. The Contractor's standing  
41 within its industry, membership in specific groups, organizations, or  
42 associations and political or social affiliations (for example union vs. non-  
43 union employee status) are not legitimate causes for the rejection or non-  
44 solicitation of bids in the Contractor's efforts to meet the DBE COA Goal.
- 45
- 46 5. Making efforts to assist interested DBEs in obtaining bonding, lines of  
47 credit, or insurance as required by the recipient or Contractor.
- 48
- 49 6. Making efforts to assist interested DBEs in obtaining necessary  
50 equipment, supplies, materials, or related assistance or services.
- 51



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.  
4  
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.  
12  
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.  
16

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.  
21

## 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.  
40

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.  
45

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.  
49

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:  
52

- 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.

1 **Prompt Payment**

2 Prompt payment to all subcontractors shall be in accordance with Section 1-  
3 08.1. Prompt payment requirements apply to progress payments as well as  
4 return of retainage.  
5

6 **Reporting**

7 The Contractor and all subcontractors/suppliers/service providers that utilize  
8 DBEs to perform work on the project, shall maintain appropriate records that  
9 will enable the Engineer to verify DBE participation throughout the life of the  
10 project.  
11

12 Refer to Section 1-08.1 for additional reporting requirements associated with  
13 this contract.  
14

15 **Changes in COA Work Committed to DBE**

16 The Contractor shall utilize the COA DBEs to perform the work and supply the  
17 materials for which each is committed unless a change is approved by the  
18 Engineer. The Contractor shall not be entitled to any payment for work or material  
19 completed by the Contractor or subcontractors that was committed to be completed  
20 by the COA DBEs.  
21

22 **Owner Initiated Changes**

23 Where the Engineer makes changes that result in changes to Work that was  
24 committed to a COA DBE. The Contractor may be directed to substitute for the  
25 Work in such instances.  
26

27 **Contractor Initiated Changes**

28 The Contractor cannot reduce the amount of work committed to a COA DBE  
29 without good cause. Reducing DBE Commitment is viewed as partial DBE  
30 termination, and therefore subject to the termination procedures below.  
31

32 **Original Quantity Underruns**

33 In the event that Work committed to a DBE firm as part of the COA underruns  
34 the original planned quantities the Contractor may be required to substitute the  
35 remaining applicable Work to another DBE.  
36

37 **Contractor Proposed DBE Substitutions**

38 Requests to substitute a COA DBE must be for good cause (see DBE  
39 termination process below), and requires prior written approval of the  
40 Engineer. After receiving a termination with good cause approval, the  
41 Contractor may only replace a DBE with another certified DBE. When any  
42 changes between Contract Award and Execution result in a substitution of  
43 COA DBE, the substitute DBE shall be certified prior to the bid opening on the  
44 Contract.  
45

46 **DBE Termination**

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

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.

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

1 equal to the amount of the unmet Commitment, in addition to the sanctions outlined  
2 in Section 1-07.11(5).  
3

4 **Payment**

5 Compensation for all costs involved with complying with the conditions of this  
6 Specification and any other associated DBE requirements is included in payment  
7 for the associated Contract items of Work, except otherwise provided in the  
8 Specifications.