

**APPENDIX J**

**DISADVANTAGED BUSINESS ENTERPRISE**

**REQUIREMENTS**

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### DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENTS

#### I. DBE GOAL—

The Pennsylvania Department of Transportation (Department) has established, in connection with this contract, a Disadvantaged Business Enterprise (DBE) goal as specified in the Request for Proposal/Request for Quote/Invitation for Bid for the utilization of for profit, small business concerns that are 51% owned and controlled by socially and economically disadvantaged (disadvantaged) individuals certified by the PA Unified Certification Program (PA UCP) as DBEs. *For the purposes of this document, the term 'bid' refers to the response to a request for proposal, request for quote, or invitation for bid.* The DBE goal is stated in terms of total project cost and is based on the project's potential for subcontracted work and the availability of DBEs to perform such work. If the DBE goal is zero, the selected vendor will be required to make a DBE good faith effort (GFE) to identify, solicit, and utilize DBEs and Small Business Enterprises (SBEs). This DBE goal remains in effect for the life of the project.

The selected vendor shall include the following provisions (paragraphs a through d) in every subcontract. These provisions shall be binding upon the selected vendor as well each subcontractor, supplier, service provider or consultant.

- (a) **Policy for Federally-Funded Projects.** It is the policy of the U.S. Department of Transportation (DOT) and the Department that DBEs, as defined in 49 CFR Part 26, (Part 26) and this specification, be afforded the opportunity to participate in the performance of contracts financed in whole or in part with Federal funds under this contract. Consequently, the DBE requirements of Part 26, apply to this contract.
- (b) **DBE Obligation.** The selected vendor will take all necessary and reasonable steps to ensure that DBEs have the opportunity to compete for and to perform contracts. The selected vendor shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of the Department and DOT - assisted contracts.
- (c) **Failure to Comply with DBE Requirements.** Failure to carry out the requirements as specified constitutes a breach of contract and may result in termination of the contract, being barred from bidding on Department contracts for up to three (3) years, or any other remedy that the Department deems appropriate. Failure to comply with DBE requirements may include, but is not limited to, failure to submit DBE Participation information with the bid, failure to exert a reasonable Good Faith Effort to meet the established DBE goal, or failure to realize the approved DBE participation level set forth may result in the selected vendor being declared ineligible for the contract.
- (d) **Small Business Enterprise (SBE) Participation.** The recruitment and utilization of certified SBEs serves as an additional requirement in addition to all other equal opportunity requirements of the contract. There is no SBE goal for this contract.

#### II. DEFINITIONS—

The following definitions apply for terms used in this specification:

- (a) **Certified Disadvantaged Business Enterprise (DBE).** A for-profit small business concern that meets the following requirements:
  1. DBE certification from the Pennsylvania Unified Certification Program (PAUCP) as listed on [www.paucp.com](http://www.paucp.com).
  2. Meets the ownership and control requirements of the DBE certification program as set forth in Part 26.
  3. Meets the Personal Net Worth requirements of the DBE certification program.

- (b) **Certified Small Business Enterprise (SBE).** A for-profit small business concern that meets the following requirements:
  1. Obtains certification as an SBE by the Department as listed on [www.dotsbe.pa.gov](http://www.dotsbe.pa.gov).
  2. Meets the ownership and control requirements of the SBE certification program.
  3. Meets the Personal Net Worth requirements of the SBE certification program.
- (c) **Commercially Useful Function (CUF).** A DBE performs a CUF when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a CUF, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, installing (where applicable), and paying for the material itself.
- (d) **Interdisciplinary Review Team (IRT).** A team of three (3) individuals representing the Department's Bureaus of Equal Opportunity and representatives from the impacted business area(s) that performs the initial review of the GFE documentation and makes the recommendation to the Director of the Bureau of Equal Opportunity.
- (e) **Committee.** The GFE Review Committee.
- (f) **Director.** Director, Bureau of Equal Opportunity.
- (g) **DBE Participation.** The work performed by DBEs on the contract and counted toward the project's DBE goal. This information is to be submitted with the bid and if approved becomes a contractual obligation for the life of the contract.
- (h) **Revised DBE Participation.** If, during the performance of the contract the DBE Participation requires revision, the selected vendor must request approval from the Department. If approved, the Revised DBE Participation becomes a contractual obligation for the life of the contract.
- (i) **Supplier.** A manufacturer, regular dealer, or transaction expeditor/broker.
  1. **Manufacturer.** A DBE/SBE that operates or maintains a factory or establishment that produces on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
  2. **Regular Dealer.** A DBE/SBE that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided above if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.
  3. **Transaction Expeditor/Broker.** A DBE/SBE packager, broker, manufacturers' representatives, or other persons who arrange or expedite transactions and who arrange for material drop-shipments.
- (j) **Service Provider.** A DBE/SBE that performs professional, technical consultant, or managerial services.
- (k) **Shortfall.** The difference between the dollar amount on the approved DBE commitment and the amount of payments to the approved DBE entities.

### III. COUNTING DBE PARTICIPATION

Utilization of certified DBEs is in addition to all other equal opportunity requirements of the contract.

Count DBE Participation toward meeting the DBE Goal for federal projects as follows: If a firm is a certified DBE contractor or subcontractor at the time of submission for the bid, the total dollar value of the contract awarded to the certified DBE is counted toward the applicable DBE goal as provided below. Any services to be performed by a DBE are required to be readily identifiable to the project.

**(a) Construction.**

**1. Prime Contractor.** The Department requires that all prime contractors including DBE prime contractors perform at least 50% of the work on a Department project. A DBE prime contractor will receive credit for all work performed with its own forces. The Department strongly encourages DBE prime contractors to make additional outreach efforts to solicit DBEs to perform subcontracting work on the project.

**2. Subcontractor.** When a DBE participates in a contract directly as a subcontractor or as a second- tier or lower-tier subcontractor, count only the value of the work actually performed by the DBE.

Count the entire amount of that portion of a contract that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the subcontract, including supplies purchased or equipment leased by the DBE.

When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count towards the contract's DBE goal.

Count expenditures to a DBE contractor only if the DBE is performing a CUF on that contract.

**(b) Materials and Supplies.**

**1. DBE Manufacturer.** If the materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies.

**2. DBE Regular Dealer.** If the materials or supplies are purchased from a DBE regular dealer, count 60% of the cost of the materials or supplies.

**3. DBE Transaction Expeditor/Broker.** If the materials or supplies are purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of 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, provided the fees are determined to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves.

**(c) Service Providers.** Count toward the DBE Goal 100% of expenditures of DBE services including, professional, technical, consultant, or managerial services. Count fees or commissions charged for providing any bonds or insurance specifically required for the performance the contract, provided the fee is reasonable and not excessive as compared with fees customarily allowed for similar services.

**(d) Trucking Firms.** Count 100% of trucking costs using the following factors to determine what can be counted:

**1.** Count if the DBE is responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.

**2.** Count if the DBE owns and operates at least one fully licensed, insured, and operational truck used on the contract.

3. Count the total value of the transportation services the DBE provides on the contract using trucks it owns, insures, and operates using drivers it employs.
4. The DBE may lease trucks from another DBE firm, including an owner-operator who is a certified DBE. If the DBE leases trucks from another DBE, count the total value of the transportation services the lessee DBE provides on the contract.
5. The DBE may also lease trucks from a non-DBE firm, including an owner-operator. If the DBE leases trucks from a non-DBE count only the fee or commission it paid as a result of the lease arrangement. Do not count the total value of the transportation services provided by the lessee, since these services are not provided by a DBE.
6. For purposes of this provision, a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from being used for work for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

#### IV. COUNTING SBE PARTICIPATION

- (a) Recruitment and utilization of certified SBEs is in addition to all other equal opportunity requirements of the contract.
- (b) There is no SBE goal.
- (c) Count SBE participation the same as DBE participation.

#### V. ACTIONS REQUIRED BY THE BIDDER AT THE BIDDING STAGE AND PRIOR TO AWARD FOR PROJECTS WITH A DBE GOAL—

- (a) **Submission Requirements.** The selected vendor must include its DBE Participation with the bid by completing Form EO-385. This submission must include the business name of the DBE firm with address, contact person, and phone number, a detailed narrative description of the service to be provided by the DBE along with the corresponding North American Industry Classification System (NAICS) code(s), and the percent of the bid's cost to be contractually allocated to the DBE in the bid submission. Do not request or include physical certification letters. The PA UCP database at [www.paucp.com](http://www.paucp.com) is the only resource that should be used to verify DBE eligibility. In addition, please note that DBE certification does not expire and expiration dates should not be requested or included. As long as a firm remains visible in the PA UCP database they remain eligible to participate as a DBE on federally-assisted contracts.

When the DBE goal established by the Department is not met (the Department will not round), demonstrate a Good Faith Effort (GFE) to meet the contract's DBE goal. Demonstrate that the efforts made were those that a vendor seeking to meet the DBE goal established by the Department would make, given all relevant circumstances. Failure to include GFE documentation with the submission, when the DBE goal is not met, will result in rejection of the bid.

- (b) **Good Faith Effort Requirements.** In response to a bid, the vendor must make a 'Good Faith Effort' to subcontract a portion of the contract work to certified DBEs. The demonstration of GFE is accomplished by seeking out DBE participation in the contract given all relevant circumstances. If unable to meet the contracts established DBE Goal, the selected vendor must submit documentation of its GFE. The following illustrate the types of efforts that may be taken, but they are not deemed to be exclusive or exhaustive. The Director and/or Committee will consider other factors and types of efforts that may be relevant:

- Efforts made to solicit through all reasonable and available means (e.g., use of the DBE Directory, 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 selected vendor must provide written notification, at least fifteen (15) calendar days prior to the bid due date, to allow the DBEs to respond to the solicitation. The selected vendor must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.
- Efforts made to select portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goal will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the selected vendor might otherwise prefer to perform these work items with its own forces.
- Efforts made to provide 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.
- Efforts made to negotiate in good faith with interested DBEs. It is the selected vendor's responsibility to make a portion of the contract 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. A vendor 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 contract DBE goals 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 vendor's failure to meet the contract's DBE goal, as long as such costs are reasonable. Also, the ability or desire of the selected vendor to perform the work of a contract with its own work force does not relieve the vendor of the responsibility to make GFE. The selected vendor is not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable. In situations where the selected vendor chooses to reject a DBE firm's quote over a non-DBE firm solely due to cost, copies of the quotes received from both the DBE and non-DBE firm must be included in the GFE documentation.
- The selected vendor's determination of a DBE as being unqualified without sound reasons based on a thorough investigation of their capabilities. The selected vendor'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 selected vendor's efforts to meet the DBE contract goal.
- Efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance.
- Efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
- Efforts to effectively use the services of the Department's DBE and/or SBE Supportive Services Centers, 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.

## VI. ACTIONS TO BE TAKEN BY THE DEPARTMENT BEFORE AWARD—

- (a) **Approval.** If the selected vendor includes the DBE Participation with their bid, meets the contract's DBE goal, and all other contract requirements, the Department will approve the submission.
- (b) **Good Faith Effort Review.** If the selected vendor includes the DBE Participation with their bid, but fails to meet the contract's DBE goal, the Department will review the GFE documentation included with

the bid. The selected vendor may not provide additional GFE documentation beyond what is included at the time of bid submission. However, if during the review of the vendor's GFE information the reviewers have questions, the selected vendor may be contacted by the IRT Chairperson for clarification. The GFE steps to be taken are as follows:

1. The IRT reviews and makes a recommendation to the Director.
2. The Director will do one of the following:
  - a. Concur with the IRT recommendation that a GFE was made and the DBE Participation will be approved;
  - b. Concur with the IRT disapproval of the GFE submission. The selected vendor will be afforded the opportunity for administrative reconsideration as required by Part 26.
    - (i.) If the selected vendor requests administrative reconsideration, the Director forwards the GFE request to the Committee.
    - (ii.) If the selected vendor does not request administrative reconsideration, then the recommendation stands and the GFE is disapproved. The selected vendor must notify the Department to this effect in writing. The bid will then be considered non-responsive and will be rejected.
  - c. Disagree with the IRT recommendation. If the Director determines that a GFE has been made, the DBE Participation will be approved. If the Director determines that a GFE has not been made, the selected vendor will be afforded the administrative reconsideration process as described above.
3. If administrative reconsideration is requested, the Committee meets and makes the final determination. If the Committee determines that the selected vendor made a GFE, the DBE Participation will be approved. If the Committee determines that the selected vendor has failed to make a GFE, the bid will be rejected and the selected vendor will be notified of the rejection. The Department will then review the next selected vendor's DBE participation to determine if the DBE goal is met or if a GFE was made.

## **VII. ACTION TO BE TAKEN BY THE DEPARTMENT DURING PERFORMANCE OF THE CONTRACT—**

To ensure that all obligations awarded to DBEs under this contract are met, the Department will review the selected vendor's DBE involvement efforts during the performance of the contract whether or not the DBE is listed on the approved DBE Participation. The review will include a CUF review and analysis for all DBEs performing on the contract.

**Sanctions.** Upon completion of the work the Department will review the actual DBE participation and make a determination regarding the selected vendor's compliance with the applicable requirements. Sanctions may be imposed for noncompliance or unwarranted shortfalls in the approved DBE goal.

## **VIII. ACTIONS REQUIRED BY THE SELECTED VENDOR DURING PERFORMANCE OF THE CONTRACT—**

- (a) **DBE Participation.** When DBE Participation is approved in an amount less than the contract's DBE goal, continue GFE toward meeting the contract's DBE goal for the life of the contract. Ensure that the DBE Participation is attained. Proof of attainment is provided by payments to DBEs and documented in monthly reports.
- (b) **DBE Revised Participation.** Obtain written consent from the impacted business area before substituting a DBE or making any change to the approved DBE Participation or any other DBE performing on the project. Immediately request substitution authorization from the impacted business area in writing who will contact the Bureau of Equal Opportunity. The request must include documentation supporting the substitution and written agreement from the DBE to the change. Include proof that a certified letter giving

the DBE five (5) days to respond with acceptance or to notify the Department of non-acceptance. Demonstrate that every effort has been made to allow the DBE to perform.

1. If the arrangement to be replaced is agreeable between the selected vendor and the DBE, document the following procedures:
  - Make a GFE to subcontract the work with another DBE, or subcontract other work items to DBE firms, to make up the DBE shortfall. The selected vendor has seven (7) days from approval of its request to submit the GFE documentation. The selected vendor may request additional time by contacting the impacted business area in writing.
  - When the substitution results in meeting the DBE goal, complete a Revised DBE Participation which includes letter(s) from the DBE(s) of their intent to perform on the contract. If the DBE being replaced or substituted has already performed on the contract, the Revised Participation request should include the total amount paid to the DBE prior to its substitution or replacement.
  - When the substitution does not result in meeting the DBE goal, complete a Revised DBE Participation with DBE acknowledgement and provide GFE documentation. If the DBE performed on the project, the Revised DBE Participation should include the total amount paid to the DBE prior to their substitution.

**Good Faith Effort Review.** The Department will review the GFE documentation for substitution. If, during the review of the selected vendor's GFE information and documentation, the reviewers have questions, the selected vendor may be contacted for clarification. The GFE steps to be taken are, as follows:

- a. The impacted business area reviews and, if acceptable, approves the GFE and Revised DBE Participation or recommends that the IRT make the determination.
- b. The IRT either:
  1. Approves recommendation that the GFE was met and the Revised DBE Participation will be approved, or
  2. Disapproves the GFE resulting in a shortfall requiring the selected vendor to continue to fulfill its GFE obligation and commitment.
- c. If forwarded to them by the impacted business area, the IRT makes a final determination.

Do not perform any of the DBE work included in the substitution request without prior written approval from the Department.

If the projected DBE participation meets or exceeds the DBE goal amount for the contract without replacing the DBE, then no contract shortfall exists. A Revised DBE Participation must be submitted to reflect the decreased dollar amount.

2. If the arrangement to be replaced is not agreeable between the selected vendor and the DBE, the following procedures are required:
  - Until a determination is made, do not perform the DBE work without prior approval.
  - The IRT will review and make a determination and the impacted business area will notify both the selected vendor and the DBE.
  - The selected vendor or the DBE may request a meeting with the Department by contacting the impacted business area.

(e) **SBE Participation.** There is no goal for SBE participation. However, the utilization of SBE firms must be reported and documented in monthly reports with proof of payment consistent with the process for DBE firms.



**(f) Additional Work.** When additional work is required for any classification of work which is identified on the DBE Participation to be performed by the DBE, at least (50%) of this additional work will be performed by the same DBE unless the DBE submits, in writing, that he/she cannot perform the work due to his/her own limitations.

**(g) Progress Payments.** Make payments to all subcontractors, suppliers, service providers, and consultants no later than ten (10) days after being reimbursed by the Department. Document all DBE and SBE progress payments via the Monthly DBE/SBE Status Report, EO-402. The form is to be submitted no later than ten (10) days following the start of the month for the proceeding month's activity [PennDOTDBEGoal@pa.gov](mailto:PennDOTDBEGoal@pa.gov). Bring to the attention of the Department, in writing, any situation in which regularly scheduled progress payments are not made to DBE/SBE subcontractors, suppliers, service providers or consultants.

**(h) Records and Reports.** Keep such project records as are necessary to determine compliance with DBE Requirements. These records can be used as GFE documentation. Design these records to indicate:

- The number of disadvantaged and non-disadvantaged subcontractors, small businesses, regular dealers, manufacturers, consultants, and service providers, and the type of work or services performed on or materials incorporated in this project.
- The progress and efforts made in seeking out DBE and SBE contractor organizations and individual DBEs and SBEs for work on this project.
- Documentation of all correspondence, personal contacts, telephone calls, etc., to obtain the services of DBEs and SBEs for this project. Submit reports, as required by the Department. Certify that the amounts were actually paid to the DBE and SBE for work performed on the project and keep cancelled checks on file in the home office to reflect payment for the specific project and for inspection and audit by the Department. Enter the payment information on the monthly payment report which will include the following:
  - The number of contracts awarded to DBEs and SBEs, noting the type of work and amount of each contract executed with each firm and including the execution date of each contract.
  - The amount paid to each DBE and SBE during the month and the amount paid to date. If no payments are made to a DBE/SBE during the month, enter a zero (\$0.00) payment.
  - Paid invoices or a certification attesting to the actual amount paid to each firm, upon completion of the individual DBE's and SBE's work. In the event the actual amount paid is less than the award amount, provide a complete explanation of the difference.

Maintain all such records for a period of three (3) years following acceptance of final payment. Make these records available for inspection by the Department and FHWA.

If DBE credit is being claimed for material costs included in a DBE subcontract or agreement, submit purchase orders for the material to [PennDOTDBEGoal@pa.gov](mailto:PennDOTDBEGoal@pa.gov) on a monthly basis in conjunction with the monthly payment report.