

Chapter 3: SUBPART C – GOALS, GOOD FAITH EFFORTS, AND COUNTING

Section 1: Role of Statutory 10% Goal

CDOT acknowledges that the statutes authorizing the DBE Program provide that, except to the extent the Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs. This 10 percent goal is an aspirational goal at the national level, which USDOT uses as a tool in evaluating and monitoring DBEs' opportunities to participate in contracts. The national 10 percent goal does not authorize or require CDOT to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

Ref: 49 CFR 26.41

Section 2: Use of Set-Asides or Quotas

CDOT does not use set-asides or quotas for DBEs in the administration of its DBE Program.

Ref: 49 CFR 26.43

Section 3: Setting Overall Goals

As necessary, CDOT sets a separate and distinct overall goal for each USDOT funding source: Federal Highway Administration (FHWA), Federal Transit Administration (FTA) and Federal Aviation Administration (FAA). Given the significant differences between the distribution and utilization of these funds, separation of the DBE goals allows CDOT to appropriately tailor the DBE program to the relative industry. When permitted, CDOT may also set program or project overall goals, which will be submitted for review by the applicable operating administration.

CDOT sets its overall goals based upon the relative availability of DBEs in an attempt to generate the DBE participation one would expect absent the effects of discrimination. CDOT's goal methodology for each goal can be found online at <https://www.codot.gov/business/civilrights/dbe/dbemain>. CDOT's overall goals provide for participation by all certified DBEs and are not subdivided into group-specific goals

CDOT reviews and sets its overall goals on the three-year cycles established by FHWA, FTA and FAA, if applicable. FHWA's goal submission schedule can be found at www.fhwa.dot.gov/civilrights/memos/dbememogalcycle2010.htm. CDOT submits its goals and the supporting methodology to the applicable DOT operating administration by August 1 of each three-year interval. The overall goal and the provisions of Sec. 26.47(c) apply to each year during the three-year period.

CDOT consults with minority, women's and general contractor groups, community organizations, and other officials or organizations that could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and CDOT's efforts to establish a level playing field for the participation of DBEs. Some of these organizations include the Small Business Development Centers, Colorado Contractors Association, Hispanic Contractors of Colorado and Black Construction Group. CDOT documents its consultation as part of its goal setting process.

CDOT publishes a notice announcing its proposed overall goal before submitting it to the operating administration. The notice is posted on CDOT's civil rights website and may be posted in other sources (e.g., minority-focused media, trade association publications). If the proposed goal changes following review by the OA, CDOT also posts the revised goal on the website.

CDOT may adjust its three-year overall goal during the three-year period to which it applies, in order to reflect changed circumstances. CDOT will submit such an adjustment to the concerned operating administration for review and approval. The operating administration may also direct CDOT to undertake review of a goal if necessary to ensure that the goal continues to fit its circumstances appropriately.

Ref: 49 CFR 26.45

Section 4: Failure to Meet Overall Goal

CDOT cannot be penalized for falling short of the overall goal. However, CDOT will be considered in noncompliance if CDOT has failed to implement and administer the DBE program in good faith or does not have an approved DBE program or overall goal.

If the awards and commitments shown on CDOT's Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, CDOT will do the following in order to be regarded by USDOT as implementing its DBE program in good faith:

- a. Analyze in detail the reasons for the difference between the overall goal and awards and commitments in that fiscal year;
- b. Establish specific steps and milestones to correct the problems CDOT identifies in its analysis and to enable it to meet fully its goal for the new fiscal year;
- c. Submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed under paragraphs (2)(a) and (b) of this section to the appropriate OA for approval. If the OA approves the report, CDOT will be regarded as complying with the requirements of this section for the remainder of the fiscal year.

The OA may impose conditions on CDOT as part of its approval of CDOT's analysis and corrective actions including, but not limited to, modifications to its overall goal methodology, changes in its race-conscious/race-neutral split, or the introduction of additional race-neutral or race-conscious measures. CDOT may be regarded as being in noncompliance with 49 CFR Part 26 and therefore subject to the remedies in 49 CFR 26.103 or 26.105 and other applicable regulations, for failing to implement its DBE Program in good faith if CDOT did not submit its analysis and corrective actions to the OA in a timely manner, the OA disapproves CDOT's analysis or corrective actions, or CDOT does not fully implement the corrective actions to which it has committed or conditions that the OA has imposed following review of CDOT's analysis and corrective actions.

If CDOT's Uniform Report of DBE Awards or Commitments and Payments or other information demonstrates that current trends make it unlikely that CDOT will achieve DBE awards and commitments that would be necessary to allow it to meet its overall goal at the end of the fiscal year, the OA may require CDOT to make further good faith efforts, such as modifying its race-conscious/race-neutral split or introducing additional race-neutral or race-conscious measures for the remainder of the fiscal year.

Ref: 49 CFR 26.47

Section 5: Transit Vehicle Manufacturers

CDOT, as an FTA recipient, requires that each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA assisted transit vehicle procurements, certify that it has complied with the requirements of 49 CFR 26.49. CDOT does not include FTA assistance used for procurements from transit vehicle manufacturers in the base amount from which CDOT's overall goal is calculated. Within 30 days of making an award, CDOT's Division of Transit and Rail will submit the name of the successful bidder, and the total dollar value of the contract in the manner prescribed in its grant agreement with FTA.

Ref: 49 CFR 26.49

Section 6: Meeting Annual Overall Goals

CDOT meets the maximum feasible portion of its overall goals using race-neutral methods. Race neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts). The race neutral means CDOT use include, but are not limited to, the following:

- a. Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses, participation;
- b. Providing DBEs with assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing, developing and improving immediate and long term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;
- c. Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);
- d. Providing services to help DBEs and other small businesses improve long term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self sufficiency;
- e. Focusing on special projects to assist new, start up firms, particularly in fields in which DBE participation has historically been low;
- f. Ensuring distribution of CDOT's DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and
- g. Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media; and
- h. Facilitating relationships between DBEs and contractors through mandatory prebid processes and networking events.

CDOT currently hosts a Small Business Forum in construction and professional services once every quarter. The forum helps develop transparency in CDOT processes for small businesses and also serves as an outlet where small business can express their concerns.

Upon review of its overall goal, CDOT submits its projection of the portion of the overall goal expected to be met through race neutral means and the basis for that projection. CDOT establishes contract goals to meet any portion of its overall goals that it does not project being able to meet using race neutral means, but a contract goal is not required for every DOT-assisted contract. Contract goals may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract.

Over the period covered by its overall goal, CDOT sets contract goals so that they will cumulatively result in meeting any portion of the overall goal CDOT projects not being able to meet through the use of race-neutral means. CDOT's contract goals are established by the RCRO. They are established utilizing an engineer's estimate for construction or scope of work for professional services based upon a consideration of the subcontracting opportunities within the project and the availability of ready and willing DBEs to perform such work. CDOT's contract goals provide for participation by all certified DBEs and are not subdivided into group-specific goals.

CDOT is able to track its progress toward the overall goal through monthly reports on DBE contract awards. To ensure that CDOT's DBE program continues to be narrowly tailored to overcome the effects of discrimination, CDOT adjust the use of contract goals as necessary. If the approved projection estimates that CDOT can meet its entire overall goal for a given year through race-neutral means, CDOT implements the program without setting contract goals during that year, unless it becomes necessary in order meet the overall goal. If, during the course of any year in which CDOT is using contract goals, CDOT determines that it will exceed the overall goal, CDOT will reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If CDOT determines that it will fall short of its overall goal, then CDOT makes appropriate modifications in its use of race-neutral or race-conscious measures to allow it to meet the overall goal.

If the DBE participation CDOT has obtained by race neutral means alone meets or exceeds CDOT's overall goals for two consecutive years, CDOT will use only race neutral means to meet CDOT's overall goals unless and until CDOT does not meet CDOT's overall goal for a year. If CDOT obtains DBE participation that exceeds CDOT's overall goal in two consecutive years through the use of contract goals (i.e., not through the use of race neutral means alone), CDOT will reduce CDOT's use of contract goals proportionately in the following year. In any year in which CDOT projects meeting part of CDOT's goal through race neutral means and the remainder through contract goals, CDOT will maintain data separately on DBE achievements in those contracts with and without contract goals, respectively, and CDOT will report this data to the concerned OA as provided in 49 CFR 26.11.

Ref: 49 CFR 26.51

Section 7: Good Faith Efforts Processes

When CDOT has established a DBE contract goal, CDOT may only award the contract to a bidder that makes good faith efforts to meet it. A bidder has made good faith efforts if the bidder either documents that it has obtained enough DBE participation to meet the goal or that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the

bidder documents adequate good faith efforts, CDOT will not deny award of the contract on the basis that the bidder failed to meet the goal. CDOT uses Appendix A to 49 CFR Part 26 as a guideline in determining whether a prime has made good faith efforts. Additionally, CDOT provides as additional guidance to primes at

<https://www.codot.gov/business/civilrights/dbe/good-faith-effort-guidance-construction-projects>.

All CDOT solicitations for DOT-assisted construction contracts include CDOT's Standard Special Provision, Disadvantaged Business Enterprise Requirements, and CDOT's Project Special Provision, Disadvantaged Business Enterprise (DBE) Contract Goal. The Project Special Provision designates the DBE goal for the contract and can be found at

<https://www.codot.gov/business/designsupport/cdot-construction-specifications/2017-construction-standard-specs/project-special-provision-work-sheets/dbecg.docx/view>. The Standard Special Provision outlines

the good faith effort requirements for award. The Standard Special Provision also outlines the requirements for ongoing good faith efforts during the contract including procedures for termination and substitution of DBEs as outlined in 49 CFR 26.53. It is available at

<https://www.codot.gov/business/designsupport/cdot-construction-specifications/2017-construction-standard-specs/rev-ssp/rev-misc/dbe.docx/view>. The Standard Special Provision was most recently revised on July 3, 2017.

All CDOT solicitations for DOT-assisted professional services contracts include terms that outline the pre-award good faith effort requirements. The operating agreement for services outlines references the compliance criteria for consultants. A copy of these terms is attached as **Subpart G, Exhibit F**. Because professional services contracts are negotiated procurements, good faith effort documentation is not required at the time of solicitation. However, all proposers must provide an affidavit committing to meet the goal or make good faith efforts to do so.

Special processes apply to innovative contracts (i.e. design-build, construction manager/general contractor, and public private partnerships). CDOT has written unique provisions for CM/GC, Design-Build and Public Private Partnerships. These terms are included in the Request for Proposals which is subject to FHWA approval.

Preaward good faith effort reviews for construction contracts, fund encumbered professional services contracts and innovative contracts are conducted by the Civil Rights and Business Resource Center . For on call professional services contracts, preaward good faith effort reviews are conducted by the RCRO. During the course of the project, good faith efforts are also overseen by the RCRO. The procedures for termination and substitution are set forth in the relevant contracting documents.

CDOT does provide for administrative reconsideration of the good faith efforts determinations. For construction, innovative projects, and fund encumbered professional services contracts, the administrative reconsideration is conducted by the Chief Engineer. A copy of this process is attached as **Subpart G, Exhibit J**. Task order good faith effort and sanctions determinations may be appealed to the Regional Transportation Director.

The good faith efforts processes outlined in this Section also apply to DBE bidders/offerors for prime contracts. In determining whether a DBE bidder/offer for a prime contract has met a contract goal, CDOT will count the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.

Section 9: Counting DBE Participation Toward Goals

CDOT counts DBE participation in accordance with 26.55, with the exception that CDOT does not permit any credit for non-DBE leased trucks as allowed under 26.55(d)(5).

When a DBE participates in a contract, CDOT only counts the value of the work actually performed by the DBE toward DBE goals. For construction contracts this includes the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate). Additionally, CDOT counts the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, provide the fee is reasonable and not excessive as compared with fees customarily allowed for similar services.

When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals. When a DBE performs as a participant in a joint venture, CDOT counts a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces.

CDOT counts expenditures toward DBE goals only if the DBE is performing a commercially useful function on that contract. A DBE performs a commercially useful function 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 commercially useful function, 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, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, CDOT must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, CDOT must examine similar transactions, particularly those in which DBEs do not participate. If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own workforce, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, CDOT must presume that it is not performing a commercially useful function.

A DBE trucking company must be 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. The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract. The DBE receives credit for the total value of the

transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs. CDOT does not permit additional non-DBE trucks to count toward the DBE goal.

The CDOT Regional Civil Rights Offices are responsible for overseeing DBE performance and performing commercially useful functions reviews. When CDOT determines a DBE is not to be performing a commercially useful function, the DBE may present evidence to rebut this presumption. CDOT may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices. CDOT's decisions on commercially useful function matters are subject to review by the concerned OA, but are not administratively appealable to DOT.

CDOT determines the amount of credit awarded to a firm for the provisions of materials and supplies (e.g., whether a firm is acting as a regular dealer or a transaction expediter) on a contract-by-contract basis. For purposes of counting, a regular dealer is a firm 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 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.

Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers. CDOT considers a DBE which is neither a manufacturer nor a regular dealer, to be a broker. If CDOT determines such fees are reasonable, CDOT will 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, toward DBE goals. If a firm is acting as a broker, CDOT does not count any portion of the cost of the materials and supplies themselves toward DBE goals.

A DBE firm must be certified in the work to be performed at the time of commitment and contract in order to count toward the DBE goal. When a prime contractor has made a commitment to using a DBE firm, or CDOT has made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before the firm is decertified, the ineligible firm cannot count toward the contract goal or overall goal. The prime contractor must replace the ineligible firm with an eligible DBE firm or demonstrate to CDOT that it has made a good faith effort to do so. If a prime contractor has executed a subcontract with a firm before it is notified of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where CDOT let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after the notice of ineligibility shall not count toward CDOT's overall goal, but may count toward the contract goal. However, if the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, CDOT and the prime may continue to count its participation on that contract toward overall and contract goals.

If a DBE is suspended, the DBE cannot count toward the contract goal on any new contracts. The DBE may continue to perform under an existing contract executed before the DBE received a Notice of

Suspension and may be counted toward the contract goal during the period of suspension as long as the DBE is performing a commercially useful function under the existing contract.

All amounts must be paid to the DBE, including release of retainage, to count toward the DBE goal. CDOT tracks payments to DBEs through the payment submissions in B2G Now. For older contracts, CDOT also captures the information via Form 1313 for professional services contracts or Forms 1418 and 1419 for construction contracts.

CDOT's counting requirements are set out in the DBE Standard Special Provision at <https://www.codot.gov/business/designsupport/cdot-construction-specifications/2017-construction-standard-specs/rev-ssp/rev-misc/dbe.docx/view> or the professional services language in **Subpart G, Exhibit F**.

Ref: 49 CFR 26.55, 26.87 and 26.88