January 20, 2017

DISADVANTAGED BUSINESS ENTERPRISE (DBE) REQUIREMENTS

**NOTICE**

This is a standard special provision that revises or modifies CDOT’s *Standard Specifications for Road and Bridge Construction*.  It has gone through a formal review and approval process and has been issued by CDOT’s Project Development Branch with formal instructions for its use on CDOT construction projects.  It is to be used as written without change.  Do not use modified versions of this special provision on CDOT construction projects, and do not use this special provision on CDOT projects in a manner other than that specified in the instructions unless such use is first approved by the Standards and Specifications Unit of the Project Development Branch.  The instructions for use on CDOT construction projects appear below.

Other agencies which use the *Standard Specifications for Road and Bridge Construction* to administer construction projects may use this special provision as appropriate and at their own risk.

**Instructions for use on CDOT construction projects:**

Use this Standard Special Provision on all Federal-Aid Design-Bid-Build Projects, except Local Agency Projects.  For purposes of this Standard Special Provision, Federal-Aid Design-Bid-Build Projects includes only those projects for which the construction contract will be federally funded in whole or part.  This Standard Special Provision will be used only for the construction phases of CM/GC projects. Do not use on design-build or other innovative projects.  For DBE provisions for these projects, contact the Civil Rights and Business Resource Center (CRBRC) at (303)757-9234.

This Standard Special Provision shall also not be used for Local Agency projects.  Use the DBE Local Agency Requirements Standard Special Provision for Local Agency projects.

Use this Standard Special Provision in conjunction with the Project Special Provision Worksheet, Disadvantaged Business Enterprise (DBE) Contract Goal. The Designer will not set a DBE contract goal.  The Designer will consult with the Regional Civil Rights Office (RCRO) to obtain the contract goal.  A contract goal of zero still requires the use of this Standard Special Provision and Project Special Provision Worksheet.

1. **Overview.** The Disadvantaged Business Enterprise (DBE) Program is a federally-mandated program that seeks to ensure non-discrimination in the award of U.S. Department of Transportation (DOT)-assisted contracts and to create a level playing field on which DBEs can compete fairly for DOT-assisted contracts.  In order to be awarded a Contract, the lowest apparent bidder must show that it has committed to DBE participation sufficient to meet the goal or has otherwise made good faith efforts to do so.

CDOT will monitor the progress of the Contractor throughout the project to ensure that the Contractor’s DBE commitments are being fulfilled.  Modifications to the commitments, substitutions and terminations must be approved by CDOT.  If the amount of the contract increases during the performance of the contract, the Contractor must make good faith efforts to obtain additional participation to meet the contract goal. CDOT may reduce the final payment to the Contractor if the Contractor has failed to fulfill the commitments or make good faith efforts to meet the contract goal.

For general assistance regarding the DBE program and compliance, contact CDOT’s Civil Rights and Business Resource Center (CRBRC) at (303)757-9234 or the Regional Civil Rights Manager. For project specific issues, contact the Engineer or Regional Civil Rights Manager.

All forms referenced herein can be found on the CDOT website in the forms library:<http://www.coloradodot.info/library/forms/cdot-forms-by-number>.

1. **Contract Assurance.** By submitting a proposal for this Contract, the bidder agrees to the following assurance and shall include it verbatim in all subcontracts including those with non-DBE firms:

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 CDOT 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.

1. **Contract Goal.** The contract goal is a percentage of the contract that the CDOT Regional Civil Rights Office has established for participation by DBEs.  The contract goal is unique for each contract and is set forth in the Project Special Provision, Disadvantaged Business Enterprise Contract Goal.
2. *Pre-award Calculation.* For pre-award, the dollar value of the contract goal is calculated by multiplying the lowest responsible bidder’s proposal amount less any force account items by the percentage set forth in the Project Special Provision, Disadvantaged Business Enterprise Contract Goal.
3. *Final Calculation.* At the end of the project, the dollar value of the contract goal is calculated by multiplying the total earnings amount by the contract goal percentage less any waiver granted to the Contractor.  Total earnings amount means the amount of the Contract earned by the Contractor, including approved changes and force account work performed, but not including incentives or deductions.
4. **Good Faith Efforts.** Good faith efforts means all necessary and reasonable steps to achieve the contract goal which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if not fully successful.  Good faith efforts of the Contractor should include, but are not limited to, reaching out to DBEs that could perform subcontracting opportunities on the project, unbundling work the prime would self-perform to create opportunities for DBEs, negotiating in good faith with DBEs and not refusing to utilize a DBE for price alone, and other efforts to obtain DBE participation on the contract. For additional guidance on making good faith efforts see 49 CFR Part 26 Appendix A.
5. **Pre-award Process.** When CDOT has established a DBE contract goal for a project, it may not award the contract until it determines the bidder has demonstrated good faith efforts to meet the contract goal.  At pre-award, good faith efforts may be evidenced by either (1) documenting sufficient commitments to DBEs to meet the contract goal or (2) documenting adequate good faith efforts to meet the goal even though it did not obtain enough participation to do so. A commitment is a portion of the Contract, identified by dollar amount and work area, designated by the bidder or Contractor for participation by a particular DBE. A commitment may be made to a firm at any tier.  A commitment is not a subcontract, however the Contractor must have received a quote from a DBE in order to claim a commitment to a DBE.
6. *Anticipated Participation Plan.* With its proposal, the bidder shall submit a Form 1414, Anticipated DBE Participation Plan listing its commitments obtained from DBEs, even if such commitments do not meet the contract goal.  If the bidder has not obtained any DBE commitments, it shall still submit Form 1414 documenting zero anticipated participation.  If the Contract Goal is greater than zero, failure to submit a signed Form 1414 shall result in rejection of the proposal and the bidder deemed non-responsive. The bidder shall ensure that commitments, and the estimated DBE eligible participation resulting therefrom, have been properly calculated prior to submitting its proposal.  If the bidder is a DBE seeking credit for self-performance, the bidder shall include itself in Form 1414 and list the work to be self-performed and amount that the bidder intends to count for DBE credit.
7. *Utilization Plan.* Within five days of bid opening, the low responsible bidder shall submit a Utilization Plan (UP) to CDOT. The bidder will receive notice from CDOT to submit a Utilization Plan (UP) via B2GNow.  In order to complete the UP the bidder shall obtain and upload in B2G a Form 1415, Commitment Confirmation from each DBE listed on Form 1414. If the total eligible participation submitted by the bidder on the Form 1414 did not meet the contract goal, the bidder shall also request a waiver of the goal by submitting a Form 1416, Good Faith Effort Report, in the UP in B2G.

In completing the Form 1415, the bidder shall complete Section 1 of the Form 1415 and the DBE shall complete Section 2 of Form 1415. The commitment confirmations shall be consistent with the commitment listed on Form 1414. If a commitment is made to second tier or lower DBE subcontractor, the Contractor is still ultimately responsible for the fulfillment of the commitment and shall sign the Form 1415.  The bidder shall contact the CRBRC if any issues arise which may require the bidder to alter a commitment. The bidder shall not terminate a commitment listed on Form 1414 without following the procedures outlined below.

If the bidder is submitting a Form 1416, the bidder shall include any supporting documentation that the bidder would like considered by CDOT as evidence of good faith efforts. If a non-DBE was selected in lieu of a DBE, the bidder shall include all quotes from the non-DBE and DBE firms.

1. *Pre-award Good Faith Effort Review.* The CRBRC will evaluate the documentation submitted in the UP to ensure that each commitment is valid and all eligible participation has been properly calculated.  CDOT may investigate or request additional information in order to confirm the accuracy of a commitment. If the bidder’s 1414 claimed that the contract goal was met but CDOT determines that the total estimated eligible participation of the commitments does not meet the contract goal, CDOT will return the UP to the Contractor. The Contractor will be given two business days to amend the UP and return it to CDOT.  CDOT may require the Contractor to complete Form 1416 and provide documentation of good faith efforts.

When required, CDOT will review Form 1416 and all supporting documentation submitted by the bidder.  A bidder will be deemed to not have made good faith efforts if the bidder lists a DBE for a work area for which the DBE is not certified and the bidder cannot establish a reasonable basis for its determination.  CDOT will only consider commitments made after submission of the bid if the bidder demonstrates that (1) good faith efforts were made prior to submission of the bid and (2) there is a reasonable justification for not obtaining the commitments prior to submission of the bid.  If the CRBRC determines that the bidder did not demonstrate good faith efforts to meet the contract goal, it will provide the bidder with written notice of its determination and an opportunity to appeal.

1. *Approval*. If CDOT determines that the bidder has met the contract goal or made good faith efforts to do so, the CRBRC will approve the UP.  If CDOT determines the bidder did not meet the contract goal but made good faith efforts to do so, CDOT may grant a waiver to the Contractor and amend the contract goal.
2. **Utilization Plan Modifications.** The Contractor shall utilize the specific DBEs listed to perform the work and supply the materials for which it is listed unless the Contractor obtains CDOT’s written consent to terminate, reduce or modify the commitment. Unless CDOT grants such consent, the Contractor will not be entitled to payment for the work or materials. During the performance of the Contract, the Contractor shall use Form 1420, DBE Participation Plan Modification Request to communicate all requests for termination, reduction, substitution, and waivers to CDOT. One Form 1420 may include multiple requests and must be submitted at the time of the occurrence or, if that is not possible, within a reasonable time of the occurrence requiring termination, reduction, substitution or waiver. Failure to carry out the requirements of this section is a material breach of the Contract and may result in the termination of the Contract or other remedies established by CDOT.
3. *Terminations and Reductions.* A termination occurs when a Contractor no longer intends to use a DBE for fulfillment of a commitment.  A reduction occurs when the scope of the commitment changes and constitutes a partial termination. Terminations and reductions include, but are not limited to, instances in which a Contractor seeks to perform work originally designated for a DBE subcontractor with its own forces, those of an affiliate, a non-DBE firm or with another DBE firm.

CDOT cannot approve a termination or reduction unless the Contractor has good cause to terminate or reduce the commitment.  Good cause includes:  the DBE fails or refuses to execute a written contract;  the DBE fails or refuses to perform the work of its subcontract consistent with normal industry standards, provided that such failure is not the result of bad faith or discriminatory actions of the Contractor or one of its subcontractors; the DBE fails to meet reasonable, nondiscriminatory bond requirements;  the DBE becomes bankrupt, insolvent, or exhibits credit unworthiness; the DBE is ineligible to work because of suspension or debarment proceedings or other state law;  the DBE is not a responsible contractor;  the DBE voluntarily withdraws from the project and provides written notice to CDOT, the DBE is ineligible to receive DBE credit for the work required; the DBE owner dies or becomes disabled and is unable to complete the work;  the DBE ceases business operations or otherwise dissolves; or other documented good cause that compels termination.  Good cause does not exist if the Contractor seeks to terminate a DBE it relied upon to obtain the contract so that the Contractor can self-perform the work for which the DBE was engaged or so that the Contractor can substitute another DBE or non-DBE contractor after contract award.

The Contractor shall provide the DBE notice of the Contractor’s intent to terminate or reduce the commitment and the reason for such termination or reduction, with a copy to the CDOT engineer and Regional Civil Rights Office (RCRO).   In the notice of intent, the Contractor shall provide the DBE at least five calendar days to respond to the notice and inform CDOT and the Contractor of the reasons, if any, why it objects to the proposed termination or reduction and any reasons that it shall not be approved.  The Contractor is not required to provide the five days written notice in cases where the DBE in question has provided written notice that it is withdrawing from the subcontract or purchase order.  The notice period may be reduced by CDOT if required by public necessity.

Following the notice period, the contractor shall submit a Form 1420 to request approval of termination or reduction. If the RCRO determines that the Contactor had good cause for termination, the RCRO will approve the termination or reduction. If the RCRO does not agree, the RCRO may reject the termination and require the Contractor to make additional good faith efforts with the DBE.

1. *Substitutions.* When a commitment is terminated or reduced (including when a DBE withdraws), the Contractor shall make good faith efforts to find another DBE to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount, but not necessarily the same type, of work under the contract as the participation that was terminated or reduced up to the contract goal.  To make a substitution, the Contractor shall request the addition of a new DBE and provide a Form 1415, Commitment Confirmation with the request.  If the Contractor has not obtained substitute participation, the RCRO may require the Contractor to submit evidence of good faith efforts to substitute. The contractor shall have seven days to submit such information.  This period may be extended at the discretion of the RCRO.
2. *Commitment Modifications*. If the contractor seeks modifying the work to be performed under a DBE commitment, it shall submit a revised Form 1415 with the request for the modification.  Increases in work included in the original 1415 do not need CDOT approval.
3. *Change Orders.* The Contractor is required to make good faith efforts to meet the goal on the total earnings amount. Therefore, if CDOT issues a change which increases or adds new work items, the Contractor shall ensure that it has obtained sufficient DBE participation to meet the Contract Goal on the increased amount or has made good faith efforts to do so.  If the Contractor determines that additional DBE participation cannot be obtained, the Contractor shall request a waiver of the participation.  The Contractor shall include its justification for not obtaining additional participation and, at its discretion, CDOT may require additional information regarding the efforts of the Contractor.

1. **Counting.** In order for work performed by a DBE to count as DBE credit toward the contract goal, the following criteria must be met:
2. *DBE Certified to Perform the Work.* The DBE must be certified by the Colorado Unified Certification Program (UCP) in the work to be performed.  DBEs are certified in particular areas of work which are designated by a six digit North American Industry Classifications System code plus a descriptor.  Each DBE’s work codes can be found in its profile on the Colorado UCP DBE Directory at www.coloradodbe.org.

The DBE must be certified to perform the work, and not under suspension, upon submission of the commitment and upon execution of the DBE’s subcontract.  When a commitment has been made, but upon review of the sublet request the DBE is no longer certified in the work code which covers the work to be performed, the Contractor may not use the DBE’s participation toward the contract goal.  The Contractor shall terminate the DBE commitment and seek substitute DBE participation. However, a DBE’s work will continue to count as eligible participation if the DBE was certified upon approval of the sublet request but the certification status changes during the performance of the work. Suppliers must be certified upon execution of the purchase order.

1. *Work Included in Commitment or Verified via Form 205.* The work performed by the DBE must be reasonably construed by CDOT to be included in the work area and work code identified by the Contractor in an approved commitment or verified via Form 205. While a Form 205 is not usually required for suppliers, if no commitment has been made to the DBE, the Contractor shall submit the Form 205 and a copy of the supplier quote to CDOT. This work shall not count against the Contractor’s thirty percent as required under *CDOT Standard Special Provisions for Road and Bridge Construction* subsection 108.01.

If the Contractor intends to use a DBE for work that was not listed in the original commitment, the Contractor shall submit a request for modification.  Unapproved work will not count toward the contract goal. A DBE commitment cannot be modified to include work for which the DBE was not certified at the time of the approval of the original commitment unless such work is in addition to the original commitment.

1. *Work Performed by DBE.* The work must be actually performed by the DBE with its own forces. For purposes of this specification, work performed by the DBE with its own forces includes work by temporary employees, provided such employees are under the control of the DBE, the cost of supplies and materials obtained by the DBE for its work on the Contract, provided that such supplies are not purchased or leased from the Contractor or a subcontractor that is subletting to the DBE, the cost any equipment leased by the DBE, provided that such equipment is not leased from the Contractor or a subcontractor that is subletting to the DBE.

When a DBE subcontracts part of the work, the value of the subcontracted work shall be counted toward the goal only if the subcontractor is a DBE and meets the criteria of this standard special provision. Performance by non-DBE subcontractors, including non-DBE trucking firms and owner-operators, shall be deducted from the DBE’s participation.

1. *Payment Received for Work*. The DBE must receive payment, including the release of its retainage, in order for the work to count.
2. *Special Calculations for Suppliers.* When a DBE supplies goods or materials for a project, the DBE may be classified as a manufacturer, dealer or broker.  The DBE’s status as a manufacturer, dealer or broker is determined on a contract-by-contract basis by CDOT, based upon the actual work performed, in accordance with 49 CFR Part 26.53(e).  When a DBE is deemed to be acting as a manufacturer, one hundred percent of the commitment will count as eligible participation.  When a DBE is deemed to be acting as a regular dealer (i.e. non-manufacturer supplier), only sixty percent of the commitment will count as eligible participation. When a DBE is deemed to be acting as a broker, only the reasonable brokerage fee will count as eligible participation.
3. *Reasonable Service Fees.* For 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, the fees and commissions charged by the DBE shall count toward the contract goal, provided CDOT determines the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. In the case of DBE temporary employment placement agencies, only the placement fee for a temporary employee that will be specifically and exclusively used for work on the contract shall count as DBE credit; the hourly fee does not count toward the contract goal unless the firm is also certified in the work to be performed.
4. *Joint Venture Calculation.* When a DBE is a participant in a joint venture, the DBE must apply to CDOT to determine how much of the work performed by the joint venture will count toward the contract goal.  The DBE shall complete Form 893, Information for Determining DBE Participation when a Joint Venture Includes a DBE. To ensure sufficient time for review, Form 893 shall be submitted to CDOT no less than ten days before the submission of the proposal or, if requested during the contract, the point at which the DBE will begin work.
5. *Commercially Useful Function.* If CDOT determines that a DBE has not performed a commercially useful function (CUF) on the project, no participation by such DBE shall count toward the contract goal. CUF means responsibility for the execution of the work and carrying out such responsibilities by actually performing, managing and supervising the work. CDOT will monitor performance during the Contract to ensure each DBE is performing a CUF.  If CDOT determines that a DBE is not performing a CUF, no work performed by such DBE shall count as eligible participation.  The DBE, Contractor, and any other involved third parties may also be subject to additional enforcement actions.

When determining whether a DBE is performing a CUF, CDOT will consider the amount of work subcontracted, industry practices, the amount the firm is to be paid compared to the work performed and eligible participation claimed, and any other relevant factors. With respect to material and supplies used on the Contract, in order to perform a CUF the DBE must be responsible for negotiating price, determining quality and quantity, ordering the material, installing the material, if applicable, and paying for the material itself.

With respect to trucking, in order to perform a CUF, the DBE trucking firm must own and operate at least one fully licensed, insured and operational truck used on the Contract.  Additionally, the DBE trucking firm must be responsible for the management and supervision of the entire trucking operation for which it is responsible on the Contract.  CDOT only permits a DBE trucking firm to count the work performed with trucks it owns, insures and operates using drivers it employs or with trucks it leases from another DBE firm including owner operators who are certified DBEs. The DBE who leases trucks from another DBE receives credit for the transportation services the lessee DBE provides on the contract.

A DBE does not perform a CUF when 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. CDOT will evaluate similar transactions involving non-DBEs in order to determine whether a DBE is an extra participant. If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work than would be expected on the basis of normal industry practice for the type of work involved, CDOT will presume that the DBE is not performing a CUF.  The DBE may present evidence to rebut this presumption.

1. *Joint Checks. A*ll joint checks must be approved by CDOT before they are used in payment to a DBE. A joint check is a check issued by the Contractor or one of its subcontractors to a DBE firm and a material supplier or other third party for materials or services to be incorporated into the work.  Joint checks used in payments to DBEs will be monitored closely to ensure (1) the DBE is performing a CUF and (2) the joint checks are not being used in a discriminatory manner.  The Contractor shall request approval for the use of a joint check in a written letter signed by the DBE and the Contractor, stating the reason for the joint checks and the approximate number of checks that will be needed. Failure to receive approval of a joint check may result in CDOT not counting such payment as participation by the DBE.
2. **Contract Finalization**

1. *Form 1432, Commercially Useful Function Questionnaire.* In order to finalize the project, the Contractor must submit a Form 1432, Commercially Useful Function Questionnaire for each DBE that performed work or provided supplies toward meeting the contract goal. The Form 1432 must be signed by the DBE, Contractor and Engineer.
2. *Payment Reduction.* The Contractor’s retainage will not be released until CDOT has determined whether the Contractor will be subject to a payment reduction. The Contractor will be subject to a payment reduction for any termination or reduction which was not approved. Additionally, the Contractor will be subject to a payment reduction for the portion of the contract goal that was not met and was not waived. The contractor will not be subject to duplicate reduction for the same offense. CDOT may adjust the payment reduction wherein the Contractor demonstrates that its failure to obtain DBE participation was due to circumstances outside of its control.
3. **Other Enforcement**. As it determines necessary, CDOT may conduct reviews or investigations of participants. All participants, including, but not limited to, DBE firms and applicants for DBE certification, complainants, and contractors using DBE firms to meet contract goals, are required to cooperate fully and promptly with compliance reviews, certification reviews, investigations, and other requests for information.

Participants shall not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by the DBE program or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the DBE program. Failure to comply with this paragraph shall be a ground for appropriate action against the party involved (e.g., with respect to recipients, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).

If CDOT determines that a Contractor or subcontractor was a knowing and willing participant in any intended or actual subcontracting arrangement contrived to artificially inflate DBE participation or any other business arrangement determined by CDOT to be unallowable, or if the Contractor engages in repeated violations, falsification or misrepresentation, CDOT may  refuse to count any fraudulent or misrepresented DBE participation; withhold progress payments to the Contractor commensurate with the violation;  suspend or reduce the Contractor’s prequalification status;  refer the matter to the Office of Inspector General of the US Department of Transportation for investigation; or  seek any other available contractual remedy.