

**PILOT DISADVANTAGED BUSINESS ENTERPRISE  
PROJECT SPECIAL PROVISION**

**NOTICE**

This is a pilot project special provision for CDOT Project No. 025A-016, sub account 18842, I-25 North Design/Build – Woodmen Rd to Interquest Parkway, which has been developed in accordance with 49 CFR Part 26. This pilot special provision replaces the Disadvantaged Business Enterprise Definitions and Requirements Standard Special Provision and modifies the CDOT's *Standard Specifications for Road and Bridge Construction* on this project. It is to be used as written without change. Do not modify or apply this pilot special provision to any other projects.

For additional information on the project, please visit:

<http://www.coloradodot.info/projects/I25NorthCOSDB>

The following pilot forms are referenced in and attached to this Project Special Provision:

- *714P - DBE Performance Plan*
- *16P - Monthly Prompt Pay and GFE Summary*
- *17P - DBE/ESB Participation Final Report*

With the exception of Form 893, other forms traditionally utilized to fulfill the requirements of the DBE program on CDOT contracts will not be accepted on this project.

## I. DEFINITIONS

For this project, the following terms are defined:

**Bid.** The offer of a contractor to perform work and to furnish labor and/or materials.

**Bid Proposal.** The appropriate CDOT form on which bids are prepared and submitted to CDOT, which may be written, electronic or a combination thereof.

**Bid Shopping.** An unethical practice in which a contractor discloses the bid price of one subcontractor to another (before or after award of the subcontract) in an attempt to obtain a lower bid price. This practice by a prime contractor may lead to bad relations with potential subcontractors and ultimately impair a contractor's ability to meet DBE goals on a project. CDOT considers bid shopping to be unethical and a bad business practice that may ultimately harm the contractor's reputation and ability to bid or propose on CDOT projects. CDOT strongly discourages bid shopping. If known to CDOT, bid shopping will negatively affect CDOT's evaluation of a contractor's pre-award and post-award Good Faith Efforts where applicable.

**Business Specific Commitment.** A Commitment to a specific DBE subcontractor, subconsultant or supplier to perform or provide certain items on the contract.

**Center for Equal Opportunity (CEO).** The Colorado Department of Transportation Center for Equal Opportunity.

**CFR.** Code of Federal Regulations.

**Colorado Unified Certification Program (UCP).** The USDOT-approved Colorado DBE certification program.

**Commitments.** Portions of the contract, listed in actual dollar amounts of the expected subcontracts (i.e. not the contractor's price to CDOT), which have been designated for performance by DBE subcontractors, subconsultants, and/or suppliers as stated in the contractor's DBE Performance Plan. Commitments include Business Specific Commitments and Work Area Commitments.

**Commercially Useful Function.** Responsibility for the execution of the work of the contract and actual performance, management, and supervision of the work involved, which is further explained in 49 CFR 26.55(c) and (d).

**Contract Goal(s).** The design and/or construction goals for DBE participation on this contract, which have been established by CDOT as percentages of the entire contract amount. The design and construction goals are separate and distinct goals. CDOT will not count participation in excess of one Contract Goal toward the other.

**Disadvantaged Business Enterprise (DBE).** A business certified as a DBE by the Colorado UCP.

**DBE Directory.** A list of DBEs certified under the Colorado UCP. See <http://apps.coloradodot.info/ucp>.

**DBE Joint Venture.** An association of a DBE firm and one or more other firms to operate as a single entity on a specific CDOT contract.

**DBE Performance Plan.** The Form 714P which documents the contractor's tailored commitments and Good Faith Efforts for this project. The Form 714P must be submitted to and approved by CDOT for award of the contract and also becomes part of the contract if awarded.

**Good Faith Efforts.** Efforts to achieve DBE participation, which, by their scope, intensity, and appropriateness, can reasonably be expected to result in the achievement of the Contract Goals. Pre-award Good Faith Efforts will be evaluated in order to determine whether a contractor is a responsive bidder eligible to be awarded the contract.

Post-award Good Faith Efforts will be evaluated in order to determine whether a contractor will be sanctioned for not meeting the Contract Goals.

**Joint Check.** A two-party check between a contractor, a DBE and the regular dealer of material or supplies.

**Sanctions.** Monetary fines for non-compliance with the DBE contract requirements.

**Work Area Commitment.** A Commitment which identifies a work area within the contract that is designated for DBE participation, but does not identify the exact DBE to perform such work area.

## **II. COUNTING ELIGIBLE DBE PARTICIPATION TOWARD CONTRACT GOALS**

### *A. Responsibility of the Contractor*

1. The contractor shall exercise its own judgment in selecting any DBE to participate in the project.
2. The contractor is solely responsible for verifying the certification of DBEs it intends to use prior to submitting a Bid Proposal and prior to entering into a subcontract with a DBE.
3. In order for a DBE Joint Venture to count for DBE participation, the DBE Joint Venture must submit a Form 893, "Information for Determining DBE Participation when a Joint Venture Includes a DBE" to the Center for Equal Opportunity for approval. Approval of DBE Joint Venture is a certification for the project, therefore forms must be submitted at least ten business days in advance of bidding to be considered for eligibility.

### *B. Certified Work Codes*

1. Only work performed by DBEs in the work code(s) for which they are certified on the DBE Directory shall count toward the Contract Goals.
2. In order to determine whether a Business Specific Commitment shall count toward the Contract Goals for award of the contract, CDOT will evaluate the certification status of each DBE at the submission of the contractor's DBE Performance Plan.
3. In order to determine whether a DBE's performance on the contract shall count toward the Contract Goals as eligible DBE participation:
  - a. If the contractor is a DBE, the eligibility of the work shall be based upon its certification status at the time of the performance of the work.
  - b. For a DBE subcontractor, subconsultant, or supplier, the eligibility of the work shall be based upon the certified work codes of the DBE upon approval of the Form 205P. Changes in the DBE's certified work codes during the performance of the contract shall not affect the eligibility of the DBE's work unless such changes are due to the following: failure of the DBE to maintain certification, fraudulent activity, immediate safety concerns, debarment, conviction or other similar reasons. CDOT will provide notice to the contractor if the DBE's certified work codes change in a manner that will affect the eligibility of the DBE's work.

### *C. Commercially Useful Function*

1. Only payments to DBEs that independently perform a Commercially Useful Function in the work of the contract shall count toward the Contract Goals.

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2. CDOT will use the standards set forth in 49 CFR Part 26.55(c) and (d) to determine whether a company is performing a Commercially Useful Function.
3. A contractor shall not use Joint Checks where it compromises the Commercially Useful Function of a DBE, including the responsibility for negotiating for and/or paying for the material of a project. Where a Joint Check is used in payment to a DBE, the contractor shall bear the burden of demonstrating that the Joint Check did not compromise the Commercially Useful Function of the DBE and that such activity was non-discriminatory standard company or industry practice.

### *D. Calculation of Eligible DBE Participation Amount*

1. Service and construction work contracts performed by DBE firms shall count toward the Contract Goals in accordance with 49 CFR 26.55(a).
2. Provided a DBE Joint Venture has been preauthorized by CDOT on a Form 893, such DBE Joint Venture shall count toward the Contract Goals in accordance with 26.55(b).
3. Material and supply contracts fulfilled by DBE firms, including brokerage contracts, shall count toward the Contract Goals in accordance with 26.55(e).
4. Trucking contracts performed by DBE firms shall count toward the Contract Goals as follows:
  - a. The DBE trucking firm shall receive credit for all transportation services performed with its own trucks and employees and/or DBE lessees;
  - b. The DBE trucking firm will not receive credit for any work performed by non-DBE lessees; and
  - c. Where a DBE trucking firm acts as a broker it shall only receive credit for its fees and services in accordance with 26.55(a)(2) provided it is certified as a broker on the DBE Directory.

## **III. PRE-AWARD REQUIREMENTS**

### *A. Pre-Award Good Faith Efforts*

1. The Good Faith Efforts made by the contractor prior to award will be evaluated by the Center for Equal Opportunity in order to determine whether a contractor is a responsive bidder for the contract. Pre-award Good Faith Efforts include Business Specific Commitments, Work Area Commitments, and/or outreach and other activities undertaken to generate DBE participation on the contract.
2. A contractor must demonstrate its pre-award Good Faith Efforts in its DBE Performance Plan in accordance with Section III.B “Contractor’s DBE Performance Plan Requirements” below. If a contractor ultimately fails to demonstrate adequate pre-award Good Faith Efforts, the contractor will be determined to be an unresponsive bidder and will not receive the contract award in accordance with 49 CFR 26.53(a).
3. CDOT will utilize 49 CFR 26.53 and Appendix A to 49 CFR Part 26, as well as any other requirements for Good Faith Efforts stated herein, to determine whether the contractor demonstrated all reasonable and necessary pre-award Good Faith Efforts.

### *B. Contractor’s DBE Performance Plan Requirements*

1. Within three (3) business days of being designated the apparent low bidder for the contract, the contractor must submit to the CDOT Center for Equal Opportunity its complete and fully executed DBE Performance Plan for this project. The purpose of the DBE Performance Plan is to demonstrate to CDOT

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that the contractor has and will continue to make all reasonable and necessary Good Faith Efforts to secure DBE participation on this project.

2. The contractor's DBE Performance Plan must be submitted on the attached Form 714P.

3. The contractor must complete its DBE Performance Plan as follows:

a. Part 1. Contractor's DBE Officer

Identify and provide contact information for the contractor's DBE Officer for this contract. The DBE Officer shall be responsible for the following:

- i. Completing and submitting all forms and reports as required herein;
- ii. Implementing Good Faith Efforts of the contractor throughout the project; and/or
- iii. Communicating with CDOT regarding any DBE performance issues and/or modifications to the DBE Performance Plan.

b. Part 2. Business Specific Commitments

List all Business Specific Commitments being made in order to achieve the Contract Goals.

- i. Business Specific Commitments must be designated as participation toward either the construction or design Contract Goal.
- ii. CDOT expects the contractor to make reasonable efforts to secure Business Specific Commitments and a failure to do so will result in rejection of the DBE Performance Plan.
- iii. Where the prime contractor is a DBE, it must list itself and the work it intends to perform as a Business Specific Commitment.

c. Part 3. Work Area Commitments

Where there is sufficient justification, the contractor may make a Work Area Commitment in lieu of a Business Specific Commitment.

- i. Work Area Commitments must be designated as participation toward either the construction or design Contract Goal and must be accompanied by a justification for their utilization in lieu of a Business Specific Commitment.
- ii. The Work Area Commitment must be of a sufficient detail to accurately describe the work to be performed. For example, use "Asphalt Hauling" instead of "Trucking."

d. Part 4. Pre-Award Good Faith Efforts

Where the contractor fails to make sufficient Commitments to meet the Contract Goals, the contractor must provide an explanation of its other pre-award Good Faith Efforts to justify an award on this basis. This section may include the following:

- i. A description of the pre-award outreach and procurement approach the contractor undertook to meet the Contract Goals; and

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- ii. A summary of the results of the outreach and procurement approach, including the justification for the failure to make Commitments sufficient to reach the Contract Goals.

*NOTE: If a contract is awarded based upon pre-award Good Faith Efforts, the Contract Goals are not waived. The contractor may still be liable for sanctions based upon the original Contract Goals if adequate post-award Good Faith Efforts are not demonstrated throughout the project.*

### e. Part 5. Post- Award Good Faith Effort Strategy

Every contractor is responsible for performing ongoing post-award Good Faith Efforts throughout the duration of the project. Post-award Good Faith Efforts are those efforts made by the contractor to meet the Contract Goals after the contract has been awarded and executed, but before the project has been completed. Therefore, the post-award Good Faith Effort Strategy should be developed as an approach to:

- i. Handling issues related to DBE participation on the project to ensure an adequate opportunity for DBEs to perform;
- ii. Continuing outreach and increasing DBE participation on the project, especially where the contractor has not made sufficient Commitments to reach the Contract Goals;
- iii. Monitoring and implementation of the contractor's DBE Performance Plan; and
- iv. Where the contractor is a DBE, accounting for possible changes to its DBE certification status.

*NOTE: In accordance with FHWA Form 1273, every contractor is responsible for demonstrating that it will use its best efforts to solicit bids from and utilize DBE subcontractors or subcontractors with meaningful minority and female representation among their employees.*

### f. Part 6. Affirmations and Signatures

A representative from the contractor, with the authority to contractually bind the company, must attest to the following and sign the DBE Performance Plan.

*I declare under penalty of perjury in the second degree and any other applicable state or federal laws that the statements made in this document are complete, true and accurate and that I have the authority to commit my company to statements made herein. Further, I understand and agree that if my company is awarded the contract for this project, it will comply with all requirements of the Pilot DBE Project Special Provision, shall not discriminate on the basis of race, color, national origin, or sex, and shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of contracts. Failure 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.*

4. With its DBE Performance Plan, for each Business Specific Commitment, the contractor must submit written confirmation from the applicable DBE stating that it is aware of the Commitment. This confirmation is required in order for the Commitment to be counted toward the Contract Goal. Failure to secure this written confirmation is not justification for Work Area Commitments and/or award based upon Good Faith Efforts.
5. The DBE Performance Plan and all required attachments must be submitted by email to Greg Diehl ([greg.diehl@dot.state.co.us](mailto:greg.diehl@dot.state.co.us)) at the Center for Equal Opportunity.

### C. Evaluation of the DBE Performance Plan

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1. CDOT will evaluate the DBE Performance Plan based upon the following criteria:
  - a. Whether a DBE is certified for each work area identified in a Business Specific Commitment in order to count toward the Contract Goals.
  - b. Whether the contractor made every reasonable effort to secure Business Specific Commitments to meet the Contract Goals.
  - c. Whether Work Area Commitments are supported by reasonable justifications to be accepted in lieu of the Business Specific Commitments.
  - d. Where pre-award Good Faith Efforts are evaluated, whether the prime contractor has a history of meeting or not meeting Contract Goals; and
  - e. Whether contractor's Good Faith Efforts, in both pre-award (if applicable) and post-award strategy, are in conformance with 49 CFR Part 26 and its appendices, including actively trying to identify and create opportunities for DBEs.
2. If CDOT determines that the contractor's DBE Performance Plan is acceptable, CDOT will notify the contractor via email or fax that its DBE Performance Plan has been approved.
3. If CDOT identifies deficiencies in the contractor's DBE Performance Plan, it will send the contractor an email or fax explaining the deficiencies and provide the contractor an opportunity to cure.
4. In order to cure, the contractor must submit a modified DBE Performance Plan which addresses the deficiencies identified by CDOT.
5. If CDOT determines that the contractor failed to cure the deficiencies of the plan, CDOT will provide the contractor with written notice that the contractor failed to make adequate Good Faith Efforts for award. Within three (3) business days of such notice, the contractor may request administrative reconsideration of the decision. All requests must be sent via fax to (303)757-9019 or mail to CDOT Center for Equal Opportunity, 4201 E. Arkansas Ave, Room 200, Denver, CO 80222.
6. The administrative reconsideration will be conducted by CDOT's Chief Engineer and the DBE Liaison Officer or their designees. The contractor may request an in-person meeting with the reconsideration officials to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. No new arguments or evidence of Good Faith Efforts shall be submitted during the administrative reconsideration.
7. CDOT will send the contractor a written decision on reconsideration, explaining the basis for finding whether the contractor demonstrated adequate Good Faith Efforts to be awarded the contract. The result of the reconsideration process is not administratively appealable to the United States Department of Transportation.
8. CDOT's acceptance of a DBE Performance Plan wherein the contractor did not make Business Specific or Work Area Commitments sufficient to meet the goal does not waive the Contract Goals on the project. All documented efforts of the contractor, and lack thereof, to meet the Contract Goals will be considered when CDOT evaluates whether to assess sanctions at the end of the project.

### **IV. POST-AWARD REQUIREMENTS**

#### *A. Post-Award Good Faith Efforts*

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1. The contractor must provide monthly reports to CDOT, wherein it shall document post-award Good Faith Efforts (see Section IV.D). The monthly reports of the contractor shall constitute the record for the project and shall not be amendable after the fact. Therefore, the contractor must ensure that the monthly reports completely and accurately reflect its entire post-award Good Faith Efforts and keeps supporting documentation thereof.
2. When a contractor fails to meet the design and/or construction Contract Goals at the end of the project, CDOT will evaluate the contractor's documented post-award Good Faith Efforts to determine whether and to what extent to assess sanctions.

### *B. Modifications to and Enforcement of the Contractor's DBE Performance Plan*

1. The Contract Goals shall be based upon the total dollar amount of the contract including all change orders and adjustments. The contractor is responsible for meeting the Contract Goals and/or making and demonstrating Good Faith Efforts to do so.
2. All modifications to the contractor's DBE Performance Plan, including changes in scope which reduce a DBE's participation, a temporary substitution and/or the contractor's intent to self-perform work that is part of the DBE Commitments, must be submitted for approval in writing by the contractor's DBE Officer to the Regional Civil Rights Professional. The modification(s) shall not be made until approved by CDOT. Termination of a DBE is covered in Section IV.C.

### *C. Termination of a DBE*

Any termination or cancellation of a Business Specific Commitment and/or a written agreement with a DBE for which a 205P has been submitted will require the approval of the CDOT Regional Civil Rights Professional. When termination is being considered, the contractor should discuss such termination with the Regional Civil Rights Professional to determine the best course of action. Further, in order for such termination or cancellation to be approved, the contractor must:

1. Have a good cause for seeking modification to the Commitment. Good cause may include:
  - a. the DBE fails or refuses to execute a written contract;
  - b. the DBE fails or refuses to perform the work of its subcontract consistent with normal industry standards and not resulting from bad faith or discriminatory actions of the prime;
  - c. the DBE fails to meet reasonable, nondiscriminatory bond requirements;
  - d. the DBE becomes bankrupt, insolvent, or exhibits credit unworthiness;
  - e. the DBE is ineligible to work because of suspension and debarment proceedings;
  - f. the DBE is not a responsible contractor; the DBE voluntarily withdraws from the project and provides written notice;
  - g. the DBE is ineligible to receive DBE credit for the type of work required;
  - h. the DBE owner dies or becomes disabled and is unable to complete its work; or
  - i. other documented good cause that compels termination.
2. Give written notice to the DBE of the contractor's intent to seek CDOT's approval of the termination or modification of the DBE's participation with a copy to the Region Civil Rights Professional; and



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3. Provide the DBE five (5) days to respond to the notice and resolve the situation. The notice period may be reduced by CDOT if required by public necessity (e.g., safety, critical deadlines, etc.).

### *D. Monthly Reporting*

1. On a monthly basis, the contract must submit a Form 16P to the Project Engineer. The purpose of the Form 16P is to document the following:
  - a. Prompt payment to all subcontractors, subconsultants and supplier in accordance with state law and/or CDOT requirements;
  - b. The contractor's estimated current DBE participation;
  - c. Approval requests for modifications to its DBE Performance Plan; and
  - d. Summaries of post-award Good Faith Efforts conducted by the contractor.
2. CDOT may withhold part or all of the monthly progress payments due to the contractor if:
  - a. The contractor failed to timely submit a fully completed Form 16P;
  - b. The Form 16P indicates that the contractor is not paying the subconsultants, subcontractors and/or suppliers in accordance with state law and/or CDOT requirements.
  - c. The Form 16P indicates that the contractor is not complying with the Commitments of the DBE Performance Plan and/or modifying the plan as necessary.
3. If, based upon the data provided in the monthly reports, it appears that the contractor is not fulfilling the obligations of its DBE Performance Plan, CDOT may issue a Form 105 requiring the contractor to take remedial action and to update the DBE Performance Plan. CDOT may withhold periodic payments to the contractor until an adequate remedy is proposed and/or provided.

### *E. Final Reports*

1. At the end of the contract, in order to receive final payment, the contractor must submit a Form 17P for each DBE that participated on the contract.
2. Form 17P must be signed by a representative of the contractor and of the DBE.

## **V. COMPLIANCE VIOLATIONS**

### *A. Abuse, Fraud and Misrepresentation*

1. DBE firms which fail to perform a Commercially Useful Function consistent with 49 CFR Part 26 or operate in a manner which is inconsistent with the intent of the DBE Program may be subject to revocation of certification.
2. Any intended or actual subcontracting arrangement which is contrived to artificially inflate DBE participation is not allowed.
3. If CDOT determines a contractor was a knowing and willing participant in a business arrangement determined by CDOT to be unallowable, or if the contractor engages in repeated violations, falsification or misrepresentation, CDOT may:

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- a. Assess sanctions based upon failure to meet the Contract Goal;
- b. Withhold progress payments commensurate with the violation(s);
- c. Suspend bidding privileges or seek debarment; and/or
- d. Refer the matter to the Office of Inspector General of the US Department of Transportation for investigation.

### *B. Failure to Meet the Contract Goals:*

1. CDOT will impose sanctions for failure to meet the Contract Goal(s).
2. Sanctions will be equal to the final dollar amount of Contract Goal(s), calculated from the percentages of the design goal and the construction goal, less the amount of eligible DBE participation on the project.
3. If the CDOT Regional Civil Rights Professional determines that the contractor demonstrated reasonable and necessary Good Faith Efforts to meet the Contract Goals, he/she may reduce or waive sanctions. The Regional Civil Rights Professional will consider quantity under-runs, project changes, or other unexpected occurrences outside the control of the contractor when determining the total amount of the sanctions.

### *C. Suspension or Reduction of Prequalification*

1. If CDOT finds that a contractor has failed to comply with this pilot special provision, the requirements of 49 CFR 26 or CDOT's Specifications for Road and Bridge Construction Section 109.06, CDOT may suspend the contractor's prequalification status or reduce the contractor to a lower level of prequalification in accordance with CDOT's Bid Rules, Chapters 2 and 3.
2. Suspension or reduction will be recommended by CDOT staff and approved by the Chief Engineer. Suspension or reduction will be set for a definite period of time which correlates to the severity of the violation(s).