

## CDOT PROFESSIONAL SERVICES LOCAL AGENCY CIVIL RIGHTS AND DISADVANTAGED BUSINESS ENTERPRISE (DBE) CONTRACT REQUIREMENTS

Please refer to CDOT's Local Agency Civil Rights Guidelines for more information:

[www.codot.gov/compliance/la](http://www.codot.gov/compliance/la)

At the time of initial proposal, the proposer must make a contractually binding guarantee to meet the Contract Goal in accordance with 49 CFR 26.53.

All parties included in the performance of work on the Contract shall comply with these terms and conditions. The following requirements shall apply to all FHWA assisted contracts and subcontracts.

### I. DEFINITIONS

*B2Gnow.* Web based platform utilized by CDOT to track Civil Rights compliance (DBE/ESB participation) and prompt payment requirements on its contracts. The Consultant shall use this platform to submit Utilization Plans and DBE Subconsultant and Supplier/Vendor information on the Contract. References to B2Gnow in this document refers to CDOT's B2Gnow system.

*Civil Rights.* The CDOT Civil Rights Office that assists with the contract and prompt payment requirements on contracts. This can be in either the region or headquarters office.

*Commercially Useful Function (CUF).* A DBE's responsibility for the execution of work by actually performing, managing, and supervising the work, as described in 49 CFR Part 26.55.

*Commitment.* A portion of the Contract designated by the Consultant for participation by DBE firms. Commitments must identify the work to be performed by the DBE and include the percentage of the contract committed to each DBE firm. Commitments are measured at the end of the contract and are calculated by the actual payments to a DBE firm divided by the total payments made under the Contract.

*Contract.* The IGA agreement between the Local Agency and the Consultant, whereby the Consultant shall be compensated in exchange for providing Professional Services and ancillary services. For purposes of this document, the term "Contract" refers to an individual executed Task Order for an On-Call Agreement or a Main/Master Contract (overarching agreement) for Project Specific and Program Specific Agreements.

*Contract Goal/Contract Goal Percentage.* The percentage of Contract goal established by CDOT for reasonable participation by DBEs and stated in the Request for Proposal as part of the Solicitation for Professional Consultant Services.

*Consultant.* An individual, firm, corporation, or other legal entity with a direct contractual relationship with the Local Agency's solicitation to render Professional Services and ancillary services.

*Disadvantaged Business Enterprise (DBE).* A Colorado certified Disadvantaged Business Enterprise listed on the Colorado Unified Certification Program (UCP) DBE Directory at <https://coucp.dbesystem.com/>.

*Environmental Justice Equity (EJE).* **Formerly Civil Rights and Business Resource Center (CRBRC).** The CDOT Civil Rights Office at Headquarters is included in the EJE department.

*Emerging Small Business (ESB).* A CDOT certified Emerging Small Business firm listed on the ESB Directory at <https://cdot.dbesystem.com/FrontEnd/searchcertifieddirectory.asp>.

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*Good Faith Efforts (GFE).* All necessary and reasonable steps to secure the necessary Commitments to meet the Contract Goal or other requirements of this contract, which by their scope, intensity, and appropriateness to the objective could reasonably be expected to fulfill the contract requirement. Guidance on Good Faith Efforts to meet the Contract Goal is provided in 49 CFR Part 26, Appendix A, including definitions of necessary and reasonable steps.

*Local Agency.* A public agency, local public agency, established public owned organization, or private interest that can legally enter into an intergovernmental agreement with CDOT for a transportation related contract. This can involve the design, construction or management of State and Federally funded contracts.

*Professional Services.* The practice of architecture, engineering, professional land surveying, landscape architecture, and industrial hygiene as defined in Colorado Revised Statutes (CRS) 24-30-1402.

*Reduction.* Reduction occurs when the Consultant reduces a Commitment to a DBE. A Reduction is a reduced, partial Termination of the Commitment.

*Subconsultant.* An individual, firm, corporation or other legal entity to whom the Consultant sublets part of the contract.

*Substitution.* Substitution occurs when a Consultant seeks to find another certified DBE firm to perform work on the contract as a result of a Reduction or Termination.

*Supplier.* An individual, firm, or corporation who meets one or both of the following criteria: (1) Fabricates or processes a material not on the site of work per 29 CFR 5.2. (2) Delivers material directly to the project. In both cases, the material shall be intended for permanent incorporation into the worksite.

*Termination.* Termination occurs when a Consultant no longer intends to use a DBE firm for fulfillment of a Commitment. This includes, but is not limited to, instances in which a Consultant seeks to perform work originally designated for a DBE Subconsultant with its own forces or those of an affiliate, a nonDBE firm, or with another DBE firm.

*Utilization Plan (UP).* The documentation of Subconsultant and Supplier/Vendor participation on the awarded Contract. The Utilization Plan details all Subconsultants and Suppliers/Vendors included as part of the proposal team and Commitments by percentage made by the Consultant. The Consultant must submit the Utilization Plan within five (5) calendar days of receiving notice from CDOT's B2Gnow system.

*Vendor.* Participant on a CDOT contract that is providing services not considered to be a Professional Services as defined in Colorado Revised Statute 24-30-1402 and 48 CFR Part 2.

*Work Code.* A code to identify the work that a DBE is certified to perform. A work code includes a six (6) digit North American Industry Classifications System (NAICS) code plus a descriptor. Work codes are listed on a firm's profile on the Colorado UCP DBE Directory at <https://coucp.dbesystem.com/>. The Local Agency may include CDOT in discussions for clarification. The Consultant may contact the Environmental Justice Equity to receive guidance on whether a work code covers the work to be performed.

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**II. NONDISCRIMINATION AND SUBCONTRACTING REQUIREMENTS**

A. *Non-discrimination.* The Consultant, with regard to the work performed by it during the contract term, shall not discriminate on the grounds of race, color, or national origin in the selection and retention of Subconsultants, including procurement of materials and leases of equipment. The Consultant shall not participate either directly or indirectly in the discrimination prohibited by the Acts and the Regulations, including employment practices when the contract covers any activity, contract, or program set forth in Appendix B of 49 CFR Part 21.

B. *Civil Rights Act of 1964 Title VI.* CDOT, in accordance with the provisions of Title VI of the Civil Rights Act of 1964 (78 Stat. 252, 42 USC. §§ 2000d to 2000d-4) and the Regulations, hereby notifies all bidders that it shall affirmatively ensure that for any contract entered into pursuant to this advertisement, Disadvantaged Business Enterprises shall be afforded full and fair opportunity to submit bids in response to this invitation and shall not be discriminated against on the grounds of race, color, or national origin in consideration for an award.

C. *Consultant Assurance.* By submitting a proposal for this contract, the Consultant agrees to the following assurance:

1. The Consultant, sub recipient, or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Contract.
2. The Consultant shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT assisted contracts.
3. Failure by the Consultant 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 deems appropriate, which may include, but is not limited to:
  - a. Withholding monthly progress payments.
  - b. Assessing sanctions.
  - c. Liquidated damages.
  - d. Disqualifying the Consultant from future bidding as non responsible.

D. *Prompt Payment.* Payments to all Subconsultants shall be made within seven (7) calendar days of receipt of payment from the Local Agency, or no later than thirty (30) calendar days from the date of the submission of a complete invoice from the Subconsultant, whichever occurs first. The Local Agency shall assist in enforcing the Civil Rights Requirements outlined above as well as prompt payment as outlined in 49 CFR, Part 26.29.

1. If the Consultant or Subconsultant payor believes it has good cause, in the context of assessing prompt payment, to delay or withhold a subconsultant's progress payment, the Consultant shall notify the Subconsultant in writing no later than the required date for payment.
  - a. Such notification shall include the amount disputed, justification for the withholding, and what conditions the Subconsultant must meet to receive payment.
  - b. The Consultant shall maintain records of payment that show amounts paid to all Subconsultants. The Consultant and all Subconsultant payors shall electronically submit prompt payment audit reports in B2Gnow by the fifteenth (15) of each month through the B2Gnow system software.
  - c. If no payment has been made, the Local Agency shall document this in the prompt payment audit reporting and upload the submitted good cause notice in CDOT's B2Gnow system.

E. *Subcontract Terms.* Parts A-D of this section shall be included in all subcontracts or other agreements for the performance of work on the contract.

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**III. CONTRACT COMMITMENT**

A. *Affidavit of Small Business Participation.* The *Affidavit of Small Business Participation* form is the proposer's contractually binding guarantee to meet the Contract Goal or make Good Faith Efforts to do so. CDOT's *Affidavit of Small Business Participation* form must be submitted with the proposal. Failure to submit the CDOT *Affidavit of Small Business Participation* form shall result in the proposer being deemed non responsive and ineligible for award. The Local Agency shall copy the top preferred proposals to CDOT's Environmental Justice Equity (EJE) for approval of CDOT's *Affidavit of Small Business Participation* form. This form includes the commitments to meet the DBE goal.

B. *Contract Good Faith Effort Requirement.* The *Affidavit of Small Business Participation Plan* shall not be approved by CDOT until the Consultant documents sufficient Commitments to meet the Contract Goal or demonstrates Good Faith Efforts to meet the Contract Goal, even though it did not succeed in obtaining sufficient Commitments to do so.

1. Good Faith Efforts mean that the proposer:
  - a. Documents it has obtained enough DBE participation to meet the Contract Goal, or
  - b. Documents that it made adequate good faith efforts to meet the Contract Goal, even though it did not succeed in obtaining enough DBE participation to do so.
2. If the proposer has not documented sufficient Commitments to meet the Contract Goal, the proposer shall provide an explanation of its efforts to obtain Commitments by submitting the CDOT *Professional Services Good Faith Efforts Report* form and supporting documentation to the EJE.
3. In conducting Good Faith Effort reviews, the EJE shall utilize the guidance found in Appendix A to 49 CFR Part 26, where applicable. The EJE may also consider, but is not limited to, the following factors in evaluating the proposer's Good Faith Efforts:
  - a. Performance of other consultants in meeting DBE goals on contracts that have a similar scope of work, contract amount, location, and time frame.
  - b. Proposer's reason(s) for choosing a nonDBE subconsultant over an interested DBE.
  - c. Documentation of DBEs solicited by the proposer and verification from the DBEs that they were contacted by the proposer.
  - d. Past performance by the proposer on contracts that have a similar scope of work, contract amount, location and time frame including DBE firms outside the "most qualified" team in the event that DBE team members are unavailable or unwilling to participate.
  - e. Any other factors that may be pertinent to the factual circumstances.
4. If Environmental Justice Equity determines the proposer has made Good Faith Efforts to meet the Contract Goal, the Master Contract Utilization Plan shall be approved with applicable changes and documentation in CDOT's B2Gnow system.

C. *Administrative Reconsideration.* If the EJE determines that the Consultant did not demonstrate Good Faith Efforts to meet the Contract Goal, the Consultant shall be provided a written notice of its determination. The Consultant shall have an opportunity for administrative reconsideration by the CDOT Chief Engineer or a designee.

1. The Chief Engineer or a designee shall conduct administrative reconsideration.
  - a. The Consultant shall have five (5) calendar days from the written notice to request administrative reconsideration of an adverse Good Faith Efforts determination.
  - b. The request shall include the basis for reconsideration and any supporting documentation that the Consultant would like to be considered as part of the reconsideration.

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- c. The reconsideration should also specify whether the Consultant is requesting an informal, in person or telephonic hearing with CDOT to address the issues in the Good Faith Efforts determination.
- d. If a request for an informal hearing is not made, the Consultant shall be deemed to have waived this opportunity.
- 2. Upon a hearing request, the EJE shall establish a date and time for the hearing and send written notice via email to the Consultant, the Local Agency and CDOT Civil Rights at least two (2) business days in advance of the hearing.
  - a. If schedules permit, the parties may waive the two (2) business day requirement.
  - b. The CDOT Chief Engineer or designee may request additional documentation from the Consultant and/or the Local Agency.
  - c. A copy of all requests and responses should be provided to the other party and the other party shall be given an opportunity to respond.
- 3. The CDOT Chief Engineer or a designee shall issue the final determination as to whether the Consultant made Good Faith Efforts to meet the Contract Goal.
  - a. The determination shall be in writing and explain the basis for the CDOT Chief Engineer or designee decision regarding whether or not the Consultant demonstrated Good Faith Efforts to meet the Contract Goal.
  - b. The Good Faith Efforts determination of the CDOT Chief Engineer or designee is not appealable.

*D. Contract Utilization Plan (UP).* Once the proposer is selected and the *Affidavit of Small Business Participation* form is approved by CDOT, the Local Agency shall submit the *Local Agency Professional Services B2Gnow Contract Information* form for CDOT to set up the contract in the B2Gnow system. Once the contract is set up in the system, the Consultant shall receive a notice from CDOT within five (5) calendar days of selection, to complete and submit a Utilization Plan through B2Gnow. In order to complete the Utilization Plan, the Consultant shall list all DBE Subconsultants and Suppliers/Vendors included as part of its “most qualified” team from the proposal. The Utilization Plan shall also include all Commitments by percentage.

*E. Consultant Responsibility.* The Consultant is solely responsible for ensuring that the Contract Goal is achieved upon completion of the work, expenditure of funds, and/or expiration of the Contract, whichever occurs first. The Local Agency and CDOT assists in the monitoring as oversight agencies.

### **IV. ELIGIBLE DBE PARTICIPATION**

In order to count for DBE eligible participation, the work performed by the DBE Consultant, Subconsultant, or Supplier/Vendor must be identified in an approved Commitment, and the Consultant, Subconsultant, or Supplier/Vendor must be DBE certified in the committed work upon submission of the Commitment. The Local Agency shall evaluate whether the work it is committed to perform can reasonably be construed to fall within the work areas for which the DBE Consultant, Subconsultant, or Supplier/Vendor is certified. The Local Agency may request assistance from CDOT if needed.

A. In order for DBE participation to count toward the Contract Goal, DBE firms must perform work within the NAICS codes they are certified for. DBEs may perform work outside of their NAICS codes, but this work will not count toward the Contract Goal or other DBE specific contract requirements.

B. If a DBE Consultant, Subconsultant, or Supplier/Vendor is decertified as a DBE following the approval of a Contract, its participation on that Contract may continue to count as DBE participation.

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C. Only work actually performed by the DBE shall count towards the Contract Goal. DBE participation shall be tracked through CDOT's B2Gnow system when reporting documents.

1. The Consultant may count the entire amount of fees or commissions charged by a DBE firm:
  - a. Providing a bona fide service, such as professional, technical, consultant, or managerial services; and/or
  - b. Providing assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for the performance of work, provided that the fee or commission is determined by the Local Agency to be reasonable and not excessive as compared with fees customarily allowed for similar services.
2. When a DBE subcontracts part of the work of its contract to another firm, individual, or entity, the value of the subcontracted work may only be counted if the subcontractor is also a DBE certified firm.
  - a. Work that a DBE subcontracts out to a noncertified firm shall not count toward the goal.
  - b. DBE firms may use an employee leasing company for the work.
  - c. The participation of the leased employees shall
    - i. The participation of the leased employees shall count only if the certified DBE firm maintains an employer-employee relationship with the leased employees.
    - ii. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the leased employees, as well as ultimate responsibility for wage and tax obligations related to the employees.
  - d. Unless certified in the work to be performed, staffing agencies only count toward the Contract Goal for placement fees and any hourly fee beyond the temporary employee's actual rate of pay.
3. When a DBE performs as a participant in a joint venture:
  - a. Only the portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work that the DBE performs with its own forces may count toward the Goal.
  - b. In order to receive credit, the joint venture agreement must be submitted as an attachment in the utilization plan submitted through CDOT's B2Gnow system for review and approval by CDOT.

D. A DBE must be performing a Commercially Useful Function, as defined by 49 CFR 26.55, in order for its participation to count towards the Contract Goal.

1. To perform a Commercially Useful Function:
  - a. The DBE must be responsible for the execution of the work to be performed and
  - b. Actually performing, managing, and supervising the work.
2. In evaluating whether a DBE is performing a Commercially Useful Function, the Local Agency shall consider factors, including but not limited to:
  - a. The amount of subcontracted work.
  - b. Industry practices, and
  - c. Whether payment to the DBE is commensurate with the work for which the DBE is claiming credit, and any other relevant factors.
3. DBE does not perform a Commercially Useful Function if its role is limited to that of an extra participant in a transaction through which funds are passed in order to obtain the appearance of DBE participation.
4. A DBE is presumed as not performing a Commercially Useful Function:
  - a. When it does not perform or exercise responsibility for at least thirty (30) percent of the total cost of the work it is contracted to perform with its own workforce; or
  - b. When the DBE subcontracts a greater portion of its work than would be expected based on normal industry practice for the type of work involved.
  - c. In these circumstances, the DBE may present evidence to CDOT in order to rebut the presumption.

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5. In order to finalize the Contract, the Consultant must submit a *Professional Services Commercially Useful Function Questionnaire* form for each DBE firm that performed work or provided supplies toward meeting the contract goal. The DBE, Consultant and Engineer must sign the *Professional Services Commercially Useful Function Questionnaire* form.

6. The Local Agency's determinations regarding Commercially Useful Function matters are not appealable. The Local Agency may request assistance from CDOT if needed.

### V. UTILIZATION PLAN MODIFICATIONS

*A. Reduction, Substitution, Termination.* Reduction, Substitution, or Termination during the life of the Contract shall only be permitted at the discretion of the Local Agency based upon a demonstration of Good Cause by the Consultant. The Consultant may not Reduce, Substitute, Terminate, or add Commitments without the Local Agency's approval. Consultants may request modification approval to the Local Agency. The Local Agency may request CDOT's assistance and/or use CDOT's *Professional Services DBE Participation Plan Modification Request* form.

1. *Notice to Subconsultant.* Before requesting the Local Agency approval, the Consultant must give the DBE Subconsultant notice in writing of the Consultant's intent to Reduce, Substitute or Terminate the Subconsultant's work. Unless otherwise waived in writing by the DBE, the Consultant must give the DBE five (5) calendar days to respond to the Consultant's notice and advise the Local Agency of objections, if any, that it objects to the proposed reason and why the Consultant's proposed action should not be approved. If required as a matter of public necessity (e.g., safety), the Local Agency may waive or reduce the period to respond. The DBE firm may also voluntarily waive the response period.

2. *Good Cause Requirement.* A Consultant must demonstrate Good Cause before a request for Reduction, Substitution or Termination can be approved by the Local Agency. Good Cause does not exist if Reduction, Substitution or Termination of a DBE is sought solely so that the Consultant can self perform the work for which the DBE was engaged or so that the Consultant can substitute another firm to perform the work. In evaluating whether Good Cause exists, the Local Agency shall consider, but is not limited to, the following factors:

- a. Changes in the scope of work or scheduling that directly impacts the work committed to the DBE.
- b. Failure or refusal by the DBE to execute a written contract.
- c. Failure or refusal by the DBE 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 Consultant or one of its Subconsultants.
- d. The DBE fails to meet reasonable, nondiscriminatory insurance requirements.
- e. The DBE becomes bankrupt, insolvent, or exhibits credit unworthiness.
- f. The DBE is ineligible to work because of suspension or debarment proceedings or other state law.
- g. The DBE is not a responsible Consultant.
- h. The listed DBE voluntarily withdraws from the contract and provides to the Consultant written notice of its withdrawal.
- i. The listed DBE is ineligible to receive credit for its participation.
- j. The DBE owner dies or becomes disabled and the firm is unable to complete the work it is committed to perform.
- k. The DBE ceases business operations or otherwise dissolves; and/or
- l. Other documented good cause reasons determined by the Local Agency to compel the termination of the DBE Subconsultant.

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3. *Good Faith Effort Requirement.* When a Commitment is Reduced or Terminated (including when a DBE withdraws), the Consultant shall make Good Faith Efforts to find a Substitution up to the Contract Goal for the DBE whose Commitment has been Terminated or Reduced.
  - a. Prior to making a Substitution, the Consultant must receive the Local Agency's approval for the Substitution.
  - b. Substitutions do not have to be in the same type of work that was Terminated or Reduced.
  - c. An approval of the modification constitutes a modification of the Utilization Plan through CDOT. Each added DBE approved by the Local Agency must have documentation. Documentation similar to a Project Cost Worksheet for Subconsultants, a Letter of Intent for a Supplier/Vendor or an amended contract that shows commitments to the firm on the contract are required. Once approved, the Local Agency shall work with the EJE to modify the UP in B2Gnow.
4. *Amended Contracts.* Consultants must obtain prior approval from the Local Agency for the addition of Subconsultants and Suppliers/Vendors not previously included as part of the selected team. New DBE additions will be added in the contract in CDOT's B2Gnow system for tracking and monitoring.

### VI. ENFORCEMENT

It is the responsibility of the Local Agency and Consultant to ensure that Commitments are fulfilled or to request Utilization Plan modifications in a timely manner as described in the *Eligible DBE Participation* and *Utilization Plan Modifications* sections. Approvals under the Contract are not an explicit or implicit approval by the Local Agency or CDOT of any Commitment Terminations, Reductions, Substitutions, or any other waiver of the Contract Civil Rights requirements. The Local Agency may request assistance from CDOT if needed.

A. The Local Agency or CDOT may conduct reviews or investigations of firms on the contract as necessary. Any firm on the Main Contract and all subsequent Task Orders under that Main Contract, including, but not limited to, DBE Subconsultants or Suppliers/Vendors, applicants for DBE or ESB certification and complainants to meet contract goals can be reviewed. The firms are required to cooperate fully and promptly with compliance reviews, certification reviews, investigations, and other requests for information.

B. If the Local Agency or CDOT determines that a Consultant, Subconsultant or Supplier/Vendor 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 the Local Agency to be unallowable, or if the Consultant engages in repeated violations, falsification or misrepresentation, the Local Agency may:

1. Refuse to count any fraudulent or misrepresented DBE/ESB participation.
2. Withhold progress payments to the Consultant commensurate with the violation.
3. Reduce the Consultant's prequalification status.
4. Refer the matter to the Office of Inspector General of the US Department of Transportation for investigation; and/or
5. Seek any other available contractual remedy.

C. If the Consultant fails to fulfill any Commitments at the conclusion of a Contract, CDOT may seek reimbursement from the Local Agency at contract closing for failure to comply with these requirements.

1. The reimbursement shall equal the difference between the total dollar amount of the Commitment and the total dollar amount of actual payments made to the committed DBE firm(s).



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2. The total dollar amount of a Commitment shall be calculated by multiplying the percentage identified in the Commitment with the total dollar value of the actual payments made by CDOT to the Consultant.
3. For the purposes of evaluating the reimbursement amounts that CDOT shall be seeking from the Local Agency for unfulfilled Commitments, CDOT shall consider, but is not limited to, the following:
  - a. The difference between the total Contract amount awarded and the actual payments made by the Local Agency to the Consultant.
  - b. Any material changes to the Contract, including the scope of the work, total amount, location, and scheduling.
  - c. Whether any of the work types associated with a Commitment were self performed by the Consultant or performed by another firm.
  - d. Whether the Consultant was aware of any circumstances that would materially affect its ability to meet its Commitments and took timely and reasonable steps to address it.
  - e. Circumstances outside of the Consultant's control; and/or
  - f. Any other relevant considerations.

**VI. CONTRACT CLOSEOUT**

- A. The Local Agency shall collect a completed CDOT *Professional Services Closeout Report* form upon completion of the work and expenditure of all funds, and/or expiration of the Contract, whichever comes first. Prior to submission of the Closeout report, the Consultant shall ensure all approvals and documentation, such as modifications and CUF's, are uploaded in CDOT's B2Gnow system.
- B. The approved CDOT *Professional Services Closeout Report* form shall report the final actual DBE participation on the Contract and will be reviewed for possible sanctions. The Local Agency shall submit the Closeout form to CDOT Civil Rights prior to the submission of the final invoice. Any sanctions of the Consultant not meeting the DBE commitments shall be deducted from the Local Agency's final payment.