

CDOT PROFESSIONAL SERVICES CIVIL RIGHTS AND DISADVANTAGED BUSINESS ENTERPRISE (DBE) REQUIREMENTS FOR NONPROJECT SPECIFIC (NPS) CONTRACTS

All parties included in the performance of work on the Contract shall comply with the terms of the Solicitation for Professional Consultant Services instructions. The following requirements shall apply to all FHWA assisted contracts and subcontracts.

I. DEFINITIONS

Advisory Contract Goal. The default percentage of participation by DBEs on each Task Order issued under the Main Contract. This percentage may be modified on a per Task Order basis only upon a Reevaluation of DBE goal request by the Consultant and subsequent approval and goal modification by CDOT.

B2Gnow. Web based platform utilized by CDOT to track Civil Rights compliance (DBE and ESB participation) and prompt payment requirements on its contracts. The Consultant shall use this platform to submit Utilization Plans and Subconsultant and Supplier/Vendor information on the Main Contract and subsequent Task Orders. 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. This can be in either the region or headquarters office.

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

Commitment. A portion of the Task Order 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 Task Order.

Consultant. An individual, firm, corporation, or other legal entity with a direct contractual relationship with CDOT to render Professional Services and ancillary services. This party is responsible for the performance of the work.

Contract. Agreement between CDOT and the Consultant, whereby the Consultant shall be compensated in exchange for providing Professional Services and ancillary services. The agreement includes all attached exhibits, all documents incorporated by reference, all referenced statutes, rules and cited authorities and any future modifications thereto.

Contract Goal/Contract Goal Percentage. The percentage of the Main/Master 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.

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>. The Department of Transportation program is designed to remedy ongoing discrimination and the continuing effects of past discrimination in federally assisted highway, transit, airport and highway safely financial assistance transportation contracting markets nationwide.

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Emerging Small Business (ESB). A CDOT certified Emerging Small Business firm listed on the ESB Directory at <https://cdot.dbesystem.com/FrontEnd/searchcertifieddirectory.asp>. This is a CDOT administrated program to provide assistance to certified emerging small businesses.

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

Engineer. The licensed person acting directly or through an authorized representative, who is responsible for engineering and administrative supervision of the project.

Good Faith Efforts (GFE). All necessary and reasonable steps to secure the necessary Commitments achieve a Task Order Goal, which by their scope, intensity, and appropriateness to the objective could reasonably be expected to obtain sufficient participation. Guidance on Good Faith Efforts is provided in 49 CFR Part 26, Appendix A.

Main Contract. **Formerly known as Master Contract.** Overarching agreement between CDOT and the Consultant, whereby the Consultant shall be compensated in exchange for providing Professional Services and ancillary services on an as needed basis.

Professional Services. The practice of architecture, engineering, professional land surveying, landscape architecture, and industrial hygiene as defined in Colorado Revised Statute (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.

Reevaluation of DBE Goal. Formal request at Task Order creation to assess whether the Advisory Contract Goal should be applied to a Task Order. The Reevaluation of DBE Goal request must be approved by the Civil Rights Office prior to the DBE Goal being modified.

Subconsultant. An individual, firm, corporation or other legal entity to whom the Consultant sublets part of the contract. For purposes of these requirements, the term subconsultant includes Suppliers/Vendors. It is a party, if any, engaged by a consultant to aid in performance of the work which provides consultant services.

Substitution. Substitution occurs when a Consultant seeks to find another DBE certified 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(1)(3). (2) Delivers material directly to the project. In both cases, the material shall be intended for permanent incorporation into the worksite.

Task Order. Agreement between CDOT and the Consultant to provide particular services for a specified amount within the scope of the overarching Main Contract. A document issued in accordance with the contract that specifically describes the work to be performed on a project.

Task Order Goal. Percentage of the Task Order established by CDOT for participation by DBEs on a Task Order.

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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). Documentation of Subconsultant and Supplier/Vendor participation in the B2Gnow system. The Main/Master Contract Utilization Plan details all Subconsultants and Suppliers/Vendors included as part of the proposal team. The Main/Master Contract Utilization Plan must be submitted in B2Gnow by the Consultant and approved by CDOT within five (5) calendar days of receiving notice from CDOT to complete the Utilization Plan prior to the Contract being initiated or any Task Order requests being reviewed for approval.

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.

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 consultant may contact the Environmental Justice Equity (EJE) to receive guidance on whether a work code covers the work to be performed.

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, project, 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 Subconsultant 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 other such remedy as CDOT deems appropriate, which may include but is not limited to:

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- a. Withholding monthly progress payments.
- b. Assessing sanctions/disincentives.
- 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 CDOT or no later than thirty (30) calendar days from the date of the submission of a complete invoice from the Subconsultant, whichever occurs first, as outlined in 49 CFR, Part 26.29.

1. If the Consultant or its Subconsultant fail to comply with this provision, the Engineer shall not authorize further progress payment for work performed directly by the Consultant or the noncompliant Subconsultant until the required payments have been made or CDOT determines that there is sufficient good cause to delay payment.
2. The Engineer shall continue to authorize progress payments for work performed by compliant Subconsultants.
3. If the Consultant or Subconsultant payor believes it has good cause 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 being withheld, justification for the withholding, and what conditions the Subconsultant must meet to receive payment. The Consultant shall maintain records of payment that show amounts paid to all Subconsultants.
 - b. The Consultant and all Subconsultant payors shall electronically submit prompt payment audit reports in B2Gnow by the fifteenth (15th) of each month through the B2Gnow system software.
 - c. If no payment has been made, the Consultant shall document this in the prompt payment audit reporting and upload the submitted good cause information to B2Gnow.

E. *Subcontract Terms.* The assurance of parts "A-D" of this section shall be included in all subcontracts or other agreements for the performance of work on the Contract.

III. MASTER CONTRACT COMMITMENT

At the time of initial proposal, the proposer must make a contractually binding guarantee to make Good Faith Efforts to meet the Task Order Goal for each Task Order issued under the Main Contract.

A. *Affidavit of Small Business Participation.* The *Affidavit of Small Business Participation* form is the proposer's contractually binding guarantee to make Good Faith Efforts to meet the Task Order Goal for each Task Order issued under the Main Contract. This form includes the Commitments to meet the DBE goal at time of proposal. CDOT's *Affidavit of Small Business Participation* form must be submitted with the Request for Proposal. Failure to submit CDOT's *Affidavit of Small Business Participation* form shall result in the proposer being deemed non responsive and ineligible for award.

B. *Main Contract Utilization Plan (UP).* Within five (5) calendar days of selection as the "most qualified" proposer, the proposer shall receive a notice from CDOT to complete and submit a Utilization Plan through B2Gnow. In order to complete the Utilization Plan, the proposer shall list all DBE, ESB, and nonDBE/ESB Subconsultants and Suppliers/Vendors included on its proposal as part of its "most qualified" team. An approved Utilization Plan in B2Gnow must be in place prior to a new Task Order or amendments.

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C. *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 Task Order, whichever occurs first.

IV. SCORING

In evaluating the most qualified proposer, a maximum of ten (10) points may be awarded based upon a variety of factors, including a proposal's strategic small business participation plan, the proposer's certification status, and/or the proposer's potential standing as a new prime consultant on a CDOT contract.

A. *Small Business Participation Plan.* Scoring criteria only comes from information on the *Small Business Participation Plan*. Information on the required *Affidavit of Small Business Participation* form are the DBE commitments and not part of the scoring criteria.

B. *Prime Consultants.* NonDBE/ESB Consultants may receive a maximum of six (6) points. Consultants holding both DBE and ESB certifications may receive a maximum of ten (10) points. Consultants holding a single certification (DBE or ESB) may receive a maximum of eight (8) points. However, such firms with a single certification may receive a maximum of ten (10) points if such firms state they have not been awarded any CDOT Professional Services Contracts as a Prime Consultant for the past five (5) years in their Small Business Participation Plan.

C. *Small Business and Contingency Plan.* The Small Business Participation plan shall explain the small business' specific work and how goals are met. An outlined specific approach to subcontracting, including a plan for unbundling work to establish opportunities for DBEs and ESBs, as well as identification of work areas that DBE and ESB firms shall be utilized during the contract. This shall include a detailed contingency plan if the planned approach or proposal teams cannot assist with or does not meet the DBE goal.

D. *ESB Utilization.* Points shall be granted with the utilization of ESB level 1, 2 or SBE firms. The proposer shall list the ESB firms, their level of certification, and the work they will be performing on the contract in the Small Business Participation Plan.

E. *CDOT ESB Mentor/Protégé Program.* To receive points associated with the CDOT Mentor-Protégé Program, the firm used on the contract has to be an active or past participant in the CDOT program. The Prime Consultant will be an active or one (1) year graduate participant in the CDOT Small Business Mentor/Protégé Program as a Mentor. An ESB Protégé still holding a certification (could be their own Protégé) that has been in the program can be used, even if they have Primed. A description of what the Protégé shall learn and how they shall be used on the CDOT contract should also be in the small business plan. **Protégés participating in the program prior to 2018 are required to submit proof of participation at the time of proposal.**

F. *Small Business Compliance Oversight.* Contract Compliance oversight requires the plan highlights identification of the compliance officer and shall outline the specific planned processes to monitor Civil Rights compliance on the contract.

G. *Zero (0) DBE Goal.* If the contract goal has been set to zero (0) percent, small business participation is still encouraged by CDOT for scoring purposes and to assist with small businesses working with CDOT.

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Points shall be allocated using the following rubric:

*See rubric alt text on website.

		0 points	0.5 points	1 point	2 points	4 points
Strategic Small Business Participation Plan (Maximum of 6 points). The plan should be a comprehensive approach to all strategic small business participation and should contain the following elements: Small Business Participation and Contingency Plan, the use of ESB Firms, the use of a participants in CDOT's Mentor/Protégé Program, Small Business Contract Compliance Oversight.	1	Small Business Participation and Contingency Plan	Firm provides general approach OR contingency plan with minimal detail if the planned approach or team does not meet the DBE goal(s).	An outlined specific approach to subcontracting, including a plan for unbundling work to establish opportunities for DBEs and ESBs as well as identification of work areas that DBE and ESB firms will be utilized on during the project. This will include a detailed contingency plan if the planned approach or team changes or does not meet the DBE goal.	n/a	n/a
	2	ESB Subconsultants and Vendors (Maximum of 10% Vendors) Firms	n/a	Only Level 2 or SBA certified ESBs included on team. Must state level of certification(s) in Small Business Participation Plan.	Level 1 ESBs included on team. Must state level of certification(s) in Small Business Participation Plan.	n/a
	2	Participant from the CDOT Mentor/Protégé Program	No current or graduated Protégé's from CDOT's Small Business Mentor/Protégé program included	Any current or graduated Protégé that is still ESB certified from CDOT's Small Business Mentor/Protégé program AND description of how the Protégé will learn and be used on this CDOT contract	The Prime Consultant is an active or one (1) year graduate participant in the CDOT Small Business Mentor/Protégé Program as a Mentor AND uses an ESB Protégé still holding a certification (could be their own Protégé) that has been in the program. A description of what the Protégé will learn and how they will be used on the CDOT contract should also be in the Small Business Plan. A Mentor or Protégé must be an active or graduated participant.	n/a
Certification Status and New Prime Opportunities	1	Small Business Contract Compliance Oversight	Proposal does not highlight an individual OR process responsible for monitoring/enforcing Civil Rights compliance on the project including prompt payment, DBE utilization, etc.	Proposal highlights identification of compliance person AND outlines specific planned processes to monitor Civil Rights compliance on project	n/a	n/a
	4	Prime Consultant Certification	No DBE OR ESB certification	n/a	DBE Certification OR ESB Certification	1) DBE Certification AND ESB Certification. 2) OR Prime has a single certification (DBE Certification or ESB Certification) AND is bidding as a New Prime Consultant that has not been awarded a Non-Project Specific, Project/Program Specific Contract for five (5) years. 3) OR a NEW Prime or Prime Consultant that has not been awarded an NPS or PS/PGS Contract as a Prime for the past five (5) years

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V. TASK ORDER PROCESS

With each Task Order request, the Consultant shall submit a CDOT *Anticipated Participation Plan for NonProject Specific Contracts and Good Faith Efforts* form that documents all DBE and/or ESB Subconsultants that shall be used to complete the work of the Task Order. All Subconsultants and Suppliers/Vendors on a task order must be set up in B2GNow to report payments and other reporting. A task order for an NPS contract is considered a “separate” contract.

A. *Task Order Goal.* The Advisory Contract Goal shall become the default Task Order Goal for any Task Orders issued under the Main Contract and may only be modified through a Task Order Goal Reevaluation.

B. *Reevaluation of Contract Goal.* Prior to the submission of a new Task Order request, the Consultant may request a reevaluation and modification of the passed down default Task Order Goal from the Main Contract advisory goal via the CDOT *Professional Services Reevaluation of DBE Goal* form.

1. The reevaluation request shall be reviewed by the Civil Rights office that is overseeing Civil Rights compliance on the Task Order.
2. Reevaluation determinations shall be made within five (5) calendar days of the request.
3. If a determination has not been made within the five (5) day period, the CDOT Project Engineer/Manager may request an expedited reevaluation of the Task Order Goal by the Environmental Justice Equity.
4. The reviewer of the request may increase, decrease, or decline to modify the default Task Order Goal.
5. The reviewer shall upload the determined reevaluation prior to approving the task order.
6. Modifications to a Task Order Goal shall only apply to that Task Order and shall be changed by EJE through B2Gnow using the approved Reevaluation form.
7. The Advisory Contract Goal shall continue to be the default Task Order Goal for any future Task Orders issued under the Main Contract and may only be modified through a separate Task Order Goal Reevaluation.

C. *Task Order Approval and Documents.* Submitted documents include CDOT’s *Task Order Request* form with a CDOT *Anticipated Participation Plan for Project Specific/Program Specific Contracts and Plan Status Report* form. Project Cost Worksheets must be submitted for Subconsultants and Letters of Intent confirming the use of any Supplier/Vendor for which a Project Cost Worksheet is not provided with all other pertinent documents.

1. For Amended Funds or Time Extension Task Order requests, refer to the *Task Order Modifications* section.
2. The Consultant shall submit a completed CDOT *Professional Services Closeout Report* form for every task order to the Civil Rights Office upon completion of the work, expenditure of funds, and/or expiration of the task order, whichever occurs first, for approval. This form shall report the final actual DBE participation on the task order and shall be considered in the closeout of the Main Contract for possible sanctions. Refer to the *Task Order and Main Contract Closeout* section.

D. *Task Order Good Faith Effort Requirement.* A Task Order under the Main Contract shall not be approved by CDOT until the Consultant has demonstrated Good Faith Efforts to meet the Task Order Goal.

1. Good Faith Efforts mean that the Consultant:
 - a. Documents it has obtained enough Commitments to meet the Task Order Goal, or

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- b. Documents that it made adequate Good Faith Efforts to meet the Task Order Goal, even though it did not succeed in obtaining enough DBE participation to do so.
 2. If the Consultant has not documented sufficient Commitments to meet the Task Order Contract Goal, the Consultant shall be required to provide documentation to the Civil Rights Office of its efforts to obtain Commitments by submitting CDOT's *Professional Services Good Faith Efforts Report* form and supporting documentation.
 3. In conducting Good Faith Effort reviews, Civil Rights shall utilize the guidance found in Appendix A to 49 CFR Part 26, where applicable. The Civil Rights Office may also consider, but is not limited to, the following factors in evaluating the Consultant's Good Faith Efforts:
 - a. Performance of other consultants in meeting the Task Order Goal on Task Orders that have a similar scope of work, contract amount, location, and time frame.
 - b. Consultant reasons for choosing a nonDBE subconsultant over an interested DBE.
 - c. Documentation of DBEs solicited by the Consultant and verification from the DBEs that they were actually contacted by the Consultant, including DBE firms outside of the "most qualified" team in the event that DBE team members are unavailable or unwilling to participate.
 - d. Any other factors that may be pertinent to the factual circumstances.
 4. If the Civil Rights Office determines that the Consultant has made Good Faith Efforts to meet the Task Order Goal, the Environmental Justice Equity shall approve the Utilization Plan and all documentation be uploaded in B2Gnow.
- E. *Administrative Reconsideration.* If the Civil Rights Office determines that the Consultant did not demonstrate Good Faith Efforts to meet the Task Order Goal, the Consultant shall be provided a written notice of its determination. The Consultant shall have an opportunity for administrative reconsideration.
1. Administrative reconsideration shall be conducted by the Environmental Justice Equity .
 - 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.
 - 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 Civil Rights Office's 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 Environmental Justice Equity shall establish a date and time for the hearing and send written notice via email to the Civil Rights Office and the Consultant 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 administrative reconsideration official may request additional documentation from the Consultant and/or the Civil Rights Office.
 - 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 Environmental Justice Equity shall issue the final determination as to whether the Consultant made Good Faith Efforts to meet the Task Order Goal.

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- a. The determination shall be in writing and explain the basis for the Environmental Justice Equity 's decision regarding whether or not the Consultant demonstrated Good Faith Efforts to meet the Task Order Goal.
- b. The Good Faith Efforts determination of the administrative reconsideration official is not appealable.

VI. ELIGIBLE DBE PARTICIPATION

In order to count for eligible DBE 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 and approval of the Task Order. CDOT evaluates 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.

A. In order for DBE participation to count toward the Contract Goal, DBE firms must perform work within the NAICS codes they are certified with. 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 Task Order, its participation on that Task Order may continue to count as DBE participation. Any new Task Orders approved after decertification shall not count as DBE participation even if they were certified at the time of Main Contract award. If the Contract loses DBE participation from the decertified firm, the Consultant will take necessary and reasonable steps to secure Commitments to replace the DBE participation. Replacements to meet the Contract Goal do not need to be the same type of work of the lost participation.

C. If a Consultant, Subconsultant or Supplier/Vendor is certified as a DBE after the Main Contract award, the participation on new Task Orders approved after it has been certified as a DBE shall count towards the DBE goal. If a Subconsultant or Supplier/Vendor is certified as a DBE after the Main Contract award, participation by the Subconsultant or Supplier/Vendor on new Task Orders approved after it has been certified as a DBE shall be eligible for participation.

D. Only work actually performed by the DBE shall count towards the Contract Goal. DBE participation shall be tracked through B2Gnow when reporting payments.

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.
 - b. Providing assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for the performance on the Task Order, provided that the fee or commission is determined by CDOT 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 subconsultant is also a DBE certified firm.
 - a. Work that a DBE subcontracts to a nonDBE firm shall not count as eligible DBE participation. DBE firms may use an employee leasing company for the work.
 - 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.

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- b. 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.
- c. If the DBE is a manufacturer, dealer or broker, the value of participation is as follows:
 - i. Manufacturer: 100%
 - ii. Regular dealer/supplier: 60%
 - iii. Broker: only reasonable brokerage fee counts
- 3. When a DBE performs as a participant in a joint venture:
 - a. Only the portion of the total dollar value of the Task Order equal to the distinct, clearly defined portion of the work of the Task Order that the DBE performs with its own forces may count toward the Task Order Goal.
 - b. In order to receive credit, the joint venture agreement must be submitted as an attachment in the utilization plan submitted through B2Gnow 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 on any Task Order and
 - b. Actually performing, managing, and supervising the work.
- 2. In evaluating whether a DBE is performing a Commercially Useful Function, CDOT 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. A 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 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.
- 5. In order to finalize and close out the contract, the Consultant must submit a CDOT *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 CDOT Engineer must approve the CDOT *Professional Services Commercially Useful Function Questionnaire* form.
- 6. CDOT's determinations regarding Commercially Useful Function matters are not appealable.

VII. TASK ORDER MODIFICATIONS

A. *Reduction, Substitution, Termination.* Reduction, Substitution, or Termination shall only be permitted at the discretion of CDOT based upon a demonstration of Good Cause by the Consultant. The Consultant may not Reduce, Substitute, Terminate, or add Commitments without CDOT approval. Consultants may request modification approval by submitting the CDOT *Professional Services DBE Participation Plan Modification Request* form.

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1. Notice to Subconsultant. Before requesting CDOT 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 through the *CDOT Professional Services DBE Participation Plan Modification Request* form. 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 CDOT of its objections, if any, 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), CDOT 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 CDOT. 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, CDOT 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 project and provides to you 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 CDOT to compel the termination of the DBE Subconsultant.
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.

B. *Amended Task Orders.* Consultants must obtain prior CDOT approval for the addition of Subconsultants and Suppliers/Vendors not previously included as part of the selected team. Added Subconsultants or Suppliers/Vendors, not originally on the Main contract, will require the PCW, LOI or amended contract to be uploaded in B2Gnow. If the contract requires additional funds or needs a time extension on a contract, an amendment shall be submitted to CDOT for approval. Civil Rights shall input the changed information into the B2Gnow system.

1. Prior to making a Substitution, the Consultant must submit a *CDOT Professional Services DBE Participation Plan Modification Request* form and receive CDOT's approval for the Substitution.
2. Substitutions do not have to be in the same type of work that was Terminated or Reduced.
3. An approval of an added Subconsultant and/or Supplier/Vendor constitutes modifications through the B2Gnow software on the Task Order. A Project Cost Worksheet for Consultants, a Letter of Intent for

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Supplier/Vendor, or an amended contract must be submitted as required documentation and uploaded in B2Gnow for each Substitution approved by CDOT.

VIII. ENFORCEMENT

It is the sole responsibility of the Consultant to ensure that Commitments are fulfilled or to request Task Order modifications in a timely manner. Approval of Task Orders and Contract amendments under the Main Contract is not an explicit or implicit approval by CDOT of any Commitment Terminations, Reductions, Substitutions, or any other waiver for the contract's DBE requirements.

A. 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 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 CDOT to be unallowable, or if the Consultant engages in repeated violations, falsification or misrepresentation, CDOT 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. A Consultant shall not receive payment for any work performed on a Task Order resulting from a modification that is not authorized by CDOT.

D. If the Consultant fails to fulfill any Commitments at the conclusion of a Contract, CDOT may seek reimbursement from the Consultant 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).
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 Consultant for unfulfilled Commitments, CDOT shall consider, but is not limited to, the following:
 - a. The difference between the total Main Contract amount awarded and the actual payments made by CDOT to the Consultant.
 - b. Any material changes to the Main Contract, including the scope of the work, total amount, location, and scheduling.
 - c. Whether any of the work types associated with a Commitment was self performed by the Consultant or performed by another firm.

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- 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.
- E. CDOT shall adjust the total reimbursement amount if the Consultant demonstrates that its failure to meet Commitments was approved by CDOT through the modification process.
- F. CDOT shall provide written notice to the Consultant of any amounts for which it is seeking reimbursement. Consultants must reimburse CDOT within thirty (30) calendar days of the written notice.
- G. CDOT may decline to approve future Task Orders under the Main Contract based upon the Consultant's failure to timely reimburse CDOT. Future Task Orders under the Main Contract that are submitted for approval within the thirty (30) day calendar payment period for reimbursement shall not be approved until CDOT is reimbursed by the Consultant for the outstanding amount.

IX. TASK ORDER AND MASTER CONTRACT CLOSEOUT

- A. CDOT shall collect and approve a completed CDOT *Professional Services Closeout Report* form upon completion of the work, expenditure of all funds including final payments, and/or expiration of each Task Order and Main Contract. Prior to submitting the Closeout form, the Consultant shall ensure all approvals and documentation, such as modifications and CUF's, are uploaded in B2Gnow.
- B. The approved CDOT *Professional Services Closeout Report* form shall report the final actual DBE participation on the Task Order(s) and shall be considered for possible sanctions. If a reimbursement is due, the Consultant shall receive a Request for Reimbursement letter and shall submit the payment to CDOT Accounting.