

CDOT PROFESSIONAL SERVICES CIVIL RIGHTS AND DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENTS FOR NON PROJECT SPECIFIC CONTRACTS

All parties included in the performance of work on the Contract shall comply with **Sections 3L, M, P and Q and Section 7** of the Solicitation for Professional Consultant Services instructions.

I. DEFINITIONS

Advisory Contract Goal. The default percentage of participation by DBEs on each Task Order issued under the Master Contract. This percentage may be modified on a per Task Order basis only upon a goal reevaluation 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 will use this platform to submit Utilization Plan(s) and Subconsultant and Supplier/Vendor information on the Master Contract and subsequent Task Orders.

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.

Civil Rights and Business Resource Center (CRBRC). CDOT's Civil Rights office at Headquarters.

Commercially Useful Function (CUF). Responsibility for the execution of work by actually performing, managing, and supervising the work, as described in 49 CFR Part 26.55(c).

Commitment. A portion of the Task Order designated by the Consultant for participation by DBE firms. The DBE firm(s) are included in the proposal team for participation to meet the Contract Goal. 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.

Contract. Agreement between the Local Agency and the Consultant, whereby the Consultant will be compensated in exchange for providing Professional Services and ancillary services.

Contract Goal Percentage. The percentage of the Master Contract established by CDOT for reasonable participation by DBEs and stated in the invitation for consultant services.

Disadvantaged Business Enterprise (DBE). A Colorado certified Disadvantaged Business Enterprise listed on the Colorado Unified Certification Program (UCP) DBE Directory at www.coloradodbe.org.

Emerging Small Business (ESB). A CDOT certified Emerging Small Business firm listed on the ESB Directory at www.coloradoesb.org.

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.

CDOT PROFESSIONAL SERVICES CIVIL RIGHTS AND DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENTS FOR NON PROJECT SPECIFIC CONTRACTS

Master Contract. Overarching agreement between CDOT and the Consultant, whereby the Consultant will 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 and 48 CFR Part 2.

Reduction. Reduction occurs when the Consultant reduces a Commitment to a DBE. A Reduction is a partial Termination.

Reevaluation of DBE Goal. Requested reevaluation from the Consultant of passed down DBE advisory goal from the Master Contract at task order level. This is prior to a Task Order being approved. A Task Order reevaluation of the DBE goal may not be modified unless approved by CDOT.

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.

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.

Task Order. Agreement between CDOT and the Consultant to provide particular services for a specified amount within the scope of the overarching Master Contract.

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

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 Master Contract Utilization Plan details all Subconsultants and Suppliers/Vendors included as part of the proposal team. The 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 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 and 48 CFR Part 2. A vendor would provide Non-Engineering Services (i.e. Geotechnical drilling, Public Information/Relations, traffic control, etc) and would not be overseen by a licensed engineer.

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 Civil Rights and Business Resource Center (CRBRC) to receive guidance on whether a work code covers the work to be performed.

**CDOT PROFESSIONAL SERVICES CIVIL RIGHTS AND DISADVANTAGED BUSINESS
ENTERPRISE REQUIREMENTS FOR NON PROJECT SPECIFIC CONTRACTS**

II. NONDISCRIMINATION AND SUBCONTRACTING REQUIREMENTS

The following requirements apply to all contracts and subcontracts.

- A. *Non-discrimination.* The Consultant, with regard to the work performed by it during the contract term, will 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 will 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 U.S.C. §§ 2000d to 2000d-4) and the Regulations, hereby notifies all bidders that it will affirmatively ensure that for any contract entered into pursuant to this advertisement, disadvantaged business enterprises will be afforded full and fair opportunity to submit bids in response to this invitation and will 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: 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. The Consultant shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT assisted contracts. 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. Such other remedy as CDOT deems appropriate, which may include, but is not limited to:
- Withholding monthly progress payments
 - Assessing sanctions/disincentives
 - Liquidated damages
 - Disqualifying the consultant from future bidding as non responsible
- D. *Prompt Payment.* Prompt Payment. Payments to all Subconsultants shall be made within seven (7) calendar days of receipt of payment from CDOT, or no later than ninety (90) calendar days from the date of the submission of a complete invoice from the Subconsultant, whichever occurs first. CDOT will assist in enforcing the Civil Rights Requirements outlined above as well as prompt payment as outlined in 49 CFR, Part 26. If the Consultant has good cause to dispute an amount invoiced by a Subconsultant, the Consultant shall notify the Subconsultant no later than the required date for payment. Such notification shall include the amount disputed and justification for the withholding. The Consultant shall maintain records of payment that show amounts paid to all Subconsultants. Good cause does not include failure to timely submit an invoice or to deposit payments made. The Consultant shall electronically submit prompt payment audit reports in B2GNow by the fifteenth (15th) of each month through the B2GNow software. If no payment has been made, the Consultant shall document this in the prompt payment audit reporting.
- 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.

CDOT PROFESSIONAL SERVICES CIVIL RIGHTS AND DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENTS FOR NON PROJECT SPECIFIC CONTRACTS

III. MASTER CONTRACT COMMITMENT

At the time of initial proposal, the Consultant must make a contractually binding guarantee to meet the Task Order Goal for each Task Order issued under the Master Contract in accordance with 49 CFR 26.53.

A. *Affidavit of Small Business Participation.* The Affidavit of Small Business Participation is the Consultant's contractually binding guarantee to meet the Task Order Goal for each Task Order issued under the Master Contract or make Good Faith Efforts to do so. 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 Consultant's statement of interest proposal. Failure to submit CDOT's *Affidavit of Small Business Participation* form will result in the Consultant being deemed non responsive and ineligible for award.

B. *Master Contract Utilization Plan (UP).* Within five (5) calendar days of selection as the "most qualified" proposer, the Consultant will receive a notice from CDOT to complete and submit a Utilization Plan via B2GNow. In order to complete the Utilization Plan, the Consultant shall list all DBE, ESB, and nonDBE/ESB Subconsultants and Suppliers/Vendors included as part of its "most qualified" team. Requests for Task Orders under the Master Contract will not be submitted until there is a Master Contract Utilization Plan approved by CDOT in the B2GNow system.

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 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 project.

A. NonDBE/ESB Consultants can only receive a maximum of five (5) points. Consultants only holding a single certification (DBE or ESB) can receive a maximum of seven (7) points. However, such firms may receive a maximum of ten (10) points if such firms state they have not been awarded a CDOT professional services contract as a Prime Consultant for the past three (3) years in their Strategic Small Business Participation Plan. Consultants holding both DBE and ESB certifications may receive a maximum of ten (10) points.

B. A new teaming partnership occurs when the Consultant is a Prime and has not included the DBE/ESB Subconsultant on a CDOT awarded contract in the previous two (2) years. The period for evaluating new teaming relationships will be the two (2) years immediately preceding the date that the Request for Proposals are advertised for the Master Contract that is being scored for award. New teaming relationships must be subconsultants and do not include Suppliers/Vendors.

C. To receive points associated with the CDOT Mentor-Protege Program, both the Mentor and their Protege shall be included in the proposal and the firms must be an active program participant or be less than one year post graduation following the completion of the complete two-year program. The Consultant must provide written documentation within the Strategic Small Business Participation Plan evidencing active participation in the program (i.e., dates met with program partner, current team goals, written statement detailing progress made toward the established team goals, etc.). Acceptance into the CDOT Mentor-Protege

CDOT PROFESSIONAL SERVICES CIVIL RIGHTS AND DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENTS FOR NON PROJECT SPECIFIC CONTRACTS

Program will not be considered evidence of active participation in the program without additional documentation of the firm's activities as a program participant.

D. 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.

Points will be allocated using the following rubric:

		Scoring Rubric					
		0 points	0.5 points	1 point	2 points	5 points	
Strategic Small Business Participation Plan (Maximum of 5 Points). The plan should state a comprehensive approach to strategic small business participation and should contain the following elements: Small Business Participation and Contingency Plan, General/Specific type of work for DBE subconsultants and Vendors, New Teaming Partner in past 2 years of ad date OR is an active participant in the CDOT Mentor/Protege Program and on the team, Small Business Contract Compliance Oversight.	1	Small Business Participation and Contingency Plan	No outlined specific approach to subcontracting OR contingency plan identified if the planned approach or team does not meet the DBE goal(s) OR is nonresponsive.	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 specific work areas that DBE and ESB firms will be utilized on during the contract. 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	General/Specific type of work of DBE Subconsultants and Vendors (Maximum of 10% Vendors work)	Team Does not Include Any DBEs OR is nonresponsive	Any DBE firm included on proposal team	Only specialized work of DBE firms included on team OR only general work of DBE firms included on team who cannot perform the bulk of the work expected under this contract. Must state in Small Business Participation Plan.	DBE firms included on team represent a mix of general (CM, CI, MT) AND specialized work areas required by this contract OR the Prime Consultant has active DBE Certification. Must state in Small Business Participation Plan.	n/a
	1	New DBE or ESB Teaming Partner on a CDOT contract in past 2 years as of ad date of project OR an Active Participant in the CDOT Mentor/Protege Program	No new teaming partners identified OR is nonresponsive	DBE OR ESB new teaming partner identified without specific plan for integrating new teaming partner on the project	DBE AND ESB new teaming partners identified with specific planned approach for utilizing firms OR the Prime Consultant is an active/1 year graduate participant in the CDOT Mentor/Protege Program AND is submitting a proposal that includes utilization of their protege	n/a	n/a
	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. OR is nonresponsive	Compliance person identified OR process described with minimal detail	Proposal highlights identification of compliance person AND outlines specific planned processes to monitor Civil Rights compliance on project	n/a	n/a
Certification Status and New Prime Opportunities	5	Prime Consultant Certification	No DBE OR ESB certification	n/a	n/a	DBE Certification AND ESB Certification OR Consultant has one type of Certification (single certification) AND is bidding as a New Prime Consultant that has never been awarded a Professional Services (NPS/PS/PGS) Contract in the past three years	

July 1, 2022

V. TASK ORDER PROCESS

With each Task Order request, the Consultant shall submit a CDOT *Anticipated Participation Plan for Non Project Specific Contracts and Good Faith Efforts* form that documents all DBE and/or ESB Subconsultants that will be used to complete the work of the Task Order. A task order on an NPS contract is considered a “separate” contract with the Consultant.

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

B. *Task Order Goal Reevaluation.* 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 Master Contract advisory goal via the CDOT *Reevaluation of Professional Services Task Order DBE Goal* form.

1. The reevaluation request will be reviewed by the Civil Rights office that is overseeing Civil Rights compliance, on the Task Order
2. Reevaluation determinations will 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 Civil Rights and Business Resource Center
4. The reviewer of the request may increase, decrease, or decline to modify the default Task Order Goal
5. The reviewer will notify the Project Engineer/Manager, and Consultant of its determination

**CDOT PROFESSIONAL SERVICES CIVIL RIGHTS AND DISADVANTAGED BUSINESS
ENTERPRISE REQUIREMENTS FOR NON PROJECT SPECIFIC CONTRACTS**

6. Modifications to a Task Order Goal will only apply to that Task Order and will be changed by the Civil Rights office through B2GNow.

7. The Advisory Contract Goal will continue to be the default Task Order Goal for any future Task Orders issued under the Master Contract and may only be modified through a separate Task Order Goal Reevaluation

C. *Task Order Good Faith Effort Requirement.* A Task Order under the Master Contract will 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 DBE participation to meet the Task Order Goal, or
- 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 total eligible DBE participation submitted in the Utilization Plan does not meet the Task Order Goal, the Civil Rights Office will conduct a review to determine whether the Consultant has demonstrated Good Faith Efforts to meet the Task Order Goal even though it did not succeed in obtaining enough DBE participation to do so. As part of this review, the Consultant will be required to provide documentation of its efforts to secure DBE participation on the Task Order by submitting the CDOT *Professional Services Good Faith Efforts Report* form.

3. In conducting Good Faith Effort reviews, Civil Rights will 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. Reason(s) 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 on the Task Order being reviewed for approval
- d. Past performance by the Consultant, including on prior Task Orders under the specific Master Contract at issue and other CDOT contracts
- e. 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 Civil Rights and Business Resource Center will approve the Utilization Plan.

D. *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 will be provided a written notice of its determination and an opportunity for administrative reconsideration.

1. Administrative reconsideration will be conducted by the Civil Rights and Business Resource Center.

- a. The Consultant will have five (5) calendar days from the written notice to request administrative reconsideration of an adverse Good Faith Efforts determination

**CDOT PROFESSIONAL SERVICES CIVIL RIGHTS AND DISADVANTAGED BUSINESS
ENTERPRISE REQUIREMENTS FOR NON PROJECT SPECIFIC CONTRACTS**

- 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 will be deemed to have waived this opportunity
2. Upon a hearing request, the Civil Rights and Business Resource Center will 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 Civil Rights and Business Resource Center shall issue the final determination as to whether the Consultant made Good Faith Efforts to meet the Task Order Goal.
- a. The determination will be in writing and explain the basis for the Civil Rights and Business Resource Center'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
- E. *Task Order Approval and Documents.* CDOT's approval of a Task Order is neither a determination on the Consultant's Good Faith Efforts to fulfill its Commitments, nor a basis for waiving any portion of the Contract Goal.
1. Documents include the CDOT's *Task Order Request* form, Project Cost Worksheet(s) with a CDOT *Anticipated Participation Plan for Non Project Specific Contracts and Good Faith Efforts Report* form. The Consultant must submit and upload a Letter of Intent confirming the use of any Supplier/Vendor for which a Project Cost Worksheet is not provided with all other pertinent documents.
 2. If an Amended Funds or Time Extension Task Order request, CDOT Civil Rights will upload the documents in B2GNow and make changes to the Contract through the Change Order/Task Order tab when the task order is approved.
 3. The Consultant will 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. This form will report the final actual DBE participation on the task order and will be considered in the closeout of the Master Contract for possible sanctions. See Contract Task Order and Master Contract Closeout section.

**CDOT PROFESSIONAL SERVICES CIVIL RIGHTS AND DISADVANTAGED BUSINESS
ENTERPRISE REQUIREMENTS FOR NON PROJECT SPECIFIC CONTRACTS**

VI. ELIGIBLE DBE PARTICIPATION

In order to count towards the Contract Goal, (1) the work performed by the DBE Consultant, Subconsultant, or Supplier/Vendor must be identified in an approved Commitment, and (2) 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 will 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.

- A. If a 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. The Consultant, Subconsultant, or Supplier/Vendor may not continue to count as a DBE participant on new Task Orders approved after decertification even if the Consultant, Subconsultant, or Supplier/Vendor was certified at the time of Master Contract award.
- B. If a Consultant is certified as a DBE after the Master Contract award, the Consultant's participation on new Task Orders approved after it has been certified as a DBE will count towards the DBE goal. Commitments approved at the time of the Master Contract award continue to be binding on the Consultant. If a Subconsultant or Supplier/Vendor is certified as a DBE after Master Contract award, participation by the Subconsultant or Supplier/Vendor on new Task Orders approved after it has been certified as a DBE will count towards the DBE goal.
- C. Only work actually performed by the DBE will count towards the Contract Goal.
1. The Consultant may count the entire amount of fees or commissions charged by a DBE firm for:
 - 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 out to a non-certified firm will not count toward the goal. If the work includes materials, partial DBE participation may be included.
 - b. DBE firms may use an employee leasing company for the work
 - i. The participation of the leased employees will 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
 - c. 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:

CDOT PROFESSIONAL SERVICES CIVIL RIGHTS AND DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENTS FOR NON PROJECT SPECIFIC CONTRACTS

- 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(c), 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 will 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 Prime 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 the contract, the Consultant must have submitted 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 sign the CDOT *Professional Services Commercially Useful Function Questionnaire* form.
 6. CDOT's determinations regarding Commercially Useful Function matters are not appealable.

VII. UTILIZATION PLAN 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.
- B.

CDOT PROFESSIONAL SERVICES CIVIL RIGHTS AND DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENTS FOR NON PROJECT SPECIFIC CONTRACTS

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 Reduction, Termination, and/or Substitution 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 will 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. Substitutions do not have to be in the same type of work that was Terminated or Reduced.
 - a. 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
 - b. An approval constitutes a change order through the B2GNow software on the task order. A Project Cost Worksheet, or a Letter of Intent for Suppliers/Vendors, must be submitted for each Substitution approved by CDOT.
- C. **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 and whose participation will be used to count towards Task Order Goals.

**CDOT PROFESSIONAL SERVICES CIVIL RIGHTS AND DISADVANTAGED BUSINESS
ENTERPRISE REQUIREMENTS FOR NON PROJECT SPECIFIC CONTRACTS**

VIII. ENFORCEMENT

It is the sole responsibility of the Consultant to ensure that Commitments are fulfilled or to request Utilization Plan modifications in a timely manner as described in the Utilization Plan Modifications section. Approval of

Task Orders and change orders under the Master Contract is not an explicit or implicit approval by CDOT of any Commitment Terminations, Reductions, Substitutions, or any other waiver of the Master Contract DBE requirements.

A. CDOT may conduct reviews or investigations of participants as necessary. All participants on the Master Contract and all subsequent Task Orders under that Master Contract, including, but not limited to, DBE Subconsultants or Suppliers/Vendors, applicants for DBE certification and complainants to meet contract goals are required to cooperate fully and promptly with compliance reviews, certification reviews, investigations, and other requests for information. This also includes applicants for DBE certification, ESB Subconsultants and applicants for ESB certification, complainants, and Consultants using Subconsultants to meet Task Order Goals.

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. CDOT will withhold approval of Task Orders and/or seek reimbursement at Contract closing from the Consultant for failure to comply with these requirements.

D. A Consultant shall not receive payment for any work performed on a Task Order resulting from a Modification that is not authorized by CDOT. If the Consultant fails to fulfill any Commitments at the conclusion of the Task Order, CDOT will seek reimbursement from the Consultant equaling the difference between the total dollar amount of its Commitments and the total dollar amount of actual payments made to committed DBEs.

E. CDOT will adjust the total reimbursement amount if the Consultant demonstrates that its failure to meet Commitments was approved by CDOT through the modification process described in the Utilization Plan Modifications section.

F. For the purposes of evaluating the reimbursement amounts that CDOT will be seeking from the Consultant for unfulfilled Commitments, CDOT shall consider, but is not limited to, the following:

1. The difference between the total Task Order amount awarded and the actual payments made by CDOT to the Consultant
2. Any material changes to the Task Order, including the scope of the work, total amount, location, and scheduling

**CDOT PROFESSIONAL SERVICES CIVIL RIGHTS AND DISADVANTAGED BUSINESS
ENTERPRISE REQUIREMENTS FOR NON PROJECT SPECIFIC CONTRACTS**

3. Whether any of the work types associated with a Commitment was self performed by the Consultant or performed by another firm
4. 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
5. Circumstances outside of the Consultant's control; and/or
6. Any other relevant considerations

G. CDOT will provide written notice to the Consultant of any amounts for which it is seeking reimbursement. Consultants must reimburse CDOT within thirty (30) days of the written notice. CDOT may decline to approve future Task Orders under the Master Contract based upon the Consultant's failure to timely reimburse CDOT. Future Task Orders under the Master Contract that are submitted for approval within the thirty (30) day calendar payment period for reimbursement will not be approved until CDOT is reimbursed by the Consultant for the outstanding amount.

IX. TASK ORDER AND MASTER CONTRACT CLOSEOUT

CDOT will collect a completed CDOT *Professional Services Closeout Report* form upon completion of the work, expenditure of funds, and/or expiration of each Task Order and Master Contract, whichever comes first. This form will report the final actual DBE participation on the Task Order(s) and any amounts for which CDOT will be seeking reimbursement due to the Consultant not meeting Commitments.