

## **DISADVANTAGED BUSINESS ENTERPRISE (DBE) REQUIREMENTS FOR PROGRAM SPECIFIC CONSULTANT CONTRACTS**

### **I. OVERVIEW**

The Disadvantaged Business Enterprise (DBE) Program is a federally-mandated program that seeks to ensure non-discrimination in the award of U.S. Department of Transportation (DOT)-assisted contracts and to create a level playing field on which DBEs can compete fairly for DOT-assisted contracts (See 49 CFR Part 26). To such end, the Colorado Department of Transportation (CDOT) sets a contract goal for DBE participation for each DOT-assisted contract. In order to be awarded a contract, a consultant must commit to meet, or otherwise make good faith efforts to meet, the DBE contract goal. DBE certified consultants can self-perform to meet the contract goal.

Consultants must submit an affidavit of small business participation with the consultant's statement of interest. In the affidavit, the consultant must certify that the consultant will meet or otherwise make good faith efforts to meet the DBE contract goal. Following selection, the consultant shall submit a detailed participation plan that documents the DBE firms that will be used to meet the DBE contract goal. CDOT will monitor the progress of the participation plan throughout the project to ensure that the consultant's commitments are fulfilled. Modifications to the participation plan must be approved by CDOT. CDOT may seek contractual remedies, including the withholding of funds during the project, if a consultant is in violation of the requirements of this contract.

For general assistance regarding the DBE program, contact CDOT's Civil Rights and Business Resource Center (CRBRC) at (303)757-9234.

### **II. DEFINITIONS**

*Disadvantaged Business Enterprise (DBE).* A Colorado-certified Disadvantaged Business Enterprise listed on the Colorado Unified Certification Program (UCP) DBE Directory at [www.coloradodbe.org](http://www.coloradodbe.org).

*Contract Goal.* The percentage of the contract established by CDOT for participation by DBEs. The contract goal is based on the type of work and the availability of certified firms capable of performing the work. As indicated in the advertisement, a separate contract goal has been established for each package.

*Commitment.* A portion of the contract, identified by dollar amount and work area, designated by the consultant for participation by a particular DBE. Commitments are submitted to CDOT via an Anticipated Participation Plan (Exhibit 2). Once approved, commitments are obligations of the contract that are enforceable by CDOT.

*Commercially Useful Function.* Responsibility for the execution of work by actually performing, managing, and supervising the work. To determine whether a firm is performing a commercially useful function, CDOT will evaluate the amount of work subcontracted, work performed solely by the firm, industry practices, and other relevant factors. If a DBE does not perform or exercise responsibility for at least thirty-percent (30%) of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, the DBE shall be presumed not to be performing a commercially useful function. The DBE may present evidence to rebut this presumption to the CDOT.

*Good Faith Efforts.* All necessary and reasonable steps to achieve a contract 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.

*Reduction.* Reduction occurs when the consultant reduces a commitment to a DBE. A reduction constitutes a partial termination.

*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 vendors.

*Substitution.* Substitution occurs when a consultant seeks to find another certified firm to perform work on the contract as a result of a reduction or termination.

*Termination.* Termination occurs when a consultant no longer intends to use a DBE 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 non-DBE firm, or with another DBE firm.

*Work Code.* A code to identify the work that a DBE is certified to perform. A work code includes a six digit North American Industry Classifications System code plus a descriptor. Work codes are listed on a firm's profile on the UCP DBE Directory. The consultant may contact CRBRC to receive guidance on whether a work code covers the work to be performed.

### III. **NON-DISCRIMINATION AND SUBCONTRACTING REQUIREMENTS**

- a. *CDOT Assurance.* The Colorado Department of Transportation, 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 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.
- b. *Consultant Assurance.* By submitting a proposal for this contract, the Consultant agrees to the following assurance:

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. 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 or such other remedy as CDOT deems appropriate, which may include, but is not limited to: withholding monthly progress payments; assessing sanctions; liquidated damages; and/or disqualifying the consultant from future bidding as non-responsible.

- c. *Prompt Payment.* Payments to all Subconsultants shall be made within thirty (30) days of receipt of payment from CDOT or no later than sixty (60) days from the date of the submission of a

complete invoice from the Subconsultant, whichever occurs first. If the Consultant has good cause to dispute an amount invoiced by a Subconsultant, the Consultant shall notify the CDOT regional office and the Subconsultant within five (5) days of such decision, but 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.

- d. *Subcontract Terms.* The assurance provided in subsection (b) and the prompt payment terms outlined in subsection (c) of this section shall be included in all subcontracts or other agreements for the performance of work on the project.

#### IV. **CONTRACT GOAL PROCEDURES FOR PROGRAM SPECIFIC CONTRACTS**

- a. *Affidavit of Small Business Participation.* With the Consultant's SOI, the Consultant shall submit the Affidavit of Small Business Participation (Exhibit 1) certifying that the Consultant will make Good Faith Efforts to meet the Contract Goal prior to award and throughout performance of the Contract.
- b. *Selection & Award.* Once selected, the Consultant must provide evidence of good faith efforts in order to be eligible for award. Good Faith Efforts prior to award may be demonstrated in one of two ways: (1) obtaining DBE commitments that meet or exceed the Contract Goal; or (2) if the Consultant does not obtain sufficient DBE commitments to meet the Contract Goal, through evidence of other Good Faith Efforts.
  - i. *Anticipated Participation Plan & Commitment Confirmation.* Within five (5) days of selection, the Consultant shall submit an Anticipated Participation Plan (Exhibit 2), listing all Commitments. The Consultant must also submit a Commitment Confirmation (Exhibit 3) for each DBE Subconsultant listed in the Anticipated Participation Plan. If the Consultant has not obtained any Commitments, the Consultant shall state so on Anticipated Participation Plan. The CRBRC shall review the plan and Commitments prior to contract award to confirm eligible DBE participation and ensure that the Consultant has made Good Faith Efforts.
  - ii. *Good Faith Effort Report.* If the Consultant is not able to obtain Commitments sufficient to meet the Contract Goal, the Consultant must also complete and submit a Good Faith Efforts Report (Exhibit 4), and supporting documentation with the Anticipated Participation Plan. CDOT may request additional information as needed to determine whether the Consultant made Good Faith Efforts. Additionally, the CRBRC may require the Consultant to complete the Good Faith Effort Report if a review of the Commitments shows the Consultant did not actually meet the Contract Goal. If the CRBRC determines that Good Faith Efforts were not demonstrated, the Consultant shall have the opportunity for administrative reconsideration by the Chief Engineer or his or her designee.
  - iii. *Approval.* If the CRBRC determines the Consultant has made Good Faith Efforts, the CRBRC shall issue an approved participation plan and the Commitments therein shall be binding

obligations of the Contract, for which the Consultant may be subject to payment reduction if not fulfilled.

## V. ELIGIBLE PARTICIPATION

The following rules will be used to determine whether work performed by a Subconsultant qualifies as eligible participation under the Contract:

- a. *Approved Commitment for Work to be Performed.* The work performed by a DBE Subconsultant must be identified in an approved Commitment.
- b. *DBE Must be Certified to Perform the Work.* The DBE must be certified to perform the work identified upon submission of the Commitment. CDOT will evaluate whether the work to be performed can reasonably be construed to fall under the applicable Work Code. If a Subconsultant is decertified after the execution of a subcontract, the participation will still count as DBE participation.
- c. *Commercially Useful Function.* Only work performed by a DBE that performs a Commercially Useful Function in the work of the Contract may be counted towards the Contract Goal. If the DBE is deemed not to perform a Commercially Useful Function, then no participation shall count toward the Contract Goal.
- d. *Special Calculations.* When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward Contract Goal only if the subcontractor is a DBE certified firm. Work that a DBE subcontracts to a non-certified firm does not count toward the Contract Goal. When a DBE performs as a participant in a joint venture, only the portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces may count toward the Contract Goal.
- e. *Reasonable Fees.* The Consultant may count fees or commissions charged for providing a bona fide service, such as professional, technical, consultant or managerial services and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the Contract, 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.
- f. *Received Payment for Work.* Eligible participation shall be calculated based upon the total amount paid to DBEs under the Contract.

## VI. REPORTING & MODIFICATIONS

- a. *Termination or Reduction.* Termination or Reduction of Commitments shall only be permitted at the discretion of CDOT based upon a demonstration of good cause by the Consultant. Consultants may request modification approval by submitting a participation plan modification request to CDOT. The Consultant may not Terminate or Reduce a Commitment without CDOT approval. Unapproved use of a DBE will not be counted toward the Contract Goal.

- b. *Notice of Termination or Reduction to Subconsultant.* The Consultant must give notice in writing to the Subconsultant of the Consultant's intent to Terminate or Reduce the Subconsultant's work before requesting approval for the modification. A copy of the notice given to the Subconsultant must be submitted to CDOT with the participation plan modification request. The Consultant must give the DBE five (5) days to respond to the Consultant's notice and advise CDOT of the reasons, if any, that it objects to the proposed Termination or Reduction and why the Consultant's action should not be approved. If required in a particular case as a matter of public necessity (e.g., safety), CDOT may waive the period to respond.
- c. *Substitution.* When a DBE Subconsultant is Terminated or fails to complete its work on the Contract for any reason, the Consultant shall make Good Faith Efforts to find another DBE Subconsultant to Substitute for the original Subconsultant. Good Faith Efforts shall be directed at finding another DBE to perform at least the same amount of work under the Contract as the Subconsultant that was Terminated. If the Consultant is unable to find commensurate substitution, the Consultant shall demonstrate the Consultant's Good Faith Efforts. If CDOT requests additional documentation, the Consultant shall submit the documentation within seven (7) days, which may be extended for an additional seven (7) days if necessary at the request of the Consultant. CDOT shall provide a written determination to the Consultant stating whether or not Good Faith Efforts have been demonstrated. If CDOT determines that Good Faith Efforts were not demonstrated, the Consultant shall have the opportunity to appeal the determination with the Regional Transportation Director or his designee.

## VII. ENFORCEMENT

- a. *Investigation.* CDOT may conduct reviews or investigations of participants as necessary. All participants, including, but not limited to, DBE Subconsultants and applicants for DBE certification, complainants, and Consultants using DBE Subconsultants to meet the Contract Goal, are required to cooperate fully and promptly with compliance reviews, certification reviews, investigations, and other requests for information.
- b. *Falsification and Misrepresentation.* If CDOT determines that a Consultant or Subconsultant 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:
  - i. Refuse to count any fraudulent or misrepresented DBE participation;
  - ii. Withhold progress payments to the Consultant commensurate with the violation;
  - iii. Reduce the Consultant's prequalification status;
  - iv. Refer the matter to the Office of Inspector General of the US Department of Transportation for investigation; and/or
  - v. Seek any other available contractual remedy.

- c. *Failure to Obtain Consent for DBE Termination or Reduction or to Make Good Faith Efforts to Substitute.* In accordance with 49 CFR Part 26.53(f)(1)(i), a Consultant shall not be entitled to payment for any work or material performed by an unapproved Subconsultant as a result of an unapproved Termination or Reduction of a DBE Subconsultant. Additionally, the Consultant shall not receive payment for any portion of the Contract in which the Consultant did not demonstrate Good Faith Efforts to replace an approved Reduction or substitution. The Consultant will not be subject to duplicate reduction for the same offense. CDOT may adjust the payment reduction wherein the Consultant demonstrates Good Faith Efforts.
  
- d. *Failure to Comply with DBE Requirements.* CDOT may withhold payment for any work or material performed in violation of the requirements of this Contract.

Exhibit 1 – Affidavit of Small Business Participation

<b>COLORADO DEPARTMENT OF TRANSPORTATION AFFIDAVIT OF SMALL BUSINESS PARTICIPATION</b>	Project Name:
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**Instructions:** An officer of the consultant must complete and submit an original copy of this form as part of the **Commendation Section** of your Statement of Interest (SOI).

<b>Consultant:</b>	
Consultant Company Name:	Prime is an ESB? <input type="checkbox"/> Y or <input type="checkbox"/> N Prime is a DBE? <input type="checkbox"/> Y or <input type="checkbox"/> N
Consultant E-mail:	Consultant Phone #:

**The consultant affirms that:**

- The consultant will make good faith efforts to meet the contract goal.
- The consultant understands that making good faith efforts to achieve the contract goal is a condition of contract award.
- The consultant attests that the information above is true and understands that a fraudulent misrepresentation or failure to make good faith efforts to meet the contract goal may result in the withholding of progress payments, reduction of prequalification status, referral of the matter to the Office of Inspector General of the US DOT, and/or other contractual remedies.

**By signing below, the consultant affirms that the statements made in this document are true and complete.**

I, \_\_\_\_\_, am the \_\_\_\_\_ of \_\_\_\_\_.  
*(Consultant Owner or Executive Officer Name) (Title) (Consultant Company Name)*

I have the authority to make this affidavit for and on behalf of my company. All information provided herein is true and accurate to the best of my belief.

\_\_\_\_\_  
*(Signature)*

\_\_\_\_\_  
*(Date)*

Exhibit 2 – Anticipated Participation Plan

<b>COLORADO DEPARTMENT OF TRANSPORTATION ANTICIPATED PARTICIPATION PLAN</b>	Project Name & Package:	Contract Goal:
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**Instructions:**

- This form must be submitted to the CDOT Civil Rights and Business Resource Center within five days of selection.
- **REQUIRED ATTACHMENT:** For each subconsultant listed on this form, attach a commitment confirmation.

Subconsultant	Certifications		Work to be Performed	\$ Anticipated	Anticipated %
	DBE?	ESB?			
1	<input type="checkbox"/>	<input type="checkbox"/>		\$	%
2	<input type="checkbox"/>	<input type="checkbox"/>		\$	%
3	<input type="checkbox"/>	<input type="checkbox"/>		\$	%
4	<input type="checkbox"/>	<input type="checkbox"/>		\$	%
5	<input type="checkbox"/>	<input type="checkbox"/>		\$	%
6	<input type="checkbox"/>	<input type="checkbox"/>		\$	%
7	<input type="checkbox"/>	<input type="checkbox"/>		\$	%
8	<input type="checkbox"/>	<input type="checkbox"/>		\$	%
9	<input type="checkbox"/>	<input type="checkbox"/>		\$	%
10	<input type="checkbox"/>	<input type="checkbox"/>		\$	%
<b>Total</b>					

<b>Prime Consultant:</b>		
Prime Consultant Company Name:	Prime is an ESB? <input type="checkbox"/> Y or <input type="checkbox"/> N	
	Prime is a DBE? <input type="checkbox"/> Y or <input type="checkbox"/> N	
If seeking DBE credit for self performance, please describe work to be performed:		
Representative Name:	Title:	Representative Phone #:
<p><b>As the representative for the prime consultant, I certify that:</b></p> <p><input type="checkbox"/> We understand that the use of the subconsultant(s) for the items of work listed above is a condition of contract award.</p> <p><input type="checkbox"/> We attest that the information above is true and understand that a fraudulent misrepresentation or failure to meet these commitments may result in the withholding of progress payments, reduction of prequalification status, referral of the matter to the Office of Inspector General of US DOT, and/or other contractual remedies.</p> <p><input type="checkbox"/> We understand that any modification to this Anticipated Participation Plan requires approval from CDOT and will only be approved upon demonstration of good cause.</p> <p><b>I declare under penalty of perjury, and any other applicable state or federal laws that the statements made on this document are true and complete to the best of my knowledge.</b></p>		
Representative Signature:		Date: / /

Exhibit 3 – Commitment Confirmation

<b>COLORADO DEPARTMENT OF TRANSPORTATION COMMITMENT CONFIRMATION</b>	Project Name & Package:
Prime Consultant Company Name:	

**Instructions:**

- Submit a separate confirmation for each DBE subconsultant that will be used to achieve the contract goal.
- Submission of missing, incomplete, and/or unverifiable information will result in related participation not counting toward the contract goal.

**Commitment Summary:**

Company Name:		Address:		
Representative Name:	Title:	Representative Phone #:		
Proposed Work Item(s)		Corresponding DBE Work Code	Commitment Amount	%
<b>Total</b>				

**DBE/ESB Subconsultant Confirmation:**  
List any work that will be subcontracted to other firms (include firm name and approximate amount):

I attest that the above is full and accurate to the best of my knowledge. I have reviewed the foregoing and consent to participating on this contract as stated herein. My company is currently certified for each of the specific work items listed above. I understand this is not a contract between the prime and my firm. I attest that my firm will perform a commercially useful function on this contract and will not seek credit for any work performed by non-DBE subcontractors.

<b>DBE/ESB Subconsultant Representative Signature:</b>	<b>Date:</b> / /
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<b>Prime Consultant Representative Name:</b>	<b>Title:</b>	<b>Representative Phone #:</b>
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**As the representative for the prime consultant, I certify that:**

We have accepted a proposal from the DBE subconsultant named above.

We understand that use of the DBE subconsultant for the items of work listed above is a condition of the contract award.

We attest that the information above is true and understand that a fraudulent misrepresentation or failure to meet this DBE commitment may result in the withholding of progress payments, reduction of prequalification status, referral of the matter to the Office of Inspector General of the US DOT, and/or other contractual remedies.

We understand that any modification to this commitment requires approval from CDOT and will only be approved upon demonstration of good cause.

**I declare under penalty of perjury in the second degree, and any other applicable state or federal laws that the statements made on this document are true and complete to the best of my knowledge.**

<b>Representative Signature:</b>	<b>Date:</b> / /
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Exhibit 4 – Good Faith Effort Report

<b>COLORADO DEPARTMENT OF TRANSPORTATION GOOD FAITH EFFORTS REPORT</b>	<b>Project Name &amp; Package:</b>
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**Instructions:** Attach a narrative that answers the questions below. Provide any supporting documents which demonstrates your good faith efforts.

Section 1. Consultant & Project Information			
Consultant:			
Contact Name:			
Contact Phone:		Contract Goal (%):	Commitment (%):
Contact Email:		Contract Goal Value (\$):	Commitment (\$)

Section 2. Efforts to Achieve DBE/ESB Participation.
<p>a. Describe your overall plan/approach to meeting the contract goal. Include how much and what work you intend to self-perform; how much and what work you intend to subcontract; what work areas were identified as subcontracting opportunities for DBEs; and the approximate number of DBEs per area.</p> <p>b. Describe you efforts to obtain DBE participation (i.e. how you attempted to execute your plan or approach to meeting the contract goal). Include direct outreach (state the DBE solicited, date(s) and method of contact); indirect outreach such as events, publications and/or communication with organizations that you conducted to reach DBE firms (include the date(s), location, and audience) and other efforts you made to assist DBE in competing for, or obtaining contracts (accepting quotes from DBE that may be higher than other subcontractors, modifications to contract scopes, unbundling, mentoring, etc.); and obstacles you encountered in assisting or contracting with DBEs.</p> <p>c. If the eligible participation submitted in your commitments were miscalculated, determined to be invalid or otherwise did not meet the contract goal, provide your justification for such deficiencies and the remedies you have taken or intend to take to avoid the issue in the future.</p>

Section 3. Affidavit of Good Faith Efforts.
<p>The consultant must show that it took all necessary and reasonable steps to achieve the committed DBE participation and to achieve the contract goal which by its scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient participation, even if not successful. 49 CFR Part 26, Appendix A sets forth examples and guidance for good faith efforts. The consultant is not limited to the examples provided in 49 CFR Part 26, Appendix A and may provide any documentation that demonstrates good faith efforts to obtain DBE participation on this contract.</p> <p>If, at any time, CDOT has reason to believe that any person or firm has willfully and knowingly provided incorrect information or made false statements, CDOT may initiate suspension or debarment proceedings against the person or firm under 49 CFR Part 29, take enforcement action under 49 CFR Part 31, refer the matter to the Department of Justice or Officer of the Inspector General for criminal prosecution under 18 U.S.C. 1001, and/or pursue other contractual remedies.</p> <p>By signing below, the consultant hereby affirms that it has made good faith efforts and has documented all such efforts in this form and the attached supporting documentation.</p> <p>I, _____, am the _____ of _____.</p> <p align="center"><small>(Representative Name) (Title) (Company)</small></p> <p>I have the authority to make this affidavit for and on behalf of my company. All information provided herein and attached as evidence of my company's good faith efforts is true and accurate to the best of my belief.</p> <p align="center">_____</p> <p align="center"><small>(Signature) (Date)</small></p>

