

# STATE OF COLORADO



## DISADVANTAGED BUSINESS ENTERPRISE (DBE) & EMERGING SMALL BUSINESS (ESB) REQUIREMENTS FOR AS NEEDED CONSULTANT CONTRACTS

### I. OVERVIEW

The Disadvantaged Business Enterprise (DBE) Program is a federally-mandated program that seeks to ensure non-discrimination in the award and administration 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.. To such end, the Colorado Department of Transportation (CDOT) may set a contract goal for DBE participation on any DOT-assisted contract. The DBE contract goal for this project can be found in the Invitation for Consultant Services.

The Emerging Small Business (ESB) Program is a CDOT-specific program that aims to help small businesses acquire the knowledge, experience, and resources needed to participate on CDOT construction, professional service, and research contracts. To encourage ESB participation on CDOT contracts, CDOT may award incentive points for Consultant commitments to ESB participation and/or set an ESB contract goal. See the Invitation for Consultant Services and Professional Consultant Services Statement of Interest (SOI)/Work Plan (WP) Preparation Instructions for Consultants for additional information.

With its statement of interest, each Consultant must submit an Affidavit of Small Business Participation stating that it will make good faith efforts to meet the contract goal on the total value of the contract and on each task order. The Consultant shall submit a DBE/ESB participation plan for each task order and the task order will not be awarded until the Consultant demonstrates good faith efforts to meet the contract goal. CDOT will monitor the progress of the participation plan throughout the task order to ensure that the consultant's commitments are fulfilled. Modifications to the participation plan must be approved by CDOT. CDOT may withhold payment or seek other contractual remedies if a consultant is in violation of the requirements of this contract.

For general assistance regarding the DBE and ESB programs, contact CDOT's Civil Rights and Business Resource Center (CRBRC) at (303)757-9234. For questions regarding compliance during a project, contact the applicable regional civil rights office.

### II. DEFINITIONS

- a. *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).
- b. *Emerging Small Business (ESB)*. A CDOT-certified Emerging Small Business firm listed on the ESB Directory at [www.coloradoesb.org](http://www.coloradoesb.org).
- c. *DBE Contract Goal*. The percentage of the contract established by CDOT for participation by DBEs. The DBE contract goal is stated in the Invitation for Consultant Services.

- d. *Commitment.* A portion of the contract, identified by dollar amount and work area, designated by the Consultant for participation by a particular DBE and/or ESB firm. Commitments are submitted to CDOT via Form XXXX, Anticipated Participation Plan. Once approved, commitments are obligations of
- e. *Commercially Useful Function.* As further described in 49 CFR 26. 55(c), responsibility for the execution of work and is carrying out its responsibilities by actually performing, managing, and supervising the work.
- f. *ESB Contract Goal.* The percentage of the contract established by CDOT for participation by ESBs. The ESB contract goal is stated in the Invitation for Consultant Services.
- g. *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.
- h. *Reduction.* Reduction occurs when the consultant reduces a commitment to a DBE and/or ESB. A reduction constitutes a partial termination.
- i. *Small Business Targets.* Percentages of the contract and/or commitments to utilize ESBs and/or DBEs for which the Consultant received incentive points during the selection process. Small Business Targets are binding obligations of the Contract subject to enforcement actions, including withholding of payments and /or future Task Order approvals, if not fulfilled.
- j. *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.
- k. *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.
- l. *Termination.* Termination occurs when a consultant no longer intends to use a DBE and/or ESB 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 and/or ESB subconsultant with its own forces or those of an affiliate, a non-DBE and/or ESB firm, or with another DBE and/or ESB firm.
- m. *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, DBEs 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 seven (7) days of receipt of payment from CDOT or no later than ninety (90) 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 CDOT 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 to CDOT or to deposit payments made.
- 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. PROCEDURES

##### a. *Statement of Interest:*

- i. *Affidavit of Small Business Participation.* The Consultant shall outline its approach to meeting the contract goals, obligations for incentive points, and affirm under oath that it will make Good Faith Efforts to meet the contract goal on the overall Contract and on each Task Order on the Affidavit of Small Business Participation. The Consultant shall also identify the Small Business Targets for which it is seeking points.
- ii. *Incentives and Scoring.* CDOT shall award incentive points for Small Business Targets established by the Consultant in the Affidavit of Small Business Participation. Consultants without DBE or ESB certification may receive a maximum of 7 points. Consultants with DBE and/or ESB certification may receive a maximum of 10 points. Points will be awarded as follows:
  - a. Consultants with ESB certification receive 10 points.
  - b. Consultants with DBE certification receive 6 points.
  - c. 0.5 points for each percentage of ESB participation committed.
  - d. 1 point for the use of a new ESB or DBE subconsultant. A new ESB/DBE subconsultant is an ESB/DBE firm that the prime has not teamed with in the past 3 years. To receive credit, the subconsultant must be performing the lesser of \$50,000 or 2% of the work.
  - e. 1 point for the use of a certified Level 1 ESB subconsultant. To receive credit, the subconsultant must be performing the lesser of \$50,000 or 2% of the work.

##### b. *Task Orders:*

- i. *Small Business Participation Plan.* With each Task Order Proposal, the Consultant shall document all DBE and/or ESB Subconsultants that will be used to complete the Contract work via an Anticipated Participation Plan. If the Consultant has not obtained any Commitments, the Consultant shall state so. If the Consultant is a certified firm, it shall include itself on the Anticipated Participation Plan.
- ii. *Letter of Intent from Vendors:* The Project Cost Worksheet shall constitute confirmation of the commitment by the DBE or ESB firm. The Consultant must submit a Letter of Intent confirming the commitment for any vendor subconsultant for which a Project Cost Worksheet is not provided.
- iii. *Good Faith Efforts.* If the Consultant does not obtain sufficient participation to meet the DBE Contract Goal, ESB Contract Goal, and/or Small Business Targets on the applicable Task Order or the overall contract, the consultant shall provide an explanation of its Good Faith Efforts to obtain participation by submitting a Good Faith Efforts Report and supporting documentation. The Consultant may include proposed participation on future task orders, which may be considered as part of the good faith effort review.

- iv. *Withholding of Task Order*: If the applicable regional civil rights office determines the consultant has not made Good Faith Efforts, the Task Order Proposal will not be approved. The regional civil rights office may also withhold approval and/or request additional information if the Consultant has not met its Small Business Targets. The determination of the regional civil rights office may be appealed to the Regional Transportation Director. The determination of the Civil Rights and Business Resource Center shall be appealable to the Chief Engineer.

## V. ELIGIBLE PARTICIPATION

The following rules will be used to determine whether work performed by a Subconsultant qualifies as eligible participation to count toward the DBE Contract Goal, ESB Contract Goal and/or the Small Business Targets:

- a. *Approved Commitment for Work to be Performed*. The work performed by the DBE and/or ESB Subconsultant must be identified in an approved Commitment.
- b. *Certified Upon Submission of Commitment and Prior to Starting Work*. The Subconsultant must be certified upon submission of the Commitment and prior to starting work on the relevant Task Order. For DBE firms this includes being certified in the work to be performed. CDOT will evaluate whether the work to be performed can reasonably be construed to fall under the Work Codes in which the DBE is certified. If a Subconsultant is decertified after the issuance of a Task Order, the participation on such Task Order by that DBE or ESB will continue to count.
- c. *Commercially Useful Function*. Only work performed by a DBE and/or ESB that performs a Commercially Useful Function in the work of the Contract will count.
- e. *Subcontracted Work*. When a DBE and/or ESB subcontracts part of the work of its contract to another firm, the value of the subcontracted work may only be counted if the subcontractor is also a certified firm. Work that a DBE and/or ESB subcontracts to a non-certified firm does not count. DBE and ESB firms may use an employee leasing company. Such participation will count if the certified firm maintains an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.
- f. *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.
- g. *DBE and ESB Staffing Agencies*. Unless certified in the work to be performed, DBE staffing agencies only count toward the contract goal for placement fees and any hourly fee beyond the temporary employee's actual rate of pay.
- h. *Joint Ventures*. When a DBE and/or ESB 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 and/or ESB performs with its own forces may count toward the contract goal. In order to receive credit, the joint venture agreement must accompany the Commitment Confirmation, Form XXX1, and be reviewed by CDOT.
- i. *Received Payment for Work*. For purposes of determining whether the Consultant has met the contract goal and/or ESB Targets at the end of the Contract, eligible participation shall be calculated based upon the total amount paid to DBEs and/or ESBs under the Contract.

## VI. REPORTING & MODIFICATIONS

- a. *Prompt Pay Report.* The Consultant shall electronically submit prompt payment reports to CDOT by the 15<sup>th</sup> of each month.
- b. *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 revised Small Business Participation Plan to CDOT. The Consultant may not Terminate or Reduce a Commitment without CDOT approval.
  - i. *Notice of Termination or Reduction to Subconsultant.* The Consultant must give notice in writing to a DBE and/or ESB Subconsultant of the Consultant's intent to Terminate or Reduce the Subconsultant's work before requesting approval for the modification, with a copy to CDOT. Unless otherwise waived in writing by the DBE or ESB, the Consultant must give the DBE/ESB 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 or reduce the period to respond. The DBE/ESB firm may also voluntarily waive the response period. Examples of good cause justifications can be found in 49 CFR Part 26.53(f)(3).
  - ii. *Substitution.* When a Commitment is Terminated or a small business fails to complete its work on the Contract for any reason, the Consultant shall make Good Faith Efforts to find another firm to perform at least the same amount of work under the Contract as the Subconsultant that was Terminated.
  - iii. *Termination, Reduction and Substitutions Requests.* Following the five (5) day response period for termination or reductions, the Consultant shall request the termination or reduction from CDOT by submitting a revised Small Business Participation Plan for approval. f the Consultant is unable to find commensurate substitution, the Consultant shall provide documentation of the Consultant's Good Faith Efforts to CDOT within the requses. 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.

## 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, ESB Subconsultants and applicants for ESB certification, complainants, and Consultants using 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 and/or ESB 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/ESB 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/ESB Termination or Reduction or to Make Good Faith Efforts.* 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 certified 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 meet the Contract Goal. 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 Requirements.* CDOT may withhold approval of task orders and/or payment to the Consultant for failure to comply with these requirements.





