

# DISADVANTAGED BUSINESS ENTERPRISE (DBE) & EMERGING SMALL BUSINESS (ESB) REQUIREMENTS

## I. Definitions

*Commercially Useful Function.* Responsibility for the execution of work by actually performing, managing, and supervising the work, as described in 49 CFR 26. 55(c).

*Commitment.* A portion of the contract, identified by dollar amount and work area, designated by the Consultant for participation by a particular DBE or ESB firm in order for participation to count toward a Contract Goal or Small Business Target.

*Contract Goal.* The percentage of the contract established by CDOT for participation by DBEs. The Contract Goal is 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](http://www.coloradodbe.org).

*Emerging Small Business (ESB).* A CDOT-certified Emerging Small Business firm listed on the ESB Directory at [www.coloradoesb.org](http://www.coloradoesb.org).

*Good Faith Efforts.* All necessary and reasonable steps to achieve a Contract Goal or Small Business Target 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 or ESB. A reduction is a partial Termination.

*Small Business Targets.* Promises to utilize DBEs or ESBs for which the Consultant received incentive points during the selection process.

*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 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.

*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.

## II. Non-Discrimination and Subcontracting Requirements

The following requirements apply to all contracts and subcontracts.

- a. *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.
- b. *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. The Consultant shall electronically submit prompt payment audit reports to CDOT by the fifteenth (15<sup>th</sup>) of each month through the B2G software. If no payment has been made, the Consultant shall document this in the prompt payment audit report.
- c. *Subcontract Terms.* The assurance provided in subsection (a) and the prompt payment terms outlined in subsection (b) of this section shall be included in all subcontracts or other agreements for the performance of work on the project.

### **III. Good Faith Effort Requirement**

In accordance with 49 CFR 26.53, CDOT may not award a contract until it has determined that the Consultant has demonstrated Good Faith Efforts to meet the Contract Goal. In negotiated procurements, such as professional services contracts, the Consultant must make a contractually binding commitment to meet the Contract Goal at the time of the submission of the statement of interest proposal and more detailed Commitments must be submitted prior to final award.

- a. The Affidavit of Small Business Participation is the Consultant’s contractually binding commitment and must be submitted with the Consultant’s statement of interest proposal. Failure to submit the Affidavit of Small Business Participation will result in the Consultant being deemed non-responsive and ineligible for award. In section two (2) of the Affidavit of Small Business Participation, the Consultant shall outline its approach to meeting the Contract Goal and affirm, under oath, that the Consultant will make Good Faith Efforts to meet the Contract Goal. For as-needed, task order-based contracts, the Consultant will affirm it will make Good Faith Efforts on the overall contract and on each task order.
- b. For fund-encumbered contracts, Commitments are due prior to contract award. For as-needed, task order-based contracts, Commitments are due with each task order proposal.

### **IV. Small Business Targets and Scoring**

The Affidavit of Small Business Participation also provides space for the Consultant to identify the Small Business Targets for which it is seeking points.

- a. 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. Failure by the Consultant to meet the Small Business Targets will result in sanctions unless CDOT

determines that the Consultant demonstrated Good Faith Efforts to fulfill the Small Business Targets.

b. Small Business Target points will be awarded as follows:

ESB Prime:	10 points
DBE Prime:	6 points
ESB Participation:	0.5 points for each percentage of ESB participation committed
New Relationship:	1 point for a new relationship with an ESB or DBE Subconsultant.
Level 1:	1 point for the use of a certified Level 1 ESB Subconsultant.

Non-DBE/ESB Consultants can only receive a maximum of 7 points. A new relationship occurs when the Consultant is not teamed with the ESB/DBE Subconsultant on a CDOT contract in the past 3 years. Teaming relationships will be tracked starting on July 14, 2016, thus, all relationships can be considered a new relationship starting on this date. By making the commitment to a New Relationship or Level 1 firm, the Consultant is committing to use this Subconsultant for at least \$50,000 or 2% of the work, whichever is less. The ESB Participation, New Relationship, and Level 1 points may all be combined.

**V. Submission of Utilization Plan in B2G Now**

Prior to contract award, the selected Consultant must submit a utilization plan using B2G Now Software. CDOT will initiate the utilization plan and the Consultant will have five days to return it to CDOT.

- a. If the contract is fund-encumbered, the Consultant must document all team members the Consultant expects to utilize on the contract. Additionally, the Consultant must submit Commitments to meet the Contract Goal and/or Small Business Targets. The Commitments must include the Subconsultant(s) the Consultant will use, the work area(s) the Subconsultant(s) will be performing, and the value of the work that the Subconsultant(s) will perform. The Consultant must attach a project cost worksheet for each Commitment. If a project cost worksheet is not available, the Consultant must attach a letter of intent confirming the firm's participation on the contract. If the Consultant is a certified firm, it shall include itself in the utilization plan for DBE credit. If the Consultant does not obtain sufficient participation to meet the DBE Contract Goal, the Consultant shall provide an explanation of its Good Faith Efforts to obtain participation by submitting a Good Faith Efforts Report and supporting documentation in the utilization plan.
- b. If the contract is an as-needed, task order-based contract, the Consultant must only document all team members the Consultant expects to utilize on the contract. However, the team members must be consistent with the participation promised in the Affidavit of Small Business Participation. The Consultant may document 0% participation for each team member in the utilization plan, with the exception of New Relationships and Level 1 ESBs, which must have a commitment of at least 2%.

**VI. Task Order Process for As-Needed, Task Order-Based Contracts**

CDOT will not award a task order unless the Consultant provides Commitments sufficient to meet the Contract Goal and the ESB participation Small Business Target on the task order and the overall contract, or otherwise demonstrates Good Faith Efforts. The applicable regional civil rights office may also withhold approval and/or request additional information if the Consultant is not on track to meet its other Small Business Targets.

- a. With each task order proposal, the Consultant shall submit an Anticipated Participation Plan for Task Orders that documents all DBE and/or ESB Subconsultants that will be used to complete

the work of the task order. 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 for Task Orders.

- b. The project cost worksheet shall constitute confirmation of the Commitment by the DBE or ESB Subconsultant. The Consultant must submit a letter of intent confirming the Commitment for any vendor Subconsultant for which a project cost worksheet is not provided.
- c. If, on a task order the Consultant does not obtain sufficient participation to meet the DBE Contract Goal or the ESB participation Small Business Target, 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 an explanation of proposed participation on future task orders.
- d. If the applicable civil rights office determines the Consultant has not made Good Faith Efforts, the contract and/or task order proposal will not be approved. 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.

## **VII. Eligible DBE and ESB Participation**

The following rules will be used to determine whether work performed by a Subconsultant qualifies as eligible participation to count toward the Contract Goal or Small Business Target:

- a. The work performed by the DBE and/or ESB Subconsultant must be identified in an approved Commitment.
- b. The Subconsultant must be certified upon submission of the Commitment and prior to starting work. 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 contract and/or task order, the participation on such contract and/or task order by that DBE or ESB will continue to count.
- c. Only work performed by a DBE and/or ESB that performs a Commercially Useful Function in the work of the contract will count.
- d. 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.
- d. 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.
- e. 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.

- f. 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 be submitted as an attachment in the utilization plan submitted through B2G software and be reviewed by CDOT.
- g. For purposes of determining whether the Consultant has met the Contract Goal and/or Small Business 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.

## **VIII. PLAN MODIFICATIONS**

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 to CDOT a revised Anticipated Participation Plan for Task Orders or a modification request through B2G. The Consultant may not Terminate or Reduce a Commitment without CDOT approval.

- a. Before requesting CDOT approval, the Consultant must give the DBE and/or ESB Subconsultant notice in writing of the Consultant's intent to Terminate or Reduce the Subconsultant's work, and provide a copy of the notice 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 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.
- b. A Consultant must have good cause to terminate or reduce the work. Examples of good cause justifications can be found in 49 CFR Part 26.53(f)(3).
- c. When a Commitment is Terminated or Reduced, 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. For as-needed, task order-based contracts, the Consultant may make the work up on the applicable task order or on another task order under the contract.
- d. 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 Anticipated Participation Plan for Task Orders or a modification request through B2G. If the Consultant is unable to find commensurate Substitution, the Consultant shall provide documentation of the Consultant's Good Faith Efforts to CDOT 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.
- e. A Consultant shall not be entitled to payment for any work or material performed by an unapproved DBE or ESB 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 or Small Business Targets. 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.

## **IX. ENFORCEMENT**

- a. 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. 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. CDOT may withhold approval of task orders and/or payment to the Consultant for failure to comply with these requirements.

# COLORADO DEPARTMENT OF TRANSPORTATION

## AFFIDAVIT OF SMALL BUSINESS PARTICIPATION

Project Name:

DBE Contract Goal:

### Section 1. Consultant Information.

Consultant:

Contact Name:

Consultant is an ESB:

Consultant is a DBE:

Contact E-mail:

Contact Phone #:

### Section 2. Participation & Incentive Scoring.

#### DBE Participation Plan (mandatory):

Work Area	Approximate Percentage of Participation

**Small Business Targets (optional for incentive points):** Check all that apply and include the number of applicable firms in the underlined blank space. This section will be evaluated for incentive point scoring. Teaming relationships will be tracked starting on July 14, 2016, thus, all relationships can be considered a new relationship starting on this date. To receive credit for new teaming relationships and Level 1 ESB participation, each firm must perform at least \$50,000 or 2% of the work, whichever is less.

- The consultant commits to \_\_\_ Level 1 ESB firm(s).
- The consultant commits to \_\_\_ DBE/ESB firm(s) not teamed with in the past 3 years.
- The consultant commits to \_\_\_% of ESB participation (The total of all ESB participation should be indicated in the blank space).

### Section 3. Affidavit

#### The Consultant affirms that:

The Consultant shall make good faith efforts to meet the contract goal on the overall contract and each task order. The consultant understands that making good faith efforts to achieve the contract goal is a condition of contract award. The consultant understands that promised participation is a binding obligation of the contract, if awarded. 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 or promised participation 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 \_\_\_\_\_.

(Name) (Title) (Consultant Company Name)

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

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





