

## **J.0 Disadvantaged Business Enterprise**

### **J.1 Governing Documents**

This Contract is subject to the requirements of Title 49 Part 26 of the Code of Federal Regulations (CFR) (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Program) which is implemented by CDOT in accordance with the CDOT Disadvantaged Business Enterprise (DBE) Program Manual. 49 CFR §§ 26.3(a) and 26.5.

### **J.2 Assurance of Non-Discrimination**

The Proposer agrees to the following assurance and shall include it without modification in all subcontracts. 49 CFR § 26.13(b)

*The Contractor, sub recipient or Subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Contract. The Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the Contractor 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 the recipient deems appropriate.*

### **J.3 DBE Contract Goals**

CDOT has established two DBE Contract goals for this project. The DBE Contract goal for the design portion of the Contract is five percent (5%) of the design elements. The DBE Contract goal for the construction portion of the Contract is two percent (2%) of the construction elements. Design elements include design survey, geotechnical, utilities investigation and design, pavement design, structures design, drainage design, MS-4 and stormwater management plans, landscape design, civil roadway design, electrical design, and quality control or quality assurance that occur during design. All other elements will be considered construction elements.

The Contractor must make a good faith effort to secure DBE participation sufficient to meet the DBE Contract goals prior to and throughout the performance of the Contract. The CDOT Civil Rights and Business Resource Center (CRBRC) will evaluate the efforts of the Contractor prior to the award of Notice to Proceed 1 (NTP1) and Notice to Proceed 2 (NTP2). Good faith efforts are all necessary and reasonable steps to achieve the DBE Contract goals which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if not fully successful.

### **J.4 Proposal Requirements**

With the Proposal, the Proposer must provide a plan documenting how it intends to reach the DBE Contract goals and an assurance that the Proposer will either meet the DBE Contract goals or make a good faith effort to do so. The plan should be separated according to the design and construction elements and provide areas of work that the Proposer is designating for DBE participation; including a percentage of the applicable portion each area of work. If the Proposer believes that additional elements should be included in the design elements, the Proposer may draft the DBE plan accordingly and provide a recommendation to CDOT explaining the reason for such designation. The plan must also designate a the Proposer's DBE/Civil Rights Liaison who will be responsible for communicating with CDOT and small businesses, ensuring the Contractor's compliance with the civil rights requirements for this Contract, and conducting outreach.

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The DBE/Civil Rights Liaison should be an individual who will be present at regularly scheduled meetings with the project team and have the authority to address issues related to DBE participation or other civil rights matters on the project. The Contractor may select more than one individual for this role (i.e. a liaison for design and a liaison for construction).

### **J.5 Notice to Proceed Requirements**

CDOT may not award work to the Contractor without making a determination that the Contractor has made good faith efforts to meet the DBE Contract goals. Prior to NTP1 the Contractor must establish good faith efforts by securing and documenting commitments for participation by DBEs that are sufficient to meet the DBE Contract goals or, if the commitments are not sufficient to meet the DBE Contract goals, documenting the commitments obtained as well as other adequate good faith efforts. 49 CFR §§ 26.11(c) and 26.53(a). Review of the Contractor's good faith efforts will occur prior to NTP1. The commitments should correlate to the plan provided in the Proposal.

A commitment is a portion of the Contract, listed in actual dollar amounts and distinct areas of work, which designates certain items of work for participation by a particular DBE. Only the portion of the commitment which will be considered eligible DBE participation shall count toward the DBE Contract goals. Eligible participation is further explained in Subpart C, Section 9 of the CDOT DBE Program Manual. Commitments are binding contractual obligations that may only be amended or terminated in accordance with Section IX below. CDOT permits commitments originating from non-DBE subcontracts with lower-tier DBE firms, however the Contractor must sign all commitment documents and remains ultimately responsible for fulfillment of the commitment.

For the design portion, with the Preliminary Schedule and prior to NTP1, the Contractor must submit a Subcontractor Proposal Summary (Form 1413DB), Contractor DBE Commitment Summary (Form 1414DB) and supporting DBE Commitment Confirmations (Form 1415DB) for review by the CDOT Civil Rights and Business Resource Center. For the construction portion, with the Original Initial Schedule and prior to NTP2, the Contractor must submit a Subcontractor Proposal Summary (Form 1413DB), Contractor DBE Commitment Summary (Form 1414DB) and supporting DBE Commitment Confirmations (Form 1415DB) for review by the CDOT Civil Rights and Business Resource Center. The Contractor DBE Commitment Summary must list all DBE commitments that the Contractor intends to use to meet the respective goal. If the Contractor is a DBE, the Contractor must also list the work that it intends to self-perform and count toward the DBE Contract goals. After submission of the Form 1414DB, the Contractor may only terminate listed commitments for good cause with CDOT approval and may only add or increase commitments to substitute for a termination. 49 CFR § 26.53(b).

A 1415DB must be submitted for each commitment listed on the Form 1414DB. 49 CFR § 26.53(b)(2)(iv). The information provided on the DBE Commitment Confirmation should correlate to the commitment listed on the Contractor DBE Commitment Summary. CDOT will review all DBE commitments to ensure that the commitments have been properly calculated. CDOT may adjust commitments as necessary to be consistent with the DBE Program Manual or 49 CFR Part 26. 49 CFR § 26.53(c).

If the Contractor fails to secure commitments sufficient to meet either DBE Contract goal, the Contractor must also submit a DBE Participation Good Faith Efforts Affidavit (Form 1416DB) listing all good faith efforts made by the Contractor. Examples and guidance regarding good faith efforts can be found in 49 CFR Part 26, Appendix A. If the Form 1414DB appeared to meet the DBE Contract goal, but upon further review the commitments are deemed insufficient, the Form 1416DB is due within two business days of notice from CDOT. CDOT will consider the reasons for the deductions or modifications to the commitments listed in the proposal as well as post-award efforts of the Contractor to remedy the deficiencies as part of the good faith effort evaluation. Any indication of intentional

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misrepresentation or fraudulent activity will weigh heavily against a determination that the Contractor made good faith efforts to meet the DBE Contract goal.

### **J.6 Administrative Reconsideration**

If CDOT determines that the Contractor has not demonstrated good faith efforts to meet the DBE Contract goals, it will provide the Contractor with written notice of such decision. The Contractor will have two business days from the date of the notice to appeal the decision. The appeal must be submitted to CDOT in writing to the CDOT Civil Rights and Business Resource Center, Attn: GFE Appeal, 4201 E. Arkansas Ave, Denver, CO 80222, and include the argument for appeal and any supporting documentation the Contractor would like considered by the reconsideration official. The Contractor has the option of an in-person hearing with the reconsideration official. A request for the hearing must be included in the written appeal submitted by the Contractor.

Once a decision is made by the reconsideration official, CDOT will send the Contractor a written decision on reconsideration, explaining the basis for finding that the Contractor did or did not meet the goal or make adequate good faith efforts to do so. If CDOT determines that the Contractor did not make good faith efforts as required, CDOT will not provide the Contractor with the Notice to Proceed. The result of the reconsideration process is not administratively appealable to the USDOT. See 49 CFR § 26.53(d).

### **J.7 Eligible DBE Participation**

For purposes of this Contract, DBEs are firms that have been certified as owned and controlled by disadvantaged individuals by a certifying member of the Colorado Unified Certification Program (UCP). All eligible DBE firms are listed on the Colorado UCP DBE Directory ([www.coloradodbe.org](http://www.coloradodbe.org)). CDOT's approval of a DBE commitment does not ensure eligibility of the DBE participation on the Contract. DBE participation shall be calculated in accordance with Subpart C, Section 9 of the CDOT DBE Program Manual. A DBE's certification status represents the maximum total participation for which the DBE may count but eligible participation is calculated based on actual work performed by the DBE and paid for by the Contractor. DBE participation is calculated based upon the actual value of the subcontracts not including any mark-up allowed to the Contractor.

### **J.8 DBE Participation Tracking and Reporting**

The Contractor shall include a breakdown of expected DBE participation as part of the Original Initial Schedule provided to CDOT. Thereafter, the Contractor shall use the monthly Subcontractor report required in Book 1, Section 7.4 to document DBE participation. Upon completion of the Project, the Contractor must submit a CDOT Form 1417DB summarizing all DBE participation on the project. CDOT will not provide Final Acceptance of the project until the final Form 1417DB has been approved by the CDOT Region Civil Rights Office.

The Contractor's representative and the Region Civil Rights Officer shall meet on a quarterly basis to review the Contractor's compliance with the DBE plan and all applicable requirements of 49 CFR Part 26. The Contractor shall provide the following at each quarterly review: (1) A detailed breakdown of the firms that have participated on the project, the work that has been performed and the amount paid to date. The Contractor should maintain and have available all supporting documentation including the Contract, agreement or purchase order, invoices, and monthly reports. (2) An assessment of DBE participation to date and anticipated participation in the next three months. (3) Any other documentation requested by the Region Civil Rights Office.

## **J.9 Termination and Substitution**

A Contractor shall not fully or partially terminate a DBE commitment without written approval from CDOT. Termination includes, but is not limited to, instance in which a Contractor seeks to perform work originally designated for a DBE Subcontractor with its own forces or those of an affiliate, a non-DBE firm or with another DBE firm. 49 CFR § 26.53(f)

Reduction of a commitment constitutes a partial termination. Reducing the amount of work committed to a DBE requires approval by the Region Civil Rights Office. This means that Contractor can reduce the amount of work committed to the DBE only for good cause and only with advance written concurrence of the Region Civil Rights Office even if the Contractor may meet the DBE Contract goal through other means. USDOT Q & A 12/9/11. Approval is not required where CDOT reduces the work that the Contractor had designated for performance by a DBE. All other terminations, including terminations based upon efficiencies of the Contractor, must be approved.

The following criteria must be met in order for CDOT to approve termination of a DBE commitment:

1. The Contractor must demonstrate good cause for termination. Good cause includes:
  - a. the DBE fails or refuses to execute a written contract;
  - b. the DBE fails or refuses 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 Contractor;
  - c. the DBE fails to meet reasonable, nondiscriminatory bond requirements;
  - d. the DBE becomes bankrupt, insolvent, or exhibits credit unworthiness;
  - e. the DBE is ineligible to work because of suspension or debarment proceedings or other state law;
  - f. the DBE is not a responsible contractor;
  - g. the DBE voluntarily withdraws from the project and provides written notice to CDOT,
  - h. the DBE is ineligible to receive DBE credit for the type of work required;
  - i. the DBE owner dies or becomes disabled and is unable to complete its work; or
  - j. other documented good cause that compels termination.
2. The Contractor must provide the DBE notice of its intent to terminate and the reason for such termination. A copy of the notice must simultaneously be provided to the Project Engineer and Region Civil Rights Office;
3. The Contractor must provide the DBE at least five days to respond to the notice and resolve the situation. The notice period may be reduced by the Region Civil Rights Office if required by public necessity; and
4. Following the five-day notice period, the Contractor must submit a request to the Region Civil Rights Office to terminate the commitment. The Region Civil Rights Office will issue a written determination of concurrence or denial of the termination and the reasons for such determination. 49 CFR § 26.53(f).

When a DBE commitment is terminated and approved by CDOT, the Contractor must make good faith efforts to find another DBE Subcontractor to substitute. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the Contract as the participation that was terminated or reduced up to the Contract goal.

Substitutions must be submitted to the Region Civil Rights Office as a new commitment on a Form 1415DB. The DBE shall not commence work until the commitment is approved in writing by the Region Civil Rights Office. Without approval, substitute performance will not count toward the DBE Contract goal. Once approved, a substitution is considered a binding commitment and may only be terminated in accordance with the provisions above. 49 CFR § 26.53(g).

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If CDOT eliminates work that the Contractor had designated to a DBE as a commitment or substitution, the Contractor shall provide notice of such elimination to the Region Civil Rights Office with a request for termination of the commitment. Elimination of the work shall be considered good cause for termination not subject to substitution requirements.

### **J.10 Change Orders**

Alterations or changes in quantities which result in an increase to the amount to be paid to the Contractor shall be subject to review for a DBE goal. If a DBE goal is applied to the change modification order, it shall not be awarded unless the Contractor makes commitments sufficient to meet the DBE goal or makes good faith efforts to do so. The Contractor will be required to submit Forms 1414DB, 1415DB and/or 1416DB for approval from the Region Civil Rights Office. If the Region Civil Rights Office determined that the Contractor has not made good faith efforts to meet the goal, the determination may be appealed in accordance with Section VI.

### **J.11 Use of Joint Checks**

All joint checks must be approved by the Region Civil Rights Office before they are used in payment to a DBE. Joint checks used in payments to DBEs will be monitored closely to ensure (1) the DBE is performing a Commercially Useful Function (CUF) and (2) the joint checks are not being used in a discriminatory manner. The Contractor shall submit a written request signed by the DBE and the Contractor, stating the reason for the joint checks and the approximate number of checks that will be needed.

### **J.12 Payment Reduction**

The Contractor's retainage will not be released until CDOT has determined whether the Contractor will be subject to a payment reduction. Payment reductions will be calculated as follows:

- A. *Failure to Fulfill Commitments.* If the Contractor terminated or reduced a commitment, the Contractor will be subject to a payment reduction for any termination or reduction which was not approved in advance by the Region Civil Rights office.
- B. *Failure to Meet Contract Goal.* If the Contractor failed to meet either Contract goal as calculated separately for design and construction elements, the Contractor will be subject to a payment reduction for the portion of the Contract goal that was not met.
- C. *Duplication.* The Contractor will not be subject to duplicate reduction for the same offense.
- D. *Adjustments.* CDOT may adjust the payment reduction wherein the Contractor demonstrates that its failure to obtain DBE participation was due to circumstances outside of its control.

### **J.13 Enforcement**

Failure to comply with these DBE Requirements will be considered default of the Contract.

If CDOT determines that a Contractor 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 Contractor engages in repeated violations, falsification or misrepresentation, CDOT may: (1) refuse to count any fraudulent or misrepresented DBE participation and assess sanctions against the Contractor based upon failure to meet the DBE Contract goals; (2) withhold progress payments to the Contractor commensurate with the violation; (3) suspend or reduce the Contractor's prequalification status; (4) refer the matter to the Office of Inspector General of the US Department of Transportation for investigation; or (5) seek any other available contractual remedy.

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A DBE firm which fails to perform a commercially useful function or operates in a manner inconsistent with these requirements, 49 CFR Part 26, the DBE Program Manual or the intent of the DBE program, may be subject to revocation of certification.