

## DBE CONTRACT PROVISIONS

For Locally Procured Federal-aid Contracts



### By signing this bid or quote, the bidder/contractor agrees to the following provisions:

All contractors shall pursue affirmative action requirements to encourage and increase participation of disadvantaged individuals in business enterprises in all federal-aid projects overseen by the Iowa Department of Transportation (hereinafter referred to as the Department), as set forth in these provisions which are imposed pursuant to 49 CFR Part 26 Subpart A through F and Public Law 105-178, 112 Stat. 107, which supersedes all existing minority business enterprise regulations, orders, circulars, and administrative requirements concerning financial assistance programs that the United States Department of Transportation has issued.

The requirements set forth in these provisions shall constitute the specific affirmative action requirements for project activities under this contract insofar as disadvantaged business enterprises (DBE)s are concerned.

**A. Disadvantaged Business Enterprise Policy.** The contractor shall accept as operating policy and include in all subcontract agreements the following statement which is designed to promote full participation of DBEs as suppliers and subcontractors through a continuous, positive result-oriented program on contracts overseen by the Department:

"The contractor, subrecipient, 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 Department assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in termination of this contract or such other remedy as the contracting authority deems appropriate."

**B. Contractor's Affirmative Action Responsibilities.** The contractor shall designate a responsible person or company official to serve as its DBE Liaison Officer. The DBE Liaison Officer shall:

1. Have the necessary statistics, funding, authority, and responsibility to carry out and enforce the intent of the firm's DBE policy and shall be responsible for developing, managing, and implementing the program on a day-to-day basis.
2. Use the current Iowa Directory of Certified DBEs to identify potential material suppliers and contractors.
3. Make every reasonable effort to involve DBEs in the performance of contracts, as suppliers and subcontractors, by soliciting quotations from the DBE's and incorporating them into the firm's bid.
4. Advise the Department of any known DBE not included in the current Directory of Certified DBEs.
5. Make every reasonable effort, at least 2 weeks prior to the time prices and quotations are to be submitted, to establish systematic written and/or oral contact with those DBEs that have been determined to have necessary potentials and capabilities to furnish needed materials and perform necessary work to be subcontracted.
6. Provide or arrange to assist certified DBEs with obtaining necessary bonding, analyzing plans and specifications, planning and managing work, and by providing other technical assistance.
7. Maintain complete records of negotiations with DBEs to reach agreeable prices, quotations, and work schedules.
8. Ensure that regularly scheduled progress payments are made to DBEs as specified in the Proposal Notice.
9. Report to the Department all suspected instances of firms fraudulently claiming to be DBEs.

**C. Counting DBE Participation Toward Meeting Goals.** The contractor may count toward the DBE goal only those expenditures to DBEs that perform a necessary and commercially useful function (as determined by the Department) towards the completion of a contract, including those functions as a subcontractor. The work performed by the DBE firm shall be consistent with normal construction industry practices in Iowa.

The contractor may count the following DBE expenditures towards the DBE goal:

- 1. Projects where the DBE is the Prime Contractor** - The portions of the contract to be completed by a certified DBE prime contractor will be counted toward the goal. Items of the contract subcontracted to non-DBE firms will not be counted toward the goal.
- 2. Portions of a bid from a Joint Venture** - A bid from a joint venture, between a DBE and non-DBE contractor shall include the "Statement of DBE Commitments" (Form 517012), which is included in the bidding documents provided by the contracting authority, listing the dollar value of the contract which will be completed by the DBE partner. The portion of the contract completed by the DBE contractor will be counted toward the DBE goal. The portion of the contract completed by the non-DBE contractor will not be counted toward the goal.
- 3. DBE Subcontractors** – The contractor may count toward the DBE goal 100% of the work to be completed by certified DBE subcontractors. However, the cost of materials purchased from the contractor or the cost of equipment leased from the contractor will not count toward the project DBE goal. The DBE subcontractor shall assume actual and contractual responsibility for provision of materials and supplies, subcontracted work, or other commercially useful functions of the items of work subcontracted to them.
- 4. Manufacturers** - The contractor may count toward the DBE goal 100% of its expenditures for materials and supplies required under a contract and obtained from a DBE manufacturer only if the DBE firm produces and supplies goods manufactured from raw materials or substantially alters them before resale.
- 5. Regular Dealers (e.g., Material Suppliers)** - The contractor may count toward the DBE goal 60% of its expenditures for materials and supplies required under a contract and obtained from a DBE regular dealer only if the DBE firm performs a commercially useful function in the supply process. For purposes of this section, a regular dealer is a firm that owns; operates; or maintains a store, warehouse, or other establishment in which materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold to the public in the usual course of business. To be a regular dealer, the firm shall engage in, as its principal business and in its own name, the purchase and sale of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock if it owns or operates the distribution equipment. If the DBE supplier does not own the distribution equipment, an acceptable lease containing the terms of the agreement shall be available. The contracting authority and / or the Department may request a copy of this lease.
- 6. Brokers and Packagers** - Brokers and packagers will not be regarded as regular dealers within the meaning of this section. Only the cost of the service performed may be counted towards the DBE goal.
- 7. Transportation or Hauling of Materials** - If a DBE trucking company picks up a product from a manufacturer or regular dealer and delivers the product to the contractor, the commercially useful function performed is not that of a supplier, but that of a transporter of goods. Unless the DBE company is itself the manufacturer or a regular dealer in the product, credit only will be allowed for the cost of the transportation service. For transportation of materials by truck to be counted toward the DBE goal, the following shall apply:
- a. The DBE shall be responsible for management and supervision of the entire trucking operation that is to count toward the commitment. The DBE shall maintain strict records to verify the amount of hauling done by each trucker. These records shall be available to the contracting authority and / or the Department, upon request.
  - b. The Department's Office of Contracts will maintain a truck roster for each DBE that performs trucking. Each truck on the truck roster shall be either owned by the DBE or controlled by the DBE under a lease. Trucks that are leased shall be from a firm that is in the commercial leasing business; the owner of the commercial leasing business can not be a heavy-highway contractor. The DBE firm shall make available to the contracting authority and / or the Department the lease agreement, if requested.
  - c. To be counted toward the DBE goal, the following conditions shall be used:
    - 1) At least one fully licensed, insured, and operational truck, listed on the truck roster under the DBE trucking company shown on the "Statement of DBE Commitments" (Form 517012), shall be hauling on the project at all times. The contractor will receive credit for the fee paid to the DBE for these trucks.
    - 2) Any truck on the truck roster of another DBE may be used. There is no limitation to the number of these trucks that can be used. The contractor will receive credit for the fee paid to the DBE for these trucks.

**3)** A DBE trucker may also use trucks from a non-DBE firm, including an owner operator. The contractor will receive credit toward the DBE goal only for the fee or commission retained by the DBE trucker. The contractor will not receive credit for the total amount paid for the truck because the DBE was a lessee rather than the actual provider of transportation services.

**8. Other Commercially Useful Functions** - The fees paid to certified DBE firms which are necessary for the completion of the contract and commonplace outside of the DBE program may be counted towards the commitment.

Interpretations by the Department regarding participation of DBEs will be in accordance with 49 CFR, Part 26 Public Law 105-178, 112 Stat.107.

**D. Contract Award Procedures.** The proposal will specify whether or not the proposed contract has an established DBE goal. The established DBE goal will be shown on the proposal as a percent of the total amount bid. If the proposal includes more than one project, the bidder may only count work on the federal-aid projects towards the DBE goal.

**1. Bidder' Responsibility.** It is the bidder's responsibility to determine the level of professional competence and financial responsibility of any proposed DBE subcontractor. The bidder shall ascertain that the proposed DBE subcontractor has suitable experience and equipment to perform a commercially useful function for work that is common industry practice in the Iowa construction industry. Subcontractor expenditures, which may be counted towards the DBE commitment, will include DBE trucking, purchase of materials from a DBE manufacturer or supplier, or off-site services provided by a certified DBE firm.

**2. Proposals With Established Project DBE Goals.** For proposals with established project goals the bidder will be required to complete the "Statement of DBE Commitments" (Form 517012) according to the instructions provided on the form, and submit this form with their bid. Submittal of this form with a signed bid proposal constitutes the bidder's DBE commitment for the contract.

In cases where the required information is included on the form, but where discrepancies occur, the contracting authority will make the following calculations to determine the contractor's DBE commitment. The DBE dollar commitment will be the sum of the amounts listed in the "Amount to DBE" column, adjusted for suppliers as provided in the instructions. The total percent of DBE participation will be calculated by dividing the total DBE dollars committed as determined above, by the total bid amount. Each bidder's DBE participation commitment will be calculated to the nearest 0.1%. If two or more projects are combined on one proposal, the DBE commitment will be calculated by dividing the sum of the DBE dollar commitments for each project by the total bid amount.

The completed form shall be filled out in ink or be computer generated and submitted with the bidding documents. Failure to attach this completed form or submitting incomplete forms will cause the bid to be rejected as irregular. Only DBE firms listed in the Iowa Directory of Certified DBEs, which was current at the time the contract was advertised for bids, may be used.

**3. Bidder Selection.** The successful bidder will be selected on the basis of having submitted the lowest responsive bid. Bidders shall make a Good Faith Effort to achieve the DBE goal in order to be responsive. Bidders who meet or exceed the proposed contract goal will be assumed to have made Good Faith Effort to utilize DBE firms. DBE firms who bid as prime contractors will also be considered to have met the goal.

The contracting authority will use the following methods to judge the Good Faith Effort of a bidder who has not met the established DBE goal:

**a. 80% of the Goal.** A bidder who has achieved 80% of the established goal will be assumed to have made Good Faith Effort to achieve the goal.

**b. 80% of the Average Commitment.** A bidder will be assumed to have made a Good Faith Effort who has achieved 80% of the Average DBE Commitment, calculated as follows:

**1)** Only that amount of a bidder's DBE commitment that does not exceed the established goal will be used in the calculation.

**2)** The established DBE goal will be used as the DBE commitment amount from DBE bidders who are bidding the project as the prime contractor.

- 3) The commitments to DBE firms who are affiliates of the bidder will not be included in the calculation.
- 4) The established DBE Goal will be included in the sum of the bidders commitments.

Example Calculation:

Project Proposal has a 10% Goal for DBE participation	= 10.0%
Contractor "A" submits a commitment of 11.8%	= 10.0%
Contractor "B" submits a commitment of 7.0%	= 7.0%
Contractor "C" submits a commitment of 11.4% (of which 4.0% was committed to a DBE affiliate)	= 7.4%
Contractor "D" submits a commitment of 3.6%	= 3.6%
Contractor "E" is a DBE	= 10.0%
Sum of Commitments	= 48.0%
Average DBE Commitment = $48.0 / 6 = 8.0\%$	
80% of the Average DBE Commitment = $80\% \text{ of } 8.0 = 6.4\%$	

Contractors "A", "C", and "E" would all be responsive for meeting the DBE goal. Contractor "B" would be responsive for meeting 80% of the Average DBE Commitment. Contractor "D" would not be responsive for meeting 80% of the Average DBE Commitment.

**c. Other Considerations.** A bidder may also satisfy the Good Faith Effort requirement, if in the fair and reasonable judgment of the contracting authority, the bidder took all steps that would reasonably be expected to achieve the established DBE goal. The contracting authority will consider the quality, quantity, and intensity of the efforts demonstrated by the bidder.

If the lowest bidder is non-responsive due to failure to meet any of the three Good Faith Effort methods described above, the next lowest bidder will be evaluated for a Good Faith Effort using the same methods. This process will continue until a bidder is identified that has made a Good Faith Effort to meet the DBE goal.

**d. Administrative Reconsideration of Project Specific Good Faith Effort.** Contractors who have not met the specified DBE goal or have not been determined to have demonstrated Good Faith Effort by the above methods can request administrative reconsideration of their Good Faith Effort.

Within 5 business days after the deadline for bid submittal, the contracting authority will use the three Good Faith Effort methods to determine which bidders have made a Good Faith Effort to meet the DBE goal on each proposal for which bids were received. The contracting authority will contact the otherwise lowest responsive bidder who has not met any of the Good Faith Effort criteria and offer that bidder an opportunity for an Administrative Reconsideration meeting with the Department's Administrative Reconsideration Committee. This committee consists of the Department's Contracts Engineer, Assistant Contracts Engineer, and the EEO/AA Administrator. The bidder shall request the Administrative Reconsideration meeting within 3 business days of the contracting authority's offer of an Administrative Reconsideration meeting.

Any bidder who has requested Administrative Reconsideration shall not adjust their DBE Commitment or provide any additional documentation of DBE firms contacted that were not listed on the "Statement of DBE Commitments" (Form 517012). However, the bidder will be allowed to provide documentation on other Good Faith Efforts they did to utilize DBE firms that are listed on the "Statement of DBE Commitments" (Form 517012). These efforts may include:

- 1) Efforts to provide interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.
- 2) Written documentation of negotiation with certified DBE firms including the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.
- 3) Written documentation of follow-ups made after the initial solicitations to encourage DBE firms to quote.

4) Written documentation that the DBE firm's quote was not reasonable or that the DBE firm was not capable of performing the work for which they quoted. The fact that there may be some additional costs involved in finding and using DBE firms is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a bidder to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make Good Faith Efforts.

5) Written documentation of efforts to assist interested DBE firms in obtaining bonding, lines of credit, or insurance as required by the specifications.

6) Written documentation of efforts to assist interested DBE firms in obtaining necessary equipment, supplies, materials, or related assistance or services needed for the project.

The determination made by the Administrative Reconsideration Committee shall be considered final.

#### **E. Construction Period Requirements.**

1. The contractor shall use those DBEs for the amounts listed on "Statement of DBE Commitments" (Form 517012), as submitted with their bid. After adequate notice by the contractor, if any DBE is unable to perform, the contractor shall inform the contracting authority of the reasons why a DBE will be unable to complete the work for which they were committed. The contractor shall document their efforts to have another DBE perform the item or to have a DBE perform other items to replace the original DBE commitment amounts.

2. The contractor is allowed to offer construction assistance to DBE subcontractors, but only in areas where DBEs can benefit from their expertise or in situations arising from unforeseen emergencies or natural disasters. The assistance shall be short-term and involve only equipment, or workers that function as trainers.

3. Before making a substitution for a DBE subcontractor or offering assistance to a DBE subcontractor, as described in paragraphs E.1 and E.2 above, the contractor shall request and receive approval from the contracting authority and the Department. The contractor shall send such a request to the contracting authority, which will forward the request along with its recommendation to the Department for review. The Department will review the request and notify the contractor and the contracting authority of its decision.

4. Brokering of work by DBEs is not allowed and is a contract violation. A DBE firm involved in brokering of work may be decertified. Any firm involved in brokering of work, that engages in willful falsification, distortion, or misrepresentation with respect to any facts related to the project shall be referred to the U. S. Department of Transportation's Office of the Inspector General for prosecution under Title 18, U. S. Code, Section 100.20.

#### **F. Post Construction Requirements.**

For all federal-aid contracts on which a DBE performed work, the contractor shall complete Section 1 of the "Certification of DBE Accomplishments" (Form 517013). This certification shall be signed and dated by a responsible official legally representing the contractor and submitted to the contracting authority with the request for final payment. Falsification of this certification will result in suspension of bidder qualifications with the Department.

The contracting authority will complete Section 2 of the "Certification of DBE Accomplishments" (Form 517013) for all federal-aid contracts, regardless of whether a DBE goal was set or whether a DBE contractor performed any work. If the contract contained a DBE goal, the contracting authority will verify the contractor's DBE accomplishment and calculate any adjustments, as described below:

**1. Adjustments to DBE Commitment:** If applicable, the contracting authority will decrease the original DBE commitment by the sum of the following dollar amounts: (1) the dollar value of underruns or deletion of contract items which were subcontracted to DBE firms; and (2) the dollar value of work that a DBE firm failed to perform, provided that prior concurrence to substitute a non-DBE firm for this work was received from the contracting authority and the Department.

**2. Adjustments to Contract Price:** If applicable, the contracting authority will reduce the amount paid to the contractor according to the following criteria:

- a. If the total adjusted DBE commitment is less than the DBE goal, the price adjustment will be the difference between the total DBE accomplishment and the total adjusted DBE commitment.
- b. If the total adjusted commitment is greater than the DBE goal, the price adjustment will be the difference between the total DBE accomplishment and the DBE goal.
- c. If the DBE accomplishment for any individual DBE firm is less than adjusted DBE commitment for that firm, the price adjustment will be the difference between the DBE accomplishment and the adjusted DBE commitment for that firm, even if the total adjusted DBE commitment exceeded the DBE goal.

**G. Required Records.** The contractor and subcontractors shall retain, for a period of not less than 3 years after final acceptance of a project, copies of canceled checks or other documentation that substantiates payments to DBE firms. These records shall be available at reasonable times and places for inspection by authorized representatives of the contracting authority, Department and appropriate Federal Agencies.

#### **H. Sanctions for Failing to Comply with the Intent of the DBE Regulations.**

**1. DBE Firms.** The ability to be eligible to receive DBE goal work is a privilege made available to a select group of firms. Firms that abuse this privilege may have their ability to be counted towards the DBE goal restricted if the firm fails to perform their work consistent with common industry practices. Examples of not performing work consistent with common industry practice include, but are not limited to:

- a. Patterns of failing to perform a commercially useful function for work quoted to meet a DBE goal.
- b. Patterns of failing to complete the work with their own organization for work quoted to meet a DBE goal.
- c. Patterns of failing to pay for all labor and materials for the work they have subcontracted to meet a DBE goal.
- d. Patterns of failing to perform the work they have subcontracted.
- e. Patterns of failing to notify the prime contractor in a timely manner when their work schedule makes it impossible for them to begin subcontract work at the requested time.
- f. Patterns of failure to furnish documents (e.g. certified payrolls, material test reports, etc.) within the timeframes allowed by the specifications.

The Department will provide written notice to the DBE firm, informing them of any proposed sanction. The DBE firm will have 14 calendar days, from the receipt of the certified notification, to make a written request for a hearing. The appeal hearing will be held with a three-person committee consisting of representatives from the Office of Contracts, Office of Construction, and a district office. If the Department does not receive a written request for a hearing, or if the DBE firm does not provide sufficient evidence at the hearing to refute the violations, the Department may suspend the DBE firm from the ability to be counted towards the commitment on projects with DBE goals. The duration of the suspension will be determined based on the severity of the violation and the number of prior suspensions of the DBE firm.

**2. Prime Contractors.** Contractors who show a pattern of non-compliance with the DBE requirements of the contract may be suspended from bidding on contracts that have DBE goals. Examples that would indicate a lack of good faith effort to comply with the DBE requirements include, but are not limited, to:

- a. Patterns of performing work with their own organization, or having another company perform work, which was committed to a DBE firm to meet a DBE goal.
- b. Patterns of not keeping the DBE firms posted on the status of their projects, and not providing advance notification to the DBE when their subcontract work will be available to the DBE firm.
- c. Patterns of not promptly paying DBE firms for completed work.
- d. Not treating DBE firms as they would any other subcontractor on the project.

The Department will provide written notice to the contractor, informing them of any proposed sanction for failure to comply in good faith with the intent of the DBE regulations. The contractor will have 14 calendar days, from the receipt of the certified notification, to make a written request for a hearing. The appeal hearing will be held with a three-person committee consisting of representatives from the Office of Contracts, Office of Construction, and a district office. If the Department does not receive a written request for a hearing, or if the contractor does not provide sufficient evidence at the hearing to refute the violations, the Department may suspend the contractor from bidding on projects that have DBE goals. The duration of the suspension will be determined based on the severity of the violation and the number of prior suspensions of the contractor for DBE sanctions. The sanctions may be extended beyond contracts with DBE goals if the contractor's treatment of DBE firms has extended beyond contracts assigned DBE goals.