

INSTRUCTIONAL MEMORANDUMS

To Local Public Agencies



To: Counties and Cities	Date: February 29, 2016
From: Local Systems Bureau	I.M. No. 5.010
Subject: DBE Guidelines	

Contents: This Instructional Memorandum (I.M.) includes general guidelines and procedures for a Local Public Agency (LPA) to comply with the Disadvantaged Business Enterprise (DBE) requirements on locally let construction contracts and consultant contracts, if either will be reimbursed with Federal funds.

Introduction

The DBE program was created to ensure nondiscrimination in the award and administration of United States Department of Transportation (U.S. DOT) assisted contracts. It seeks to create a level playing field for minority and women firms to compete, and to help remove barriers to participation in these contracts. It also aims to help DBE firms grow, so that they may compete successfully outside of the DBE program. It applies only to contracts that include U.S. DOT funds. General regulations for the program are set forth in 49 CFR 26.

The Iowa Department of Transportation (Iowa DOT) is responsible to certify DBE firms, ensure that contract opportunities are provided for DBE firms, and submit a semi-annual DBE report to the Federal Highway Administration (FHWA). For LPA Federal-aid projects, the LPA has the ultimate responsibility for determining contract goals and awards.

For the specific steps and forms needed to address the DBE requirements on Federal-aid consultant contracts, refer to [I.M. 3.310](#), Federal-aid Participation in Consultant Costs. For the specific steps and forms needed to address the DBE requirements on locally let construction contracts, refer to [I.M. 5.120](#), Local Letting Process – Federal-aid.

Which Firms are Certified DBE firms?

The [Iowa Directory of Certified Disadvantaged Business Enterprises](#) is the official register of Iowa certified DBE firms eligible to participate in Federal-aid projects. This on-line, searchable directory is provided by the Iowa DOT, Civil Rights Bureau.

When Should a DBE Goal be Set?

DBE goals can only be set on Federal-aid contracts. However, they do not need to be set on all Federal-aid contracts. The Federal regulations require each contract to be analyzed to determine the potential for DBE participation. Following are some issues the LPA should consider when deciding if a DBE goal should be set for a Federal-aid contract:

1. **Availability of Firms:** The availability of DBE firms, as identified in the Iowa Directory of Certified DBE firms, should be a primary factor in establishing a goal.
2. **Multiple ways to Meet a Goal:** Contracts that provide more than one opportunity to meet a DBE goal should be given consideration. For example, DBE firms are available to perform three different types of work on the contract; or three different DBE firms are available to perform a single type of work included on the contract.
3. **Size of Contract and Subcontracts:** The size of the estimated contract and subcontract amounts should also be given consideration. In general, larger contracts provide more opportunities for substantial subcontracts (i.e., those that exceed \$10,000). In contrast, small contracts often provide only very limited subcontract opportunities, or none at all. The Iowa DOT has developed the following ranges of estimated contract costs to assist the LPA in determining if a DBE goal should be set:
 - Less than \$250,000 – These contracts generally do not provide subcontract opportunities that exceed \$10,000. Therefore, DBE goals are usually not set on these small contracts.
 - Contracts with estimated costs greater than \$250,000 – These contracts almost always present sufficient subcontract opportunities. Therefore, these contracts should always be considered for DBE goals. The

Civil Rights Bureau should be consulted for information on availability of DBE firms to perform work on the contract.

If no DBE goal is proposed for contracts of \$250,000 or more, the LPA shall provide an explanation to support this decision. This explanation shall describe the nature of the proposed work, any special conditions associated with the work, and most importantly, provide specific reasons why setting a DBE goal is not feasible.

For assistance in determining whether a goal should be set or providing adequate justification for not setting a goal, [contact Civil Rights Bureau](#).

What Size DBE Goal Should be Set?

The availability of DBE firms and the options available for the prime contractor (Contractor) or consultant to meet the DBE goal should be considered in setting the size of the DBE goal. The items of work on the proposed contract should also be reviewed. Goals on Iowa DOT let construction contracts are normally established in a range from 1% to 15%, in 1% increments. The Iowa DOT recommends use of similar procedures for LPA consultant and locally let construction contracts.

Advertising for DBE Participation

Opportunities to include DBE firms in the contract should be made, even if no DBE goal is set. This can be done by notifying available DBE firms of the upcoming contract and by encouraging the Contractor or consultant to seek out DBE firms to use as subcontractors or subconsultants.

For consultant contracts, the LPA should consider including the following phrase in the Request for Proposals (RFP) when no DBE project goal was set: "No Disadvantaged Business Enterprise (DBE) goal has been set on this contract. However, use of DBE firms is encouraged."

Demonstration of Good Faith Efforts by Contractors or Consultants

All firms submitting a bid or proposal for contracts with a DBE goal shall provide with their bid or proposal sufficient documentation of their good faith efforts to achieve the goal. This information shall include: the names of the DBE firms contacted, a list of those DBE firms who submitted a quote or proposal to perform work on the contract, and an explanation of the reasons why any DBE firm that submitted a quote or proposal was not used. The documentation submitted with the bid or proposal should be sufficient for the LPA to determine the reasonableness of the Contractor's or consultant's good faith effort.

LPA Review of Contractor or Consultant Good Faith Efforts

If the Contractor or consultant has met the DBE goal, no review of their good faith effort is required. But if a Contractor or consultant did not meet the established DBE goal, the LPA must review their good faith efforts before a contract can be awarded to such a Contractor or consultant.

To demonstrate a good faith effort, the Contractor or consultant must take all steps that would reasonably be expected to achieve the DBE goal.

The LPA should consider the quality, quantity and intensity of the efforts documented by the Contractor or consultant to demonstrate an active and aggressive effort to meet the goal. Guidelines to assist the LPA in making this judgment are listed below:

- Past relationships between a Contractor and a DBE subcontractor or subconsultant may be considered in evaluating good faith efforts, with certain restrictions. A Contractor may elect not to use a particular DBE subcontractor or subconsultant because of demonstrated and documented difficulties in past working relationships. However, a Contractor may not elect to avoid a DBE subcontractor or subconsultant solely because they have established a relationship with a non-DBE firm for similar services. One objective of the DBE program is to provide opportunities for DBE firms that they otherwise may not have had. Continuing to use non-DBE firms solely because of familiarity interferes with that objective.
- Proximity to the work site may not be considered as a reason to not select a DBE subcontractor or subconsultant. It is the responsibility of the subcontractor or subconsultant to perform the work. The

subcontractor or subconsultant should have the option to travel or take other measures to adequately perform, if they are willing to do so.

- Incompatibility of electronic data systems may be considered when selecting a subcontractor or subconsultant. Contractors and subs must have the ability to communicate efficiently and accurately in order to complete the work. However, efforts to overcome these differences must be made similarly for both DBE and non-DBE firms.
- Additional cost that might be associated with utilizing DBE firms is often cited as a reason to not select a DBE firm. However, it is recognized that the DBE program will have some costs in order to meet the Federal government's objective for the program. Therefore, unless the additional cost is unreasonable, cost may not be used as reason for not using a DBE firm.

For assistance in evaluating the good faith effort of a Contractor or consultant, [contact Civil Rights Bureau](#).

Disputes Concerning Good Faith Efforts

The Federal regulations require the LPA provide an opportunity for administrative reconsideration to firms that will be denied a contract due to lack of good faith effort to achieve the DBE goal. Administrative reconsideration involves providing the Contractor or consultant an opportunity to present their case as to why they were unable to achieve the DBE goal.

The administrative reconsideration meeting *must* be conducted with individuals who were not involved in the original decision to deny the contract award. The *sole* responsibility of the individuals involved in the administrative reconsideration is to confirm that the Contractor or consultant did not make reasonable effort to achieve the DBE goal. The individuals conducting the administrative reconsideration cannot revise the project DBE goal, or allow the Contractor or consultant to revise the amount of their DBE commitment. For LPA Federal-aid projects, the administrative reconsideration will be conducted by the Iowa DOT.

Good Faith Efforts when a DBE Firm is Unable to Perform the Work

If a DBE is unable to perform the work for which they were committed to perform, the Contractor or consultant should notify the LPA and the Iowa DOT. The Contractor or consultant must make a good faith effort to replace the dollar amount of the lost DBE commitment. No monetary sanction will be imposed if the DBE firm is unable to perform for reasons beyond the control of the Contractor or consultant, and the Contractor or consultant made an adequate good faith effort to replace the lost DBE commitment. Monetary sanctions should be imposed if the Contractor or consultant intentionally fails to meet their original DBE commitment.