

OKLAHOMA DEPARTMENT OF TRANSPORTATION  
BAMS/LAS - LETTING AND AWARD SYSTEM  
SPECIAL PROVISIONS

CX00210B-NEW DISADVANTAGED BUSINESS ENTERPRISES PROGRAMS

POLICY STATEMENT

10-8-19

The Oklahoma Department of Transportation is committed to implementing the Disadvantaged Business Enterprise Program (DBE) as mandated in 49 CFR Part 26. The stated objectives of the program are:

- \* To ensure nondiscrimination in the award and administration of U.S. DOT assisted contracts;
- \* To create a level playing field on which DBEs can compete fairly for U.S. DOT assisted contracts;
- \* To ensure that the program is narrowly tailored in accordance with the applicable law;
- \* To ensure that only firms that fully meet the eligibility standards are permitted to participate as DBEs;
- \* To help remove barriers to the participation in U.S. DOT assisted contracts;
- \* To assist in the development of DBE firms so that they may compete successfully in the marketplace outside of the DBE program.

Failure of the contractor, subcontractor, material supplier or service contractor to carry out the requirements set forth shall constitute a breach of contract, and after notification by the Department, may result in termination of the contract by the State or such action as the State deems appropriate.

BIDDER'S ACTION

When ODOT has established a DBE contract goal, ODOT awards the contract only to a bidder who makes responsible good faith efforts to meet or exceed the goal. ODOT determines that a bidder has made good faith efforts

if the bidder does either of the following things, as per 49 CFR 26.53:

- (1) Documents that it has obtained enough DBE participation to meet the goal; or
- (2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the bidder does document adequate good faith efforts, ODOT

must

not deny award of the contract on the basis that the bidder failed to meet the goal.

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In the solicitations for DOT-assisted contracts for which a contract goal has been established, award of the contract will be conditioned on meeting the requirements of this section. All bidders or offerors will be required to submit the following at the time of bid within AASHTOWare Project Bids:

- \* DBE Form 6 - Prime Contractor - Confirmation of Intent to Subcontract Federal-Aid Projects;
- \* The names and addresses of DBE firms that will participate in the contract;
- \* A description of the work that each DBE will perform. To count toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;
- \* The dollar amount of the participation of each DBE firm participating;
- \* Written documentation of the bidder's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal; and
- \* Written confirmation from each listed DBE firm that it is participating in the contract in the kind and amount of work provided in the prime contractor's commitment (i.e. subcontractor's quote).

If the contract DBE goal cannot be met, evidence of good faith efforts are to be submitted on the DBE Form 5 - Prime Contractor - Good Faith Efforts and submitted at the time of bid within AASHTOWare Project Bids.

If the bidder to whom ODOT proposes to award the contract is able to demonstrate good faith efforts, ODOT may reduce the contractual DBE goal to the bidder's proposed adjusted goal. Acceptance by ODOT of the bidder's proposed adjusted goal does not release the bidder from its contractual obligation to continue to make efforts throughout the duration of the project to utilize DBEs on the project.

The successful bidder shall review and certify the DBE Commitment included in the contract. The DBEs listed on the DBE Commitment shall be considered binding, and changes of committed DBEs may only be made after the contract is fully executed, and may only be changed through the procedures established in the DBE Program Manual.

All bidders shall submit with their bid completed and signed quote(s) from each DBE to be subcontracted in order to achieve the contract DBE goal, along with the respective DBE Form 6. All DBE firms included in the bid must be currently certified by ODOT as eligible to participate in the DBE program. Failure to submit the required DBE documents, or to use an ODOT certified DBE will render the bid non-responsive.

The DBEs submitted on this form shall be considered binding and changes of committed DBEs may only be made after the contract is fully executed, and may only be changed through the procedures established in the DBE Program Manual.

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The steps taken by the bidder to obtain DBE participation shall be documented and shall include, but is not limited to the good faith efforts found in this Special Provision.

It is the contractor's responsibility to submit the information necessary for ODOT to ascertain compliance with the good faith efforts requirement. Extra cost involved in finding and utilizing DBEs will not be accepted as an adequate reason for the bidder's failure to meet the project DBE goal as long as such costs are reasonable.

Good Faith Effort Process (GFE)  
Administrative Reconsideration Process - Construction

If ODOT determines that the apparent successful bidder has failed to meet the requirements, prior to awarding the contract, ODOT will provide the bidder an opportunity for administrative reconsideration.

1. If the ODOT Disadvantaged Business Enterprise Liaison Officer (DBELO) determines that the Bidder did not demonstrate good faith efforts to meet the contract goal, the DBELO shall notify the Bidder in writing, via the email address provided from the contact(s) listed on the submitted DBE Form 6.
2. The notice shall state that the Bidder is entitled to administrative reconsideration. ODOT's independent administrative reconsideration official is the Director of Capital Programs and/or designee, provided that such designee did not participate in the original determination. The DBELO shall provide the administrative reconsideration official with a copy of the notice to the Bidder.
3. The Bidder has five business days from the date of the notice from the DBELO to submit a request for administrative reconsideration to the email addresses provided in the notice. The request shall include the Bidder's basis for the appeal and any supporting documentation that the Bidder would like considered as part of the reconsideration. The request shall also include a statement as to whether the Bidder would like a hearing and specify whether the Bidder would like an in-person or a telephone hearing. If the Bidder does not include a request for a hearing, the right to a hearing is waived.
4. If the Bidder has requested a hearing, the administrative reconsideration official will establish a date and time for the hearing and send written notice via email to the DBELO and Bidder at least two business days in advance of the hearing. If schedules permit, the parties may waive the two day requirement.

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5. The administrative reconsideration official may request additional documentation from the Bidder and/or the DBELO. A copy of all requests and responses shall be provided to the other party and the other party shall be given an opportunity to respond.

6. The administrative reconsideration official shall issue the final determination as to whether the Bidder made good faith efforts to meet the contract goal.

In instances where a DBE is participating in a contract as a joint venture, the joint venture must submit the specific units of work which will be performed by the DBE joint venturer. The DBE joint venturer's portion of the contract work will be submitted as the Contractors' commitment and the advertised goal of the contract becomes the contractual obligation.

In instances where a successful bidder's DBE commitment exceeds the actual DBE contract goal, the advertised goal of the contract remains the contractual obligation.

ASSURANCE OF NON DISCRIMINATION

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 U.S. 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 Oklahoma Department of Transportation deems appropriate.

GOOD FAITH EFFORTS

The steps taken by the bidder to obtain DBE participation shall be documented and shall include, but are not limited to the following good faith efforts: (APPENDIX B ~ TO CFR 49, PART 26)

ODOT verifies that all information is complete and accurate and adequately documents the bidder's good faith efforts. As per 49 CFR Part 26, Appendix A, the following is a list of types of actions which can be considered as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive.

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Solicit through all reasonable and available means the interest of all certified DBEs that have the capability to perform the work of the contract. This may include attendance at pre-bid and business match-making meetings and events, advertising and/or written notices, posting of Notices of Sources Sought and/or Request for Proposals, and written notices to all DBEs listed in ODOT's Directory.

The bidder should solicit this interest as early in the acquisition process as practicable to allow the DBEs to respond to the solicitation and submit a timely offer for the subcontract. The bidder should determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations. Such steps should include, but are not limited to:

- Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved.
- Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner.
- Negotiating in good faith with interested DBEs. Incur reasonable additional costs to obtain DBE Participation. Price alone is not a sufficient reason to reject a DBE. The bidder must demonstrate that the cost is excessive and unreasonable. Reasonableness is evaluated not only in terms of the dollar and percentage difference from one bidder to another, but also in light of the percentage of the total contract.
- As necessary, revise the DBE participation plan in order to obtain DBE participation. In the event the contractor is unable to obtain DBE participation under the original plan or is receiving DBE quotes in other areas, it should consider revising the plan, unbundling and forgoing self-performance or portions of the contract.
- Provide assistance to DBEs. Assistance may include providing the DBE help to understand technical and contract requirements of the project, obtain bonds and insurance for the project, and connect with others in the industry to obtain supplies, equipment or other materials for the project. The bidder should be careful not to compromise the independence or potential commercially useful function of the DBE, therefore in no instances should bidders arrange supply purchases, negotiate on behalf of a DBE, lend equipment to DBEs, or directly pay DBE employees.

If ODOT determines that the apparent successful bidder has failed to meet the requirements, prior to awarding the contract, ODOT will provide the bidder an opportunity for administrative reconsideration.

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CONTRACTOR ACTIONS AFTER AWARD OF THE CONTRACT

Counting DBE Participation Toward the Goal

Submit executed subcontracts and/or sub-agreements in pdf format to the Department using the following email address:  
[constructionsubcontracts@odot.org](mailto:constructionsubcontracts@odot.org). Submit all additional and/or modified subcontracts or sub-agreements to the Department via the same email address.

All subcontracts must be reviewed and approved by the Department prior to the subcontractor performing contract work. If a subcontractor performs contract work prior to approval of the subcontract by the Department, then the Contractor will be subject to one or more of the following:

- No pay for specific work items;
- Withhold progressive estimates in entirety; or
- Impose other severe sanctions as deemed appropriate.

When a DBE participates in a contract, only the value of the work actually performed by the DBE is counted toward the contract goal. The entire amount of that portion of a contract that is performed by the DBE's own forces is counted, including the cost of supplies and materials obtained by the DBE for the work on the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE purchases or leases from a prime contractor or its affiliate).

Fees or commissions charged by a DBE firm for providing a bona fide service such as professional, technical, consultant or managerial services, or for providing bonds or insurance specifically required for the performance of a U.S. DOT assisted contract, count toward the goal, provided those fees are determined to be reasonable and not excessive compared with fees customarily allowed for similar services.

When a DBE performs as a participant in a joint venture, the portion of the total dollar value of the contract equal to the clearly defined portion of the work that the DBE performs with its own forces may be counted toward the goal.

Only expenditures to a DBE contractor who performs a commercially useful function may be counted toward a DBE goal.

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COMMERCIALLY USEFUL FUNCTION

A DBE performs a commercially useful function (CUF) when it is responsible for the execution of the work of its contract and is carrying out its responsibilities by actually performing, managing and supervising the work involved. The DBE must be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself.

To determine whether a DBE is performing a CUF, ODOT will evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid is commensurate with the work it is actually performing and the DBE credit claimed, and other relevant factors.

A DBE does not perform a CUF if its role is limited to that of an extra participant in a transaction through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is acting as a pass-through, ODOT will examine similar transactions, particularly those in which DBEs do not participate.

Use of Joint Checks

A joint check is a two party check between a DBE, a prime contractor, and the regular dealer of materials/supplies. Typically, the prime contractor issues the check as payor to the DBE and supplier jointly to guarantee payment to the supplier for materials/supplies used by the DBE.

A joint check may be used when the following conditions are met:

- \* The second party (typically the prime contractor) acts solely as a guarantor
- \* The DBE must release the check to the supplier
- \* The use of joint checks is a commonly recognized business practice in the industry
- \* ODOT approves the practice before it is used

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The use of joint checks will not be approved if it conflicts with the commercially useful function (CUF) requirements of 49 CFR Section 26.55. All aspects of the CUF requirements must be fulfilled by the DBE to include negotiating the purchase and delivery of the materials required for the performance of the contract.

The use of joint checks should be short term in nature and there shall be no exclusive ongoing relationship between one prime and one DBE in the use of joint checks, which may bring the DBE's independence into question.

The DBE shall notify the Civil Rights Office prior to the use of joint checks, providing full and prompt disclosure of the circumstances and a request for approval. The Civil Rights Office will review the request and determine whether approval will be granted.

Lease of Use of Prime Contractors' Equipment

The DBE may lease equipment necessary to perform work, where the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the DBE firm. 49 CFR Section 26.55(a)(1) does not allow materials purchased or equipment leased from a prime contractor to count toward the DBE goal. If a DBE uses or leases equipment from the prime contractor, the prime contractor cannot claim credit for the value of that equipment lease toward the DBE goal. If a DBE uses a prime contractor's equipment, it shall be for an unusual circumstance of limited duration, and the DBE shall provide the ODOT a written agreement between the DBE and the prime contractor.

TRUCKING

The certified DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.

The DBE, itself, must own and operate at least one fully licensed, insured, and operational truck used on the contract.

The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs. ODOT does not permit additional non-DBE trucks to count toward the DBE goal.



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MANUFACTURERS AND MATERIAL SUPPLIERS

If the materials or supplies are obtained from a certified DBE manufacturer, 100 percent of the cost of the materials or supplies will be counted toward the DBE goal. A manufacturer is a firm that operates the or maintains a factory or establishment that produces, on the premises, materials required under the contract as described by the specifications.

If the materials or supplies are purchased from a certified DBE regular dealer, 60 percent of the cost of the materials or supplies will be counted toward the DBE goal. A regular dealer is a firm that owns, operates or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment described by the specification and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating or maintaining a place of business as provided for in the above paragraph if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad-hoc or contract-by-contract basis.

In order for a firm to qualify as a DBE supplier of metal and/or concrete pipe, the firm must also fabricate the pipe. Metal or concrete pipe is specialty pipe which is project specific and is inspected during the manufacturing process. This arrangement provides for no warehousing of metal or concrete pipe and essentially requires the manufacturer to be the supplier. Merely ordering pipe from the fabricator, and in turn selling it to contractors is not consistent with normal industry practice. Contractors normally purchase pipe directly from the manufacturer, thus eliminating the middleman. Supplying metal or concrete pipe is viewed as brokering and is considered inconsistent with DBE program requirements.

SUBSTITUTION/REPLACEMENT OF DBEs

Substitution or replacement of a DBE will only be permitted or allowed after award and execution of the U.S. DOT assisted contract.

As per the 49 CFR 26.53 and the DBE Program Manual, a prime contractor may not terminate, for convenience; a DBE (or an approved substitute DBE firm) listed in their contract and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without ODOT's prior written consent. The contractor will notify

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the DBE subcontractor in writing as to reasons for termination and/or substitution. The DBE subcontractor will have five (5) days to respond to the contractor with any objection to termination and/or substitution. The contractor must then submit a request with documentation to the ODOT Civil Rights Division for approval before proceeding with termination and/or substitution.

When the contractor obtains a substitute DBE, the contractor shall provide the Civil Rights Division with copies of the substitute's subcontract, the Notification Change of DBE Participant (DBE Form 4), and supporting documentation prior to work being performed.

If the contractor is unable to replace the DBE with another DBE, then the contractor must provide ODOT with evidence that they have made a good faith effort (APPENDIX B ~ TO CFR 49, PART 26).

If a contractor fails to comply with this section, the contractor will not be entitled to any payment for work material unless it is performed or supplied by the listed DBE(s). Furthermore, appropriate administrative remedies as listed in the titled Administrative Remedies will be taken.

PROMPT PAYMENTS

To ensure that all prime contractors' obligations under U.S. DOT contracts are met, the prime contractor shall pay all subcontractors for satisfactory performance of their contracts no later than fifteen calendar days after receipt of each progressive payment from ODOT. The prime contractor must further make prompt return of retainage held to the subcontractor or DBE within fifteen days after the subcontractor's work is satisfactorily completed, whether the prime contractor's work is complete or not. The term "satisfactorily completed" is defined as when; 1) ODOT finds the work completed in accordance with the Plans and Specifications, 2) any required paperwork, including material certification, payrolls, etc., have been received and approved by ODOT or 3) the Department has determined the final quantities on the subcontractor's portion of the work. In the event, prime contractor fails to comply with prompt payment requirements or a pattern and practice of prompt payment violations is recognized and all other efforts for remedy have been exhausted, the agency shall invoke administrative actions including but not limited to the withholding of bid proposals.

Prime contractors must include in their subcontract agreements notifying subcontractors of their right to prompt payment and return of retainage under 49 CFR part 26.29.

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Administrative Remedies

The following administrative remedies will be invoked when the federal DBE contractual requirements are not met by a contractor, and if the contractor has failed to provide evidence of a sufficient good faith effort to meet said provisions:

- Suspension of processing progressive estimates
- Refusal to issue proposals
- Refuse to award or approve subcontractors or material suppliers
- Suspension of work on the project
- Suspension of prequalification
- Contractor Performance suspension
- Contractor Debarment

RECORD KEEPING REQUIREMENTS

The prime contractor will keep such records as are necessary to determine compliance with the DBE contract obligations. The records kept by the contractor will indicate:

1. The name(s) of DBEs or other subcontractors, the type of work being performed, and payment for work, services and procurement.
2. Documentation of correspondence, verbal contracts, telephone calls, etc., to obtain services of DBEs on the project.
3. The prime contractor shall maintain a copy of the DBE trucking firm's list of trucks to be used on that project. This shall be provided to the prime by the DBE prior to the DBE beginning the work of their hauling agreement. The prime contractor shall submit this list along with the actual hauling subcontract/agreement for approval by the Department.

Upon request, the prime contractor shall submit all purchase orders, contracts, agreements, and financial transactions, including canceled checks, executed with DBEs with the reference to records referred to in this provision, in such form, manner, content prescribed by ODOT.

Once the project begins, prime contractors will be required to submit Monthly Payment Log Forms (DBE Form 2) to the Resident Engineer each month for the duration of the project. The DBE Form 2 will record payments made to all DBE firms providing materials or services to the project, whether listed in the Contract to meet a project goal or not. Listed on the forms should be all payments made, including final payment and return of retainage. The forms should be submitted even if there is no contractual DBE goal listed in the contract and/or the prime contractor is a DBE. These forms must be received by the Resident Engineer no later than the 15th of the following month.

DATE: July 27, 2020

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For contracts with DBE participation, regardless of a contractual DBE goal, the contractor shall submit to the Resident Engineer a DBE Final Payment Report (DBE Form 3A), which replaces the Summary Form 1. The contractor should list all DBEs as in the contract and summarize total amounts paid to DBEs and the project goal amount for each DBE. DBE Prime Contractors must also list all DBEs as in the contract and summarize total amounts paid to other DBEs and the project goal amount for each DBE. In instances where the contract is performed as a joint venture and one of the members of the joint venture is a DBE, the joint venture should summarize the total amounts paid to the DBE joint venturer for work performed.

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