

100-C-151B DISADVANTAGED BUSINESS ENTERPRISE PROCEDURE AND GOOD FAITH
EFFORTS

(Revised 09-09-10)

The Standard Specifications are revised as follows:

SECTION 103, BEGIN LINE 1, DELETE AND INSERT AS FOLLOWS:

SECTION 103 – AWARD AND EXECUTION OF CONTRACT

103.01 Disadvantaged Business Enterprise Program

This requirement will apply only to a federal aid contract.

(a) General Requirements

Failure to carry out the requirements set forth in 49 CFR ~~23.43(a)~~ 26, as outlined in the Department's DBE Program Manual, shall constitute a breach of contract and, after notification may result in ~~termination of the contract or such remedy as the State deems appropriate~~ such contract sanctions as the Department or the Federal Highway Administration may determine to be appropriate, including, but not limited to: (a) withholding of payments to the Contractor under the contract until the Contractor complies, and/or (b) cancellation, termination or suspension of the contract, in whole or in part.

The above referenced CFR section requires the following policy and disadvantaged business enterprise obligation to be included in all subsequent agreements between the Contractor and all subcontractors as follows:

1. It will be the policy of the Department ~~that disadvantaged business enterprises, as defined in 49 CFR Part 23, shall have the maximum opportunity to participate in the performance of contract work financed in whole or in part with Federal funds provided under this contract to create a level playing field on which DBE's can compete fairly for federally funded contracts.~~ Consequently, the disadvantaged business enterprise requirements of 49 CFR Part 23 26, as outlined in the Department's DBE Program Manual, apply to this contract.
2. ~~The Contractor agrees to ensure that disadvantaged business enterprises certified by the State shall have the maximum opportunity to participate in the performance of contract work or subcontract work financed in whole or in part with Federal funds provided under this contract. In this regard, the Contractor shall take all necessary and reasonable steps, in accordance with 49CFR Part 23, to ensure that disadvantaged business enterprises have the maximum opportunity to compete for and perform work in this contract.~~ The Contractor shall not discriminate on the basis of race, color, national origin, or sex, in the award and performance of this contract. *The Contractor shall carry out the applicable DBE requirements in the award and administration of federally funded 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 Department or the Federal Highway Administration deems appropriate. The Contractor shall include language prohibiting discrimination on the basis of race, color, national origin, or sex in the performance of this contract in all subcontracts.

SECTION 103, BEGIN LINE 59, DELETE AND INSERT AS FOLLOWS:

4. Certified DBE

A business enterprise which has completed and filed a request for certification with the ~~Indiana~~ Department of Administration, and that the business enterprise has been reviewed and determined to comply with the guidelines established in 49 CFR Part 23 26. Business enterprises which are determined to be eligible will be certified as DBEs to perform specific types of work.

(c) Goal

A contract provision DBE goal may be shown on the Proposal sheet. Such goal, if required, has been established as the *desired minimum* amount to be contracted to DBEs. The Contractor shall meet or exceed the goal, or demonstrate that it could not be met despite ~~best~~ *good faith* efforts. Achievement of the ~~contract provision~~ goal does not relieve the Contractor of the requirement for affirmative action on subsequent subcontracting on this contract. Only work with listed DBEs ~~which that~~ are certified prior to the date of the letting will count toward the goal. *Credit towards contract goals will be given only for work performed by certified DBEs in the work areas for which they have been certified. The same requirements with respect to obtaining the goal apply for a Contractor that is certified as a DBE. A DBE Contractor must either achieve the goal utilizing other DBE firms or demonstrate that the goal could not be met despite good faith efforts.*

Contracting may be in the form of a subcontract, lease agreement, or material supply *agreement*. Full credit will be given for subcontracts and lease agreements. Credit for utilization of a DBE material supplier will be limited to those DBEs certified as suppliers prior to the letting at the rate of 60% of the expenditure to the supplier unless the supplier is also the manufacturer. Suppliers that do not manufacture the items shall also perform a commercially useful function in order for credit to be received.

A written request for changes in utilization of race/gender conscious DBE firms listed in the Affirmative Action Certification shall be approved prior to start of listed services or purchase of listed materials. Requests to reduce or eliminate the services or material provided by a listed race/gender conscious DBE that include written approval by the DBE will be considered sufficient justification if the committed DBE utilization after the requested change will meet or exceed the contract goal or a lesser percentage approved prior to execution of the contract. If the committed DBE utilization after the change does not meet or exceed the contract goal or a lesser percentage approved prior to execution of the contract, or the listed race/gender conscious DBE does not approve the change, the Contractor shall submit documented evidence that the DBE is unable to perform successfully. Disposition of the request for change will be determined on the basis of the affirmative actions taken as required herein.

When a race/gender conscious DBE firm is removed from eligibility, the

Contractor shall take the following steps:

1. *If a subcontract has not yet been executed, the Contractor shall not count work performed by the firm toward the contract goal. The Contractor will be directed to meet the contract goal with an eligible DBE firm or demonstrate that it has made a good faith effort to do so.*
2. *If a subcontract has been executed before the firm has been declared ineligible, the Contractor shall continue to count work performed by the firm toward the contract goal.*

SECTION 103, BEGIN LINE 95, DELETE AND INSERT AS FOLLOWS:

DBE joint ventures type A do not require DBE joint venture certification. DBE joint venture type B do require DBE joint venture certification. A request for DBE joint ventures type B certification shall be submitted not later than 9:00 a.m. local time the last ~~work~~ business day before the letting and shall be approved prior to bidding in order to receive credit toward the DBE goal. The DBE shall be certified with the Department prior to requesting DBE joint venture certification. The work for the DBE shall be identified, performed, managed, and supervised by its forces.

SECTION 103, DELETE LINES 102 THROUGH 119.

SECTION 103, DELETE LINES 143 THROUGH 242.

SECTION 103, AFTER LINE 243, INSERT AS FOLLOWS:

(e) Determination of Good Faith Efforts

Appendix A of 49 CFR Part 26 has been used for guidance in preparing the Department's procedures to determine the adequacy of good faith efforts. Additional factors consistent with 49 CFR Part 26, and the Department's policies and procedures have also been utilized.

1. Good Faith Efforts Prior to Award

The following factors will be considered in determining good faith efforts prior to award of a contract. The Contractor, including DBE Contractors, shall submit evidence on each of the factors.

1. *The Contractor shall make reasonable effort to contact all ready, willing, and able DBEs who express a desire to work on any of the pay items of the contract.*
2. *To effectively participate, the DBE shall have the opportunity to analyze the contract and submit quotations prior to letting. Information provided by the Contractor to the DBEs shall include, at a minimum, the contract number, pay items, quantities for those pay items to be subcontracted, and the date the subcontract bid is desired.*
3. *The Contractor shall select the portions of the work to be performed by DBEs in order to increase the likelihood of DBE participation. This shall include, where appropriate, an attempt to break down the*

contract into economically feasible units to facilitate DBE participation.

- 4. The Contractor shall provide the interested DBEs with complete information about the plans, specifications, and requirements of the contract. Attempts shall be made to have plans available or to notify the DBE of the location of available plans. The Contractor shall notify the DBE of revisions to the contract.*
- 5. It will be considered unacceptable to avoid subcontracting to DBEs if such subcontracting to DBEs results in the need to further subdivide remaining work items.*
- 6. The Contractor shall negotiate in good faith with interested DBEs and not reject such DBEs as unqualified without sound reasons based on thorough investigation of their capabilities. Confirmed documentation that a DBE has not been able to perform previous work through no fault of others will be considered to be sound reason. Unacceptable criteria include, but are not limited to, unsubstantiated oral statements and unsigned documentation.*
- 7. The Contractor shall make efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance required by the State. However, the Contractor shall affirmatively consider waiving requirements it may have in order to assist the DBE.*
- 8. Only firms certified as DBEs prior to the letting date can be used to meet the contract goal for the Department's DBE program.*

The Contractor will be considered to have made good faith efforts if it either:

- 1. Documents that it has obtained enough DBE participation to meet the goal, or*
- 2. Documents that it made adequate good faith efforts in accordance with the factors set out above to meet the goal even though it did not succeed in obtaining enough DBE participation to do so.*

If a DBE goal has been established for the contract, the Contractor shall take good faith efforts to achieve the established goal prior to the bid opening. The Affirmative Action Certification shall be completed and submitted with the Proposal Book to indicate both race/gender conscious and race/gender neutral proposed DBE utilization.

The award of the contract will be made to the lowest and best bidder when all other requirements have been met and good faith efforts have been taken toward meeting the DBE goal, if required, in accordance with these requirements.

If the apparent low bidder has not achieved the contract DBE goal, the bidder shall respond in writing within three business days after notification by the Department of the failure to meet the DBE goal. The response shall provide evidence identifying the bidder's good faith efforts and all affirmative actions taken prior to letting to achieve the required DBE goal. Failure to respond within the three business day period will result in rejection of the bid, and may result in forfeiture of the bid bond, and the referral of the bidder to the Prequalification Committee.

Responses shall be sent to the Department's Division of Contract Administration. The Department will review the bidder's good faith efforts for compliance with these requirements.

If the Department determines that adequate good faith efforts have been made, and the bidder has met all other bidding requirements, the contract will be awarded.

If the Department determines that good faith efforts were inadequate, the Department will issue written notification of the determination to the bidder. The determination will outline the reasons for determination of non-compliance with good faith effort requirements.

The bidder may request a review of a determination of non-compliance by making a written submittal within five business days of the bidder's receipt of notification of non-compliance from the Department. The request for review shall include evidence disputing the Department's reasons for issuing a determination of non-compliance. The request shall be sent to the Department's Division of Contract Administration.

Upon receipt of a request, the Department will contact the bidder to schedule a review. The review will be held by the Department's Deputy Commissioner and Chief Counsel, or a designee who did not participate in the original determination of non-compliance. The review will be conducted in accordance with the Department's policy for review of good faith efforts requirements. A copy of the policy is available on the Department's website or through the Division of Contract Administration.

If the Deputy Commissioner's finding determines that the bidder's good faith efforts were adequate, and the bidder has met all other bidding requirements, the contract will be awarded and the Department will adjust the contract time by the number of calendar days from the date of the original determination of non-compliance to and including the date of the Deputy Commissioner's findings.

If the Deputy Commissioner's finding determines that the bidder's good faith efforts were inadequate, the finding will be forwarded to the Commissioner. The Commissioner will review the Deputy Commissioner's finding and issue a written Contract Award Determination.

If the Commissioner's Contract Award Determination finds that the bidder's good faith efforts were adequate, and the bidder has met all other bidding requirements, the contract will be awarded and the Department will adjust the contract time by the number of calendar days from the start of the original determination of non-compliance to and

including the date of the Commissioner's determination.

If the Commissioner's Contract Award Determination finds that the bidder's good faith efforts were inadequate, at the Commissioner's sole option and without further proceedings, either all bids will be rejected or the contract will be awarded to the next lowest and qualified bidder. An apparent low bidder who has not met the DBE goal and requirements for good faith efforts may be requested not to rebid on this contract during subsequent lettings.

The Commissioner's Contract Award Determination will be the final decision of the Department.

2. Good Faith Efforts for Extra Work

When extra work in accordance with 104.03 is added to a contract with a DBE goal, the Contractor shall hire or make good faith efforts to hire a DBE subcontractor to perform significant extra work.

For purposes of DBE good faith efforts, significant extra work is defined as new pay items added to a Contract that result in a new contracting opportunity not reasonably related to existing pay items being performed by the Contractor or a subcontractor.

When significant extra work related to existing pay items being performed by a DBE subcontractor is added to a contract with a DBE goal, the Contractor shall offer that same DBE subcontractor the opportunity to perform the extra work whether or not the existing pay items are counted toward the DBE goal. The Contractor shall consider other DBE subcontractors if the extra work would result in the original DBE subcontractor exceeding its prequalification limits. The Department may consider an exception to a DBE subcontractor's prequalification limit. If the DBE subcontractor is unable to perform the extra work, the Contractor shall hire or make good faith efforts to hire an alternate DBE subcontractor to perform the work.

When significant extra work related to existing pay items being performed by a non-DBE subcontractor is added to a contract with a DBE goal, the non-DBE subcontractor may perform the extra work. If the non-DBE subcontractor is unable to perform the extra work, the Contractor may self-perform the extra work. If the Contractor chooses not to self-perform the extra work, the Contractor shall hire or make good faith efforts to hire a DBE firm to perform the work.

When significant extra work related to existing pay items being performed by the Contractor is added to a contract with a DBE goal, the Contractor may self-perform the extra work. If the Contractor chooses not to self-perform the extra work, the Contractor shall hire or make good faith efforts to hire a DBE firm to perform the work.

The Contractor shall forward documentation of good faith efforts to hire a DBE subcontractor to perform extra work to the District Equal Employment Opportunity (EEO) Officer for review. The EEO Officer will determine if good faith efforts have been met in accordance with 103.01(e)1.

If the EEO Officer determines that the Contractor failed to make good faith efforts to hire a DBE firm when required as a result of significant extra work, written notice will be sent to the Contractor. The Contractor may appeal the determination in accordance with 103.01(e)1.

(f) Affirmative Action Certification

The Affirmative Action Certification, included in the Proposal book, shall be completed when the Proposal book is submitted to the Department. The certification shall list ~~DBEs or shall state the reasons DBEs are not listed~~ all DBE firms the Contractor plans to utilize, either race/gender consciously or race/gender neutrally. Blank certifications shall cause the bid to be rejected. If a portion of a pay item is to be performed by a DBE, an explanation shall be included stating exactly what the DBE is performing or supplying. Failure to do so may affect the award of the contract. *The Contractor shall ensure that DBE firms listed on the Affirmative Action Certification are certified DBE firms as listed in the Department's DBE directory at the time of letting. In addition to the listing of DBE firms that will be used race/gender consciously to meet the goal, the Contractor shall also provide a total for the amount of work that it anticipates will be performed by other DBE firms used race/gender neutrally on the contract beyond the goal requirements.*

Race/gender neutral awards involve the utilization of a DBE firm because the DBE firm is the best firm to perform the work. Race/gender conscious awards involve the utilization of a DBE firm primarily to achieve the contract DBE goal.

SECTION 103, BEGIN LINE 269, DELETE AND INSERT AS FOLLOWS:

Upon receipt of notification from the Department, a Disadvantaged Business Enterprise Utilization Affidavit, Form ~~MBE-3~~ DBE-3, shall be completed by the Contractor and returned to the Department. The Contractor and the subcontractor/lessor/supplier shall certify on Form ~~MBE-3~~ DBE-3 that specific amounts have been paid and received. *A DBE-3 Form certification shall be completed and submitted for every DBE utilized on the contract, not just those listed on the Affirmative Action Certification.*

SECTION 103, BEGIN LINE 285, DELETE AND INSERT AS FOLLOWS:

by the DBE, or leased from another DBE, that are utilized on the project. ~~DBE hauling lessors who sublease a portion of their hauling shall take positive affirmative actions to sublease to DBEs and shall provide Form MBE-2 to the Department, evidencing those efforts prior to commencing work.~~ Trucks that are leased by a DBE for a period of at least 12 months will be considered the same as trucks owned by the DBE. In addition, DBE credit will also be given for any fee or commission the DBE receives as a result of the lease arrangement for any additional non-DBE trucks.

In order to count leased trucks toward the goal, the lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from being used by others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE. The 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 the DBE goals.

The Contractor shall provide the Engineer copies of any lease agreements between DBE trucking subcontractors and any DBE or non-DBE trucking firms or owner/operators that will be used to supplement the DBE trucking subcontractor's trucks for the purpose of meeting the DBE goal. Copies of these lease agreements shall be provided by the time of use of any supplemental trucks on the Contract.

In addition to delivery ticket information required by Section 106, the following information shall be included on each ticket for material delivered to the job site by a DBE trucking subcontractor or lessee:

- 1. Name of trucking firm*
- 2. Printed name of the driver*

The Contractor shall submit weekly reports to the Engineer on forms provided by the Department, documenting the number of DBE trucks utilized and a breakdown of the dollar amount credited toward the Contract DBE goal. The reports shall be submitted within 5 business days of the end of the week being reported. Forms are available on the Department's website or from the Division of Contract Administration.

SECTION 103, BEGIN LINE 304, DELETE AND INSERT AS FOLLOWS:

(i) Records and Reports

The Contractor shall keep such records as necessary to determine compliance with its DBE utilization obligations and compliance with Determination of Good Faith Efforts ~~for Goal Contracts~~. The records kept by the Contractor shall indicate the minimum requirements as follows:

SECTION 103, AFTER LINE 341, INSERT AS FOLLOWS:

103.02.1 Record Keeping

All firms performing work on Department contracts, bidding on Department contracts, or offering quotes for subcontract or trucking services shall register with the Department, annually, by submitting the following information to the Department's Economic Opportunity Division.

- (a) firm's name;*
- (b) firm's address;*
- (c) firm's status as a DBE or non-DBE;*
- (d) the age of the firm; and*
- (e) the annual gross receipts of the firm*
- (f) approximately how many Department projects has the firm bid or quoted in the past 12 months. (If none, please indicate 0)*
- (g) in which of the following markets has the firm participated?*
 - 1. prime Contractor*
 - 2. subcontractor*
 - 3. trucking firm*
 - 4. consultant*

SECTION 109, AFTER LINE 783, INSERT AS FOLLOWS:

Within 10 business days of receipt of payment for any such estimate, the Contractor shall make payment to all subcontractors for the value of their work performed and materials complete in place in accordance with this contract. Failure to comply with this clause shall constitute a material breach of the contract and may result in sanctions under the contract.

Any delay or postponement of payment among the parties may take place only for good cause, with the Department's written approval. The explanation from the Contractor shall be made in writing to the Department.
