

## 103-C-244 DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

*(Revised 04-21-16)*

The Standard Specifications are revised as follows:

SECTION 103, BEGIN LINE 3, DELETE AND INSERT AS FOLLOWS:

**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 26, as outlined in the Department's DBE Program Manual, shall constitute a breach of contract and, after notification, may result in 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 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 26, as outlined in the Department's DBE Program Manual, apply to this contract.
2. The Contractor shall not discriminate on the basis of race, color, national origin, ~~or religion~~, sex, *sexual orientation or gender identity* 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, *which may include, but is not limited to: withholding progress payments; assessing sanctions; liquidated damages; and/or disqualifying the Contractor from future bidding as non-responsible.* The Contractor shall include language prohibiting discrimination on the basis of race, color, national origin, ~~or religion~~, sex, *sexual orientation or gender identity* in the performance of this contract in all subcontracts.

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

~~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.~~

*The Contractor shall not terminate or reduce a commitment to a DBE, or an approved substitute DBE firm, that was listed on the Affirmative Action Certification without the prior written consent of the Department. This includes, but is not limited to, instances in which the 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. Unless the Department provides written consent, the Contractor shall not be entitled to any payment for work or materials unless it is performed or supplied by the listed DBE.*

*Written consent will only be provided by the Department if the Contractor has good cause to terminate or reduce its commitment to the DBE firm. Good cause shall consist of any of the following circumstances:*

- 1) The listed DBE subcontractor fails or refuses to execute a written contract.*
- 2) The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a manner consistent with normal industry standards, unless such failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the Contractor.*
- 3) The listed DBE subcontractor fails or refuses to meet the Contractor's reasonable, nondiscriminatory bond requirements.*
- 4) The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness.*

- 5) *The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to 2 CFR Parts 180, 215 and 1200 or applicable state law.*
- 6) *The Department has determined that the listed DBE subcontractor is not a responsible contractor.*
- 7) *The listed DBE subcontractor voluntarily withdraws from the project and provides the Department written notice of its withdrawal.*
- 8) *The listed DBE is ineligible to receive DBE credit for the type of work required.*
- 9) *A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract.*
- 10) *Other documented good causes, that the Department will determine, which compels the termination of the DBE subcontractor. Good cause does not exist, however, if the Contractor seeks to terminate a DBE it relied upon to obtain the contract so that it can self-perform the work for which the DBE contractor was engaged or so that the Contractor can substitute another DBE or non-DBE contractor after the contract has been awarded.*

*Before transmitting to the Department its request to terminate or reduce a commitment made to a listed DBE, the Contractor shall give written notice to the affected DBE, with a copy to the Department, of its intent to request termination or reduction and the reasons for the request. The DBE shall be given five days to respond to the Contractor and the Department of the reasons, if any, why it objects to the proposed termination or reduction, and why the Department should not approve the Contractor's action. If required in a particular case, as a matter of public necessity and safety, the Department may specify a response period shorter than five days.*

*When a DBE subcontractor is terminated as specified herein or fails to complete its work on the contract for any reason, the Department will require the Contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. 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 DBE that was terminated, to the extent needed to meet the contract goal the Department established for the contract.*

*In order to receive DBE credit for commitments made as part of the prime contract award process, a DBE firm shall be certified before the due date for bids on the prime contract. There may be situations after the award of the prime contract in which it is appropriate to count DBE credit for the use of a DBE firm. To be eligible to obtain DBE credit in these situations, the DBE firm shall be certified prior to participation on the contract.*

If a non-DBE contractor joint ventures with a DBE contractor, the portion of the joint venture which is performed by a DBE may be utilized to achieve the DBE goal. Two types of DBE joint ventures are allowed and are defined as follows:

SECTION 108, BEGIN LINE 102, INSERT AS FOLLOWS:

During the progress of the work, the Engineer shall be notified at least 24 h in advance of undertaking construction operations. *This advance notification shall also apply anytime a DBE is scheduled to work on a project or deliver material or supplies to a project site.*

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