

SDDOT CONSTRUCTION MANUAL  
PROJECT MANAGEMENT SECTION  
**CHAPTER 5 – DISADVANTAGED BUSINESS ENTERPRISE (DBE)**

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## **REGULATION AND AUTHORITY**

Federal regulation 49 CFR Part 26 requires that all Departments of Transportation implement a disadvantaged business enterprise (DBE) program. The program is designed to prohibit discrimination in the award and performance of federal-aid contracts. DBE is a federal requirement and does not apply to state funded projects.

## **ANNUAL DBE GOAL**

The DOT sets a triennial DBE goal for the upcoming fiscal year beginning October 1 and ending September 30. It is based on a formula using the number of prime and subcontractors bidding on federal-aid DOT work, and past DBE participation. Individual contract goals are assigned to contracts as needed to meet the annual goal by the end of the fiscal year.

## **ASSIGNING DBE CONTRACT GOALS**

The DOT Bid Letting Office assigns DBE goals to contracts. Contracts are let with or without goals, as needed, taking into account the type of work, location and potential for subcontracting to DBEs. Advertising a contract without a goal is called “race-neutral.” Proposals without DBE contract goals include form DOT-289R/N (race-neutral). Advertising a contract with a DBE goal is called “race-conscious,” and proposals for those contracts include form DOT-289R/C (race-conscious).

## **DOT-289R/N AND DOT-289R/C FORMS**

These two forms are the contractor’s commitment to use DBEs and are submitted with their bid. Having two different forms (one with a DBE goal and one without) can be confusing. The process was developed for bid letting purposes, and for counting and reporting DBE utilization to Federal Highway Administration (FHWA).

## **PRECONSTRUCTION MEETINGS**

During the preconstruction meeting the Project Engineer is to review the DBEs listed on the DOT-289R/N or DOT-289R/C. The “*Preconstruction Meetings Guidelines*” provide an outline of what is to be covered during the meeting relative to DBE utilization.

## **MONITORING DBEs ON THE PROJECT**

It is very important that the Project Engineer monitor the work committed to DBEs to ensure that the DBE actually performs the work reported on DOT-289R/N or DOT-289R/C. DBEs must perform a “commercially useful function” of “CUF”, which means that they must perform, manage and supervise the work themselves.

The CUF must be checked at least once per project but can be documented more frequently. The Project Engineer must document this in the CM&P system. To do so, go into the WPR section and then the Contract Day worked tab. You will see a column labeled CUF with an open checkbox next to any DBE's that are listed on the project.

### Bi-Weekly Progress

Bi-Weekly Progress Reports		Phases / Other Interim Requirements		Work Exclusion Periods		A + B Incentive/Disincentive		Lane Rental	
Add Delete		Details		Comments		Work In Progress		Weather	
						Substantial Completion Day Count		Field	
14	Begun								
13	Approved								
12	Approved								
11	Approved								
10	Approved								
9	Approved								
8	Approved								
7	Approved								
6	Approved								
5	Approved								
4	Approved								
3	Approved								
2	Approved								
1	Approved								

  

Contract Day	Day Count Qty	Work/Calendar	Overrun	Days Counted To Date		Overrun Days To Date	
				Work	Calendar	Work	Calendar
08/09/2020	0.0	Work	<input type="checkbox"/>	0.00	0.00	0.00	0.00
08/10/2020	0.0	Work	<input type="checkbox"/>	0.00	0.00	0.00	0.00
08/11/2020	0.0	Work	<input type="checkbox"/>	0.00	0.00	0.00	0.00
08/12/2020	0.0	Work	<input type="checkbox"/>	0.00	0.00	0.00	0.00
08/13/2020	0.0	Work	<input type="checkbox"/>	0.00	0.00	0.00	0.00
08/14/2020	0.0	Work	<input type="checkbox"/>	0.00	0.00	0.00	0.00
08/15/2020	0.0	Work	<input type="checkbox"/>	0.00	0.00	0.00	0.00
08/16/2020	0.0	Work	<input type="checkbox"/>	0.00	0.00	0.00	0.00
08/17/2020	0.0	Work	<input type="checkbox"/>	0.00	0.00	0.00	0.00
<b>Period Totals</b>		<b>0</b>					

  

Name	Worked	Exempt	CUF
Border States Paving, Inc.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Dakota Traffic Services, LLC	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Loiseau Construction, Inc.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Traffic Services Company, LLC	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Word Reclamation and Fencing, Inc.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

You will want to mark that box and also make a brief comment on what work you witnessed the DBE doing in the Work In Progress tab.

### Bi-Weekly Progress

Bi-Weekly Progress Reports		Phases / Other Interim Requirements		Work Exclusion Periods	
Add Delete		Details		Comments	
		Work In Progress		Weather	
14	Begun				
13	Approved				
12	Approved				
11	Approved				
10	Approved				
9	Approved				
8	Approved				
7	Approved				
6	Approved				
5	Approved				
4	Approved				
3	Approved				

  

**Work in Progress this Period**

Border States Paving, Inc.  
 Completed 1" leveling lift sta.371+00 to 1140+00  
 Placing 1 of 2 1 3/4" lifts sta. 371+00 to 1140+00  
 Placing 2 1/2" lift sta.371+00 to 1+00

Traffic Services Company, LLC  
 Placing temporary stripe on paved surface.

Violations of the commercially useful function requirement can occur when the work is committed to a DBE, but all or a portion is performed by the contractor or a non-DBE subcontractor. It may be a contrived arrangement between the contractor and DBE, or a DBE and a non-DBE subcontractor, where the DBE is a willing participant in an unacceptable scheme. Violations may also occur when the DBE is not a knowing participant in a scheme, but has been prevented from doing the work by the contractor.

Things to watch for which may indicate that the DBE is not performing a commercially function are:

- Equipment is owned by another company
- Employees work for another company, either the contractor or another subcontractor
- Foreman works for another company, either the contractor or another subcontractor
- The contractor or another subcontractor is doing the work committed to the DBE

Consequences for violations of commercially useful function requirements are covered in the DBE Special Provision and can include liquidated damages, suspension of bidding privileges, debarment, withholding progress payments, and referral for criminal prosecution, and for the DBE, potential loss of their DBE certification.

If you observe or suspect that a DBE listed on the DOT-289R/C or DOT-289R/N is not doing the work as indicated you should:

Inform the Prime Contractor that the DBE must perform the work unless they obtain prior approval in advance from the DOT DBE Compliance officer; and

Contact the DOT DBE Compliance Officer if it appears that the work committed to the DBE is or may be performed by another firm.

It is desirable to detect and correct a violation as soon as possible so that the DBE can perform the work committed. Imposing liquidated damages after the fact affects the contractor but does nothing to help the DBE.

## **DBE TRUCKING**

Only hauling performed with DBE trucks counts toward the commitment. This includes trucks owned by a DBE and any additional trucks used on that project and leased from other DBEs. DBE trucking can be difficult to monitor because it is permissible for the DBE reported on the DOT-289R/N or DOT-289R/C to use non-DBE trucks. However, any hauling performed by a non-DBE cannot count toward the DBE commitment. The amount of money committed to DBEs on the DOT-289R/N or DOT-289R/C must be handled with DBE trucks only. Suspected contrived arrangements may be audited during or following completion of the contract to ensure that the committed amount was paid to and retained by DBE trucking firms rather than passed through to non-DBEs.

Contact the DOT DBE Compliance Officer immediately if you suspect any violations. Do not hesitate to question the DBE trucking company on if the trucks used are being counted toward DBE participation.

## **DBE PERFORMANCE ISSUES**

DBEs with performance problems are to be treated the same as any other contractor or subcontractor. There is a perception that DBEs must be used regardless of their performance. The only difference is that prior to replacing a DBE, the contractor must first obtain prior approval from the DOT DBE Compliance Officer. The contractor has an obligation to replace the DBE with another DBE whenever possible. The reason for this extra step is to ensure that replacement is due to performance or scheduling problems, and to prevent the contractor from treating the DBE unfairly.

If you encounter performance or scheduling problems with a DBE where a replacement may be necessary, inform the contractor to contact the DOT DBE Compliance Officer. It is a disservice to the contractor, the DOT and the DBE Program to ignore or accept performance problems of DBEs.

## **DOT-289 – CERTIFICATION OF DBE PAYMENTS**

The DOT-289 is prepared by the contractor to report payments made to DBEs. The Contractor is required to report payments to DBEs twice a year from the date of the Notice to Proceed until the date of the Acceptance of Field Work. Reporting periods and deadlines for payment reporting submittals will be in accordance with the DBE Special Provision.

Occasionally, an Area Office will have trouble obtaining a DOT-289 from the contractor. Reminding the contractor that they will not receive their final payment until its receipt is generally enough incentive to obtain the form. However, in a case where the contractor owes the DOT money, additional persuasion may be required. Notifying the contractor that you will inform their bonding company of their failure to comply with all contract provisions has been an effective method of obtaining the form.

The Project Engineer should review the DOT-289 prior to submittal to the DOT DBE Compliance Officer for obvious discrepancies such as:

- A payment to a DBE that you know did not perform on that contract.
- A payment considerably larger than possible for the work they performed.

The Project Engineer must also sign the bottom portion of the DOT-289 form ensuring the DBE performed a commercially useful function.

Keep one copy of the DOT-289 in the permanent project file, and send one copy the DOT DBE Compliance Officer.

If the contractor's payment to the DBE is less than 90% of the commitment, they must provide a written explanation and submit it with the DOT-289. If a good and sufficient reason for under-payment such as quantity under-runs or project changes is not provided, liquidated damages may be applied.

You may either provide the contractor with a DOT-289 form at the preconstruction meeting, or the contractor can download the form from the DOT website, which is located at <https://dot.sd.gov/inside-sddot/forms-publications/forms>.

**DOES THE CONTRACT REQUIRE A DOT-289?**

There can be confusion over when a DOT-289 is required. A DOT-289 is required any time there is a DBE subcontractor, supplier, or trucking company is working on a project that has federal funds on it.

You can check the DOT-289R/C or DOT-289R/N forms or you can look on CM&P. In CM&P you first click on “Reports” then click on the “Manage Contracts” dropdown and then you need to click on “Print Contractors and Subcontractors”. As shown below you can see the Prime Contractor and all subcontractors, and whether they are a DBE or not.

10/06/2020

**South Dakota Department of Transportation**

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Contractors

Main PCN 05ED Project P 0183(26)39

<b>Prime Contractor</b>		<b>Vendor Nbr</b>	<b>DBE</b>
Border States Paving, Inc. P.O. Box 2586	Fargo	12027316	N

**Subcontractors**

		<b>Sublet Pct</b>	<b>DBE</b>
Loiseau Construction, Inc. 1002 W. Elm Ave.	Flandreau	12.31%	N
Traffic Services Company, LLC 11740 JB Road	Black Hawk	1.36%	Y
Aaron Swan & Associates P.O. Box 206	Pierre	0.81%	N
Word Reclamation and Fencing, Inc. 20490 Bison Place	Pierre	0.63%	Y
Brosz Engineering, Inc. P.O. Box 23	Pierre	0.59%	N
ASTECH Corp. P.O. Box 1025	St. Cloud	0.52%	N
Dakota Traffic Services, LLC P.O. Box 789	Tea	0.25%	N

If you are still unsure if you need a DOT-289 or if there are any DBE suppliers or trucking companies on the project you can contact the DBE Compliance Officer.

**LIQUIDATED DAMAGES FOR FAILURE TO PROPERLY UTILIZE DBES**

If a contractor fails to use a DBE as indicated on DOT-289R/N or DOT-289R/C, actual payments are reviewed by the DOT DBE Compliance Officer to determine if payments are in conformity with the DBE Special Provision. For actual withholding, refer to Chapter 7 – Liquidated Damages.

## **DBE DIRECTORY**

The DBE Directory is updated about once a month. You can access it on the DOT website at <https://dot.sd.gov/doing-business/contractors/dbe>.

**STATE OF SOUTH DAKOTA**  
**II. DEPARTMENT OF TRANSPORTATION**

**SPECIAL PROVISION**  
**FOR**  
**DISADVANTAGED BUSINESS ENTERPRISE**

**AUGUST 14, 2018**

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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 the termination of this contract or such other remedy as the Department deems appropriate.

**I. Definitions**

- A. Specified Goal:** A DBE participation goal for a contract as indicated by a specific numerical percentage of the total dollar amount of the contract in the bidding documents.
- B. Not Specified:** No specific DBE participation goal is specified for a contract.
- C. Disadvantaged Business Enterprise (DBE):** A for-profit small business that is certified by the Department and is listed in the DBE Directory available on the Department's web site.
- D. Good Faith Effort (GFE):** Efforts to achieve a DBE goal which; by their scope, intensity, and appropriateness to the objective; can reasonably be expected to meet the objective of the Department's DBE program pursuant to 49 CFR 26.1.
- E. Positive Contact:** Communication between the bidder and the DBE in which the bidder receives an oral or written response from the DBE stating the DBE's intention to quote or not quote a project.

F. Commitment: The dollar amount of work to be subcontracted to DBEs, according to the bidder's bid. The commitment may be compared to the dollar amount of all contract items in the bidder's bid and expressed as a percentage of the total bid amount.

## II. Bidding Requirements

A bidder must not discriminate on the basis of race, color, national origin, or sex in the solicitation or award to subcontractors and material suppliers. Bidders who demonstrate a pattern of possible discrimination through consistent and repeated under-utilization of DBEs may be subject to investigation and sanctions allowed by regulation, administrative rule, or law.

The Bidder's failure to carry out the requirements of this special provision will be treated as a non-responsive bid.

On contracts that specify a specific DBE contract participation goal, all bidders must include their DBE commitment for the contract in the bidding files provided by the Department.

If the contract indicates "Not Specified," all bidders are encouraged to include their anticipated DBE utilization for the contract in the bidding files provided by the Department.

Each bidder must submit a list of all subcontractors and suppliers (DBEs and non-DBEs) the bidder received quotes from for that contract with the bid files.

A Contractor must make reasonable efforts to provide opportunities for DBEs to participate on Federal-aid contracts throughout the life of the contract.

On contracts let with a specified DBE contract participation goal, where the low bidder has not met or exceeded that goal, upon request from the Department all bidders who did not meet or exceed the goal must provide GFE documentation as indicated in Section III of this special provision.

When the DBE participation is "Not Specified" on a contract, each bidder is encouraged to use DBE Contractors; however no bidder will be required to furnish GFE documentation.

Bidders must submit GFE documentation, when requested by the Department, within 2 business days from the date bidders are contacted by the Department. Section III of this special provision provides information on the types of action bidders should make as part of their GFE to obtain DBE participation. Bidders

may submit documentation with the bidding files provided all pertinent information is included. Bidders must submit any missing documentation within 2 business days from the date the Department contacts the bidder. If the bidder fails to comply with this requirement, the Department will consider the bid proposal irregular and may reject the bid proposal.

If the apparent low bidder does not provide documentation showing GFE as required by this special provision, the Department will consider that bid nonresponsive and may either award the contract to the next lowest responsible bidder with a responsive bid, or reject all bids. Subsequent to the DBE committee's decision that the apparent low bidder's efforts do not establish GFE, the apparent low bidder will be notified that the bid is not responsive. The apparent low bidder will have 2 business days from the date of notification to contact the Bid Letting Engineer to arrange a meeting with the Department Secretary, or the Secretary's designee, to present documentation and argument about why the bid should not be rejected. The Department Secretary or the Secretary's designee will issue a written decision on responsiveness of the bid within 2 business days after the meeting.

If the apparent low bid is rejected for failure to meet the GFE or other requirements, the next apparent low bidder's GFE will be reviewed, unless all bids are rejected. Unless all bids are rejected, award of the contract will be made to the lowest bidder with a responsive bid.

The lowest responsive bidder will be required to complete form DOT-289B, as included in the contract documents, when the contract is sent for signature. This form requires a signature from each DBE identified in the low bidder's DBE commitment. A separate form will be supplied for each DBE and will be included in the contract documents.

Bidders are encouraged to assist interested DBEs in obtaining bonding, lines of credit, insurance, necessary equipment, supplies, materials, or other related services.

### **III. Good Faith Efforts**

If a GFE package is requested on a contract with a specified goal, the bidders must submit documentation showing compliance with the following requirements:

- A.** The bidders will submit a contact log of all solicitation efforts including:
- Name of the DBE firm
  - Name and phone number of the individual with whom contact was made

- Date, time, and manner of each and every contact (by phone, in person, fax, mail, e-mail, etc.)
- The DBE's response to the solicitation
- Result of the solicitation effort

An example of a solicitation log is available on the Department's Bid Letting website. When bidding utilizing the South Dakota Department of Transportation Electronic Bid System (SDEBS), SDEBS may be used to document the log of solicitation efforts for the project.

**B.** The bidders will also submit documentation that shows GFE in relation to the following requirements:

1. The bidder must select contract work items to encourage DBE participation. This includes breaking out contract work items into economically feasible units to facilitate DBE participation, even when the bidder might otherwise prefer to perform these work items with its own forces.
2. The bidder must solicit all certified DBEs that are listed in the appropriate work classifications in the DBE directory and that have indicated in the directory they are willing to work in the project's geographic area. Without exception, all DBEs who are listed on the plan holders list by 10 AM central time 7 calendar days prior to the bid letting must be solicited in accordance with Section III.B.3 of this special provision. If the bidder has not solicited any DBE meeting these requirements, the bidder will provide a detailed written explanation showing why the DBE was not solicited.
3. To provide adequate time for the DBE to respond with a quote in the normal course of business, the bidder must make the initial solicitation at least 6 calendar days by mail or 5 calendar days by phone, fax, or e-mail prior to the letting date. Without exception, all DBEs who are listed on the plan holders list by 10 AM central time 7 calendar days prior to the bid letting must be solicited.
4. If the bidder does not receive a positive contact from a DBE, the bidder must follow up the initial solicitation with a second solicitation by phone, fax, or e-mail to determine whether the DBE is interested in quoting. The bidder must make this second solicitation at least 2 business days prior to the letting.

5. The bidder will provide interested DBEs with adequate and timely information about plans, specifications, and requirements of the contract to assist DBEs in responding to a solicitation.
  6. If a bidder rejects a DBE quote because of previous problems with a particular DBE, the bidder must prepare a detailed written explanation of the problem. Additional cost involved in finding and using DBEs is not, in itself, sufficient reason for a bidder to reject a quote. A bidder must not reject a DBE as being unqualified without sound reasons based on a thorough investigation of the DBE's capabilities.
  7. Any additional information requested by the Department.
- C. The bidder must consider qualified DBEs whose quotes are reasonably competitive. If the bidder rejects any quote because it is considered not to be "reasonably competitive," the bidder must provide copies of all DBE and non-DBE quotes, and a work item price spreadsheet comparing DBE quotes to non-DBE quotes. The spreadsheet must show which quote was included in the bid for the work items being compared. The ability or desire of a bidder to perform the work with its own forces does not relieve the bidder of the responsibility to make GFE. In the event a bidder elects to use its own forces over a DBE, the bidder must include, on the spreadsheet, documentation of the costs of using the bidder's own forces. This can be shown in a number of ways, which may include submitting portions of the bidder's work sheets used to prepare the bid.
- D. The bidder must explain why the specified goal could not be met.
- E. The bidder must identify any additional efforts the bidder made to secure DBE participation.

#### **IV. Counting DBE Participation**

On projects with a specified goal, the contract commitment, as submitted with the bid, will be documented on form DOT-289R/C as included in the contract documents.

If the project is shown as "Not Specified," the anticipated DBE utilization, as submitted with the bid, will be documented on form DOT-289 R/N – DBE Utilization Form, as included in the contract documents. The DBE utilization shown on this form is not a commitment to use the DBE. This information will be used by the Department to track anticipated DBE usage.

Only the portion of a contract performed by the DBE's own forces will count toward DBE participation. Included is the cost of supplies and materials obtained

by the DBE for the contract, including supplies purchased or equipment leased by the DBE. Supplies and equipment the DBE subcontractor purchased or leased from the Contractor or its affiliate is not allowed to be included.

When a DBE performs as a participant in an approved joint venture, only the portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces will count toward DBE participation.

A bidder may count toward its DBE participation only that percentage of expenditures to DBEs that perform a commercially useful function (CUF) in the performance of a contract. A DBE performs a CUF when the DBE is responsible for execution of the work of a contract and is carrying out the DBE's responsibilities by actually performing, managing and supervising the work involved. To perform a CUF, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating prices, determining quality and quantity, ordering and installing (where applicable) the materials, and paying for the material itself. To determine whether a DBE is performing a CUF, the Department will evaluate the amount of work subcontracted, the industry practice, and whether the amount the DBE is to be paid is commensurate with the work it is actually performing, DBE credit claimed for performance of the work, and other relevant factors.

A DBE is not performing a CUF if the DBE performs less than 30% of the total cost of its contract with its own work force, or if its role is limited to that of an extra participant in a transaction, project, or contract through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is simply an extra participant, the Department will examine similar transactions, particularly those in which DBEs do not participate.

DBE participation will be counted for trucking services as follows:

The bidder/Contractor will receive credit toward DBE participation for the total value of the transportation services the DBE provides on the contract using trucks the DBE owns, insures, and operates and which are driven by drivers the DBE employs.

A DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. When a DBE leases trucks from another DBE, the bidder/Contractor can count the total value of the transportation services the lessee DBE provides on the contract toward DBE participation.

The DBE may also lease trucks from a non-DBE firm, including an owner-operator. When a DBE leases trucks from a non-DBE, the bidder/Contractor can count toward DBE participation only the fee or commission the DBE

receives as a result of the lease arrangement. The bidder/Contractor does not receive credit toward DBE participation for the total value of the transportation services, since all services are not provided by a DBE.

The bidder may count toward DBE participation expenditures to DBE firms for materials, supplies, or services as follows:

If the materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies toward DBE participation. A manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of general character described by the specifications.

If the materials or supplies are purchased from a DBE regular dealer, count 60% of the cost of the materials or supplies toward DBE participation. 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 are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

If the materials or supplies are purchased from a DBE which is neither a manufacturer nor a regular dealer, count only the amount of fee or commission charged for assistance in the procurement of the materials or supplies or fee or transportation charges for the delivery of materials or supplies required at the job site toward DBE participation. In order to be counted, the Department must determine the fee to be reasonable and not excessive as compared to fees customarily allowed for similar services. The cost of the materials and supplies themselves will not count toward DBE goals.

The Department will not count toward DBE participation materials or services provided by a DBE who is not currently certified prior to and including the date of the Notice of Award. Additionally, the Department will not count toward DBE participation materials or services provided by a DBE who loses certification at any time after the date of the Notice of Award except in the case of a DBE whose ineligibility is cause solely by having exceeded the size standard.

No intended or actual subcontracting arrangement which is contrived to artificially inflate DBE participation is allowed. This includes, but is not limited to, DBE middlemen which serve no commercially useful function, or arrangements where a DBE is acting essentially as a broker of goods or services, but has been counted as a manufacturer, regular dealer, or subcontractor.

The Department will review and monitor projects for compliance with the bidder's intended DBE participation. Failure by the Contractor to fulfill the contract commitment constitutes a breach of contract. The Department may also investigate the form and substance of particular business arrangements between and among DBE and Contractors with regard to specific contracts. If, as a result of an investigation, the Department determines a particular business arrangement is not allowable, the dollar amount of the unallowable DBE participation will be subtracted from the Contractor's DBE participation on that project. The Contractor will be notified if the apparent DBE participation is not adequate to meet the DBE participation stated on the form DOT-289R/C. The Contractor will be directed to seek additional participation from other DBEs to meet the unallowable portion on that contract.

All Contractors and DBEs shall cooperate fully and promptly with the Department in compliance reviews, investigations, and other requests for information. If the Department determines a Contractor was a knowing and willing participant in an unallowable business arrangement, or in the event of repeated violations, falsification, or misrepresentation, the Department will impose sanctions. Sanctions may include, but are not limited to one or more of the following:

- Assessment of liquidated damages as stated in Section VII of this special provision
- Suspension of bidding privileges or debarment
- Withholding progress payments
- Securing additional DBE participation on future Federal-aid contracts sufficient to make up for the DBE participation found to be unallowable
- Referral of the matter for criminal prosecution

## **V. Joint Checks to DBEs**

A joint check is a check issued by a Prime Contractor to a DBE subcontractor and to a material supplier or another third party for items or services to be incorporated into a project. For a Prime Contractor to receive DBE credit, the DBE must perform a commercially useful function and be responsible for negotiating price, determining quality and quantity, ordering materials and installing (where applicable) and paying for materials.

To ensure that the DBE is independent of the Prime Contractor and in compliance with the regulation, use of joint checks will be reviewed and allowed only under following conditions:

- Issued for valid reasons only, not simply for the convenience of the Prime Contractor
- Used for a specific contract or specific time frame and not long-term or open ended

- Payment is made to the DBE and not directly to the supplier
- Requested and received prior written approval from the DBE Compliance Officer.

The request must include the following:

- Name of the DBE
- The DOT contract number(s)
- The DOT PCN number(s)
- The work the DBE will be performing on each contract
- Name of the supplier(s) used by the DBE
- The specific reason(s) for issuing joint checks

The Department will review the request and verify the circumstances indicated in the request with the DBE. A copy of the request and approval will be provided to the Prime Contractor and the DBE.

## **VI. Certification of DBE Performance and Payments**

Within 30 calendar days of the date of the Acceptance of Field Work the Contractor is required to submit form DOT-289 (Certification of DBE Performance and Payments), listing all DBEs that participated in the contract, and the total dollar amount paid (and anticipated to be paid) to each. DBE attainments are compared to commitments on form DOT-289R/C and any payments less than 90% of that commitment, without proper justification and documentation, will have liquidated damages assessed against the contract. The Contractor's final payment is not released until receipt of the form DOT-289.

Contractors are required to maintain a running tally of payments to DBEs. For reports of payments not being made in accordance with the prompt payment provision, alleged discrimination against a DBE or other similar complaint, the tally may be requested for review by the Department. The Department may perform audits of contract payments to DBEs to ensure that the amounts paid were as reported on the form DOT-289. All Contractors participating in Federal-aid contracts are expected cooperate fully and promptly with the Department in compliance reviews, investigations and other requests for information regarding payments to DBEs. Their failure to do so is grounds for appropriate sanctions or action against the Contractor.

The Department will monitor the running tally on a program basis and if reporting issues are identified, additional reporting requirements may be implemented.

The Contractor is required to report payments to DBEs twice a year from the date of the Notice to Proceed until the date of the Acceptance of Field Work.

Reporting periods and deadlines for payment reporting submittals will be in accordance with the following:

<b>Reporting Period:</b>	<b>Reporting Deadline:</b>
October 1 to March 31	April 30
April 1 to September 30	October 31

For each reporting period, the Contractor is required to submit form DOT-289 listing all DBEs that participated in the contract, the payments to DBEs for that reporting period, and the total dollar amount paid to each DBE. For each reporting period after the Notice to Proceed, the Contractor will mark the form DOT-289 as “On-Going” when reporting payments to DBEs prior to the Date of the Acceptance of Field Work. Within 30 calendar days of the date of the Acceptance of Field Work and all DBE payments have been made, the Contractor is required to submit form DOT-289 and the Contractor will mark the form DOT-289 as “Final”.

Each form DOT-289 must be provided to the Engineer by the reporting deadline stated above.

DBE payment are compared to commitment on form DOT-289R/C and any payment less than 90% of that commitment, without proper justification and documentation, will result in the Department assessing liquidated damages against the contract. The Contractor’s final payment will not be released until receipt of the form DOT-289 marked “Final”.

## **VII. Liquidated Damages**

**A.** If the Contractor does not meet its contract commitment documented on form DOT-289 R/C, the Department will assess liquidated damages according to the following schedule:

1. For the first \$1,000 DBE deficiency, 100% of the deficiency.
2. For the next \$9,000 DBE deficiency, 50% of the deficiency.
3. For the next \$10,000 DBE deficiency, 25% of the deficiency.
4. For any remaining DBE deficiency in excess of \$20,000, 10% of the deficiency.

This liquidated damage provision will not be applicable where actual payment to a DBE is within 90% of the commitment or where there are good and sufficient reasons, properly documented, for the deficiency such as quantity under-runs, project changes, or other unexpected occurrences.

- B.** If a Contractor finds it impossible, for reasons beyond its control, to meet the contract commitment on form DOT-289R/C, the Contractor may, at any time prior to completion of the project, provide a written request to the DBE Compliance Officer for a complete or partial waiver of liquidated damages. No request for a waiver will be accepted after Acceptance of Field Work has been issued.

### **VIII. Termination or Substitution of a DBE**

The Contractor will not be allowed to terminate or substitute a DBE without the Department's prior verbal consent followed by written approval. This includes, but is not limited to, instances in where the Contractor desires to perform work originally committed to a DBE with its own forces, with an affiliated company, with a non-DBE, or with another DBE. Department approval is required when the contract contains a "specified goal" on form DOT-289R/C and the DBE to be terminated or substituted is listed as a commitment on the form DOT-289R/C.

The Department will provide written consent only if the Department agrees the Contractor has good cause to terminate the DBE listed on the form DOT-289R/C. Good cause includes the following:

- The DBE fails or refuses to execute a written contract
- The DBE fails or refuses to perform the work of the DBE subcontract in a manner consistent with normal industry standards or Department specifications unless the failure or refusal by the DBE is a result of unfair or discriminatory actions by the Contractor
- The DBE fails or refuses to meet the Contractor's reasonable nondiscriminatory bond requirements
- The DBE becomes bankrupt, insolvent, or exhibits credit unworthiness
- The DBE is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to 2 CFR Parts 180, 215, and 1,200 or applicable state law
- The Department has determined that the DBE is not a responsible Contractor
- The DBE voluntarily withdraws from the project and provided the Department with a written notice of withdrawal
- The DBE is found to be ineligible to receive DBE credit for the type of work required
- A DBE owner dies or becomes disabled with the result that the DBE is unable to complete its work on the contract
- Other documented good cause that the Department determines to substantiate the termination of the DBE.

Good cause does not exist if the Contractor seeks to terminate a DBE so the Contractor can self-perform the work for which the DBE was committed, or so the Contractor can substitute another DBE or non-DBE Contractor after the contract award.

Before submitting a request to terminate or substitute a DBE to the Department, the Contractor must first provide written notice to the DBE, with a copy of the notice to the DBE Compliance Officer, of the Contractor's intent to request to terminate or substitute, and the reason for the request.

The Contractor must give the DBE 5 calendar days to respond to the notice and advise the Department and the Contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why the Department should not approve the Contractor's action. If required in a particular case as a matter of public necessity (e.g. safety), the Department may provide a response period shorter than 5 calendar days.

When a DBE is terminated or fails to complete its work on the contract for any reason, the Contractor must make good faith efforts to replace the committed DBE with another DBE. The Contractor must make efforts to find another DBE to perform the same amount of work under the contract as the DBE that was terminated. The letter to the Department requesting termination or substitution must include the name of the DBE and dollar amount of the replacement DBE. If the Contractor is unable to find another DBE, the Contractor must provide the names of the DBEs it contacted and reason why they were unable to use those DBEs.

If the Contractor does not utilize or pay DBEs as required, liquidated damages will be assessed as specified in Section VII of this special provision. In addition, if the Contractor is found to have knowingly and willingly attempted to circumvent the DBE contract provisions, the Department will not make payment for the work that was originally committed to a DBE and the Department may impose sanctions referred to in Section IV of this special provision.

The Contractor does not need Department approval to terminate or substitute a DBE under the following circumstances:

- The DBE is being used on a contract with a "Specified Goal" however the DBE was not listed as a DBE commitment on form DOT-289R/C.
- The DBE was listed as a commitment on a "Not Specified" DBE goal contract on form DOT-289R/N.

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