

**DISADVANTAGED BUSINESS ENTERPRISE
(DBE)**

CONTRACTORS' TOOL KIT

ENDORSED BY:

**ASSOCIATED GENERAL CONTRACTORS OF AMERICA
NATIONAL ASSOCIATION OF MINORITY CONTRACTORS
WOMEN 1st**

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TOOLKIT
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I. INTRODUCTION

Since the late 1970's, federal, State and local governments have established programs designed to maximize opportunities for firms owned by minorities, women and disadvantaged individuals to compete for and perform contracts. The United States Department of Transportation ("USDOT") issued revised regulations in February 1999 regarding the participation by Disadvantaged Business Enterprises ("DBE") in USDOT financial assistance programs. After the USDOT issued new regulations in 1999, each State DOT revised its DBE program to implement the new regulations.

This Tool Kit is meant to be a practical guide in establishing a contractor's DBE compliance program as implemented by the states and local governments where they work. It has been prepared from the user's perspective and guidance shared in the tool kit is the result of direct experience in obtaining and utilizing DBEs in accordance with the DBE program requirements.

The **Tool Kit** is divided into three sections ranging from Getting Started to assessing one's performance in meeting its own program.

The **GETTING STARTED** Section provides information on the resources you will need to set up your DBE Compliance Program.

The **ELEMENTS OF A CONTRACTOR COMPLIANCE PROGRAM** Section offers suggestions on how to follow-up on your program to insure its running properly and remains updated.

The Tool Kit provides checklists that can serve as practical tools for contractors' day-to-day use in the management of their DBE compliance program. Your program should make use of Appendices or Attachments in the same manner as this Tool Kit. Include copies of all pertinent rules, regulation, and specifications.

Because this Tool Kit is intended as a general guide, it cannot address every situation a contractor may encounter. Each State DOT may interpret or implement the same federal DBE regulations differently. The information provided in this Tool Kit can and should be adapted to meet a contractor's particular circumstances. Several key points are emphasized in the Tool Kit:

- Know your State DOT officials responsible for administering the DBE programs in the DOT headquarters and in the project area district and understand their interpretation of the rules and regulations implementing those programs.
- <http://www.txdot.gov/inside-txdot/office/civil-rights/dbe.html>

- This tool kit was created through Joint Cooperative efforts of the construction industry and government officials. This spirit of joint cooperation should be mirrored on the state and local level.
- The local contractor chapter organizations should be involved with the DOT in the local goal setting committee.
- Reach out to DBEs and to DBE assistance organizations to determine the availability and capabilities of DBEs in your area.
- Make your best efforts to meet individual contract DBE goals and document those efforts in case your DBE participation falls short of the contract DBE goal.
- Be vigilant during contract performance.
- If you assist DBEs in any way, make sure your State DOT is aware and approves of the assistance.
- Identify a Company DBE coordinator and encourage your field supervisors to contact the DBE coordinator whenever a question arises or help is needed.

TXDOT Office of Civil Rights website link and contact list

<http://www.txdot.gov/inside-txdot/office/civil-rights/contact.html>

<u>Contacts</u>	<u>Telephone</u>
Director	(512) 416-4700
Toll Free	(866) 480-2518
Affirmative Action/EEO	(512) 416-4712
Contract Compliance Section	<u>(512) 416-4750</u>
DBE & SBE Certification Section	<u>(512) 486-5500</u>
DBE Compliance Section	(512) 486-5501

Physical Address

200 E. Riverside Dr. 2nd Floor
Austin, TX 78704-1259

Fax

(512) 416-4711

Mailing Address

125 E 11th ST.
Austin, TX 78701-2409

II. GETTING STARTED

The following are some good first steps you can take to gain an understanding of your State and Federal DBE program requirements.

- Understand State and Federal Rules

Obtain copies of, review and retain for reference:

- a. Federal Rules

<http://www.fhwa.dot.gov/civilrights/programs/dbess.cfm>

- b. State Rules

[http://info.sos.state.tx.us/pls/pub/readtac\\$ext.viewtac](http://info.sos.state.tx.us/pls/pub/readtac$ext.viewtac)

- c. State DOT contract requirements

<http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr;sid=a5937b65dfcea1148edd52e3aa4ab5a4;rgn=div5;view=text;node=49%3A1.0.1.1.20;idno=49;cc=ecfr>

- d. State DBE Plan Program

<http://ftp.dot.state.tx.us/pub/txdot-info/cmd/cserve/specs/2004/prov/s0001966.pdf>

e. Include copies of these documents with your plan.

f. Review how your State DOT counts DBE participation on various types of work including subcontracts involving installation of materials, material suppliers, truckers, joint ventures, etc...

g. Review your State DOT's rules on "commercially useful function" (CUF). Attach your State DOT DBE Special Provision as **Appendix A** to this Tool Kit for guidance on what constitutes a commercially useful function.

h. Review your State DOT's policy on meeting DBE goals when contract changes are made which affect the DBE's work.

- **Program Officials:** It is important and useful for you to know the FHWA and your State DOT DBE program officials. They can assist you in understanding what they require concerning the DBE program and how you can follow the requirements.
- Review your State DOT's rules on documenting good faith efforts towards meeting the goal. You should attach your State DOT DBE Special Provision as **Appendix B** to this Tool Kit for guidance concerning what constitutes adequate good faith efforts.

<http://www.txdot.gov/txdot/forms/GetForm?formName=/2184.xdp&appID=/BOP&status=/reportError.jsp&configFile=WFServletConfig.xml>

In the next Section **ELEMENTS OF CONTRACTOR COMPLIANCE PROGRAM**, you will learn about the specific items your program should address.

III. ELEMENTS OF A CONTRACTOR COMPLIANCE PROGRAM

A. RESPONSIBILITIES

- **Identify and assign a responsible person or persons for:**

1. Overall management of the Compliance Program.
2. Administrative responsibilities such as reporting.
3. Identifying certified and capable DBEs.
4. Preparation and submission of proposed project specific DBE participation.
5. Oversight of DBE Subcontractor work performance.

The DBE Compliance program should clearly describe the contractor's management approach toward complying with the DBE program requirements. It should identify the individual(s) in the organization who have the overall responsibility to carry out the program and who is designated the key individual(s) that everyone in the organization can approach to deal with issues supporting the contractor's compliance. In addition, in describing this management approach, it is imperative that everyone, including field specialists and foremen, understand the roles and responsibility of working together to see that this is done.

- **Develop DBE procedures to follow, including:**

- a. Estimating and bidding procedures.
- b. Procedures for negotiating and writing contracts.
- c. Procedures for monitoring, inspecting and documenting a DBE's performance and progress.

THIS TOOL KIT WILL AID YOU IN DEVELOPING SUCH PROCEDURES.

B. DETERMINING AVAILABLE DBE's

- Your program should describe the process that you routinely use to identify, interview and assess available DBEs. Your State DOT requires DBEs to be certified at the time DBE commitments are submitted so it is imperative that you have an on-going process for identifying, soliciting and evaluating the capabilities of DBEs that have the potential to bid on work the contractor maybe subcontracting out in response to an STA advertisement. This normal business practice can be the essential support behind a good faith effort determination on a project specific basis. This Tool Kit suggests a two-step process.

STEP 1- DBE IDENTIFICATION

- Your State DOT is required to participate in a Unified Certification Program ("UCP"). The UCP is required to make all certification decisions on behalf of all USDOT recipients in each State. Each UCP is required to maintain a unified DBE directory containing all firms certified by the UCP. The UCP is required to make the directory available on the internet, as well as in print. (See 49 CFR § 26.81.) A State's Unified Certification Program must certify DBE firms.

Obtain a current DBE directory listing of certified firms. Your State DOT maintains and makes available to interested persons a directory identifying all firms eligible to participate as DBEs in your State DOT's program. Online directories are more up to date and a better source for obtaining information on certified DBE firms. The listing for each DBE firm will include its address, phone number and the types of work the firm has been certified to perform as a DBE. These directories are revised at least annually. Further, your State DOT will make updated information available on request.

<http://www.txdot.gov/business/partnerships/tucp.html>

The UCP DBE Directory should be relied on as your primary source of firms to contact in preparation of your bid.

Step 2 - DBE Solicitation

Your State DOT requires that you not reject DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. You need to determine whether interested DBEs are certified in the work they want to bid on. Meet with DBE firms. Assess their availability, willingness and ability to perform work. Develop ongoing dialogue and relationships with DBE firms.

- As you would with any subcontractor, you should determine whether interested DBEs are capable to perform the work they are quoting consistent with the type of work they are certified to perform as a DBE.
- Use **Appendix C**, DBE Needs Assessment, to help determine whether the interested DBE is capable to perform the work it is quoting.
- **A thorough investigation of a DBE's capabilities should include consideration of the following:**
 - a. The type and scope of work the DBE intends on quoting.
 - b. The DBE's experience in performing the type of work it wishes to quote.
 - c. The DBE's staff and its availability to perform on the project.
 - d. The equipment the DBE has available to perform the work, or if the DBE does not own equipment, how it intends to obtain the necessary equipment.
 - e. The DBE's current workload, including other contracts the DBE will be performing concurrently with this project.
 - f. How the DBE plans to obtain the necessary materials, their creditworthiness and whether joint checks may be required.
 - g. The DBE's intention to subcontract any of the work to a non-DBE.
 - h. Information on the DBE's bonding capacity, including "Total Program" and "Largest Single Project."
 - i. Your past experience working with the DBE may be considered.
 - j. Ask for references from the DBE as to other prime contractors for which they have worked and check them out.

Step 3 - INVESTIGATE DBE CAPABILITIES TO PERFORM THE WORK

Now you need to determine whether interested DBEs are capable of performing the work they are interested in quoting. A DBE must perform a "commercially useful function" as defined by USDOT in 49 CFR § 26.55 (c) and your State DOT DBE Special Provision. At some point the prime may be required to document that the DBE is performing a "commercially useful function" In determining a DBE's capabilities to perform the work the following should be ascertained:

- a. Is the work to be performed the DBE's usual type of work?
- b. Will the DBE estimate the work himself, receive all material and sub quotes and negotiate and write P.O.'s and subcontracts?
- c. Is there a clean split between what you are performing and what the DBE will perform?
- d. Will the DBE manage and supervise the work with its own managers and superintendents?
- e. Will the DBE perform the work with its own forces?
- f. Will the DBE be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, and installing (where applicable) and paying for the material itself?
- g. What work, if any, does the DBE intend to subcontract and is that amount consistent with industry practice? Work that a DBE subcontracts to a non-DBE does not count towards the contract goal.
- h. If the DBE is subcontracting an unusual amount or does not intend to perform at least 30% of the work with its own forces, your State DOT will presume the DBE is not performing a commercially useful function (49 CFR § 26.55(c)(3)). Some state rules may require subcontractors to perform more than 30% of the subcontract with its own forces.
- i. A DBE does not perform a commercially useful function if its role is limited to a "pass-through" for purposes of obtaining DBE participation.

ELEMENTS OF A CONTRACTOR COMPLIANCE PROGRAM

1. Have you identified the person responsible for managing your DBE activities?
2. Are you familiar with the persons responsible for administering the DBE program for your State DOT?
3. Are you aware of the supportive services available to assist DBEs in your area?
4. Are you familiar with capable DBEs in your normal subcontract solicitation geographic area?
5. Are you seeking to understand any problems DBEs will have in bidding or successfully completing contracts with you?

C. GOOD FAITH EFFORTS

You must make good faith efforts to meet the DBE contract goal, either by meeting the goal or by documenting adequate good faith efforts to meet the goal. You should make sincere and aggressive efforts to meet the DBE contract goal. If you do not meet the DBE contract goal, then you must document your adequate good faith efforts to meet the goal.

- You should not be automatically denied the award of a contract for not meeting DBE contract goals. Your State DOT does not have a quota for DBEs on USDOT -assisted contracts.
- Attempting to obtain a contract on the basis of documented good faith efforts should be your last resort. In other words, you should make sincere, intensive and aggressive efforts to meet the DBE contract goal and should resort to a good faith efforts submission only if your efforts do not produce DBE participation meeting the contract goal. However, as detailed in Subsection E, on USDOT assisted contracts, you are not required to use a DBE if the DBE price is excessive or unreasonable when compared to a non-DBE quote or self-performing the work. However, if you reject an excessive DBE quote you may be determined to have not made a good faith effort submission.
- You should also not be required to use a DBE you believe does not have the capabilities to perform the work.
- If it is necessary for you to make a "good faith effort" submission, **DOCUMENT** every step taken to satisfy your State DOT's good faith effort requirements and meet the contract DBE goal.
- You must be able to demonstrate in writing that you complied with the good faith effort requirements. Keep in mind that if you do not meet the contract DBE goal, you will need to convince the State DOT that it is appropriate to award the contract to you on the basis of your documented good faith efforts. As a result, the efforts discussed in Subsection D below must be documented in case it is necessary to make a good faith effort submission.

- You must thoroughly understand the listed examples or types of actions which your State DOT will consider as part of your good faith efforts to obtain DBE participation. Keep in mind also that your State DOT will likely not consider its list to be exclusive or exhaustive.
- **The following is the list of the types of good faith efforts found in the 49 CFR § 26. These actions are considered as good faith efforts:**
 - a. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.
 - b. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.
 - c. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.
 - d. Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.
 - e. A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as

- long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not required to accept higher quotes from DBEs if the price difference is excessive or unreasonable, however, state DOT approval is necessary in determining "excessive price" for a good faith effort determination.
- f. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.
 - g. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by your State DOT or contractor. Such efforts would include introducing the DBE to professionals in these fields.
 - h. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
 - i. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

D. SPECIFIC PROJECT PARTICIPATION

1. PRE-ESTIMATE ACTIONS

The Pre-Estimate involves specific actions that you should take prior to beginning an estimate for a specific project. These actions will help in achieving your State DOT's DEE contract goals, or help in making qualifying good faith efforts.

- Review project specifications and provisions to see if there are any DBE program modifications specific to this project.
- Review the contract documents for the DBE goal on this project
- Review the online certified DBE directory for the list of certified DBEs

2. DEVELOP A DBE PARTICIPATION PLAN

The second step in estimating and bidding should be to develop a DBE Participation Plan. This plan will help you achieve the DBE contract goals, or will help you in documenting that you made adequate good faith efforts to meet the contract goals.

- **Formulate a project-specific DBE Participation Plan when you decide to bid a project requiring DBE participation. This plan should address the following:**

- a. Review of the Project's Special Provision for DBE contract goals.
- b. Determine items which may be subcontracted and quantify based on estimated dollar amounts.
- c. Quantify "traditional" subcontracted items. Identify and quantify "new" potential subcontracting opportunities.
- d. When practical, divide large (scope or quantity) items into potential smaller subcontracting opportunities and quantify.
- e. If your State DOT permits DBE participation by second tier subcontracts look for second tier subcontracting opportunities and quantify.
- f. Quantify potential material supply contracting opportunities.

Determine the allowable DBE participation for material supply, i.e. 100% for materials or supplies purchased from a DBE manufacturer, and 60% for materials or supplies purchased from a DBE regular dealer. See 49 CFR § 26.55(e), attached as **Appendix D**, for additional information. See also your State DOT DBE Special Provision, refer to **Appendix E**.

- g. Determine the likely total DBE participation from all of the above items and compare to your State DOT's DBE contract goals.

1. If the likely participation well exceeds your State DOT's DBE contract goals, begin implementing your DBE Participation Plan.

2. If the likely participation does not well exceed the DBE contract goals, alternate or additional efforts are required:

- Investigate the possibility of subcontracting to DBEs work you would traditionally self-perform.
- DOCUMENT steps 1 - 6 and the reason(s) for the potential shortfall.

3. GOOD FAITH EFFORTS

Closely monitor the DBE Participation Plan throughout the estimate stage to ensure your ability to submit your most competitive bid that is in full compliance with your State DOT's DBE contract goals and/or your State DOT good faith efforts requirements.

1. Identify Good Faith Effort requirements (See Section C above).
2. Determine if this Project Special Provision has any additional good faith efforts it expects you to make.
3. Generally, for each project, if you document each of the actions listed in your State DOT DBE Special Provision, you should satisfy the good faith efforts requirement.

4. IMPLEMENT YOUR DBE PARTICIPATION PLAN

The next step is to implement your DBE Participation Plan. Even if obtaining the DBE participation is not a problem, the implementation of the DBE Participation Plan is a good approach to take for any bid. Implementing your plan provides a thorough and methodical approach to obtaining adequate DBE participation. This process, if documented, should demonstrate good faith efforts adequately.

- You should begin implementing your DBE Participation Plan at the start of the estimating process
- Solicit from your list of certified/capable DBEs (See Section B above).
- Obtain a current DBE directory listing of certified firms from your State DOT. Review certified DBEs listed on the UCP web site. See Section B above.
- Should you anticipate that your list of certified/capable DBEs may be inadequate due to the specific nature of the project, you should consider:
 - a. Consider expanding your search for DBEs to outside of your normal work discipline or geographic solicitation area.
 - b. Contact your State DOT DBE supportive services or business assistance entity to obtain the names of additional DBE firms.
 - c. Contacting available minority/women community organizations, contractor groups and State, federal and local minority/women assistance offices.
 - d. Use minority/women community organizations, contractor groups and State, federal and local minority/women assistance offices to recruit additional DBEs.
 - When soliciting interest from DBEs, notify them in a timely fashion to allow time to prepare proper quotes.

a. The written notice should include:

1. Your name, address, telephone number, fax number and email address.
2. The project location and description and if you would be willing to make a site inspection with the DBE.
3. A place where subcontractors can review bidding documents.
4. Your representative to contact.
5. Direction to contact you by email or fax to let you know whether they will be bidding.
6. The date and time by which you must receive sub-bids or quotes and the location to which they must be delivered.

b. Use email or fax, as appropriate.

c. List items for which you are particularly interested in receiving quotes. If necessary to meet the goal, identify the items that could be broken down into smaller quantities.

d. Consider enclosing a checklist for the DBEs to check off the type(s) of work they are capable/certified to do and are interested in quoting.

- Follow up the initial solicitation of interest by contacting the DBEs to determine with certainty whether or not they are interested. If possible, document the reason for a "no quote".
- Provide interested DBEs with needed information about the plans, specifications, estimated quantities, schedule and the contract requirements.
- Negotiate in good faith with interested DBEs, not rejecting DBEs as unqualified without reasons based on a thorough investigation of their capabilities. Recognize that FHWA and your State DOT expect prime contractors to negotiate a reasonable price with higher quoting DBEs rather than simply reject the quote. You are not required to accept an excessive or unreasonable quote. If you are unable to reach an agreement with a DBE on a reasonable price, or if you reject a DBE's quote and that causes you to be unable to meet the DBE goal, you should be able to explain the reasons why an agreement was not reached. The federal regulations give an example of what constitutes negotiating in good faith with interested DBEs as follows:

"A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable.

Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. *Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.*" 49 CFR 26, Appendix A, § IVD (2).

- To determine what constitutes an excessive or unreasonable quote the prime should:
- Compare proposal to bids submitted by other subcontractors.
- Prepare your own internal estimate of the cost of performing the work.
- Compare the bid to prices for similar work performed on other recent contracts.

- Remember, determining adequate GFE is an after the fact decision by the State DOT. If the reason you were unable to meet the goal is based primarily on the DBEs bid being excessive but your overall bid is substantially less than the next low bidder and/or the engineer's estimate, it might not be considered adequate.
- Direct interested DBEs to where they may obtain information about bonding, lines of credit or insurance required by the contract.
- Make efforts to assist interested DBEs in locating sources for obtaining necessary equipment, supplies, materials or related assistance or services.

- **In making efforts to assist DBEs in these areas, the following might be helpful hints:**

- ❖ This effort is not expected to involve obtaining such items for the DBE. It is intended for you to provide information on and possible referrals to the DBE of sources with whom you may have had a long term working relationship.
- ❖ This referral service and assistance may include directing the DBE to the source of such items you are currently negotiating with on a project specific basis.

5. QUOTE DOCUMENTATION

Quote documentation concerns receiving and documenting a DBE's quote. If the DBE's quote is out-of-line with other quotes and/or your own estimate, you should contact the DBE to verify its quote is correct.

- **After determining that a DBE is certified and capable, be ready to receive its quote. Confirm the following:**
 - a. Company name, contact person and telephone number.
 - h. Full scope of work being quoted.
 - c. Addenda acknowledgment.

- d. DBE status and evidence of certification.
- e. Schedule requirements if possible.
- f. Any exclusions or special conditions of the quotation.
- g. Bond rate.
- h. Quote price.

1. Occasionally you may receive quotes from DBEs with whom you have no prior experience. In addition to the information discussed in this Subsection, the following should be reviewed:

- a) Verify that the DBE is certified.
- b) Investigate the DBE's capabilities to perform the work (See section D step 3 above).
- c) Is the quote in-line with others received?

2. When receiving quotes from DBEs that are, under the particular facts and circumstances, substantially lower than other quotes and/or your own estimate, you should:

- a) Advise the DBE that its quote is substantially lower than others received and ask the DBE to double check its estimate. Do not reveal by how much the DBE's quote is low.
- b) Go over the scope of work.
- c) Check/compare quantities.
- d) Ask whether the DBE has received material quotes for the work to be performed.
- e) Ask about the DBE's schedule.
- f) Any adjustment in the quotation by the DBE should be accepted only after you are thoroughly satisfied the DBE's revised quote is legitimate and correct.

3. **DO NOT SHOP THE DBE's QUOTE.**

4. If a DBE quotes multiple items, find out from the DBE if the quote is good for each individual item or if the DBE will insist on being awarded all items it quotes. It may be possible to negotiate the use of the DBE quote for only those items for which the DBE's pricing is reasonable and not use the quote for those items where the DBE's pricing is unreasonable.

DO NOT USE PIECES OR PARTS OF A QUOTATION WITHOUT OBTAINING PERMISSION FROM THE DBE IN WRITING.

5. DO NOT accept a DBE quote from any entity other than the DBE contractor that proposes to perform the work!

6. DOCUMENT THE REASONS FOR ANY REJECTED QUOTATION.

7. Include in subcontract language the full details of the scope of work that is to be performed by the DBE for the price quoted. Details such as loading and unloading materials, storage of equipment and materials, supervision and inspection of work and all other details should be written into the subcontract.

6. EXCLUSIVITY ARRANGEMENTS

The federal regulations do not explicitly prohibit a DBE from having an exclusive relationship with a general contractor. Instead the regulations state that the DBE firm's relationships with prime contractors should be examined to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.

An exclusivity arrangement involves the situation where a DBE agrees to perform work for only one entity. These arrangements may cause questions regarding the independence of the DBE and its eligibility to be certified. To be safe, prime contractors should avoid setting up an exclusivity arrangement with a DBE.

7. BID CLOSE-OUT

The process of bid close-out involves the use of a DBE summary sheet to know where you stand in the bid with respect to meeting the DBE contract goal. A sample DBE summary sheet is attached. Some State DOTs require specific DBE goal information to be submitted with the bid others do not. In either case, this process organizes your DBE quotations and makes the process more effective.

- If it would be helpful, use a DBE Summary Sheet to determine where you stand in the bid and what it will take to meet the DBE goal. See the example form DBE Summary Sheet on page __. Instructions for using the DBE Summary Sheet are on page__.
- If the low quote is not from a DBE subcontractor/supplier and you have not yet met your goal, search for reasonable DBE quotes based on different mixture of bid item and quantities. The DBE Summary Sheet is set up to help you do this. You should obtain the DBEs permission to alter the item quantities on its quote or to select only portions of its quote. Remember, on USDOT assisted contracts, you are not required to use excessive or unreasonable quotes and may document good faith efforts in lieu of fully meeting the contract DBE goal.

- Your State DOT will have requirements of documents to be submitted either with the bid or after the bid. Usually those documents include some form of "DBE Commitment Agreement" for each DBE you intend to use to satisfy the contract DBE goal.
- The award of USDOT -assisted contracts for which a contract goal has been established requires all bidders/offerors to submit:
 - a. the names and addresses of DBE firms that will participate in the contract;
 - b. a description of the work that each DBE will perform;
 - c. the dollar amount of the participation of each DBE firm participating;
 - d. written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
 - e. written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and
 - f. if the contract goal is not met evidence of good faith efforts.
 - Copy all information submitted including your State DOT's DBE Listing page.

8. ADMINISTRATIVE RECONSIDERATION OF INADEQUATE GOOD FAITH EFFORTS

You may have your bid administratively reconsidered if your bid is rejected due to inadequate good faith efforts. The administrative reconsideration must provide you with the features described below.

- Under 49 CFR § 26.53 (d) your State DOT is required to have a procedure for reconsideration of good faith efforts by an official not involved in the initial determination that you did not make adequate good faith efforts to meet the DBE goal.
- If you desire to pursue administrative reconsideration of a rejected bid, then you should timely follow the reconsideration procedure in your State DOT DBE Special Provision.

ESTIMATING AND BIDDING CHECKLIST

1. Do you have your State DOT's current DBE directory or certification list?
2. Do you know what qualifies as good faith efforts for your State DOT? If so, what efforts are mandatory?
3. Do you know how your State DOT counts DBE participation for: (1) material supply; (2) trucking; (3) joint ventures; and (4) furnish and install subcontracts?

4. Have you developed a plan to identify and contact DBEs, including contacting your State DOT, State supportive services or business assistance office, minority contractor associations and any other DBE Assistance Organizations?
5. Have you followed-up your initial written contact with DBEs and documented your contacts?
6. Have you selected portions of work for DBEs that will likely increase their participation?
7. Have you negotiated in good faith with interested DBEs?
8. Have you determined that the DBEs you plan to use will be able to manage, supervise and perform their work?
9. Have you checked DBE quotes to see if the quotes are unreasonably low or unreasonably high?
10. Have you completed the items on the DBE Summary Sheet?

DBE INTERVIEWS

Company Name:
Interview Date:
Point of Contact:
Annual Sales Last Year
Credit Line with Vendors
\$ of Largest Job
Description work on Largest Job
Preferred Work Type
Turnkey Work?
Average # Employees
Field Supervisors
Equipment
Own or Lease

Approx. # Pcs
Current # of Active Projects
Geographical Preferences
Familiar with your State DOT Bidding
Familiar with your State DOT
Construction
Internet & Email
Other
Other

DBE SUMMARY SHEET

CONTRACT DBE % GOAL: _____ %
TOTAL DBE \$ TO MEET THE GOAL: \$ _____
DBE TOTAL
SUBCONTRACTOR DESCRIPTION DBE SUB QUOTES ADTODBE AMOUNT IN BID
PAGE TOTALS

INSTRUCTIONS FOR DBE SUMMARY SHEET

- a. Write in the contract DBE percentage goal.
- b. Calculate the total dollar amount of DBE Participation that is needed to meet the contract DBE goals. This will change as your total bid amount changes.
- c. List every DBE quote you receive.
 1. Company Name.
 2. Description of Work.
 3. Quoted Price.
- d. If the DBE submits the low quote:

1. Put quote amount into "DBE Total Amount in Bid" column.

2. Write a zero in the "Add to DBE" column.

e. If the DBE's quote is not the low quote:

1. Put a zero in the "DBE Total Amount in Bid" column.

2. Put the difference between the low bidder's quote and the DBE's quote in the "Add to DBE" column. This difference may be factored into estimating the total bid amount.

E. BUILDING THE PROJECT

1. EXECUTING DBE SUBCONTRACTS

If they are not already aware:

- Call DBEs you intend to use as soon as possible after the bid opening and let them know you intend to use them.
- Advise DBEs which items you intend to subcontract to them.

a. *Subcontract Language*

- Include the following additional provisions in the subcontract. Review these provisions with the DBE. Advise the DBE you expect it to manage, supervise and perform the work in question with its own organization and resources.

Subcontractor agrees to perform a "commercially useful function" as defined in 49 CFR § 26.55, in connection with the work covered by this subcontract. In doing so, subcontractor agrees that it will be responsible for and will actually perform, manage and supervise the work covered by this subcontract and agrees that it will not sub-subcontract a significantly greater portion of the work than would be expected on the basis of normal industry practices. Subcontractor certifies that it has adequate resources to perform the work covered by this subcontract. The subcontractor agrees to prepare and submit all sub-tier subcontracts and material contracts to the contractor for approval. The contractor reserves the right to review and reject any and all sub-subcontracts, equipment leases and/or use of other contractor's personnel entered into between subcontractor and third parties that do not conform or comply with the provisions of this section, the terms of the prime contract or the requirements of the owner. Neither the approval of nor the failure on the part of the contractor to reject such arrangements shall relieve the subcontractor of any of its obligations under this agreement. In the event it is determined that the subcontractor fails to perform a "commercially useful function," due in whole to the actions of the subcontractor, the contractor shall have the right to terminate the subcontract, without penalty or liability, and contractor may recover from subcontractor any damages contractor may suffer as a result of subcontractor's failure to perform a "commercially useful function."

- Make the DBE subcontract contingent on your State DOT's initial and continued approval of the commercially useful function to be performed by the subcontractor. As a result, insert the following provision in the subcontract:

Under the provisions of the prime contract, the contractor is required to meet the specified DBE participation. Subcontractor acknowledges that the dollar amount of the subcontract is being used by contractor to meet the specified goal and warrants that it is a certified DBE under the owner's DBE- program. Subcontractor further agrees contractor shall have the right to terminate the subcontract for default pursuant to the provisions of this Agreement, without penalty or liability, if subcontractor is decertified as a DBE, and/or if for any reason the owner refuses to count any portion of the subcontract towards meeting the DBE goal due in whole to the actions of the subcontractor. Contractor shall be entitled to recover any damages from the subcontractor it may suffer as a result of subcontractor's decertification, including any increased costs attributable to obtaining a replacement DBE acceptable to the owner to complete the subcontract work.

b. Bond

- Will the DBE provide a bond? If so, will it be for the entire project or will it be in stages?
- If a bond waiver becomes necessary and you approve, review your bond waiver form with the DBE, advising it that both the DBE and your State DOT must approve the bond waiver form. You should then obtain approval from your State DOT.

c. Contract Execution

- Make sure the DBE has copies of all pertinent documents.
- Complete the subcontract, with any necessary revisions or amendments.
- Submit the completed subcontract documents to the DBE for execution, and establish a date by which you expect to receive an executed subcontract back from the DBE.

d. Meeting DBE Goals through Second or Multiple Tier Subcontracts

The prime contractor is ultimately responsible for the actions of its subcontractors and any DBE second or multiple tier subcontractors, such as truckers and suppliers. You should therefore ensure that any subcontract between a subcontractor and DBE second tier subcontractor contains the provision below.

- Keep in mind that you, as the prime contractor, are responsible for the actions of your subcontractor and the DBE second or multiple tier subcontractors.

Make sure the subcontract includes the following provision and that the subcontractor meets its obligations:

Under the provisions of the prime contract, the contractor is required to meet the specified DBE participation. Subcontractor agrees, as part of its subcontract obligations, to provide \$_____ of the DBE participation through a sub-tier contract between subcontractor and (Name), of (Address), who subcontractor has verified as a currently certified DBE, under the owner's DBE- program. Subcontractor agrees to comply with all applicable laws, regulations, prime contract documents, and this Agreement concerning DBE participation on the project.

Subcontractor agrees to fully cooperate with the contractor and owner in every respect to assure that the DBE goals are met and that the DBE, performs a commercially useful function. Failure to provide the required participation in compliance with the applicable laws, regulations, prime contract documents, and this Agreement shall constitute failure to comply with the provisions of this Agreement as provided under Section _____ of this Agreement.

EXECUTING DBE CONTRACTS CHECKLIST

- 1. Have you made a post-bid contact with all the DBEs you included in your submission to your State DOT?**
- 2. Do the DBEs understand their obligation to perform a commercially useful function?**
- 3. Have you included the appropriate provisions in your subcontract requiring that the DBE remain certified and perform a commercially useful function?**
- 4. Have you made any of your DBE participation by second or multiple tier subcontracts? If so, have you obligated your subcontractor to ensure that the sub-tier DBE performs a commercially useful function?**

2. PAYMENT, MONITORING AND DOCUMENTATION PROCEDURES

Some DBE subcontractors and DBE material suppliers cannot secure a bond at a competitive rate. If a DBE cannot secure a bond and the DBE agrees to the use of joint checks for material payments, submit the appropriate requests to your State DOT for written approval. Each DBE subcontract or DBE material contract may need to include the lien waiver form. When beginning a project, include an administration plan for proper documentation and payment procedures involving unbonded DBE subcontractors and suppliers as you would with any un bonded subcontractor or supplier. To avoid claims by suppliers, second-tier subcontractors or laborers, a monitoring and documentation procedure should be established to verify that the following items are received from the unbonded subcontractor after each partial payment estimate and before the next payment is made:

- Require the DBE subcontractor to timely submit a copy of its certified payroll.
- Require the unbonded subcontractor/supplier to provide written verification that payment has been made to all material suppliers and second tier subcontractors for work or services for which the unbonded subcontractor has received payment on the past pay estimate.
- Prior to the end of each partial payment period, the unbonded subcontractor should provide a certified affidavit of names of all persons or entities that provided labor, services and/or materials on behalf of the unbonded subcontractor.
- The unbonded subcontractor should provide proof of payment of union benefits and IRS payroll taxes shortly after the period ends.
- If the unbonded subcontractor fails to provide this information, you should seek to satisfy yourselves.

Under 49 CFR § 26.29, your State DOT is required to establish a prompt payment contract clause to require you, as the prime contractor, to pay subcontractors for satisfactory performance of their contracts no later than **10 days (per Texas Govt. Code 2251.022)** from receipt of each payment made to you. The state's prompt pay requirement may be more stringent than that required by the USDOT. The prime contractor should include in its subcontracts the same prompt pay clause requiring compliance with prompt pay requirements. The USDOT DBE regulations require prime contractors to make prompt payments to all DBE and non-DBE firms that are performing work on the contract. Make sure to identify and comply with any prompt payment clause in the contract. Prompt payment clauses may include a contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have satisfactorily performed.

The USDOT DBE regulations also require the prompt and full return of retainage payments from you, as the prime contractor, to the subcontractor no later than **10 days (per Texas Govt. Code 2251.022)** after the subcontractor's work is satisfactorily completed and accepted by the state DOT.

3. GENERAL COUNTING RULES

When a DBE participates in a contract, you may count only the value of the work actually performed by the DBE toward DBE goals. A DBE's participation is counted toward DBE goals only if the DBE is performing a "commercially useful function." [49 CFR § 26.55(c) and your State DOT DBE Special Provision] The FHWA has made clear that it is the prime contractor's primary responsibility to make sure DBEs are performing a commercially useful function. There are five key areas for a commercially useful function. Those are management/supervision, labor, equipment, materials and performance of the work.

- Count the entire amount of that portion of a contract that is performed by the DBE's own forces (49 CFR § 26.55 (a)). Do not count the amount a DBE subcontracts to a non-DBE firm. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE. DO NOT, however, count supplies or equipment the DBE purchases or leases from you or your affiliates (49 CFR § 26.55 (a) (1)). *Note: Even though the regulations refer to supplies or equipment purchased or leased from you or your affiliates, FHWA interprets this provision as including materials.*
- Count the entire amount of fees or commissions charged by a DBE for providing a bona fide service, such as professional, technical, consulting or managerial services, or for providing bonds or insurance specifically required for performance of a USDOT assisted contract, provided that the fee is reasonable and not excessive as compared with fees customarily charged for similar services (49 CFR § 26.55 (a) (2)).
- Does your State DOT DBE Special Provision permit a DBE subcontractor to enter into second tier subcontracts? If so, keep in mind that work subcontracted to a non-DBE does not count towards DBE goals.

DBE Material Manufacturer/Regular Dealer/Broker

This section discusses expenditures with DBEs for materials or supplies and how those expenditures are counted toward DBE goals as long as the DBE assumes the actual and contractual responsibility for the provision of the materials. If materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies toward DBE goals. If the materials or supplies are purchased from a DBE regular dealer, count 60% of the cost of the materials or supplies toward DBE goals.

The following is an example that can possibly show the difference under the requirements of the DBE program between a manufacturer, a regular dealer, and if there is a normal industry practice, a broker. The example is the furnishing of crushed aggregate meeting State DOTs specification for such items as Aggregate Base Course.

A DBE as its principal business and under its name produces on its premises crushed aggregate by taking natural rock and crushing, washing and screening such rock excavated on its premises into the size and gradation meeting certain State standard specifications. Under this set of circumstances, the DBE can be considered a manufacturer and the cost of the crushed aggregate produced can be credited 100% towards meeting the goal. If, however, the same DBE obtains the same product from another source that performed that noted above, the DBE maybe considered a regular dealer of the product if it purchased this product in his/her name, he/she engages as its principal business in the purchase and sale of crushed aggregate to the general public, and owns and operates the necessary distribution equipment (since aggregate is considered a bulk item) to

deliver the crushed aggregate. Under these circumstances, the DBE can be considered a regular dealer and 60% of the cost of the crushed aggregate purchased is credited towards the goal. If the DBE firm doesn't meet all or any of the functions presented in defining a regular dealer in crushed aggregate but arranges or expedites transactions consistent with industry practice in the delivery of such materials, then the DBE (broker) services in the amounts of fees or commissions charged in the procurement and/or delivery of such materials can be credited towards the goal.

- If materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies toward DBE goals. For purposes of this paragraph, 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 the general character described by the specifications. See 49 CFR § 26.55(e) (i) & (ii) in Appendix A and your State DOT DBE Special Provision in Appendix B (you should attach a copy of your State DOT DBE Special Provision to Appendix B).
- If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals. For purposes of this section, 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 of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. . . . Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers. See 49 CFR § 26.55(e) (iii) & (iv) in Appendix A and your State DOT DBE Special Provision in Appendix B.
- With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided you determine the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. See 49 CFR § 26.55(e)(2) in Appendix A and your State DOT DBE Special Provision in Appendix B. *Trucking -* Your State DOT will likely consider:
 - 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.
 - DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract. DBE who leases trucks from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks on the contract.(Some states do not count the non-DBE leased trucks towards the DBE credit. Make sure to verify your state's rule on this.)

4. ESTABLISHING DBE PERFORMANCE OF A COMMERCIALY USEFUL FUNCTION ("CUF")

To refresh yourself on what constitutes a CUF refer to Section B - Step 3. You can be better assured that the DBE will perform a commercially useful function, if you do the following.

- *DBE Plan/or Performing Work*

If you have not already done so, determine how the DBE will perform the work including:

- a. Supervision (both on-site and off-site).
- b. Equipment utilization.
- c. Negotiation of cost, determination of quality and quantity, ordering, installation and payment for materials.
- d. Manpower utilization schedule.

- *Coordination of the Work*

- a. You should provide the DBE with overall project schedule information and how their work is integrated.
- b. The DBE should prepare their own schedule and submit to you for approval.

5. MONITORING DBE PERFORMANCE OF A COMMERCIALY USEFUL FUNCTION

It is important to understand what the FHWA and your State DOT considers important in determining whether a DBE has performed a commercially useful function. To determine whether a DBE is performing a commercially useful function, your State DOT will evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

The FHWA has made clear that your State DOTs should review the following five categories to determine whether the DBE is performing a commercially useful function:

- Management and Supervision
- Labor
- Equipment
- Materials and Supplies
- DBE Trucking

a. *Management and Supervision* - Your State DOT will likely consider:

- Scheduling work.
- Ordering equipment, materials and supplies.
- Preparing and submitting payrolls.
- Hiring and firing employees.
- Daily supervision and control of the work by a DBE's regularly employed superintendent.

Management and Supervision "Red Flags" In a presentation on DBE fraud, the following red flags on management and supervision were identified:

- Mere Performance of Administrative Duties by DBE
- DBE Provides Little or No Supervision of Work
- DBE's Superintendent Is Not a Regular Employee
- Supervision is performed by Personnel Associated with the Prime Contractor or Any Other Firm or Business
- DBE Firm's Owner is not aware of the Status of the Work or the performance of the Business
- Inquiries by your State DOT or FHWA Are Answered by the Prime Contractor

b. *Labor* - Your State DOT will likely consider:

- Workforce must be under direct supervision of the DBE firm.
- Workforce should be normally employed by the DBE and not be normally employed by a non DBE.
- DBE hires and fires employees.
- Workforce must actually be doing the work.

Labor "Red Flags" In a presentation on DBE fraud, the following red flags on labor were identified:

- Movement of Employees between Contractors
- Employee Paid by DBE and Prime
- Employee Working for Prime in Morning and DBE in Afternoon
- Employees Don't Know Who They Work For When Asked

- Superintendent or Foreman Don't Work For DBE Firm

c. *Equipment* - Your State DOT will likely consider:

- The DBE owns or leases the equipment and has a written lease agreement.
- Only equipment that is specialized and on the project for other purposes may be utilized by the DBE with an operator who remains on the prime contractor's payroll. Approval from your State DOT must be obtained first.
- No credit towards the DBE goal is counted when the prime contractor leases equipment to the DBE.

Equipment "Red Flags" In a presentation on DBE fraud, the following red flags on equipment were identified:

- Equipment Used by DBE Firm Belongs to the Prime Contractor or another Contractor with No Formal Lease Agreement
- Equipment Signs and Markings Cover another Owner's Identity, usually Through the Use of Magnetic Signs
- A DBE Trucking Business Utilizes Trucks Owned by the Prime Contractor

d. *Materials and Supplies installed by DBE Subcontractors* - Your State DOT will likely consider:

- DBE subcontractors installing materials must negotiate the cost, determine quantity and quality, arrange delivery, install and pay for the materials and supplies it utilizes.
- Invoices must be sent to the DBE, not to the prime contractor.
- Payments by joint checks must be approved in advance by your State DOT.

Materials "Red Flags" In a presentation on DBE fraud, the following red flags on materials were identified:

- Materials for the DBE Ordered, or Paid For, by the Prime Contractor
- Two Party Checks from Prime to DBE Subcontractor and Supplier or Manufacturer
- Materials or Supplies Necessary for the DBE Firm's Performance Are Delivered To, Billed to or Paid by another Business
- A DBE Contractor Only Purchases Materials While Performing Little or No Work

e. *Trucking* - Your State DOT will likely consider:

- DBE must be responsible for the management and supervision of the entire trucking operation.
- DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract
- DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates with drivers it employs
- DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract
- DBE who leases trucks from a non-DBE is entitled to credit for the total value of transportation services provided by the non-DBE lessees not to exceed the value of transportation services provided by DBE owned trucks

6. ASSISTANCE TO DBEs

There may be instances that in an effort to help a DBE develop his capabilities that you want to assist a DBE in some manner such as renting him equipment, or renting him a foreman to help train his foreman, or assistance in estimating a project. In order for anything along these lines to be done they must be transparent to all interested parties. The best way of achieving this is to spell out these items in the subcontract agreement and ask your DOT for written approval.

If you don't feel comfortable bringing it up to your DOT it probably is advisable not to do it. DBEs that need various forms of assistance should be encouraged to work with the state supportive services program.

The special provisions of the subcontract or material contract should dictate what you are doing, what the subcontractor is doing and what, if any assistance you will give the DBE. The following items are usually examined by your State DOT to verify the DBE is performing a commercially useful function:

a. Unloading and/or Hoisting Assistance

- If the DBE subcontractor quoted its work excluding the unloading and hoisting of materials, then the contract provision should exclude it from the scope of work and the contract dollar amount should also exclude it. If the unloading and hoisting is to be done by the prime, this should be spelled out in the DBE's subcontract. If not specified in the subcontract, your State DOT should be advised in advance that you will be providing the unloading and hoisting services.

b. Assistance with Equipment

In general, the DBE subcontractor must provide the necessary equipment to perform its work. The equipment can be owned by the DBE or leased from outside sources. If leased, there should be a written lease agreement. In most cases:

- Do not loan or provide your equipment to the DBE subcontractor unless your State DOT is made aware and approves of it.
- In an emergency situation (such as where equipment malfunction or unavailability make negatively impact safety, material integrity, time factors, or other concerns) you may provide your equipment to a DBE subcontractor for a short duration but be expected not to receive credit towards the goal for the amount of equipment rental.
- If the fair rental value of the equipment temporarily provided to the DBE is to be deducted from DBE participation toward the goal.

c. Assistance Ordering Materials and Supplies

- Do not count toward DBE goals the cost of materials or supplies the DBE purchased from you or your affiliate.
- Do not deal directly with the material supplier on matters that are the DBE's responsibility. For example, do not schedule, order or arrange delivery of materials for the DBE.
- The more material-intensive the DBE subcontract is the more likely FHWA or your State DOT will carefully scrutinize the DBE's handling of the material supply portion of the subcontract.

d. Providing Early Payment or Cash Flow Assistance

Most small subcontractors and suppliers, including DBEs, run tight operations from a capital and cash flow standpoint. A DBE may have problems making budget, paying creditors and/or making payroll. Depending on the circumstances, it may be necessary to provide some financial assistance that is not in-line with the payment provisions of the subcontract. Should that happen:

- Approval from your State DOT is necessary.
- Special procedures to follow must be set up and can be worked out without sacrificing the CUF or the independence of your DBE subcontractor.

e. Mentor-Protégé Program

Within the context of the DBE Mentor-Protégé program, a mentor is typically defined as an experienced contractor acting in a position of trust whereby the contractor provides guidance, counseling and training to a DBE Protégé needing assistance in successfully pursuing highway

construction work. The DBE Protégé is a firm that needs a Mentor to develop or expand the Protégé's expertise and experience.

The Mentor-Protégé program may provide incentives to you and the DBE with the goal of assisting the DBE to successfully enter the free enterprise system. The further development of DBEs includes, but is not limited to, assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from you.

Types of assistance you may provide to a protégé DBE include:

- Financial Counseling
- Management Advisement
- Capital Formation
- Technical Assistance
- Record Keeping

To participate in a Mentor-Protégé program, you must obtain your State DOT's approval. Your State DOT will provide you with details of its Mentor-Protégé program. The details should include descriptions of the types of assistance you may provide to your DBE Protégé, program requirements and parameters, and how your assistance may count toward contract goals. Consistent with the USDOT Mentor-Protégé program guidelines, as found in 49 CFR § 26, *Appendix D*, your State DOT's program will stipulate that:

1. Any mentor-protégé relationship shall be based on a written development plan, approved by your State DOT, which clearly sets forth the objectives of the parties and their respective roles, the duration of the arrangement and the services and resources to be provided by the mentor to the protégé. The formal mentor-protégé agreement may set a fee schedule to cover the direct and indirect cost for such services rendered by the mentor for specific training and assistance to the protégé through the life of the agreement. Services provided by the mentor may be reimbursable under the FTA, FHWA, and FAA programs.
2. To be eligible for reimbursement, the mentor's services provided and associated costs must be directly attributable and properly allowable to specific individual contracts. Your State DOT may establish a line item for the mentor to quote the portion of the fee schedule expected to be provided during the life of the contract. The amount claimed shall be verified by your State DOT and paid on an incremental basis representing the time the protégé is working on the contract. The total individual contract figures accumulated over the life of the agreement shall not exceed the amount stipulated in the original mentor/protégé agreement. DBEs involved in a mentor-protégé agreement must be independent business entities which meet the requirements for

certification as defined in subpart D of this part. A protégé firm must be certified before it begins participation in a mentor-protégé arrangement. If your State DOT chooses to recognize mentor/protégé agreements, it should establish formal general program guidelines. These guidelines must be submitted to the operating administration for approval prior to your State DOT executing an individual contractor/ subcontractor mentor-protégé agreement.

The USDOT limits awarding DBE credit to a non-DBE mentor firm for using its own protégé firm for:

- More than one half of its goal on any contract let by your State DOT; and
- More than every other contract performed by the protégé firm.

However, some State DOTs have sought USDOT waivers of these limitations. It is important that you look to your State DOT for guidance, requirements and details concerning its Mentor-Protégé program.

7. CHANGE ORDERS AND DBE CONTRACT GOALS

Change orders have a much different connotation and effect on the project if DOT bid the contract as a "unit price" or as a "lump sum" contract. For purposes of this tool kit the following considerations are directed towards "unit bid" contracts. A change order is a written order detailing changes to the specified work quantities or increase or modification in the contract due to such changes as additional work beyond the original contract. Some of the factors that might be considered in the application of the DBE program requirements to extra or additional work are: the nature and scope of the additional work, the degree of completion of the contract, the availability of DBEs to perform the additional work and the prime contractor's existing contractual commitments. If your state DOT should broadly use change orders to cover formal modifications such as administrative changes for revisions to and clarification of contract requirements, changes in contract time, final quantity determinations, etc., such changes may not involve apply the DBE requirements from the original contract. Some of the examples on applying the DBE program requirements to contract changes are:

- If a change order involves items of work already included in a DBE's subcontract or the work is materially the same as the work included in the DBE's subcontract, the DBE is to have the opportunity to perform the work unless it is documented that the DBE is unable or unwilling to perform the work.
- Likewise, if a change order involves items of work already included in a non-DBE's subcontract or the work is materially the same as the work included in the non-DBE's subcontract, the non-DBE should be given the opportunity to perform the work.
- If the change order involves extra or additional work outside the scope of the original contract and involves items of work not covered in the original contract, the prime

contractor is to exercise GFEs in taking all necessary and reasonable steps to meet the DBE program contract requirements.

8. EMERGENCY PERFORMANCE OF DBE WORK

A number of situations could necessitate the emergency performance of your DBE subcontractor's work. If you must use your equipment and personnel to perform part of the DBE subcontractor's work, in most cases you should follow these procedures:

- Notify your State DOT and inform it that the emergency work will be or was performed with your equipment and forces and that you will deduct an appropriate amount from the DBEs participation toward the goal.
- Document the work performed and itemize the total direct cost of equipment, labor, supplies, etc.
- Prepare a change order to reduce the DBE subcontractor's scope of work and contract dollar amount.
- Meet with the DBE subcontractor and develop procedures to eliminate the necessity for other emergency performance of work.
- Exercise good faith efforts to get additional DBE participation if there is a shortfall.
- The performance of work under these circumstances should not be routine but the exception to normal operations.

Remember documentation must be accurate and complete so that the proper reduction is made to the DBE subcontractor's scope of work and dollar amount of contract. If possible get your State DOT's approval in advance. If that is not possible notify a representative of your State DOT that you plan to perform some of the DBE's work.

9. TERMINATION OF DBE CONTRACTOR

Termination of a DBE subcontractor is not an easy process. Consider doing so only as a last resort.

- Make sure and comply with any provisions in your subcontract including any notice provisions.
- Inform your State DOT if you become concerned with a DBE subcontractor's lack of performance or declining performance.
- Use a "Show Cause" Notice Letter if necessary, sending copies to your State DOT and the DBE subcontractor's surety company.
- Document the DBE's efforts or lack of efforts to comply with the 5-Day "Show Cause" Notice Letter.

- Your State DOT DBE Special Provision likely requires that prior to terminating or removing a DBE subcontractor named in your DBE commitment, you must demonstrate to the satisfaction of your State DOT that the DBE was not able or willing to perform.
- You must obtain State DOT approval prior to any termination of a DBE.

10. REPLACEMENT OF DBE

Following the termination of, or refusal to perform by, a DBE subcontractor or supplier, it may be necessary to replace the contract DBE with one or more new DBEs.

- Under 49 CFR § 26.53(f)(2), your State DOT is required to have in its DBE Special Provision that when a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, you must 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 DBE contract goal.
- Since you are only required to replace a DBE to the extent needed to meet the contract DBE goal, thoroughly project your final DBE contract participation. This projection will indicate whether you have requirements to replace part or all of the lost DBE contract volume.
- If you will not have sufficient DBE participation to meet the contract DBE goal, meet with your State DOT to discuss the matter. Your State DOT may insist that you seek DBE participation of other work or may only require that you make good faith efforts to find a DBE subcontractor or supplier to complete the work remaining from the terminated contract.

11. FINAL DOCUMENTATION AND CERTIFICATION

Likely, your State DOT DBE Special Provision requires a final contract report or documentation of your DBE participation and likely requires managers or corporate officials to sign and certify the final contract DBE participation report. This certification must be accurate to avoid being accused of a false claim or a false statement.

Make sure you:

- Perform a final audit of DBE participation.
- Check the final audit.
- Be conservative in the totals of DBE participation.

BUILDING THE WORK***REQUIREMENTS TO COUNT DBE PARTICIPATION TOWARDS THE DBE GOALS
CHECKLIST***

1. Have you established monitoring and documentation procedures for your unbonded subcontractors and suppliers?
2. Have you identified and complied with any prompt payment clause in the contract?
3. To ensure your DBEs perform a commercially useful function, have you:
 - a. Obtained a Work Plan?
 - b. Included DBEs in your weekly scheduling meetings?
 - c. Obtained a schedule from your DBE?
4. Are you monitoring your DBEs' performance to make sure they are performing, managing and supervising the work?
5. Regarding management and supervision are your DBEs:
 - a. Scheduling, their work?
 - b. Negotiating the price, determining quantity and quality, arranging for delivery, installing and paying for materials they install?
 - c. Preparing and submitting payroll?
 - d. Hiring and firing their own employees?
 - e. Controlling the day-to-day work by their crews?
6. Regarding labor:
 - a. Are crews under the direct supervision of the DBE foreman/superintendent?
 - b. Are they normally employed by the DBE rather than being normally employed by a non-DBE?
7. Regarding equipment:
 - a. Does the DBE own or does it have a written lease for the equipment?
 - b. Is any equipment belonging to you or another non-DBE firm being utilized by the DBE? If so, is it a specialized piece of equipment that was on the job anyway, and has your State DOT given prior approval?

8. Regarding materials and supplies:

a. Has the DBE negotiated the price?

b. Has the DBE taken care of shop drawings?

c. Has the DBE arranged for delivery and received the materials?

d. Has the DBE installed the materials on this job?

e. Has the DBE paid for the materials directly?

f. Have you used joint checks to pay for materials? If so, did you obtain your State DOT approval first?



**COMMERCIALLY USEFUL FUNCTION (CUF)
PROJECT SITE REVIEW
(CONSTRUCTION PROJECTS)**

Form 2182
(Rev. 03/08)
Page 1 of 2

Per 49 CFR 26.55, "A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved... A DBE does not perform a CUF if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation..." This form is for the purposes of reviewing DBEs for compliance with the CUF requirements for credit.

District field staff will perform CUF reviews on DBE subcontractors and Material Suppliers. Perform a minimum of one review for each DBE for each project with DBE goal. The review should be conducted when the DBE first begins work. Monitor compliance through the course of the project.

Project ID/CSJ:	TxDOT Reviewer:	
County:	Reviewer's Title:	
Prime Contractor:	Review Date:	
DBE Name:		
DBE is performing as: the Prime Contractor <input type="checkbox"/> a Subcontractor <input type="checkbox"/> an other Tier Subcontractor <input type="checkbox"/> or Material Supplier: Manufacturer <input type="checkbox"/> Regular Dealer <input type="checkbox"/> Broker <input type="checkbox"/>		
Provide a brief description of the DBE's scope of work. (Obtain copy of Subcontract Agreement and/or Purchase Order if needed.)		
COMMENSURATE	YES	NO
Is Payment received by the DBE commensurate with the work being performed?	<input type="checkbox"/>	<input type="checkbox"/>
PERFORMING		
Does the DBE have employees on the job to perform the work?	<input type="checkbox"/>	<input type="checkbox"/>
Does the DBE's employees only work for the DBE?	<input type="checkbox"/>	<input type="checkbox"/>
Is the DBE working without assistance from the prime contractor or another subcontractor? (Use of prime's equipment in an emergency is allowed but the cost associated with the use of the equipment cannot be credited towards the goal.)	<input type="checkbox"/>	<input type="checkbox"/>
Is the DBE only using equipment it owns, rents, or leases? (Attach equipment list and all ownership documents and rental/lease agreements.)	<input type="checkbox"/>	<input type="checkbox"/>
Is the DBE performing at least 30% of their work?	<input type="checkbox"/>	<input type="checkbox"/>
HAULING FIRMS		
Does the DBE hauling firm own or lease their trucks? (If so, obtain verification of ownership or lease documents in the name of the DBE.)	<input type="checkbox"/>	<input type="checkbox"/>
Does the DBE employ drivers for trucks owned by the company? (If leased trucks include operators, this should be indicated in the agreement.)	<input type="checkbox"/>	<input type="checkbox"/>
Does a review of the haul tickets associated with the project indicate that hauling is being performed by the DBE?	<input type="checkbox"/>	<input type="checkbox"/>
MATERIALS		
Does the DBE's name appear on all invoices, haul tickets, and/or bills of lading?	<input type="checkbox"/>	<input type="checkbox"/>
If joint checks are used, has the District DBE Coordinator approved? (Obtain appropriate copies of TxDOT Joint Check Approval-Form 2178.)	<input type="checkbox"/>	<input type="checkbox"/>
Are joint checks signed by the DBE? (Obtain canceled check copies.)	<input type="checkbox"/>	<input type="checkbox"/>
SUPERVISING		
Is the DBE supervising its employees and their work?	<input type="checkbox"/>	<input type="checkbox"/>
Is the supervisor a full-time employee of the DBE?	<input type="checkbox"/>	<input type="checkbox"/>
CUF		
Does the DBE appear to be performing a Commercially Useful Function (CUF)? (If no, provide comments.)	<input type="checkbox"/>	<input type="checkbox"/>
If DBE is not performing a CUF, contact the OCR at 1-866-480-2518.		
COMMENTS		

[Contact/Help](#)



Prime Contractor DBE Good Faith Effort

Form 2184
(Rev. 05/08)
Page 1 of 2

County: CSJ #:

Company Name:

Company Contact:

Address:

Phone: Fax: E-mail:

The following is a list of the types of actions that may be considered as good faith efforts. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases, however please check all that apply in this instance. Please provide documentation for ALL instances selected.

- Selected portions of work to be performed by DBEs and where appropriate, broke down contracts into economically feasible units to facilitate DBE participation.
- Provided interested DBE with adequate information about plans, specifications, and requirements of the contract.
- Negotiated in good faith with interested DBE, not rejecting DBEs as unqualified without sound reasons based on a thorough investigation of their capabilities.
- Made efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance required by TxDOT or Contractor.
- Made efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
- Advertised subcontracting opportunities in appropriate media.
- Used the services of minority organizations, minority contractors' groups, local state and federal minority business assistance offices and other organizations that provide assistance identifying subcontractors.
- Provided written notice to DBEs in sufficient time to allow the DBE to respond. **(provide documentation on Pg.2)**
- Followed up initial solicitation of interest by contacting DBE to determine interest. **(provide documentation Pg. 2)**

Describe any other efforts not covered above that may indicate affirmative action to obtain DBE participation on this project and provide documentation.

If the dollar value of the goal for DBE participation in this project has not been met, the Contractor is required to complete the following questions to describe efforts to obtain DBE participation. Copies of correspondence, return receipts, telephone logs, or other documentation will be required to support good faith efforts. Please provide information for each DBE.

County: CSJ #:

Company Name:

Indicate Specific Work or Materials (by pay item):

Date Contacted:

Fax:

Contact Method (check all that apply): Phone Fax Mail E-mail

DBE Response

No Response

Submitted an acceptable sub-bid

Not interested: Indicate Reason(s)

Needs more information: Date Prime provided requested information

Will provide quote by: Date

Received unacceptable sub-bid Bid Amount \$ Type of Work

Date: Method: Phone Fax Mail E-mail

Please attach bid solicitations and all bid responses

Contact/Help



Disadvantaged Business Enterprise (DBE) Needs Assessment

Form 2307
(Rev. 6/11)
Page 1 of 5

The Texas Department of Transportation (TxDOT) is interested in assisting you with the development of your business. By completing the DBE Needs Assessment, your company will play an active role in identifying business and industry barriers that should be addressed as part of your business development plan. Completing the DBE Needs Assessment will help to measure and identify business needs and concerns in the areas of financial management, risk management, legal, marketing and aspects of construction industry barriers.

TxDOT's goal is to work with you to improve these deficiencies thereby removing barriers to improve your business growth and increase your opportunities to obtain contracts with TxDOT and on related Fed-aid projects. In order to receive services through the Technical Assistance Program (TAP) each DBE is now required to complete and submit this form for services.

Business Name:	<input type="text"/>	E-mail:	<input type="text"/>
Owner:	<input type="text"/>	Fax:	<input type="text"/>
Address:	<input type="text"/>	Website:	<input type="text"/>
City:	<input type="text"/>		
State:	Texas <input type="text"/>		
Zip:	<input type="text"/>		
Phone:	<input type="text"/>		

How did you learn of this program?

Are you a certified DBE on the TUCP? Yes If Yes, Date Certified: No Unsure

Are you on the State Certified Master Bidder List (CMBL)? Yes No

Are you certified as a State of Texas HUB? Yes No

Have you already participated in any of TxDOT's Business Development Programs? Yes No

If yes, please check all that apply:

- Technical Assistance Program (TAP)
- Learning Information Networking & Collaboration (LINC)
- Small Business Briefing
- One On One Business Appointment Program
- Industry Liaison Meeting
- Technical Assistance Workshop
- Other Outreach Activity

Business Work Categories

Identify the type(s) of work you generally perform. Please check all categories that apply:

- | | | |
|---|--|--|
| <input type="checkbox"/> Asphalt | <input type="checkbox"/> Concrete Paving & Incidentals | <input type="checkbox"/> Earthwork, Base & Subbase |
| <input type="checkbox"/> Fencing | <input type="checkbox"/> Hauling | <input type="checkbox"/> Lighting & Signal Maintenance |
| <input type="checkbox"/> Landscaping | <input type="checkbox"/> Major Structures | <input type="checkbox"/> Minor Struct./Misc. Concrete |
| <input type="checkbox"/> Painting & Striping | <input type="checkbox"/> Rest Areas (Construction) | <input type="checkbox"/> Traffic Control Devices |
| <input type="checkbox"/> Guardrail Repair | <input type="checkbox"/> Debris Cleaning/Removal | <input type="checkbox"/> Mowing |
| <input type="checkbox"/> Litter Pickup & Disposal | <input type="checkbox"/> Cleaning & Sweeping Highways | <input type="checkbox"/> Building Construction |
| <input type="checkbox"/> Rest/Picnic Area Maintenance | <input type="checkbox"/> Hazardous Material | <input type="checkbox"/> Pavement Markers |

Legal and Compliance Assessment				
	Yes	No	Not Sure	
Buy/sell agreement or succession agreement available & appropriate	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
Legal representation available	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
Work contract agreements available & appropriate	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
Federal & state compliance met	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
Contractor agreements available	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
Legal formation developed & appropriate	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
Identity	<input type="radio"/> Sole Proprietor <input type="radio"/> S Corporation <input type="radio"/> Partnership <input type="radio"/> Corporation			

Business Operations			
	Yes	No	Date
Do you have a written business plan? If so, when was it written?	<input type="radio"/>	<input type="radio"/>	<input type="text"/>
Does your business have a written marketing plan? If so, when was it written?	<input type="radio"/>	<input type="radio"/>	<input type="text"/>

Market Evaluation				
	Yes	No	Not Sure	Needs Improvement
Marketing Brochure	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Adequate marketing plan available	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Industry market assessment completed	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Demographic/competitive influences identified	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Target market identified (TxDOT primes)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Adequate networking/professional memberships	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Do you participate in Minority Contractor's Associations?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Business communication materials	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Adequacy of Accounting Records				
	Yes	No	Not Sure	Needs Improvement
Appropriate accounting method	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Do you have a computerized accounting system in place?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Commercial bank account	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Business Loan or Commercial Line of Credit	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Professional accountant	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Financial statements regularly reviewed and analyzed	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Customer credit policies and procedures in place	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Do you have a company Balance Sheet?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Do you have a company Financial Statement?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Financial Condition			
	Yes	No	Not Sure
Outstanding federal/state tax or other financial obligations	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Current credit report available	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Adequate credit score	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Current credit accounts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Adequate capital resources	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Cash flow issues	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Account write off procedures in place	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Appropriate accounts receivable procedures	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Financial records available	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Monthly adjusting entries (i.e., depreciation, amortization, interest) being made timely and in the proper amounts and in the proper places	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Risk Management			
	Yes	No	Not Sure
Employee security issues addressed	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Company safety requirements met	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Appropriate insurance coverage	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Has your company had the following safety training:			
Occupational Safety & Health Administration (OSHA)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Safety and Flagging	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Hazardous Communication	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Work Zone Safety	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Workforce Analysis					
Number of employees	<input type="radio"/> 1-10	<input type="radio"/> 11-25	<input type="radio"/> 25-50	<input type="radio"/> Over 50	
		Yes	No	Not Sure	
Appropriate number of employees		<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
Personnel manual available and adequate		<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
Turnover issues identified		<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
Employee training needs met		<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
Adequate employee pay scales and benefits		<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	

Bidding and Estimating

	Yes	No	Not Sure
Bid preparation procedures	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Appropriate and competitive bid estimates	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Bid follow up procedures	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Have you bid as prime on TxDOT projects in the last 2 years?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Have you bid as subcontractor on TxDOT projects in the last 2 years?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Are you currently working on TxDOT projects?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please list:

Project Number	<input type="text"/>	District	Select One <input type="button" value="v"/>
Project Number	<input type="text"/>	District	Select One <input type="button" value="v"/>
Project Number	<input type="text"/>	District	Select One <input type="button" value="v"/>

Bidding: Please indicate the largest bid you have bid on in the last 2 years.

Under \$100,000
 \$100,000-\$200,000
 \$201,000-\$300,000
 \$301,000-\$500,000
 Over \$500,000

Construction Business Analysis

	Yes	No	Not Sure
TxDOT Pre-Qualified Bidder	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Appropriate construction work categories	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Bonded	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Bonding Capacity Range

Under \$100,000
 \$100,000-\$200,000
 \$201,000-\$300,000
 \$301,000-\$500,000
 Over \$500,000

Knowledge of TxDOT inspection procedures	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Knowledge of project scheduling procedures	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Knowledge of TxDOT DBE program requirements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Submitted significant number of bids	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Knowledge of work zone safety requirements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Knowledge of environmental document requirements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Appropriate equipment resources	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

List available equipment:

1.	<input type="text"/>	Own <input type="radio"/>	Lease <input type="radio"/>
2.	<input type="text"/>	Own <input type="radio"/>	Lease <input type="radio"/>
3.	<input type="text"/>	Own <input type="radio"/>	Lease <input type="radio"/>
4.	<input type="text"/>	Own <input type="radio"/>	Lease <input type="radio"/>

Contracting with TxDOT and Government Agencies

Which of the following prevents you from working with TxDOT? Check all that apply.

- I am unsure of how to begin the process of working with TxDOT.
- I have enough other work to prevent me from working with TxDOT.
- I have bonding issues.
- I don't know where to find bid opportunities.
- Projects with TxDOT are too large for me to complete.
- I do not have the time to complete all the necessary paperwork to work with TxDOT.
- I have insurance issues.
- Other:
- Nothing prevents me from working with TxDOT.

Do you use *Electronic State Business Daily (ESBD)*? Yes No

Have you received and read the TxDOT *Roadlines Newsletter*? Yes No

Training Interests

Which of these topics would you like to receive training in? Check all that apply.

- | | |
|--|--|
| <input type="checkbox"/> Access to Capital | <input type="checkbox"/> Legal Issues |
| <input type="checkbox"/> Bonding | <input type="checkbox"/> Loan Packaging |
| <input type="checkbox"/> Bookkeeping | <input type="checkbox"/> Marketing Strategies |
| <input type="checkbox"/> Budgeting | <input type="checkbox"/> Negotiating Contracts |
| <input type="checkbox"/> Cash Flow Management | <input type="checkbox"/> Networking |
| <input type="checkbox"/> Credit and Collections | <input type="checkbox"/> Recordkeeping |
| <input type="checkbox"/> DBE Compliance | <input type="checkbox"/> Sources of Capital |
| <input type="checkbox"/> Financial Statements | <input type="checkbox"/> Taxes |
| <input type="checkbox"/> Government Contracting | <input type="checkbox"/> Technology |
| <input type="checkbox"/> Hiring Employees | <input type="checkbox"/> Website Development |
| <input type="checkbox"/> Insurance and Liability | <input type="checkbox"/> Writing a Business Plan |



Once you have completed this form, click the "Save Form Data" button below to save the data to your computer. E-mail your data file as an attachment to "OCR_TAP@txdot.gov" with a subject line in your e-mail that reads "DBE Needs Assessment Data."

Make sure the subject line of your e-mail reads "DBE Needs Assessment Data" or your data may not be processed in a timely manner.

[Contact/Help](#)
[Save Form Data](#)



Disadvantaged Business Enterprise (DBE) Program Commitment Agreement Form

Form SMS-4901
(Rev. 06/08)
Page 1 of 1

This commitment is subject to the award and receipt of a signed contract from the Texas Department of Transportation for the subject project.

Project #:		County:		Contract-CSJ:	
Items of work to be performed (attach a list of work items if more room is required):					
Bid Item #	Item Description	Unit of Measure	Unit Price	Quantity	Total Per Item
Total					
The contractor certifies by signature on this agreement that subcontracts will be executed between the prime contractor and the DBE subcontractors as listed on the agreement form. If a DBE Subcontractor is unable to perform the work as listed on this agreement form, the prime contractor will follow the substitution/replacement approval process as outlined in the Contract DBE Special Provision.					
IMPORTANT: The signatures of the prime contractor and the DBE, and the total commitment amount must always be on the same page.					
Prime Contractor:			Name/Title (please print):		
Address:			Signature:		
Phone:	Fax:		Date:		
E-mail:			Date:		
DBE:			Name/Title (please print):		
Vendor No.:			Signature:		
Address:			Date:		
Phone:	Fax:		Date:		
E-mail:			Date:		
Subcontractor (if the DBE will be a second tier sub):			Name/Title (please print):		
Address:			Signature:		
Phone:	Fax:		Date:		
E-mail:			Date:		

Add Row Del Row

The Texas Department of Transportation maintains the information collected through this form. With few exceptions, you are entitled on request to be informed about the information that we collect about you. Under §§52.021 and 552.023 of the Texas Government Code, you also are entitled to receive and review the information. Under §559.004 of the Government Code, you are also entitled to have us correct information about you that is incorrect.

To ensure prompt and efficient handling of your project file we are requesting that all commitments to be presented to the Office of Civil Rights, using this basic format.

[Contact/Help](#)

2004 Specifications

SPECIAL PROVISION

000--1966

Disadvantaged Business Enterprise in Federal Aid Contracts

1. Description. The purpose of this Special Provision is to carry out the U. S. Department of Transportation's (DOT) policy of ensuring nondiscrimination in the award and administration of DOT assisted contracts and creating a level playing field on which firms owned and controlled by individuals who are determined to be socially and economically disadvantaged can compete fairly for DOT assisted contracts. If the Disadvantaged Business Enterprise (DBE) goal is greater than zero, Article A, "Disadvantaged Business Enterprise in Federal Aid Contracts", of this Special Provision shall apply to this contract. If there is no DBE goal, Article B, "Race-Neutral DBE Participation", of this Special Provision shall apply to this contract. The percentage goal for DBE participation in the work to be performed under this contract will be shown on the proposal.

A. Article A. Disadvantaged Business Enterprise in Federal Aid Contracts.

- 1. Policy.** It is the policy of the DOT and the Texas Department of Transportation (henceforth the "Department") that DBEs, as defined in 49 CFR Part 26, Subpart A and the Department's DBE Program, shall have the opportunity to participate in the performance of contracts financed in whole or in part with Federal funds. The DBE requirements of 49 CFR Part 26, and the Department's DBE Program, apply to this contract as follows:
- a.** The Contractor will solicit DBEs through reasonable and available means, as defined in 49 CFR Part 26, Appendix A and the Department's DBE Program, or show a good faith effort to meet the DBE goal for this contract.
 - b.** 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 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 recipient deems appropriate.
 - c.** The requirements of this Special Provision shall be physically included in any subcontract.
 - d.** By signing the contract proposal, the Bidder is certifying that the DBE goal as stated in the proposal will be met by obtaining commitments from eligible DBEs or that the Bidder will provide acceptable evidence of good faith effort to meet the commitment. The Department will determine the adequacy of a Contractor's efforts to meet the contract goal, within 10 business days,

excluding national holidays, from receipt of the information outlined in this Special Provision under Section 1.A.3, "Contractor's Responsibilities." If the requirements of Section 1.A.3 are met, the conditional situation will be removed and the contract will be forwarded to the Contractor for execution.

2. Definitions.

a. "Broker" is an intermediary or middleman that does not take possession of a commodity or act as a regular dealer selling to the public.

b. "Disadvantaged Business Enterprise" or "DBE" is defined in the standard specifications, Article 1, Definition of Terms.

c. "DBE Joint Venture" means an association of a DBE firm and 1 or more other firm(s) to carry out a single business enterprise for profit for which purpose they combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

d. "DOT" means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

e. "Federal Aid Contract" is any contract between the Texas Department of Transportation and a Contractor which is paid for in whole or in part with DOT financial assistance.

f. "Good Faith Effort" means efforts to achieve a DBE goal or other requirement of this Special Provision which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

g. "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 the general character described by the specifications."

h. "Race-conscious" means a measure or program that is focused specifically on assisting only DBEs, including women-owned businesses.

i. "Race-neutral DBE Participation" means any participation by a DBE through customary competitive procurement procedures.

j. "Regular Dealer" is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications 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 in, as its principal business and under its own name, the purchase and sale or lease of the products in question.

A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock if it 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. Brokers, packagers, manufacturers' representatives, or other persons who arrange or expedite transactions shall not be regarded as a regular dealer.

k. “Texas Unified Certification Program” or “TUCP” provides one-stop shopping to applicants for certification, such that applicants are required to apply only once for a DBE certification that will be honored by all recipients of federal funds in the state. The TUCP by Memorandum of Agreement established six member entities to serve as certifying agents for Texas in specified regions.

3. Contractor’s Responsibilities.

These requirements must be satisfied by the Contractor.

a. After conditional award of the contract, the Contractor shall submit a completed Form SMS.4901 “DBE Commitment Agreement”, Form SMS 4901-T “DBE Trucking Commitment Agreement”, or Form SMS.4901-MS “DBE Material & Supplier Commitment Agreement” for each DBE he/she intends to use to satisfy the DBE goal or a good faith effort to explain why the goal could not be reached, so as to arrive in the Department's Office of Civil Rights (OCR) in Austin, Texas not later than 5:00 p.m. on the 10th business day, excluding national holidays, after the conditional award of the contract. When requested, additional time, not to exceed 7 business days, excluding national holidays, may be granted based on documentation submitted by the Contractor.

b. DBE prime Contractors may receive credit toward the DBE goal for work performed by his/her own forces and work subcontracted to DBEs. A DBE prime must make a good faith effort to meet the goals. In the event a DBE prime subcontracts to a non-DBE, that information must be reported on Form SMS.4902.

c. A Contractor who cannot meet the contract goal, in whole or in part, shall make adequate good faith efforts to obtain DBE participation as so stated and defined in 49 CFR Part 26, Appendix A. The following is a list of the types of action that may be considered as good faith efforts. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

Soliciting through all reasonable and available means (e.g. attendance at prebid meetings, advertising, and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The solicitation must be done within sufficient time to allow the DBEs to respond to it. Appropriate steps must be taken to follow up initial solicitations to determine, with certainty, if the DBEs are interested.

Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the Contractor might otherwise prefer to perform the work items with its own forces.

Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.

Negotiating in good faith with interested DBEs to make a portion of the work available to DBE subcontractors and suppliers and select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiations includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

A Bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional cost involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the Contract DBE goal as long as such cost are reasonable. Also, the ability or desire of the Contractor to perform the work of the Contract with its own organization does not relieve the Bidder of the responsibility to make good faith effort. Contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The Contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate cause for the rejection or non-solicitation of bids and the Contractor's efforts to meet the project goal.

Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or Contractor.

Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

Effectively using the services of available minority/women community organizations; minority/women Contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

If the Program Manager of the OCR determines that the Contractor has failed to meet the good faith effort requirements, the Contractor will be given an opportunity for reconsideration by the Director of the OCR.

d. Should the bidder to whom the contract is conditionally awarded refuse, neglect or fail to meet the DBE goal or comply with good faith effort requirements, the proposal guaranty filed with the bid shall become the property of the state, not as a penalty, but as liquidated damages to the Department.

e. The preceding information shall be submitted directly to the Office of Civil Rights, Texas Department of Transportation, 125 E. 11th Street, Austin, Texas 78701-2483.

f. The Contractor shall not terminate for convenience a DBE subcontractor named in the commitment submitted under Section 1.A.3.a, of this Special Provision. Prior to terminating or removing a DBE subcontractor named in the commitment, the Contractor must have a written consent of the Department.

g. The Contractor shall also make a good faith effort to replace a DBE subcontractor that is unable to perform successfully with another DBE, to the extent needed to meet the contract goal. The Contractor shall submit a completed Form 4901 “DBE Commitment Agreement”, Form SMS 4901-T “DBE Trucking Commitment Agreement”, or Form SMS.4901-MS “DBE Material & Supplier Commitment Agreement” for the substitute DBE firm(s). Any substitution of DBEs shall be subject to approval by the Department. Prior to approving the substitution, the Department will request a statement from the DBE concerning it being replaced.

h. The Contractor shall designate a DBE liaison officer who will administer the Contractor’s DBE program and who will be responsible for maintenance of records of efforts and contacts made to subcontract with DBEs.

i. Contractors are encouraged to investigate the services offered by banks owned and controlled by disadvantaged individuals and to make use of these banks where feasible.

4. Eligibility of DBEs.

a. The member entities of the TUCP certify the eligibility of DBEs and DBE joint ventures to perform DBE subcontract work on DOT financially assisted contracts.

b. The Department maintains the Texas Unified Certification Program DBE Directory containing the names of firms that have been certified to be eligible to participate as DBE’s on DOT financially assisted contracts. This Directory is available from the Department’s OCR. An update of the Directory can be found on the Internet at <http://www.dot.state.tx.us/business/tucp/default.htm>.

c. Only DBE firms certified at the time commitments are submitted are eligible to be used in the information furnished by the Contractor as required under Section 1.A.3.a. and 3.g. above. For purposes of the DBE goal on this project, DBEs will only be allowed to perform work in the categories of work for which they are certified.

d. Only DBE firms certified at the time of execution of a contract/subcontract/purchase order, are eligible for DBE goal participation.

5. Determination of DBE Participation.

When a DBE participates in a contract, only the values of the work actually performed by the DBE, as referenced below, shall be counted by the prime contractor toward DBE goals:

a. The total amount paid to the DBE for work performed with his/her own forces is counted toward the DBE goal. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

b. A Contractor may count toward its DBE goal a portion of the total value of the contract amount paid to a DBE joint venture equal to the distinct, clearly defined portion of the work of the contract performed by the DBE.

(1) A Contractor may count toward its DBE goal only expenditures to DBEs that perform a commercially useful function (CUF) in the work of a contract or purchase order. A DBE is considered to perform a CUF when it is responsible for execution of the work of the contract and is carrying out its 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 price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself.

In accordance with 49 CFR Part 26, Appendix A, guidance concerning Good Faith Efforts, contractors may make efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services. Contractors may not however, negotiate the price of materials or supplies used on the contract by the DBE, nor may they determine quality and quantity, order the materials themselves, nor install the materials (where applicable), or pay for the material themselves. Contractors however, may share the quotations they receive from the material supplier with the DBE firm, so that the DBE firm may negotiate a reasonable price with the material supplier.

In all cases, prime or other non-DBE subcontractor assistance will not be credited toward the DBE goal.

(2) A DBE does not perform a CUF if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation.

Consistent with industry practices and the DOT/Department's DBE program, a DBE subcontractor may enter into second-tier subcontracts, amounting up to 70% of their contract. Work subcontracted to a non-DBE does not count towards DBE goals. If a DBE does not perform or exercise responsibility for at least 30% of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, it will be presumed that the DBE is not performing a CUF

- (3)** A DBE trucking firm (including an owner operator who is certified as a DBE) is considered to be performing a CUF when the DBE is responsible for the management and supervision of the entire trucking operation on a particular contract and the DBE itself owns and operates at least 1 fully licensed, insured, and operational truck used on the contract. **(a)** The Contractor receives credit for the total value of the transportation services the DBE provides on a contract using trucks it owns, insures, and operates using drivers it employs. **(b)** The DBE may lease trucks from another DBE firm, including an owner operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the Contract. **(c)** The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by the DBE-owned trucks on the contract. Additional participation by non-DBE lessees receive credit only for the fee or commission it receives as result of the lease arrangement **(d)** A lease must indicate that the DBE has exclusive use of and control over the trucks giving the DBE absolute priority for use of the leased trucks. Leased trucks must display the name and identification number of the DBE. **(4)** When a DBE is presumed not to be performing a CUF the DBE may present evidence to rebut this presumption. **(5)** Project materials or supplies acquired from an affiliate of the prime contractor can not directly or indirectly (2nd or lower tier subcontractor) be used for DBE goal credit.

c. A Contractor may count toward its DBE goals expenditures for materials and supplies obtained from a DBE manufacturer, provided that the DBE assumes the actual and contractual responsibility for the materials and supplies. Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

(1) If the materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies toward DBE goals. (Definition of a DBE manufacturer found at 1A.c.(1) of this provision.)

For purposes of this Section (1.A.c.(1)), 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 the general character described by the specifications.

(2) If the materials or supplies are purchased from a DBE regular dealer, count 60% of the cost of the materials or supplies toward DBE goals.

For purposes of this Section (1.A.5.c.(2)), 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 of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business:

(A) 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.

(B) 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 in the first paragraph under Section 1.A.5.c.(2), 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.

(C) Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of Section 1.A.5.c.(2).

(3) With respect to materials or supplies purchased from DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided you determine the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services.

Do not count any portion of the cost of the materials and supplies themselves toward DBE goals.

- (4) Count the entire amount of 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 DOT-assisted contract, toward DBE goals, provided you determine the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

- d. If the Contractor chooses to assist a DBE firm, other than a manufacturing material supplier or regular dealer, and the DBE firm accepts the assistance, the Contractor may act solely as a guarantor by use of a two-party check for payment of materials to be used on the project by the DBE. The material supplier must invoice the DBE who will present the invoice to the Contractor. The Contractor may issue a joint check to the DBE and the material supplier and the DBE firm must issue the remittance to the material supplier. No funds shall go directly from the Contractor to the material supplier. The DBE firm may accept or reject this joint checking arrangement.

The Contractor must obtain approval from the Department prior to implementing the use of joint check arrangements with the DBE. Submit to the Department, Joint Check Approval Form 2178 for requesting approval. Provide copies of cancelled joint checks upon request. No DBE goal credit will be allowed for the cost of DBE materials that are paid by the Contractor directly to the material supplier.

- e. No DBE goal credit will be allowed for supplies and equipment the DBE subcontractor leases from the contractor or its affiliates.
- f. No DBE goal credit will be allowed for the period of time determined by the Department that the DBE was not performing a CUF. The denial period of time may occur before or after a determination has been made by the department. In case of the denial of credit for non-performance of a CUF of a DBE, the Contractor will be required to provide a substitute DBE to meet the contract goal or provide an adequate good faith effort when applicable.

6. Records and Reports.

- a. The Contractor shall submit monthly reports, after work begins, on DBE payments to meet the DBE goal and for DBE or HUB race-neutral participation. Report payments made to non-DBE HUBs. The monthly report is to be sent to the Area Engineer. These reports will be due within 15 days after the end of a calendar month. These reports will be required until all DBE subcontracting or material supply activity is completed. Form SMS.4903, "DBE Progress Report," is to be used for monthly reporting. Form. SMS.4904, "DBE Final Report," is to be used as a final summary of DBE payments submitted upon completion of the project.

The original final report must be submitted to the OCR and a copy must be submitted to the Area Engineer. These forms may be obtained from the Department or may be reproduced by the Contractor. The Department may verify the amounts being reported as paid to DBEs by requesting copies of cancelled checks paid to DBEs on a random basis. Cancelled checks and invoices should reference the Department's project number.

b. DBE subcontractors and/or material suppliers should be identified on the monthly report by Vendor Number, name, and the amount of actual payment made to each during the monthly period. Negative reports are required when no activity has occurred in a monthly period.

c. All such records must be retained for a period of 3 years following completion of the contract work, and shall be available at reasonable times and places for inspection by authorized representatives of the Department or the DOT. Provide copies of subcontracts or agreements and other documentation upon request.

d. Prior to receiving final payment, the Contractor shall submit Form SMS.4904, "DBE Final Report". If the DBE goal requirement is not met, documentation supporting Good Faith Efforts, as outlined in Section 1.A.3.c of this Special Provision, must be submitted with the "DBE Final Report."

e. Provide a certification of prompt payment in accordance with the Department's prompt payment procedure to certify that all subcontractors and suppliers were paid from the previous months payments and retainage was released for those whose work is complete. Submit the completed form each month and the month following the month when final acceptance occurred at the end of the project.

7. Compliance of Contractor. To ensure that DBE requirements of this DOT assisted contract are complied with, the Department will monitor the Contractor's efforts to involve DBEs during the performance of this contract. This will be accomplished by a review of monthly reports submitted to the Area Engineer by the Contractor indicating his progress in achieving the DBE contract goal, and by compliance reviews conducted on the project site by the Department.

The Contractor shall receive credit toward the DBE goal based on actual payments to the DBE subcontractor. The Contractor shall notify the Area Engineer if he/she withholds or reduces payment to any DBE subcontractor. The Contractor shall submit an affidavit detailing the DBE subcontract payments prior to receiving final payment for the contract.

Contractors' requests for substitutions of DBE subcontractors shall be accompanied by a detailed explanation which should substantiate the need for a substitution. The Contractor may not be allowed to count work on those items being substituted toward the DBE goal prior to approval of the substitution from the Department.

The prime Contractor is prohibited from providing work crews and equipment to DBEs. DBE Goal credit for the DBE subcontractors leasing of equipment or purchasing of supplies from the prime contractor or its affiliates is not allowed.

When a DBE subcontractor named in the commitment under Section 1.A.3.a. of this Special Provision, is terminated or fails to complete its work on the contract for any reason, the prime contractor is required 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.

A Contractor's failure to comply with the requirements of this Special Provision shall constitute a material breach of this contract. In such a case, the Department reserves the right to terminate the contract; to deduct the amount of DBE goal not accomplished by DBEs from the money due or to become due the Contractor, or to secure a refund, not as a penalty but as liquidated damages to the Department or such other remedy or remedies as the Department deems appropriate.

Forward Form 2371, "DBE Trucking Credit Worksheet," completed by the DBE trucker every month DBE credit is used.

B. Article B. Race-Neutral Disadvantaged Business Enterprise Participation. It is the policy of the DOT that Disadvantaged Business Enterprises (DBE) as defined in 49 CFR Part 26 Subpart A, be given the opportunity to compete fairly for contracts and subcontracts financed in whole or in part with Federal funds and that a maximum feasible portion of the Department's overall DBE goal be met using race-neutral means. Consequently, if there is no DBE goal, the DBE requirements of 49 CFR Part 26, apply to this contract as follows:

The Contractor will offer DBEs as defined in 49 CFR Part 26, Subpart A, the opportunity to compete fairly for contracts and subcontractors financed in whole or in part with Federal funds. Race-Neutral DBE and non-DBE HUB participation on projects with no DBE goal shall be reported on Form SMS.4903, "DBE or HUB Progress Report" and submitted to the Area Engineer each month and at project completion. Payments to DBEs reported on Form SMS.4903 are subject to the requirements of Section 1.A.5, "Determination of DBE Participation."

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 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 recipient deems

FHWA-1273 -- Revised May 1, 2012

REQUIRED CONTRACT PROVISIONS

FEDERAL-AID CONSTRUCTION CONTRACTS

I. General

II. Nondiscrimination

III. Nonsegregated Facilities

IV. Davis-Bacon and Related Act Provisions

V. Contract Work Hours and Safety Standards Act Provisions

VI. Subletting or Assigning the Contract

VII. Safety: Accident Prevention

VIII. False Statements Concerning Highway Projects

IX. Implementation of Clean Air Act and Federal Water Pollution Control Act

X. Compliance with Governmentwide Suspension and Debarment Requirements

XI. Certification Regarding Use of Contract Funds for Lobbying

ATTACHMENTS

A. Employment and Materials Preference for Appalachian Development Highway System or Appalachian Local Access Road Contracts (included in Appalachian contracts only)

I. GENERAL

1. Form FHWA-1273 must be physically incorporated in each construction contract funded under Title 23 (excluding emergency contracts solely intended for debris removal). The contractor (or subcontractor) must insert this form in each subcontract and further require its inclusion in all lower tier subcontracts (excluding purchase orders, rental agreements and other agreements for supplies or services).

The applicable requirements of Form FHWA-1273 are incorporated by reference for work done under any purchase order, rental agreement or agreement for other services. The prime contractor shall be responsible for compliance by any subcontractor, lower-tier subcontractor or service provider.

Form FHWA-1273 must be included in all Federal-aid design-build contracts, in all subcontracts and in lower tier subcontracts (excluding subcontracts for design services, purchase orders, rental agreements and other agreements for supplies or services). The design-builder shall be responsible for compliance by any subcontractor, lower-tier subcontractor or service provider.

Contracting agencies may reference Form FHWA-1273 in bid proposal or request for proposal documents, however, the Form FHWA-1273 must be physically incorporated (not referenced) in all contracts, subcontracts and lower-tier subcontracts (excluding purchase orders, rental agreements and other agreements for supplies or services related to a construction contract).

2. Subject to the applicability criteria noted in the following sections, these contract provisions shall apply to all work performed on the contract by the contractor's own organization and with the assistance of workers under the contractor's immediate superintendence and to all work performed on the contract by piecework, station work, or by subcontract.

3. A breach of any of the stipulations contained in these Required Contract Provisions may be sufficient grounds for withholding of progress payments, withholding of final payment, termination of the contract, suspension / debarment or any other action determined to be appropriate by the contracting agency and FHWA.

4. Selection of Labor: During the performance of this contract, the contractor shall not use convict labor for any purpose within the limits of a construction project on a Federal-aid highway unless it is labor performed by convicts who are on parole, supervised release, or probation. The term Federal-aid highway does not include roadways functionally classified as local roads or rural minor collectors.

II. NONDISCRIMINATION

The provisions of this section related to 23 CFR Part 230 are applicable to all Federal-aid construction contracts and to all related construction subcontracts of \$10,000 or more. The provisions of 23 CFR Part 230 are not applicable to material supply, engineering, or architectural service contracts.

In addition, the contractor and all subcontractors must comply with the following policies: Executive Order 11246, 41 CFR 60, 29 CFR 1625-1627, Title 23 USC Section 140, the Rehabilitation Act of 1973, as amended (29 USC 794), Title VI of the Civil Rights Act of 1964, as amended, and related regulations including 49 CFR Parts 21, 26 and 27; and 23 CFR Parts 200, 230, and 633.

The contractor and all subcontractors must comply with: the requirements of the Equal Opportunity Clause in 41 CFR 60-1.4(b) and, for all construction contracts exceeding \$10,000,

the Standard Federal Equal Employment Opportunity Construction Contract Specifications in 41 CFR 60-4.3.

Note: The U.S. Department of Labor has exclusive authority to determine compliance with Executive Order 11246 and the policies of the Secretary of Labor including 41 CFR 60, and 29 CFR 1625-1627. The contracting agency and the FHWA have the authority and the responsibility to ensure compliance with Title 23 USC Section 140, the Rehabilitation Act of 1973, as amended (29 USC 794), and Title VI of the Civil Rights Act of 1964, as amended, and related regulations including 49 CFR Parts 21, 26 and 27; and 23 CFR Parts 200, 230, and 633.

The following provision is adopted from 23 CFR 230, Appendix A, with appropriate revisions to conform to the U.S. Department of Labor (US DOL) and FHWA requirements.

1. Equal Employment Opportunity: Equal employment opportunity (EEO) requirements not to discriminate and to take affirmative action to assure equal opportunity as set forth under laws, executive orders, rules, regulations (28 CFR 35, 29 CFR 1630, 29 CFR 1625-1627, 41 CFR 60 and 49 CFR 27) and orders of the Secretary of Labor as modified by the provisions prescribed herein, and imposed pursuant to 23 U.S.C. 140 shall constitute the EEO and specific affirmative action standards for the contractor's project activities under this contract. The provisions of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) set forth under 28 CFR 35 and 29 CFR 1630 are incorporated by reference in this contract. In the execution of this contract, the contractor agrees to comply with the following minimum specific requirement activities of EEO:

a. The contractor will work with the contracting agency and the Federal Government to ensure that it has made every good faith effort to provide equal opportunity with respect to all of its terms and conditions of employment and in their review of activities under the contract.

b. The contractor will accept as its operating policy the following statement:

"It is the policy of this Company to assure that applicants are employed, and that employees are treated during employment, without regard to their race, religion, sex, color, national origin, age or disability. Such action shall include: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship, pre-apprenticeship, and/or on-the-job training."

2. EEO Officer: The contractor will designate and make known to the contracting officers an EEO Officer who will have the responsibility for and must be capable of effectively administering and promoting an active EEO program and who must be assigned adequate authority and responsibility to do so.

3. Dissemination of Policy: All members of the contractor's staff who are authorized to hire, supervise, promote, and discharge employees, or who recommend such action, or who are substantially involved in such action, will be made fully cognizant of, and will implement, the contractor's EEO policy and contractual responsibilities to provide EEO in each grade and classification of employment. To ensure that the above agreement will be met, the following actions will be taken as a minimum:

a. Periodic meetings of supervisory and personnel office employees will be conducted before the start of work and then not less often than once every six months, at which time the contractor's EEO policy and its implementation will be reviewed and explained. The meetings will be conducted by the EEO Officer.

b. All new supervisory or personnel office employees will be given a thorough indoctrination by the EEO Officer, covering all major aspects of the contractor's EEO obligations within thirty days following their reporting for duty with the contractor.

c. All personnel who are engaged in direct recruitment for the project will be instructed by the EEO Officer in the contractor's procedures for locating and hiring minorities and women.

d. Notices and posters setting forth the contractor's EEO policy will be placed in areas readily accessible to employees, applicants for employment and potential employees.

e. The contractor's EEO policy and the procedures to implement such policy will be brought to the attention of employees by means of meetings, employee handbooks, or other appropriate means.

4. Recruitment: When advertising for employees, the contractor will include in all advertisements for employees the notation: "An Equal Opportunity Employer." All such advertisements will be placed in publications having a large circulation among minorities and women in the area from which the project work force would normally be derived.

a. The contractor will, unless precluded by a valid bargaining agreement, conduct systematic and direct recruitment through public and private employee referral sources likely to yield qualified minorities and women. To meet this requirement, the contractor will identify sources of potential minority group employees, and establish with such identified sources procedures whereby minority and women applicants may be referred to the contractor for employment consideration.

b. In the event the contractor has a valid bargaining agreement providing for exclusive hiring hall referrals, the contractor is expected to observe the provisions of that agreement to the extent that the system meets the contractor's compliance with EEO contract provisions. Where implementation of such an agreement has the effect of discriminating against minorities or

women, or obligates the contractor to do the same, such implementation violates Federal nondiscrimination provisions.

c. The contractor will encourage its present employees to refer minorities and women as applicants for employment. Information and procedures with regard to referring such applicants will be discussed with employees.

5. Personnel Actions: Wages, working conditions, and employee benefits shall be established and administered, and personnel actions of every type, including hiring, upgrading, promotion, transfer, demotion, layoff, and termination, shall be taken without regard to race, color, religion, sex, national origin, age or disability. The following procedures shall be followed:

a. The contractor will conduct periodic inspections of project sites to insure that working conditions and employee facilities do not indicate discriminatory treatment of project site personnel.

b. The contractor will periodically evaluate the spread of wages paid within each classification to determine any evidence of discriminatory wage practices.

c. The contractor will periodically review selected personnel actions in depth to determine whether there is evidence of discrimination. Where evidence is found, the contractor will promptly take corrective action. If the review indicates that the discrimination may extend beyond the actions reviewed, such corrective action shall include all affected persons.

d. The contractor will promptly investigate all complaints of alleged discrimination made to the contractor in connection with its obligations under this contract, will attempt to resolve such complaints, and will take appropriate corrective action within a reasonable time. If the investigation indicates that the discrimination may affect persons other than the complainant, such corrective action shall include such other persons. Upon completion of each investigation, the contractor will inform every complainant of all of their avenues of appeal.

6. Training and Promotion:

a. The contractor will assist in locating, qualifying, and increasing the skills of minorities and women who are applicants for employment or current employees. Such efforts should be aimed at developing full journey level status employees in the type of trade or job classification involved.

b. Consistent with the contractor's work force requirements and as permissible under Federal and State regulations, the contractor shall make full use of training programs, i.e., apprenticeship, and on-the-job training programs for the geographical area of contract performance. In the event a special provision for training is provided under this contract, this subparagraph will be

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superseded as indicated in the special provision. The contracting agency may reserve training positions for persons who receive welfare assistance in accordance with 23 U.S.C. 140(a).

c. The contractor will advise employees and applicants for employment of available training programs and entrance requirements for each.

d. The contractor will periodically review the training and promotion potential of employees who are minorities and women and will encourage eligible employees to apply for such training and promotion.

7. Unions: If the contractor relies in whole or in part upon unions as a source of employees, the contractor will use good faith efforts to obtain the cooperation of such unions to increase opportunities for minorities and women. Actions by the contractor, either directly or through a contractor's association acting as agent, will include the procedures set forth below:

a. The contractor will use good faith efforts to develop, in cooperation with the unions, joint training programs aimed toward qualifying more minorities and women for membership in the unions and increasing the skills of minorities and women so that they may qualify for higher paying employment.

b. The contractor will use good faith efforts to incorporate an EEO clause into each union agreement to the end that such union will be contractually bound to refer applicants without regard to their race, color, religion, sex, national origin, age or disability.

c. The contractor is to obtain information as to the referral practices and policies of the labor union except that to the extent such information is within the exclusive possession of the labor union and such labor union refuses to furnish such information to the contractor, the contractor shall so certify to the contracting agency and shall set forth what efforts have been made to obtain such information.

d. In the event the union is unable to provide the contractor with a reasonable flow of referrals within the time limit set forth in the collective bargaining agreement, the contractor will, through independent recruitment efforts, fill the employment vacancies without regard to race, color, religion, sex, national origin, age or disability; making full efforts to obtain qualified and/or qualifiable minorities and women. The failure of a union to provide sufficient referrals (even though it is obligated to provide exclusive referrals under the terms of a collective bargaining agreement) does not relieve the contractor from the requirements of this paragraph. In the event the union referral practice prevents the contractor from meeting the obligations pursuant to Executive Order 11246, as amended, and these special provisions, such contractor shall immediately notify the contracting agency.

8. Reasonable Accommodation for Applicants / Employees with Disabilities: The contractor must be familiar with the requirements for and comply with the Americans with Disabilities Act and all rules and regulations established there under. Employers must provide reasonable accommodation in all employment activities unless to do so would cause an undue hardship.

9. Selection of Subcontractors, Procurement of Materials and Leasing of Equipment: The contractor shall not discriminate on the grounds of race, color, religion, sex, national origin, age or disability in the selection and retention of subcontractors, including procurement of materials and leases of equipment. The contractor shall take all necessary and reasonable steps to ensure nondiscrimination in the administration of this contract.

a. The contractor shall notify all potential subcontractors and suppliers and lessors of their EEO obligations under this contract.

b. The contractor will use good faith efforts to ensure subcontractor compliance with their EEO obligations.

10. Assurance Required by 49 CFR 26.13(b):

a. The requirements of 49 CFR Part 26 and the State DOT's U.S. DOT-approved DBE program are incorporated by reference.

b. The contractor 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 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 contracting agency deems appropriate.

11. Records and Reports: The contractor shall keep such records as necessary to document compliance with the EEO requirements. Such records shall be retained for a period of three years following the date of the final payment to the contractor for all contract work and shall be available at reasonable times and places for inspection by authorized representatives of the contracting agency and the FHWA.

a. The records kept by the contractor shall document the following:

(1) The number and work hours of minority and non-minority group members and women employed in each work classification on the project;

(2) The progress and efforts being made in cooperation with unions, when applicable, to increase employment opportunities for minorities and women; and

(3) The progress and efforts being made in locating, hiring, training, qualifying, and upgrading minorities and women;

b. The contractors and subcontractors will submit an annual report to the contracting agency each July for the duration of the project, indicating the number of minority, women, and non-minority group employees currently engaged in each work classification required by the contract work. This information is to be reported on Form FHWA-1391. The staffing data should represent the project work force on board in all or any part of the last payroll period preceding the end of July. If on-the-job training is being required by special provision, the contractor will be required to collect and report training data. The employment data should reflect the work force on board during all or any part of the last payroll period preceding the end of July.

III. NONSEGREGATED FACILITIES

This provision is applicable to all Federal-aid construction contracts and to all related construction subcontracts of \$10,000 or more.

The contractor must ensure that facilities provided for employees are provided in such a manner that segregation on the basis of race, color, religion, sex, or national origin cannot result. The contractor may neither require such segregated use by written or oral policies nor tolerate such use by employee custom. The contractor's obligation extends further to ensure that its employees are not assigned to perform their services at any location, under the contractor's control, where the facilities are segregated. The term "facilities" includes waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, washrooms, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing provided for employees. The contractor shall provide separate or single-user restrooms and necessary dressing or sleeping areas to assure privacy between sexes.

IV. DAVIS-BACON AND RELATED ACT PROVISIONS

This section is applicable to all Federal-aid construction projects exceeding \$2,000 and to all related subcontracts and lower-tier subcontracts (regardless of subcontract size). The requirements apply to all projects located within the right-of-way of a roadway that is functionally classified as Federal-aid highway. This excludes roadways functionally classified as local roads or rural minor collectors, which are exempt. Contracting agencies may elect to apply these requirements to other projects.

The following provisions are from the U.S. Department of Labor regulations in 29 CFR 5.5 "Contract provisions and related matters" with minor revisions to conform to the FHWA-1273 format and FHWA program requirements.

1. Minimum wages

a. All laborers and mechanics employed or working upon the site of the work, will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics.

Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph 1.d. of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in 29 CFR 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under paragraph 1.b. of this section) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

b. (1) The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

- (i) The work to be performed by the classification requested is not performed by a classification in the wage determination; and
- (ii) The classification is utilized in the area by the construction industry; and
- (iii) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(2) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(3) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Wage and Hour Administrator for determination. The Wage and Hour Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(4) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs 1.b.(2) or 1.b.(3) of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

c. Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

d. If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, Provided, That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

2. Withholding

The contracting agency shall upon its own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the contractor under this contract, or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work, all or part of the wages required by the contract, the contracting agency may, after written notice to the contractor, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

3. Payrolls and basic records

a. Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work. Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

b. (1) The contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the contracting agency. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under 29 CFR 5.5(a)(3)(i), except that full social security numbers and home addresses shall not be included on weekly transmittals. Instead the payrolls shall only need to include an individually identifying number for each employee (e.g. , the last four digits of the employee's social security number). The required weekly payroll information may be submitted in any form desired. Optional

Form WH-347 is available for this purpose from the Wage and Hour Division Web site at <http://www.dol.gov/esa/whd/forms/wh347instr.htm> or its successor site. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors. Contractors and subcontractors shall maintain the full social security number and current address of each covered worker, and shall provide them upon request to the contracting agency for transmission to the State DOT, the FHWA or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. It is not a violation of this section for a prime contractor to require a subcontractor to provide addresses and social security numbers to the prime contractor for its own records, without weekly submission to the contracting agency..

(2) Each payroll submitted shall be accompanied by a “Statement of Compliance,” signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

(i) That the payroll for the payroll period contains the information required to be provided under §5.5 (a)(3)(ii) of Regulations, 29 CFR part 5, the appropriate information is being maintained under §5.5 (a)(3)(i) of Regulations, 29 CFR part 5, and that such information is correct and complete;

(ii) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR part 3;

(iii) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(3) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the “Statement of Compliance” required by paragraph 3.b.(2) of this section.

(4) The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.

c. The contractor or subcontractor shall make the records required under paragraph 3.a. of this section available for inspection, copying, or transcription by authorized representatives of the contracting agency, the State DOT, the FHWA, or the Department of Labor, and shall permit

such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the FHWA may, after written notice to the contractor, the contracting agency or the State DOT, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

4. Apprentices and trainees

a. Apprentices (programs of the USDOL).

Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer and Labor Services, or with a State Apprenticeship Agency recognized by the Office, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Office of Apprenticeship Training, Employer and Labor Services or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice.

The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed.

Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination.

In the event the Office of Apprenticeship Training, Employer and Labor Services, or a State Apprenticeship Agency recognized by the Office, withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

b. Trainees (programs of the USDOL).

Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration.

The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration.

Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed.

In the event the Employment and Training Administration withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

c. Equal employment opportunity. The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR part 30.

d. Apprentices and Trainees (programs of the U.S. DOT).

Apprentices and trainees working under apprenticeship and skill training programs which have been certified by the Secretary of Transportation as promoting EEO in connection with

Federal-aid highway construction programs are not subject to the requirements of paragraph 4 of this Section IV. The straight time hourly wage rates for apprentices and trainees under such programs will be established by the particular programs. The ratio of apprentices and trainees to journeymen shall not be greater than permitted by the terms of the particular program.

5. Compliance with Copeland Act requirements. The contractor shall comply with the requirements of 29 CFR part 3, which are incorporated by reference in this contract.

6. Subcontracts. The contractor or subcontractor shall insert Form FHWA-1273 in any subcontracts and also require the subcontractors to include Form FHWA-1273 in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

7. Contract termination: debarment. A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

8. Compliance with Davis-Bacon and Related Act requirements. All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are herein incorporated by reference in this contract.

9. Disputes concerning labor standards. Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

10. Certification of eligibility.

a. By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

b. No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

c. The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

V. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT

The following clauses apply to any Federal-aid construction contract in an amount in excess of \$100,000 and subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by 29 CFR 5.5(a) or 29 CFR 4.6. As used in this paragraph, the terms laborers and mechanics include watchmen and guards.

1. Overtime requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

2. Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the clause set forth in paragraph (1.) of this section, the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (1.) of this section, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (1.) of this section.

3. Withholding for unpaid wages and liquidated damages. The FHWA or the contacting agency shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (2.) of this section.

4. Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (1.) through (4.) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (1.) through (4.) of this section.

VI. SUBLETTING OR ASSIGNING THE CONTRACT

This provision is applicable to all Federal-aid construction contracts on the National Highway System.

1. The contractor shall perform with its own organization contract work amounting to not less than 30 percent (or a greater percentage if specified elsewhere in the contract) of the total original contract price, excluding any specialty items designated by the contracting agency. Specialty items may be performed by subcontract and the amount of any such specialty items performed may be deducted from the total original contract price before computing the amount of work required to be performed by the contractor's own organization (23 CFR 635.116).

a. The term "perform work with its own organization" refers to workers employed or leased by the prime contractor, and equipment owned or rented by the prime contractor, with or without operators. Such term does not include employees or equipment of a subcontractor or lower tier subcontractor, agents of the prime contractor, or any other assignees. The term may include payments for the costs of hiring leased employees from an employee leasing firm meeting all relevant Federal and State regulatory requirements. Leased employees may only be included in this term if the prime contractor meets all of the following conditions:

- (1) the prime contractor maintains control over the supervision of the day-to-day activities of the leased employees;
- (2) the prime contractor remains responsible for the quality of the work of the leased employees;
- (3) the prime contractor retains all power to accept or exclude individual employees from work on the project; and
- (4) the prime contractor remains ultimately responsible for the payment of predetermined minimum wages, the submission of payrolls, statements of compliance and all other Federal regulatory requirements.

b. "Specialty Items" shall be construed to be limited to work that requires highly specialized knowledge, abilities, or equipment not ordinarily available in the type of contracting organizations qualified and expected to bid or propose on the contract as a whole and in general are to be limited to minor components of the overall contract.

2. The contract amount upon which the requirements set forth in paragraph (1) of Section VI is computed includes the cost of material and manufactured products which are to be purchased or produced by the contractor under the contract provisions.

3. The contractor shall furnish (a) a competent superintendent or supervisor who is employed by the firm, has full authority to direct performance of the work in accordance with the contract

requirements, and is in charge of all construction operations (regardless of who performs the work) and (b) such other of its own organizational resources (supervision, management, and engineering services) as the contracting officer determines is necessary to assure the performance of the contract.

4. No portion of the contract shall be sublet, assigned or otherwise disposed of except with the written consent of the contracting officer, or authorized representative, and such consent when given shall not be construed to relieve the contractor of any responsibility for the fulfillment of the contract. Written consent will be given only after the contracting agency has assured that each subcontract is evidenced in writing and that it contains all pertinent provisions and requirements of the prime contract.

5. The 30% self-performance requirement of paragraph (1) is not applicable to design-build contracts; however, contracting agencies may establish their own self-performance requirements.

VII. SAFETY: ACCIDENT PREVENTION

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts.

1. In the performance of this contract the contractor shall comply with all applicable Federal, State, and local laws governing safety, health, and sanitation (23 CFR 635). The contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions as it determines, or as the contracting officer may determine, to be reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract.

2. It is a condition of this contract, and shall be made a condition of each subcontract, which the contractor enters into pursuant to this contract, that the contractor and any subcontractor shall not permit any employee, in performance of the contract, to work in surroundings or under conditions which are unsanitary, hazardous or dangerous to his/her health or safety, as determined under construction safety and health standards (29 CFR 1926) promulgated by the Secretary of Labor, in accordance with Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3704).

3. Pursuant to 29 CFR 1926.3, it is a condition of this contract that the Secretary of Labor or authorized representative thereof, shall have right of entry to any site of contract performance to inspect or investigate the matter of compliance with the construction safety and health standards and to carry out the duties of the Secretary under Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C.3704).

VIII. FALSE STATEMENTS CONCERNING HIGHWAY PROJECTS

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts.

In order to assure high quality and durable construction in conformity with approved plans and specifications and a high degree of reliability on statements and representations made by engineers, contractors, suppliers, and workers on Federal-aid highway projects, it is essential that all persons concerned with the project perform their functions as carefully, thoroughly, and honestly as possible. Willful falsification, distortion, or misrepresentation with respect to any facts related to the project is a violation of Federal law. To prevent any misunderstanding regarding the seriousness of these and similar acts, Form FHWA-1022 shall be posted on each Federal-aid highway project (23 CFR 635) in one or more places where it is readily available to all persons concerned with the project:

18 U.S.C. 1020 reads as follows:

"Whoever, being an officer, agent, or employee of the United States, or of any State or Territory, or whoever, whether a person, association, firm, or corporation, knowingly makes any false statement, false representation, or false report as to the character, quality, quantity, or cost of the material used or to be used, or the quantity or quality of the work performed or to be performed, or the cost thereof in connection with the submission of plans, maps, specifications, contracts, or costs of construction on any highway or related project submitted for approval to the Secretary of Transportation; or

Whoever knowingly makes any false statement, false representation, false report or false claim with respect to the character, quality, quantity, or cost of any work performed or to be performed, or materials furnished or to be furnished, in connection with the construction of any highway or related project approved by the Secretary of Transportation; or

Whoever knowingly makes any false statement or false representation as to material fact in any statement, certificate, or report submitted pursuant to provisions of the Federal-aid Roads Act approved July 1, 1916, (39 Stat. 355), as amended and supplemented;

Shall be fined under this title or imprisoned not more than 5 years or both."

IX. IMPLEMENTATION OF CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts.

By submission of this bid/proposal or the execution of this contract, or subcontract, as appropriate, the bidder, proposer, Federal-aid construction contractor, or subcontractor, as appropriate, will be deemed to have stipulated as follows:

1. That any person who is or will be utilized in the performance of this contract is not prohibited from receiving an award due to a violation of Section 508 of the Clean Water Act or Section 306 of the Clean Air Act.
2. That the contractor agrees to include or cause to be included the requirements of paragraph (1) of this Section X in every subcontract, and further agrees to take such action as the contracting agency may direct as a means of enforcing such requirements.

X. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION

This provision is applicable to all Federal-aid construction contracts, design-build contracts, subcontracts, lower-tier subcontracts, purchase orders, lease agreements, consultant contracts or any other covered transaction requiring FHWA approval or that is estimated to cost \$25,000 or more – as defined in 2 CFR Parts 180 and 1200.

1. Instructions for Certification – First Tier Participants:

- a. By signing and submitting this proposal, the prospective first tier participant is providing the certification set out below.
- b. The inability of a person to provide the certification set out below will not necessarily result in denial of participation in this covered transaction. The prospective first tier participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective first tier participant to furnish a certification or an explanation shall disqualify such a person from participation in this transaction.
- c. The certification in this clause is a material representation of fact upon which reliance was placed when the contracting agency determined to enter into this transaction. If it is later determined that the prospective participant knowingly rendered an erroneous certification, in

addition to other remedies available to the Federal Government, the contracting agency may terminate this transaction for cause of default.

d. The prospective first tier participant shall provide immediate written notice to the contracting agency to whom this proposal is submitted if any time the prospective first tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

e. The terms "covered transaction," "debarred," "suspended," "ineligible," "participant," "person," "principal," and "voluntarily excluded," as used in this clause, are defined in 2 CFR Parts 180 and 1200. "First Tier Covered Transactions" refers to any covered transaction between a grantee or subgrantee of Federal funds and a participant (such as the prime or general contract). "Lower Tier Covered Transactions" refers to any covered transaction under a First Tier Covered Transaction (such as subcontracts). "First Tier Participant" refers to the participant who has entered into a covered transaction with a grantee or subgrantee of Federal funds (such as the prime or general contractor). "Lower Tier Participant" refers any participant who has entered into a covered transaction with a First Tier Participant or other Lower Tier Participants (such as subcontractors and suppliers).

f. The prospective first tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

g. The prospective first tier participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions," provided by the department or contracting agency, entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions exceeding the \$25,000 threshold.

h. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant is responsible for ensuring that its principals are not suspended, debarred, or otherwise ineligible to participate in covered transactions. To verify the eligibility of its principals, as well as the eligibility of any lower tier prospective participants, each participant may, but is not required to, check the Excluded Parties List System website (<https://www.epls.gov/>), which is compiled by the General Services Administration.

i. Nothing contained in the foregoing shall be construed to require the establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of the prospective participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

j. Except for transactions authorized under paragraph (f) of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

* * * * *

2. Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion – First Tier Participants:

a. The prospective first tier participant certifies to the best of its knowledge and belief, that it and its principals:

(1) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any Federal department or agency;

(2) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(3) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (a)(2) of this certification; and

(4) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

b. Where the prospective participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

2. Instructions for Certification - Lower Tier Participants:

(Applicable to all subcontracts, purchase orders and other lower tier transactions requiring prior FHWA approval or estimated to cost \$25,000 or more - 2 CFR Parts 180 and 1200)

- a. By signing and submitting this proposal, the prospective lower tier is providing the certification set out below.
- b. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department, or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.
- c. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous by reason of changed circumstances.
- d. The terms "covered transaction," "debarred," "suspended," "ineligible," "participant," "person," "principal," and "voluntarily excluded," as used in this clause, are defined in 2 CFR Parts 180 and 1200. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations. "First Tier Covered Transactions" refers to any covered transaction between a grantee or subgrantee of Federal funds and a participant (such as the prime or general contract). "Lower Tier Covered Transactions" refers to any covered transaction under a First Tier Covered Transaction (such as subcontracts). "First Tier Participant" refers to the participant who has entered into a covered transaction with a grantee or subgrantee of Federal funds (such as the prime or general contractor). "Lower Tier Participant" refers any participant who has entered into a covered transaction with a First Tier Participant or other Lower Tier Participants (such as subcontractors and suppliers).
- e. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.
- f. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions exceeding the \$25,000 threshold.

g. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant is responsible for ensuring that its principals are not suspended, debarred, or otherwise ineligible to participate in covered transactions. To verify the eligibility of its principals, as well as the eligibility of any lower tier prospective participants, each participant may, but is not required to, check the Excluded Parties List System website (<https://www.epls.gov/>), which is compiled by the General Services Administration.

h. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

i. Except for transactions authorized under paragraph e of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

* * * * *

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--Lower Tier Participants:

1. The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any Federal department or agency.

2. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

* * * * *

XI. CERTIFICATION REGARDING USE OF CONTRACT FUNDS FOR LOBBYING

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts which exceed \$100,000 (49 CFR 20).

1. The prospective participant certifies, by signing and submitting this bid or proposal, to the best of his or her knowledge and belief, that:

a. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

b. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

2. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

3. The prospective participant also agrees by submitting its bid or proposal that the participant shall require that the language of this certification be included in all lower tier subcontracts, which exceed \$100,000 and that all such recipients shall certify and disclose accordingly.

ATTACHMENT A - EMPLOYMENT AND MATERIALS PREFERENCE FOR APPALACHIAN DEVELOPMENT HIGHWAY SYSTEM OR APPALACHIAN LOCAL ACCESS ROAD CONTRACTS

This provision is applicable to all Federal-aid projects funded under the Appalachian Regional Development Act of 1965.

1. During the performance of this contract, the contractor undertaking to do work which is, or reasonably may be, done as on-site work, shall give preference to qualified persons who regularly reside in the labor area as designated by the DOL wherein the contract work is situated, or the subregion, or the Appalachian counties of the State wherein the contract work is situated, except:

a. To the extent that qualified persons regularly residing in the area are not available.

b. For the reasonable needs of the contractor to employ supervisory or specially experienced personnel necessary to assure an efficient execution of the contract work.

c. For the obligation of the contractor to offer employment to present or former employees as the result of a lawful collective bargaining contract, provided that the number of nonresident persons employed under this subparagraph (1c) shall not exceed 20 percent of the total number of employees employed by the contractor on the contract work, except as provided in subparagraph (4) below.

2. The contractor shall place a job order with the State Employment Service indicating (a) the classifications of the laborers, mechanics and other employees required to perform the contract work, (b) the number of employees required in each classification, (c) the date on which the participant estimates such employees will be required, and (d) any other pertinent information required by the State Employment Service to complete the job order form. The job order may be placed with the State Employment Service in writing or by telephone. If during the course of the contract work, the information submitted by the contractor in the original job order is substantially modified, the participant shall promptly notify the State Employment Service.

3. The contractor shall give full consideration to all qualified job applicants referred to him by the State Employment Service. The contractor is not required to grant employment to any job applicants who, in his opinion, are not qualified to perform the classification of work required.

4. If, within one week following the placing of a job order by the contractor with the State Employment Service, the State Employment Service is unable to refer any qualified job applicants to the contractor, or less than the number requested, the State Employment Service will forward a certificate to the contractor indicating the unavailability of applicants. Such certificate shall be made a part of the contractor's permanent project records.

Upon receipt of this certificate, the contractor may employ persons who do not normally reside in the labor area to fill positions covered by the certificate, notwithstanding the provisions of subparagraph (1c) above.

5. The provisions of 23 CFR 633.207(e) allow the contracting agency to provide a contractual preference for the use of mineral resource materials native to the Appalachian region.

6. The contractor shall include the provisions of Sections 1 through 4 of this Attachment A in every subcontract for work which is, or reasonably may be, done as on-site work.

2004 Specifications

SPECIAL PROVISION

009---009

Measurement and Payment

For this project, Item 009, “Measurement and Payment,” of the Standard Specifications, is hereby amended with respect to the clauses cited below, and no other clauses or requirements of this Item are waived or changed hereby.

Article 9.6. Progress Payments, Section A, Retainage is voided and replaced by the following:

A. Retainage. Retainage will not be withheld on this project.

Article 9.6. Progress Payments, Section B, Payment Provisions for Subcontractors is voided and replaced by the following:

B. Payment Provisions for Subcontractors. For the purposes of this Article only, the term subcontractor includes suppliers and the term work includes materials provided by suppliers at a location approved by the department. Pay the subcontractors for work performed within 10 days after receiving payment for the work performed by the subcontractor. Also, pay any retainage on a subcontractor’s work within 10 days after satisfactory completion of all of the subcontractor’s work. Completed subcontractor work includes vegetative establishment, test, maintenance, performance, and other similar periods that are the responsibility of the subcontractor.

For the purpose of this Section, satisfactory completion is accomplished when:

- the subcontractor has fulfilled the Contract requirements of both the Department and the subcontract for the subcontracted work, including the submittal of all information required by the specifications and the Department; and
- the work done by the subcontractor has been inspected, approved, and paid by the Department.

The inspection and approval of a subcontractor’s work does not eliminate the Contractor’s responsibilities for all the work as defined in Article 7.14, “Contractor’s Responsibility for Work.”

The Department may pursue actions against the Contractor, including withholding of estimates and suspending the work, for noncompliance with the subcontract requirements of this Section upon receipt of written notice with sufficient details showing the subcontractor has complied with contractual obligations as described in this Article.

These requirements apply to all tiers of subcontractors. Incorporate the provisions of this Article into all subcontract or material purchase agreements.