## TABLE OF CONTENTS FOR CHAPTER 5 - DBE

| | |
|---|---|
| Regulation and Authority | 5-2 |
| Annual DBE goal | 5-2 |
| Assigning DBE contract Goals | 5-2 |
| DOT-289R/N and DOT-289R/C | 5-2 |
| Preconstruction meeting | 5-2 |
| Monitoring DBEs on the project | 5-2 |
| DBE trucking | 5-3 |
| DBE performance issues | 5-4 |
| DOT-289 – Certification of DBE Payments | 5-4 |
| Does the contract require a DOT-289 | 5-5 |
| Liquidated damages for failure to properly utilize DBEs . | 5-6 |
| DBE directory | 5-6 |

## REGULATION AND AUTHORITY

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

## ANNUAL DBE GOAL

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

## ASSIGNING DBE CONTRACT GOALS

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

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

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

## PRECONSTRUCTION MEETINGS

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

## MONITORING DBEs ON THE PROJECT

It is very important that the project engineer monitor the work committed to DBEs to ensure that the DBE actually performs the work reported on DOT-289R/N or DOT-289R/C. DBEs must perform a “commercially useful function” which means that they must perform, manage and supervise the work themselves. A more detailed description of “commercially useful function” is in the Special Provision for Disadvantaged Business Enterprise located in the contract proposal.

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

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

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

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

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

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

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

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

## DBE TRUCKING

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

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

## DBE PERFORMANCE ISSUES

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

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

## DOT-289 – CERTIFICATION OF DBE PAYMENTS

The DOT-289 is prepared by the contractor to report payments made to DBEs. Within 30 days of physical completion of the contract, the Area Office is to obtain a DOT-289 from the contractor. The contractor's final payment is not to be released until receipt of the DOT-289.

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

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

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

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

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

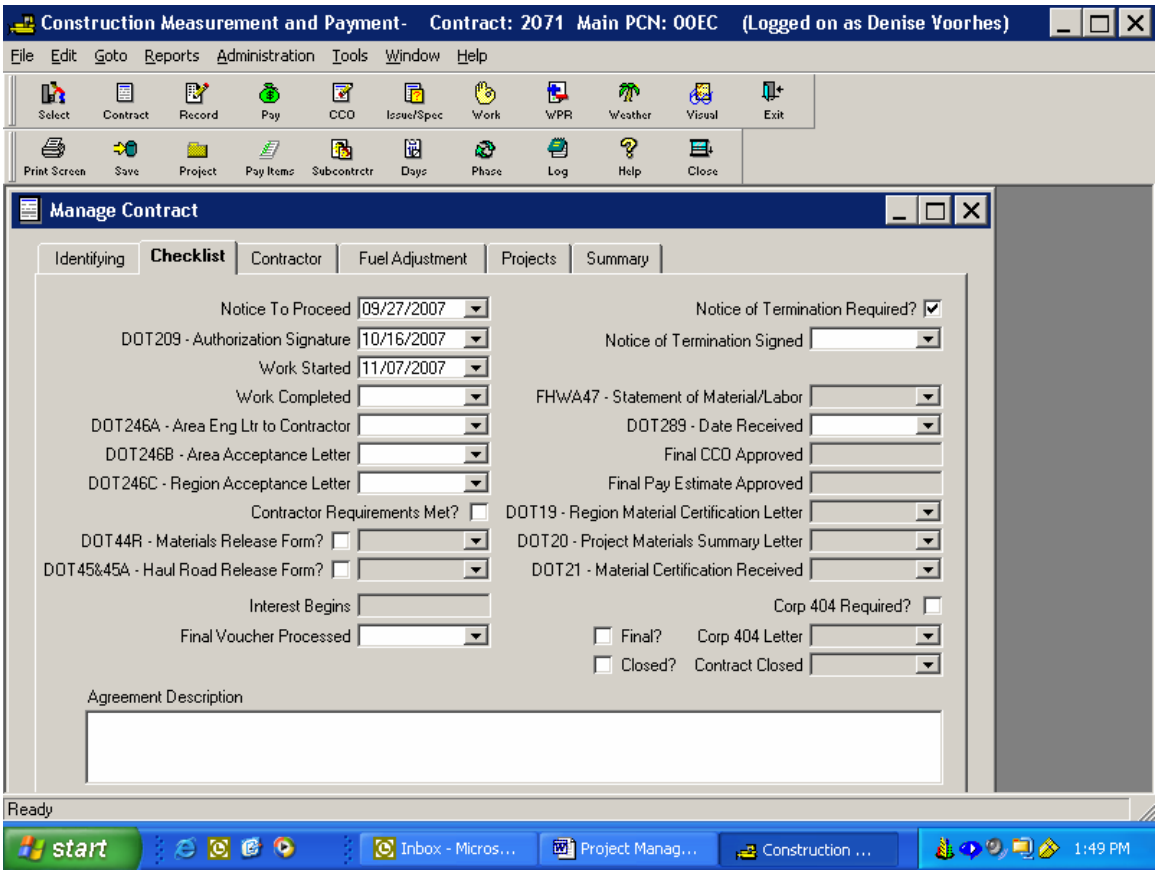
You may either provide the contractor with a DOT-289 form at the preconstruction meeting, or the contractor can download the form from the DOT website, which under "Doing Business – Disadvantaged Business Enterprise."

## DOES THE CONTRACT REQUIRE A DOT-289?

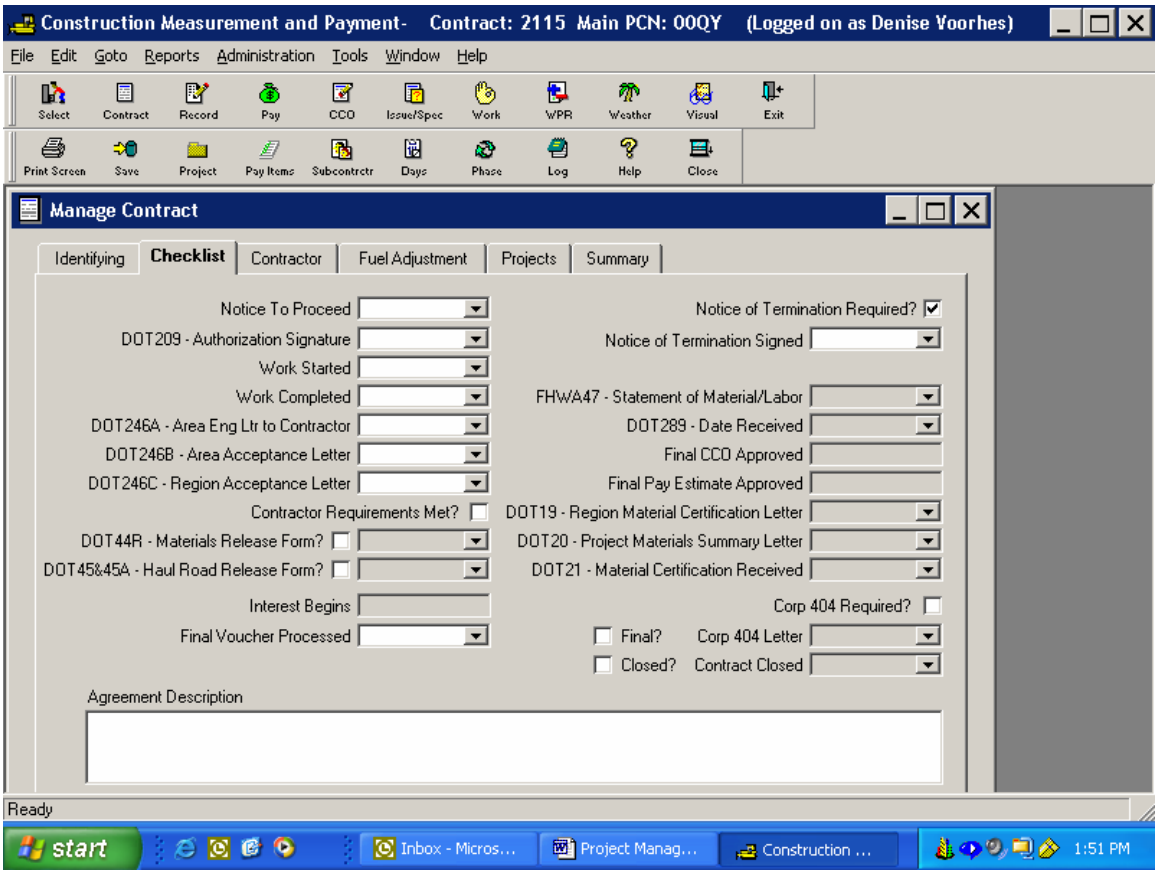
There can be confusion over when a DOT-289 is required. It is determined by the commitment rather than the DBE goal. A DOT-289 is required any time there is a commitment listed on DOT-289RN or DOT-289RC. For example:

> If a contract included a DBE goal of 2% on DOT-289R/C, but did not list any DBEs, no DOT-289 is required.
>
> If a contract did not include a DBE goal on DOT-289R/N, but reported one or more DBEs in the commitment section, a DOT-289 is required.

If you unsure if a contract requires a DOT-289 form, you can check CM&P. In CM&P, under Contract (Checklist), there is a field to record the date the DOT-289 is received by the DOT DBE Compliance Officer. If a DOT-289 is required, that field will be white with a drop down box for the date where it says "DOT-289 – date received."



If a DOT-289 is not required that field will be grayed out as indicated below.




## LIQUIDATED DAMAGES FOR FAILURE TO PROPERLY UTILIZE DBES

If a contractor fails to use DBEs in conformity with the DBE Special Provision, it may be considered a specification deviation as indicated in section 5.3 of the Standard Specifications. If a contractor fails to use a DBE as indicated on DOT-289R/N or DOT-289R/C, actual payments are reviewed by the DOT DBE Compliance Officer to determine if payments are in conformity with the provision. For actual withholding, refer to Chapter 7 - Documenting Contract Item Quantities and Payment Amounts.

## DBE DIRECTORY

The DBE Directory is updated about once a month. You can access it on the DOT website under “Doing Business – Disadvantaged Business Enterprise” to view the most current list of certified DBEs.

**SOUTH DAKOTA DEPARTMENT OF TRANSPORTATION**

**Special Provision For**
**Disadvantaged Business Enterprise**
**July 25, 2006**

The South Dakota Department of Transportation shall not discriminate on the basis of race, color, religion, sex, national origin, age or disability in the award and performance of any federal-aid contract or in the administration of its DBE program or the requirements of 49 CFR Part 26. The Department shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of federal-aid contracts. The Department's DBE program, as required by 49 CFR part 26 and as approved by FHWA and USDOT, is incorporated by reference in this contract.

Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this contract. Upon notification to the Department of its failure to carry out its approved program the USDOT may impose sanctions as provided for under part 26 and may, in appropriate cases, refer the matter for enforcement under 18 USC 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 USC 3801 et seq.).

## I. Bidding Requirements

A. Bidders shall not discriminate on the basis of race, color, religion, sex, national origin, age or disability in the solicitation and/or award to subcontractors and material suppliers. All bidders must execute the "Participation by Minority Contractors" or "Disadvantaged Business Enterprise (DBE) Assurance" included in the bidding files provided by the Department, regardless of whether the contract includes a DBE contract goal. Failure to execute the "Participation by Minority Contractors" or "Disadvantaged Business Enterprise (DBE) Assurance" will render the bid null and void.

B. Bidders are reminded that the Department's overall annual goal for DBE participation is set annually. Bidders shall make every effort to provide opportunities for DBEs to participate on federal-aid contracts throughout the life of the contract. Bidders who demonstrate a pattern of possible discrimination through consistent and repeated under-utilization of DBEs may be subject to investigation and/or sanctions allowed by regulation, administrative rule or law.

C. On contracts let <u>with</u> a DBE goal (race conscious), where the low bidder has not met that goal, the bidder must provide a written narrative and supporting documentation describing their good faith efforts to meet the goal. The apparent low bidder will have two (2) working days from the date the low bidder is contacted by the Department Bid Letting Office (measured by postmark or similar evidence of the date and time of mailing) to provide documentation to show their efforts. Section II provides information on the types of action contractors should take as part of their good faith efforts to obtain DBE participation. Documentation may be submitted with the bidding files provided all pertinent information is included in the bidding files. Any missing documentation must be submitted within 2 working days from the date the low bidder is contacted.

D. For contracts where a DBE goal is not specified (race-neutral), bidders must make the same efforts to utilize DBEs as contracts let with a DBE goal. If the DBE commitment by the low bidder is substantially less than DBE commitments of other bidders, or if a complaint is made

that a contractor has failed to solicit participation from or discriminated against a DBE in the solicitation or award to a subcontractor or supplier, the Department may request the low bidder to submit documentation of their solicitation efforts (initial solicitation, follow-up contacts, registering at the DBE room virtual sign-in, and a letter summarizing your efforts).

If solicitation documentation is requested, the low bidder will have two (2) working days from the date of the request (measured by postmark or similar evidence of the date and time of mailing) to provide the requested documentation to Department Bid Letting Office.

E. If the low bidder does not provide documentation as specified in paragraphs C or D above, or the submission is deemed unacceptable, the Department will consider award to the next lowest responsible bidder, or reject all bids. Subsequent to the DBE committee's decision that the low bidder's good faith efforts or the applicable documentation in either paragraph C or D are unacceptable, the low bidder will be notified by telephone that their bid is not acceptable. The low bidder will have two (2) working days from the date of notification to contact the Bid Letting Engineer to arrange a meeting with the Department Secretary, or his designee, to present documentation and arguments about why the bid should not be rejected. A decision on award of the contract will be made in writing within two (2) working days after the meeting. The Department's decision is not appealable to the USDOT. If the low bid is rejected for failure to meet the good faith effort or other requirements, the next low responsible bidder shall be notified. If the next low responsible bidder cannot meet the requirements of paragraphs C or D, that bidder shall have two (2) working days from the date of notification to submit documentation of their good faith efforts or the applicable documentation in paragraph C or D. Award of the contract will be made to the lowest responsible bidder that is able to demonstrate sufficient reasonable efforts were made to utilize DBEs.

F. For all federal-aid contracts with DBE commitments reported in the bidding files, the Bid Letting Office will e-mail each DBE indicated on the form of the successful bidder's commitment. A response is requested within seven (7) calendar days of the date of the email as sent to the DBE subcontractor or supplier. The e-mail will include the type of work committed and total dollar value.

G. For each contract the low bidder must submit, with their bid files, a bidder list of all subcontractors and suppliers they received quotes from for that contract.

## II. Good Faith Efforts

A. Factors to be considered in making and evaluating good faith efforts include, but are not limited to:

1. Selecting project work items for which there is DBE participation potential. 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.

2. Soliciting <u>all</u> certified DBEs <u>in the appropriate work classifications</u> in sufficient time for the DBE to respond with a quote in the normal course of business. Sufficient time is defined as seven (7) working days by mail, and five (5) working days by phone, fax or e-mail.

3. Following up the initial solicitation with a second contact to determine with certainty if DBEs are interested in quoting.

4. Maintaining a log of all solicitation efforts including:
   a. Name of the DBE firm
   b. Name and phone number of the individual contacted
   c. Date, time and manner of each contact (by phone, in person, fax, mail, e-mail, etc.)
   d. The DBE's response to the solicitation
   e. Result of the solicitation effort

5. Registering at the DBE room virtual sign-in. The virtual DBE room can be found on the SDDOT Bid Letting Office website.

6. Considering awarding subcontracts to capable DBEs where their quotes are reasonably competitive. If any quote is rejected because it is considered <u>not</u> to be "reasonably competitive," bidders must provide copies of DBE and non-DBE quotes, and a work item price spreadsheet comparing DBE quotes to non-DBE quotes. The ability or desire of a prime contractor to perform the work with its own forces does not relieve the bidder of the responsibility to make good faith efforts. In the event a bidder elects to use its own forces over a DBE, the bidder must include documentation of the costs of using its own forces. This can be shown in a number of ways including portions of the prime contractor's work sheets used to prepare the bid. The price spreadsheet should be retained in the bidder's files unless requested by the good faith efforts committee.

7. If a DBE quote is rejected because of previous problems with a particular DBE, the bidder must prepare a detailed written explanation of the problem. Additional costs involved in finding and using DBEs is not, in itself, sufficient reason for a bidder to fail to meet the obligation of considering DBEs, as long as those costs are reasonable. Bidders must not reject 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, organization or associations and political or social affiliations are not legitimate causes for rejection or non-solicitation of quotes in the contractor's efforts to utilize DBEs.

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

9. The bidder shall make efforts to assist interested DBEs in obtaining bonding, lines of credit or insurance as required by the Department or the prime. Assistance in obtaining necessary equipment, supplies, materials or related assistance or services may also be provided.

B. If a good faith effort package is requested on a contract where the goal is not specified, the low bidder must submit documentation of their efforts indicated in 1 through 5 above to the Bid Letting Office.

C. If a good faith effort package is requested on a contract <u>with</u> a goal, the low bidder must submit to the Bid Letting Office:

1. A chronology of the bidder's efforts to obtain DBE participation
2. An explanation of why agreements with DBEs could not be reached
3. Documentation of the bidder's efforts (1 through 9 above)
4. Any additional efforts the bidder made to secure DBE participation.

D. In evaluating whether a bidder has made good faith efforts, the Department will take into account the performance of other bidders. For example, if the apparent low bidder fails to meet the contract goal, but others meet it, the Department may view this as evidence of the low bidder not having made good faith efforts. If the low bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, the Department may view this, in conjunction with other factors, as evidence of the low bidder having made good faith efforts.

E. The Department will consider all efforts as a whole. In determining whether to accept the good faith efforts, or reject them and defer to the next low bidder, the following factors will be considered:

1. The completeness and thoroughness of the good faith effort package
2. The efforts involved in soliciting and using DBEs
3. Comparison of the low bidder's DBE participation to that of other bidders
4. The bidder's past DBE participation, which may show a pattern of utilization or under-utilization.

## III. Counting DBE Participation

A. The total actual dollar amount of the intended DBE participation shown on Form 289R/N or 289R/C shall count toward contract goals and the annual goal. Subcontract awards to DBEs that were not part of the 289R/C or 289R/N commitment submitted with the proposal also count toward the annual goal. Participation percentages for the contract shall be calculated from Form 289R/N or 289R/C according to the following formula:

$$\text{Percentage} = \frac{\text{dollar amount of work subcontracted to DBEs *}}{\text{total dollar amount of the prime contract *}}$$

* Both figures are adjusted as necessary to reflect any non-participating items included in the proposal.

B. Only the portion of a contract that is performed by the DBE's own forces will count toward DBE participation. Included is the cost of supplies and materials obtained by the DBE for the contract, including supplies purchased or equipment leased by the DBE. Supplies and equipment the DBE subcontractor purchased or leased from the prime contractor or its affiliate is not allowed.

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

D. A bidder may count toward its DBE participation only that percentage of expenditures to DBEs that perform a commercially useful function (CUF) in the performance of a contract. A DBE

performs a CUF when it is responsible for execution of the work of a 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 prices, determining quality and quantity, ordering and installing (where applicable) the materials, and paying for the material itself. To determine if a DBE is performing a CUF, the Department will evaluate the amount of work subcontracted, industry practice, whether the amount the DBE is to be paid is commensurate with the work it is actually performing, DBE credit claimed for performance of the work and other relevant factors.

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

F. DBE participation will be counted for trucking services as follows:

1. The contractor will receive credit toward DBE participation for the total value of the transportation services the DBE provides on the contract using trucks it owns, insures and operates using drivers it employs.

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

3. The DBE may also lease trucks from a non-DBE firm, including an owner-operator. When a DBE leases trucks from a non-DBE, the contractor can count toward DBE participation only the fee or commission the DBE receives as a result of the lease arrangement. The contractor does not receive credit toward DBE participation for the total value of the transportation services provided by the lessee, since these services are not provided by a DBE.

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

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

2. 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 participation. A regular dealer is a firm that owns, operates or maintains a store, warehouse or other establishment in which the materials, supplies, articles or equipment are bought, kept in stock and regularly sold or leased to the public in the usual course of business.

3. For materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, count toward DBE participation only the amount of fee or commission

charged for assistance in the procurement of the materials or supplies, or fee or transportation charges for the delivery of materials or supplies required at the job site. In order to be counted, the Department must determine the fee to be reasonable and not excessive as compared to fees customarily allowed for similar services. The cost of the materials and supplies themselves will not count toward DBE goals.

4. The Department will not count toward DBE participation materials or services provided by a DBE who is not currently certified.

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

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

In cases where it is determined that a contractor was a knowing and willing participant in a business arrangement determined by the Department to be unallowable, or in the event of repeated violations, falsification or misrepresentation, the Department shall provide for imposition of sanctions. Sanctions may include, but are not limited to one or more of the following:

1. Assessment of liquidated damages as stated in provision IV below.

2. Suspension of bidding privileges or debarment.

3. Withholding progress payments.

4. Securing additional DBE participation on future federal-aid contracts sufficient to make up for the DBE participation found to be unallowable.

5. Referral of the matter for criminal prosecution.

J. The contractor shall maintain a running tally of payments to DBEs to make available to the Department. Within thirty (30) days of physical completion of the project the contractor shall submit a DOT Form 289 (Certification of DBE Participation) listing all DBE firms that participated in this contract, and report the total dollar amount paid (and anticipated to be paid) to each. The contractor's final payment is not released until receipt of the 289 Form.

## IV. Liquidated Damages

A. If the contractor has failed to meet the contract goal or commitment as follows:

1. Payments to DBEs are less than the contract DBE goal (if the commitment reported on the 289R/C or 289R/N Form is higher than the contract goal); or

2. Payments to DBEs are less than the commitment reported on Form 289R/C or 289R/N, (if the commitment was the same or lower than the contract DBE goal or there was no contract goal); then:

The Department shall have the contract payments reduced as a liquidated damage and not as a penalty, by an amount according to the following schedule:

For the first $1,000 DBE deficiency, one hundred percent (100%) of the deficiency.

For the next $9,000 DBE deficiency, fifty percent (50%) of the deficiency.

For the next $10,000 DBE deficiency, twenty five percent (25%) of the deficiency.

For any remaining DBE deficiency, ten percent (10%) of the deficiency.

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

B. If a contractor finds it impossible, for reasons beyond his control, to meet the intended DBE participation stated on Form 289R/C or 289R/N, he may at any time prior to completion of the project provide a written request to the DBE Office for a complete or partial waiver of liquidated damages. Any request for a waiver will not be accepted after completion the project.

## V. Contractor Utilization of Subcontractors and Suppliers

A. All contractors participating in federal-aid contracts are expected to cooperate fully and promptly with the Department in compliance reviews, investigations and other requests for information. Failure to do so shall be grounds for appropriate sanctions or action against the party as indicated in provision III-I above. The audit and compliance office will enforce compliance with contract requirements regarding the solicitation, selection and use of subcontractors and suppliers. The audit and compliance office may conduct compliance reviews on selected projects each year to verify compliance by prime contractors. Violations will be handled in accordance with contract provisions and statutory or regulatory requirements.

B. It is expected that each DBE firm listed on Form 289R/C or 289R/N will perform the work specified (or provide materials or services as indicated), and at the dollar levels specified.

Substitutions of DBEs reported on Form 289R/C or 289R/N are not allowed, except for performance or scheduling problems on the part of the DBE, or the DBE has requested to be removed from that particular contract. Substitution shall not take place without written approval by the DBE office.

For the substitution to be valid the contractor must provide timely notification to the DBE office of the reason(s) for the substitution, providing the DBE office sufficient time to verify the information. Prior to approval by the DBE office, the contractor must also provide documentation showing their efforts to replace the designated DBE with another DBE.

C. In instances where time is critical to project progress, this process may be handled verbally with written confirmation to follow.

D. If the contractor fails to make payments to DBEs as indicated above, liquidated damages shall be assessed as specified in Section IV, above. In addition, if the contractor is found to have knowingly and willingly attempted to circumvent the DBE contract provisions, sanctions referred to in section III-I above will be imposed.

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