

REVISED

DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM SPECIFICATION

DeIDOT has established a Disadvantaged Business Enterprise (DBE) program in accordance with the regulations of the United States Department of Transportation (USDOT), 49 CFR Part 26. The Department has received Federal financial assistance from the USDOT and as a condition of receiving this assistance, the Department has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy of DeIDOT to ensure that DBEs, as defined in 49 CFR Part 26, have an equal opportunity to receive and participate in USDOT-assisted contracts. It is also the policy of the DeIDOT:

1. To ensure nondiscrimination in the award and administration of USDOT-assisted contracts;
2. To create a level playing field on which DBEs can compete fairly for USDOT-assisted contracts;
3. To ensure that the DBE program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are counted as DBEs;
5. To help remove barriers to the participation of DBEs in USDOT-assisted contracts;
6. To assist in the development of firms that can compete successfully in the marketplace outside the DBE program and;
7. To promote the use of DBEs in all types of federally assisted contracts and procurement activities.

The following definitions apply to this subpart:

Commercially Useful Function (CUF) means a Commercially Useful Function as defined fully in 49 CFR §26.55 which definition is incorporated herein by reference. CUF is discussed further in the next section.

Committed DBE means a DBE that was identified by the contractor, typically on a DBE Project Participation Affidavit, to assist in making a good faith effort to meet an assigned DBE goal. This also includes any substitute DBE that has subsequently been committed work to meet the assigned contract goal.

Days mean calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where the DeIDOT's offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

Disadvantaged Business Enterprise or DBE means a for-profit small business concern (1) that is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the

case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and, (2) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

DOT-assisted contract means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

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

Joint Venture means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties 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.

NAICS Code means the North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the US business economy.

Non-DBE means any firm that is not a DBE or any entity which has not been certified by DeIDOT as a DBE prior to bid closing.

Race-conscious measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

Race-neutral measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, race-neutral includes gender neutrality.

Small Business concern means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in 49 CFR §26.65(b).

Socially and Economically Disadvantaged Owner (SEDO) means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is - (1) any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis; (2) any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged according to 49 CFR §26.5:

- (i) Black Americans which includes persons having origins in any of the Black racial groups of Africa;
- (ii) Hispanic Americans which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
- (iii) Native Americans which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;

- (iv) Asian-Pacific Americans which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Republic of the Northern Mariana Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;
- (v) Subcontinent Asian Americans which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives, Nepal or Sri Lanka;
- (vi) Women;
- (vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

DBE Participation Goals

DelDOT has established an overall annual goal for DBE participation on Federal-aid contracts. DelDOT intends that the goal be met with a combination of race conscious and race neutral efforts. Race-conscious participation occurs when the contractor uses a percentage of DBEs, as defined herein, to meet the contract-specified goal. Race-neutral efforts are those that are, or can be, used to assist all small businesses or increase opportunities for all small businesses.

The regulation, 49 CFR, Part 26, also describes race neutral participation as when a DBE wins a prime contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal.

DelDOT will establish specific goals for each particular DOT-assisted project which will be expressed as a percentage of the total dollar amount of contract bid. The specific contract goal for this contract is listed in the General Description section of this document.

The contractor shall make Good Faith Efforts to meet the goal specified herein with DBEs or establish that it was unable to meet the goal despite making good faith efforts to do so. Prime contractors are encouraged to obtain DBE participation above and beyond any goals that may be set for this project.

DBE Project Participation Affidavit

In order to be eligible for award, ALL Bidders shall submit **no later than five (5) calendar days after bid opening** the completed DelDOT DBE Project Participation Affidavit for each Committed DBE that it intends to use to meet the project DBE goal if the contract is awarded to their firm. This affirms that the Bidder intends to utilize those listed on the form to make a good faith effort toward attaining the DBE goal assigned to this project. Information that will be included shall be as outlined in 49 CFR §26.53(b)(2). This information shall be submitted electronically to the DelDOT DBE Program Office at DOT.BidDocs@delaware.gov or via US Mail to DelDOT DBE Program Office ATTN: DBE Program Manager 800 Bay Road, Dover, DE 19901.

All Bidders will be required to complete the form and provide the following information regarding the DBE participation on their teams:

1. The names and addresses of DBE firms that will participate in the contract;
2. A description of the work that each DBE will perform. To count toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm will perform on the contract;
3. The dollar amount of the participation of each DBE firm participating;

4. Written documentation of the Bidders commitment to use a DBE subcontractor whose participation it submits to meet a contract goal; and
5. Written confirmation from each listed DBE firm that it is participating in the contract in the kind and amount of work provided in the prime contractor's commitment.

Only those DBE firms certified by DelDOT's DBE Program Office as a DBE as of the deadline for bid submittal will be considered for DBE credit. It shall be the Bidders responsibility to ascertain the certification status of designated DBEs prior to submitting a bid which seeks to rely upon an entity as a DBE to satisfy DBE participation requirements. A list of certified DBEs with their respective NAICS codes can be located in the [DeIDOT DBE Directory](https://deldotcivilrights.dbesystem.com) which is located on DelDOT's website at: <https://deldotcivilrights.dbesystem.com>.

If the apparent low bidder fails to submit the required information in the manner herein specified, or if the submitted information reveals a failure to meet the requirements of the specifications shown herein, the apparent low bidder shall be ineligible to receive award of the contract and their bid will be rejected.

Reduction of DBE commitments after affidavit submittal and prior to execution of the contract without written consent of DelDOT, which consent will only be given for good cause, will result in the bid being rejected or DelDOT rescinding any award. Scheduling conflicts are not necessarily evidence of good cause as this should have been considered during pre-bid negotiations. The contractor is responsible for ensuring the DBE is available to meet the requirements of the contract at all relevant times.

In an instance where a Bidder indicates that it is unable to meet the assigned DBE goal for a contract, the bidder shall **AT THE TIME OF BID SUBMISSION**, provide all documentation to verify that the Bidder has made Good Faith Efforts (GFE) toward meeting the assigned DBE Goal. Guidance for submitting Good Faith Efforts documentation is identified in the next section of this document and in the [DBE Program Plan](https://deldot.gov/Business/dbe/contentFolder/pdfs/dbeProgram.pdf?cache=1726767277676). <https://deldot.gov/Business/dbe/contentFolder/pdfs/dbeProgram.pdf?cache=1726767277676>

DBE Subcontract Provisions

DelDOT continues to reserve the right to approve ALL DBE subcontractors and all substitutions of DBE subcontractors prior to award, and during the of completion of the contract. **ALL DBEs subcontracted (whether submitted for participation credit or not) must be submitted to DelDOT's DBE Program Office for approval.** No contract work shall be performed by a DBE subcontractor until the executed DBE subcontract is approved in writing by DelDOT and DelDOT has issued the required Notice to Proceed. Any DBE subcontract relating to work to be performed pursuant to this contract, which is submitted to DelDOT for approval, must contain all DBE subcontractor information, the requirements contained in this contract, and must be fully executed by the contractor and DBE subcontractor.

Each contract between the prime contractor and each DBE subcontractor shall at the minimum include the following:

1. All pertinent provisions and requirements of the prime contract.
2. Assurance that the contractor and subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract.
3. Description of the work to be performed by the DBE subcontractor.

4. The dollar value of each item of work to be completed by the DBE subcontractor and the bid price of each item of work to be completed by the DBE subcontractor.
5. An attached copy of the most current FHWA 1273- Required Contract Provisions Federal-Aid Construction Contracts.
6. Language indicating that retainage will not be withheld unless the prime contract with DelDOT allows for the withholding of retainage.
7. Language requiring the payment of all funds received from DelDOT for work satisfactorily performed within the time frame contemplated by 49 CFR §26.29.

DelDOT reserves the right to conduct periodic reviews of DBE and non-DBE subcontract documentation to ensure compliance with federal requirements.

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CRITICAL DBE REQUIREMENTS

A bid may be held to be non-responsive and not considered if the required DBE information is not provided. In addition, the Bidder may lose its bidding capability on DelDOT projects and such other sanctions as the DelDOT may impose. It is critical that the bidder understands:

1. In the event that the Bidder is unable to meet the DBE goal as set forth in this specification, in accordance with 49 CFR §26.53 (b)(2)(vi), the Bidder **shall at the time of bid submittal** provide all evidence upon which Bidder intends to rely as evidence of Good Faith Efforts (GFE) to DelDOT which shall include the percentage of the DBE Goal that will be met, if any, on the completed DelDOT DBE Utilization Commitment form made a part of this contract. All Bidders shall review [Appendix A to Part 26 – Guidance Concerning Good Faith Efforts](#) as that provides guidance on what DelDOT will look for and evaluate as GFE by a Bidder to obtain DBE participation. <https://www.ecfr.gov/current/title-49/subtitle-A/part-26/appendix-Appendix%20A%20to%20Part%2026>
2. The contractor shall also at the time of bid submit all documentation that the contractor wishes to have DelDOT consider in determining that the contractor made a Good Faith Effort to meet the assigned contract DBE Goal. DelDOT will not accept Good Faith Efforts documentation other than on the scheduled date and time of the bid opening. However, DelDOT may ask for clarification of information submitted should the need arise.
3. A bid which does not contain either a completely executed DelDOT DBE Utilization Commitment and/or Good Faith Efforts documentation, where appropriate, shall be declared non-responsive and shall not be considered by DelDOT.
4. Failure of the apparent low bidder to present originals of all DBE subcontracts to substantiate the volume of work to be performed by DBE's as indicated in the bid within fifteen (15) calendar days after the bid opening shall create a rebuttable presumption that the bid is not responsive.
5. Bidders are advised that failure to make a Good Faith Effort to meet the assigned and agreed upon DBE goals during the term of the contract may subject them to DelDOT sanctions as identified in the DelDOT DBE Program Plan.
6. In the execution of this contract, the successful bidder agrees to comply with the following contract clauses:

Prompt Payment: The prime contractor/consultant receiving payments shall, within 30 days of receipt of any payment, file a statement with DelDOT on a form to be determined by DelDOT that all subcontractors furnishing labor or material have been paid the full sum due them at the stage of the contract, except any funds withheld under the terms of the contract as required by Chapter 8, Title 17

of the Delaware Code, annotated and as amended. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of DelDOT. This clause applies to both DBE and non-DBE subcontractors.

Retainage: The prime contractor agrees to return retainage to each subcontractor within 15 calendar days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of DelDOT. This clause covers both DBE and non-DBE subcontractors. As guidance, once a subcontractor has satisfactorily completed the physical work, and has given to the prime contractor a certified statement that all laborers, lower tier contractors, and materialmen who have furnished labor and materials to the subcontractor have been paid all monies due them, the prime contractor shall return retainage to the subcontractor within 15 calendar days.

7. In the execution of this contract, the successful bidder agrees to comply with the following contract assurance and will include this same language in each subcontractor contract:

"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 remedy as the recipient deems appropriate." 49 CFR Section 26.13

8. A prime contractor can receive participation credit toward DBE goals only if the DBE performs a Commercially Useful Function (CUF). According to 49 CFR §26.55 (c)(1) a DBE performs a CUF when it is responsible for execution of the work of a contract and carries out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself that it uses on the project.

In order to determine whether a DBE is performing a commercially useful function, DelDOT 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.

In addition to this specification, bidders must comply with all provisions of the rules and regulations adopted by the United States Department of Transportation for DBE participation in USDOT and DelDOT Programs (49 CFR Part 26) and the DelDOT Disadvantaged Business Enterprise Program Plan; each of which is hereby incorporated and made part of this specification. Bidders are also reminded that they must be responsive and responsible bidders in all other aspects aside from the DBE Program in order to be awarded the contract.

9. In accordance with 49 CFR §26.53(f)(1), DelDOT requires that a prime contractor not terminate a DBE subcontractor without prior written consent from the DelDOT's Office of Civil Rights, which consent will only be provided if the Bidder demonstrates good cause for the termination. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm. The contractor shall make all reasonable efforts to avoid terminating or substituting a DBE listed on the DBE Project Participation Affidavit.

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GUIDANCE FOR GOOD FAITH EFFORT

If the apparent low bidder has stated in its bid proposal that it has been unable to meet the DBE goal, that Bidder must demonstrate, through detailed and comprehensive documentation, that good faith efforts have been made to solicit, assist, and use DBE firms to meet the DBE goal prior to the bid. If the Bidder certifies that it has been unable to meet the goal and has made a good faith effort, the Bidder cannot change its position after submission of the bid and claim to have met the established goal. (See 49 CFR §26.53 and Appendix A to Part 26 of 49 CFR- Guidance Concerning Good Faith Efforts).

The contractor shall demonstrate that the efforts made were those that a contractor actively and aggressively seeking to meet the goals established by DelDOT would make, given all relevant circumstances. Evidence of this good faith effort will be submitted with the bid at the time of the bid opening.

In order to be awarded a contract on the basis of good faith efforts, a Bidder must show that it took all necessary and reasonable steps to achieve the DBE goal which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful. Simply faxing and emailing DBEs requesting bids is not sufficient to constitute good faith efforts. DelDOT will consider the quality, quantity, and intensity of the different kinds of efforts the Bidder has made. Mere pro forma efforts are not sufficient good faith efforts to meet the DBE contract requirements.

The documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted to the Bidder when a non-DBE subcontractor was selected over a DBE for work on the contract. A generalized assertion that the contractor received multiple quotes is not sufficient unless copies of those quotes are provided. Bidders are encouraged to review 49 CFR Part 26 Appendix A- Guidance Concerning Good Faith Efforts.

Failure to demonstrate good faith efforts to the satisfaction of the DelDOT will result in the rejection of the bid. In the event that the low bid is rejected, DelDOT will consider award of the contract to the next responsive and responsible bidder.

The following are the types of efforts that *may* be considered as Good Faith Efforts to meet DBE participation requirements. This list is not an exclusive or exhaustive, and DelDOT may consider other factors and types of efforts that may be relevant:

1. Contacting DelDOT's DBE Program Office prior to the submission of bids, either by email or by telephone, to inform them of the Bidder's difficulty in meeting the DBE goals on a given project and requesting assistance. The Bidder must document its contact with the DBE Program Office and indicate the type of contact, the date and time of the contact, the name of the person(s) contacted, and any details related to the communication. The contact must be made in sufficient time before bid submission to allow the DBE Program Office a meaningful opportunity to offer effective assistance. The Bidder will **not** be considered to have made good faith efforts if the Bidder failed to contact the DBE Program Office in advance of bid closing or if the Bidder fails to contact the DBE Program Office sufficiently in advance of bid submission for the DBE's that bidder intends to solicit to have a meaningful opportunity to respond to the solicitation.
2. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goal will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units (for example smaller tasks or quantities) to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces. Selection of portions of work are required to at least equal the goal for DBE utilization specified in this contract.

3. Soliciting interest as early in the process as practicable to allow DBEs a meaningful opportunity to respond to the solicitation and submit a timely offer for the subcontract. Bidders should provide written notification at least ten (10) calendar days prior to the opening of a bid, soliciting DBE interest in participating on the contract as a subcontractor, supplier, manufacturer, or distributor for specific items of work.
4. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist DBEs in responding to solicitation.
5. Negotiating in good faith with interested DBEs. It is the Bidders responsibility to make a portion of the work available to the DBE subcontractors, and to select those portions of work or material needs consistent with the available DBE subcontractors, suppliers, manufacturers, or distributors so as to facilitate DBE participation. Evidence of such negotiation includes:
 - a. Description of the means by which firms were solicited (i.e. by telephone, e-mail, written notice, advertisement).
 - b. The names, addresses, telephone numbers of DBE's contacted, the dates of initial contact; and whether initial solicitations of interest were followed-up by contacting the DBEs to determine with certainty whether the DBEs were interested.
 - c. A description of the information provided to DBE firms regarding the plans, specifications, and estimated quantities for portions of the work to be performed.
 - d. A statement of why additional agreements with DBE's were not reached in order to meet the projected goal.
 - e. Listing of each DBE contacted but not contracted and the reasons for not entering a contract.
6. Making efforts to assist DBEs that need assistance in obtaining bonding, insurance, or lines of credit required by the contractor.
7. Detailing the reasons why certified DBEs are not available or not interested.
8. Effectively using the services of available minority/women community organizations; minority/women contractor's groups; local, state and federal business assistance offices; and other organizations that provide assistance in recruitment and placement of DBEs.

The following are examples of actions that may not be used as justification by the contractor for failure to meet DBE contract goals:

1. Failure to contract with a DBE solely because the DBE was unable to provide performance and/or payment bonds.
2. Rejection of a DBE bid or quotation based on price alone.
3. Rejection of a DBE because of its union or non-union status.
4. Failure to contract with a DBE because the contractor normally would perform all or most of the work in the contract.

DelDOT may contact rejected DBEs as part of its investigation. However, nothing listed here shall be construed to require the Bidder or prime contractor to accept unreasonable quotes in order to satisfy contract goals.

In determining whether a Bidder has made good faith efforts, DelDOT will review the documented efforts of the contractor and will review the performance, taking into account the ability of other Bidders in meeting the contract DBE goal.

DelDOT will evaluate the submittal to determine whether in fact good faith efforts have been demonstrated consistent with the specifications and the Federal regulations, 49 CFR 26, Appendix A.

Administrative Reconsideration Procedures (49 CFR §26.53(d)):

Within five (5) calendar days of being informed by DelDOT that it has not documented sufficient good faith efforts, a Bidder may request an administrative reconsideration. The Bidder should make this request in writing to the attention of DelDOT's Director of Finance, 800 Bay Road, Dover, Delaware 19901, and email a copy to dot-ask@delaware.gov. The Reconsideration Official will not have played any role in the original determination that the Bidder did not document sufficient good faith efforts.

As part of this reconsideration, the Bidder will have the opportunity to provide written documentation or argument concerning the issue of whether it made adequate good faith efforts toward meeting the assigned DBE goal. The Bidder will have the opportunity to meet in person with the Reconsideration Official, to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. The final decision made by the Reconsideration Official will be communicated to the Bidder in writing. In accordance with 49 CFR §26.53(d)(5) the result of the reconsideration process is not administratively appealable to the U.S. Department of Transportation.

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