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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 their 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.

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.

and evaluating the capabilities of DBEs that have the potential to bid on work the contractor may be subcontracting out in response to an STA advertisement. This normal business practice can be the essential support

- 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"

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4. Are you familiar with capable DBEs
5. Are you seeking to understand any problems DBEs will have in bidding or successfully completing contracts with you?

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 ~~no~~ DBE quote or self performing the work.

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 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 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

Review the online certified DBE directory for the list of certified DBEs

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 A, for additional information. See also your State DOT DBE Special Provision, refer to Appendix B.
- g. Determine the likely total DBE participation from all of the above items and compare to your State DOT's DBE contract goals.

1.

- a. Consider expanding your search for DBEs 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 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 bid 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 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 the type(s) of work they are capable/certified to do and are interested in quoting.

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, 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

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.

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 inline 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 ~~other~~ 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!

DBE CONTRACTING PROCEDURES TOOL K

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.

DBE INTERVIEWS

Company Name:	
Interview Date:	
Point of Contact:	

Annual Sales Last Year	
Credit Line with Vendors	
\$ of Largest Job	
Desc work on Largest Job	
Preferred Work Type	
Turnkey Work?	
Avg # Employees	
# Field Supervisors	
Equipment	
Own or Lease	
Approx # Pcs	
Current # of Active Projects	
Geographical Preferences	

DBE SUMMARY SHEET

CONTRACT DBE % GOAL: _____%

TOTAL DBE \$ TO MEET THE GOAL: \$_____

SUBCONTRACTOR	DESCRIPTION	DBE SUB QUOTES	ADD TO DBE	DBE TOTAL AMOUNT IN BID

- a. Write in the contract DBE percentage goal.
- b. Calculate the total dollar amount of DBE Participation that 9that E ndd BT 1 0 0 1

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. 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

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 ~~AMBT/F3 12 Tf1 0 0 1 21oivW*~~hBT/F1 15 Tf1 0 0.3333 1 3

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 30 days 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 later than 30 days after the subcontractor's work is satisfactorily completed and accepted by the state DOT.

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

If, however, the same DBE

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 provide() 1 280.73 638 DBE

In a presentation on DBE fraud, the following red flags on management and supervision were identified:

Mere Performance of Administrative Duties ~~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 ~~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.

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

DBE CONTRACTING PROCEDURES TOOL

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 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 transportations 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 DBE lessees not to exceed the value of transportation services provided by DBE owned trucks

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. If order 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

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

DBE CONTRACTING P

Types of assistance you may provide 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, which is attached as part of the Tool Kit's Appendix A, 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 a 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.

DBE CONTRACTING PROCEDURES TOOL KIT

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 DBE program contract requirements.

A number of situations could necessitate emergency performance of your DBE subcontractor's work. If you must use your equipment and personnel to perform part of the DBE subcon

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.

- 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?**

USDOT REGULATIONS – PARTICIPATION BY DBEs IN USDOT FINANCIAL ASSISTANCE PROGRAMS (49 CFR § 26)	A
Your State DOT DBE Special Provision	B
USDOT GUIDANCE CONCERNING GOOD FAITH EFFORTS	C
Your State DOT GUIDANCE CONCERNING GOOD FAITH EFFORTS	D
USDOT GUIDANCE ON COMMERCIALLY USEFUL FUNCTION	E
Your State DOT GUIDANCE ON COMMERCIALLY USEFUL FUNCTION	F