

CONSTRUCTION PROCEDURES HANDBOOK

SECTION V	SUBSECTION B	DATE
CONSTRUCTION AFFIRMATIVE ACTION	DBE/ESBE and SBE PROGRAM IMPLEMENTATION and MONITORING	04/11/2017

The attachments for Federal Aid projects are located at the end of the Special Provisions.

The Disadvantaged Business Enterprise/Emerging Small Business Enterprise (DBE/ESBE) goal is available in Federal Attachment 1 of the Special Provisions.

The attachments for Wholly State funded projects are located at the end of the Special Provisions.

The Small Business Enterprise (SBE) goal is available in State Attachment 1 of the Special Provisions

DBE/ESBE or SBE Program Implementation

The [CR-266](#) is the Contractor's initial DBE/ESBE or SBE Participation Plan, outlining which certified DBE/ESBE/SBE subcontractors will be used, and the type of work they will be performing to meet the Contract DBE/ESBE or SBE Goal. All DBE/ESBE/SBE subcontractors being used to meet a contract goal must be certified to perform the kind and amount of work listed by the Contractor, and must be approved by the Division of Civil Rights and Affirmative Action (DCR/AA). The [CR-266](#) is submitted by all bidders to the Procurement Division via the internet using the appropriate software as specified in section 102.10. DCR/AA will review and if approved, issue an Initial DBE/ESBE/SBE Participation Plan Approval memorandum to the Regional Construction Engineer, with a copy to the apparent low bid Contractor. This Initial DBE/ESBE/SBE Participation Plan Approval memorandum is approval for the project's Initial DBE/ESBE or SBE Plan.

Direct written confirmation of their participation on the Contract, and the kind and type of work, is required from the DBE/ESBE or SBE firms listed on the [CR-266](#) Form in order to determine the credit toward the contract DBE/ESBE/SBE goal. DBE/ESBE or SBE participation is confirmed via the Confirmation of DBE/ESBE/SBE firm Form [CR-273](#). This confirmation is supplied by the subcontractor to the bidder, who then submits this information to the Department as indicated below. **No revisions are permitted prior to award of the Contract.**

The completed and signed [CR-273](#)-Confirmation of DBE/ESBE/SBE Firm, and if applicable: the [CR-274](#)-DBE/ESBE/SBE Trucking Verification ; the [CR-272](#)-DBE/ESBE/SBE Regular Dealer/Supplier Verification, and good faith effort

documentation are submitted as a zipped file by all bidders at time of bid, or within five (5) days after bid opening, to the DCR/AA through a designated email: DOT-CR.Verifications@dot.nj.gov. The DBE/ESBE/SBE Participation Plan Approval Memo, and copies of Forms [CR-266](#), [CR-273](#), [CR-274](#) and [CR-272](#) are forward to the Region by the DCR/AA. The Region will forward a copy of the DBE/ESBE/SBE Participation Plan Approval Memo and the Forms [CR-266](#), [CR-273](#), [CR-274](#) and [CR-272](#) to the appropriate RE.

After Award, revisions (including termination, substitution or replacement of approved DBE/ESBE/SBE subcontractors, lower tier subcontractors, transaction expeditors, regular dealers, suppliers, manufacturers or truckers, changes in work items, or changes in \$ value of subcontracts) can only be made to the DBE/ESBE or SBE Program when the Contractor submits a revised Schedule of Participation DBE/ESBE/SBE, Form [CR-266](#), to the RE. The RE will review the revision and sign the Form CR-266 as concurring to the revision then send it to the DCR/AA for review and approval. If approved, the DCR/AA will issue a Revised DBE/ESBE/SBE Participation Plan Approval Memo to the Contractor and the RE. **No changes, including termination, substitution and replacement of DBE/ESBE/SBE subcontractors, lower tier subcontractors, transaction expeditors, regular dealers, suppliers, manufacturers or truckers, changes in work items, or changes in \$ value of subcontracts can be made without prior written approval from the DCR/AA.** Unless DCR/AA provides written consent, contractors are not entitled to payment for work or material unless it is performed or supplied by the listed and approved DBE/ESBE/SBE.

As specified in Subsection 108.01 of the Standard Specifications, termination or substitution or replacement of any DBE/ESBE or SBE firm cannot be made without prior notification and written consent of the DCR/AA. (See 49 CFR § 26.53(f)(1)). Prior to the revision, the Contractor must provide written notification to the DBE, ESBE or SBE firm, and the DCR/AA, of their intent to request to terminate, substitute or replace the DBE/ESBE/SBE firm, and the reason for the request. The DBE/ESBE/SBE firm has five days to respond to the Contractor's notice and inform the Contractor and the DCR/AA of reasons why, if any, it objects to the proposed termination of their subcontract, and why the Department should not approve the Contractor's action.

The revision request must also include a written explanation of the reason for the changes, and if the contractor is replacing a DBE/ESBE/SBE firm with a non-DBE/ESBE/SBE firm, documented evidence of good faith effort(s). The revisions are to be submitted on a revised [CR-266](#), and accompanied by: 1) a completed and signed [CR-273](#), and if applicable, 2) a completed and signed [CR-272](#) and, if applicable, 3) a completed and signed [CR-274](#) for any **new** DBE/ESBE/SBE firms listed on the revised

CR-266, and 4) a detailed written explanation of why each change is being made, including documented evidence of good faith effort(s), for review and concurrence by the RE who submits the revision request and documentation to the DCR/AA for approval prior to implementation. The Contractor will make a good faith effort to replace a DBE/ESBE or SBE subcontractor that is unable to perform work with another DBE/ESBE or SBE (See 49 CFR § 26.53(g)).

At the Preconstruction Conference, or prior to it, the RE will receive a copy of the DCR/AA's DBE/ESBE/SBE Participation Plan Approval memorandum, the CR-266, and copies of CR-273s, and applicable CR-274s and CR-272s.

Monitoring

During the course of the Contract, the RE (or staff) will monitor the Contractor's ongoing goal attainment by:

- 1 Comparing DBE/ESBE Goal or SBE Goal commitments and CR-273 Confirmation of DBE/ESBE/SBE Firm form against each Request for Approval to Sublet Form DC-18, to ensure the work items correlate.
- 2 Cross checking the Daily Work Reports with each affected Form DC-18, the DBE/ESBE/SBE Participation Plan Approval memorandum and the Utilization of Disadvantaged Business Enterprise/Emerging Small Business Enterprises/SBE Monthly Report Form CR-267 to ensure the work items correlate, and the firms that performed the work correlate.
- 3 Using the Daily Work Report to provide on-site monitoring of the type of Items performed by each DBE/ESBE or SBE, including documenting which firm performs the work, whether the work is a partial work item or not, and whether there are any problems associated with said work items.
- 4a Performing Commercially Useful Function (CUF) reviews on all DBE, ESBE and SBE firms utilizing the CUF Guidelines and Checklist, Form CR-275. The CUF review will be conducted within the first ten (10) days the firm starts work at the project site. As outlined in 49 CFR part 26.55(c) (1), a DBE/ESBE (or SBE for state funded Contracts) firm performs a commercially useful function when it is responsible for the 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 commercially useful function, the DBE/ESBE or SBE must also be responsible, with respect to materials and supplies used on the Contract, for preparing the estimate, negotiating price, determining quality and quantity, ordering the material, arranging delivery, installing (where applicable), and paying for the material and supplies itself. To determine whether a DBE/ESBE or SBE is performing a commercially useful function, the RE or

staff, with the support of the DCR/AA, 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/ESBE or SBE credit claimed for its performance of the work and other relevant factors.

On Federal aid contracts, special attention should be paid to firms listed as regular dealers/suppliers, regular dealer/installers and brokers/transaction expeditors as participation credit for each is different as per 49 CFR Part 26.55.

The contractor and firms should submit to the RE documentation that supports that the DBE/ESBE or SBE firm is performing a commercially useful function. This documentation includes:

- Executed contracts
- Material/supply Agreements
- Invoices for material/supplies
- Equipment lease/rental agreements
- Delivery tickets
- Hauling tickets
- Cancelled checks
- Equipment titles of ownership

The documentation should be detailed and reference the specific project. The RE should keep this documentation as part of the project files.

- 4b Reviewing all DBE/ESBE or SBE trucking firms to ensure they are performing a commercially useful function (CUF) as outlined in 49CFR part 26.55(d). The DBE/ESBE or SBE trucking company must be responsible for the management and supervision of the entire trucking operation for which it is responsible on the Contract, and there cannot be a contrived arrangement for the purpose of meeting DBE/ESBE or SBE goals. The DBE/ESBE or SBE must itself own and operate at least one fully licensed, insured and operational truck used on the Contract. The DBE/ESBE or SBE receives credit for the total value of the transportation services it provides on the contract using trucks its own, insures and operates using drivers it employs.

A DBE/ESBE/SBE is not permitted to obtain trucks from the Contractor to perform work on the project. A DBE/ESBE or SBE may also lease trucks from another DBE/ESBE or SBE firm, including an owner-operator who is certified as a DBE/ESBE or SBE. The DBE/ESBE or SBE who leases trucks from another DBE/ESBE or SBE receives credit for the total value of the transportation services the lessee DBE/ESBE or SBE provides on the Contract. The DBE/ESBE or SBE may also lease trucks from a non-DBE/ESBE or non-SBE firm, including from an owner-operator. The DBE/ESBE or SBE who leases trucks from a non-DBE/ESBE or non-SBE is entitled to credit for the total value of transportation services provided by non-DBE/ESBE or non-SBE lessees not to exceed the value of transportation services provided by

DBE/ESBE or SBE owned trucks on the Contract. Leased trucks must clearly and visually display the name and identification number of the DBE/ESBE or SBE on the outside of the truck.

Note: Prior to trucking firms beginning work on the Contract, the Contractor must submit copies of all signed Hiring Agreements and copies of all signed lease agreements to the RE.

5. Ensure the Contractor prepares, signs and submits with the [CR-267](#), a Monthly Trucking Verification Form [CR-271](#), identifying each truck owner, DBE/ESBE or SBE and non DBE/ESBE, Certification number, company name and address, truck number, commission or amount paid, date paid and type of lease or contract arrangement for all trucks performing work on the project. Failure to submit the Monthly Trucking Verification Form [CR 271](#) may result in denial or limit of credit toward the DBE/ESBE or SBE Contract goal and/or payment being delayed or withheld as specified in 105.01 for failure to carry out provisions of the Contract.

During the course of the Contract, the RE will notify the Contractor in writing of all violations of the DBE/ESBE or SBE Program requirements, and will direct the Contractor to comply with these requirements. Failure of the Contractor to comply after thirty (30) days will result in the RE notifying the DCR/AA by memorandum and presenting pertinent documents for their review and determination as to the appropriate action to enforce compliance. The DCR/AA is to be copied on all documentation relative to the Contractor's compliance with the Contract's DBE/ESBE/SBE Program requirements.

The RE should review the Contractor's DBE/ESBE/SBE goal attainment every month and request a written plan of action from the Contractor addressing DBE/ESBE/SBE goal attainment deficiencies if they exist.

Final Program Review

- 1 Upon completion of the project, before final payment or retainage is paid to the Contractor, and payment to all DBEs/ESBEs or SBEs has been made, the Contractor's DBE/ESBE or SBE Liaison Officer will complete and sign the Final DBE/ESBE or SBE Report Form [CR-268](#) and submit it to the RE for review. The report will reflect all DBE/ESBE or SBE activity on the project. After review by the RE, the RE will immediately forward the report to the DCR/AA for review and determination of whether or not the DBE/ESBE or SBE goal was attained by the Contractor.
- 2 If the DBE/ESBE goal or SBE goal was not met, detailed documented evidence of good faith effort(s) must be submitted by the Contractor with Form CR-268 (see 49 CFR § 26.53(b)(2)). This means that the Contractor must show that it took all necessary and reasonable steps to achieve the Contract DBE/ESBE or SBE goal or other requirements of 49 CFR § 26 which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient

participation, even if they were not fully successful. Good faith efforts will be reviewed by DCR/AA based on the guidance set forth in 49 CFR Part 26 Appendix A. Adequate good faith efforts include but are not limited to the following:

1. Conducting market research to identify small business contractors and suppliers and soliciting through all reasonable and available means the interest of all certified DBEs/ESBEs/SBEs that have the capability to perform the work of the Contract. This may include attendance at pre-bid and business matchmaking meetings and events, advertising and/or written notices, posting of Notices of Sources Sought and/or Requests for Proposals, written notices or emails to all DBEs/ESBEs/SBEs listed in the State's directories of transportation firms that specialize in the areas of work desired (as noted in the DBE/ESBE/SBE directories) and which are located in the area or surrounding areas of the project. The Bidder/Contractor shall solicit this interest as early as practicable to allow the DBEs/ESBEs/SBEs to respond to the solicitation and submit a timely offer for the subcontract. The Bidder/Contractor should determine with certainty if the DBEs/ESBEs/SBEs are interested by taking appropriate steps to follow up initial solicitations.
2. Selecting portions of the work to be performed by DBEs/ESBEs/SBEs in order to increase the likelihood that the DBE, ESBE or SBE goals 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/ESBE/SBE participation, even when the Bidder/Contractor might otherwise prefer to perform these work items with its own forces. This may include, where possible, establishing flexible timeframes for performance and delivery schedules in a manner that encourages and facilitates DBE/ESBE/SBE participation.
3. Providing interested DBEs/ESBEs/SBEs with adequate information about the Plans, specifications, and requirements of the Contract in a timely manner to assist them in responding to a solicitation with their offer for the subcontract.
4. Negotiating in good faith with interested DBEs/ESBEs/SBEs. It is the Bidder's/Contractor's responsibility to make a portion of the work available to DBE/ESBE/SBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE/ESBE/SBE subcontractors and suppliers, so as to facilitate DBE/ESBE/SBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs/ESBEs/SBEs 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/ESBEs/SBEs to perform the work.

- 4(i). A Bidder/Contractor using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE/ESBE/SBE 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/ESBEs/SBEs is not in itself sufficient reason for a Bidder's/Contractor's failure to meet the Contract DBE, ESBE or SBE goal, as long as such costs are reasonable. Also, the ability or desire of a Bidder/Contractor to perform the work of a Contract with its own organization does not relieve the Bidder/Contractor of the responsibility to make good faith efforts. Bidders/Contractors are not, however, required to accept higher quotes from DBEs/ESBEs/SBEs if the price difference is excessive or unreasonable.
5. Not rejecting DBEs/ESBEs/SBEs 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 status) are not legitimate causes for the rejection or non-solicitation of bids in the Bidder's efforts to meet the Contract DBE, ESBE or SBE goal. Another practice considered an insufficient good faith effort is the rejection of the DBE/ESBE/SBE because its quotation for the work was not the lowest received. However, nothing in this paragraph shall be construed to require the Bidder/Contractor to accept unreasonable quotes in order to satisfy the Contract goals.
- 5(i). A Bidder's/Contractor's inability to find a replacement DBE/ESBE/SBE at the original price is not alone sufficient to support a finding that good faith efforts have been made to replace the original DBE/ESBE/SBE. The fact that the Bidder/Contractor has the ability and/or desire to perform the Contract work with its own forces does not relieve the Bidder/Contractor of the obligation to make good faith efforts to find a replacement DBE/ESBE/SBE, and it is not a sound basis for rejecting a prospective replacement DBE's/ESBE's/SBE's reasonable quote.
6. Making efforts to assist interested DBEs/ESBEs/SBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or Bidder/Contractor.
7. Making efforts to assist interested DBEs/ESBEs/SBEs in obtaining necessary equipment, supplies, materials, or related assistance or services, but not directly or indirectly providing equipment, supplies or materials to the DBE/ESBE/SBE.
8. 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.

Documented evidence to assist in supporting good faith effort(s) that Contractors should submit includes, but is not limited to the following:

1. The names of DBE/ESBE/SBE contractors, subcontractors, transaction expeditors and material suppliers contacted for work on the Contract, including specific documentation such as copies of letters, e-mails and other correspondence supporting when (dates & times) and how contacted, and the specific Contract work items and other information provided to each.
2. The actual dollar value of work subcontracted and awarded to DBEs/ESBEs/SBEs, including specific Contract work items and cost of each work item.
3. The progress being made and efforts taken in seeking out and utilizing DBEs/ESBEs/SBEs to include: solicitations, specific Contract work items and the quotes and bids regarding those specific Contract work items, supplies, leases, or other contract items, etc.
4. Detailed written documented evidence of all correspondence between the contractor and DBEs/ESBEs/SBEs such as contacts (letters/e-mails, etc.), telephone calls, etc., including names and dates/times, to obtain the services of DBEs/ESBEs/SBEs on the Contract.
5. Records of all DBEs/ESBEs/SBEs and non-DBEs/ESBEs/SBEs who have submitted quotes/bids to the Contractor on the Contract, including dates, times, and quotes, etc.
6. Monthly reports required for submission to the Department, hiring agreements, subcontracts, lease agreements, supply tickets and other records documenting DBE/ESBE/SBE utilization on the Contract.
7. Documented evidence outlining EEO and Affirmative Action efforts made in the administration and performance of the Contract.

If the contractor failed to meet the Contract DBE/ESBE or SBE goal without demonstrating adequate good faith effort, a payment reduction will be made from the total amount of payments made to the contractor equal to the value of the DBE/ESBE or SBE goal not attained as outlined in Subsection 105.02.

Failure by the Contractor to meet the DBE/ESBE program, rules and regulations of 49 CFR Part 26, provide the necessary documented and verifiable evidence of "good faith" effort(s), and meet other Civil Rights requirements of affirmative action, EEO, on-the-job training (training) program, and labor/wage rate may be just cause for denial or limit of credit toward the Contract goal, progress payments being delayed or withheld, assessing sanctions as set forth in 49 CFR Part 26, default, or termination of the Contract as outlined

in Subsection 105.02 of the Standard Specifications for failure to carry out provisions of the Contract.

Failure by the Contractor to meet the SBE program, rules and regulations of N.J.A.C. 12A:10A-1.2 et seq. and N.J.A.C. 17:14-1.2 et seq., to provide the necessary documented and verifiable evidence of documented "good faith" effort(s), and meet other Civil Rights requirements of affirmative action, EEO, and labor/wage rate may be just cause for denial or limit of credit toward the Contract goal, progress payments being delayed or withheld, default, or termination of the Contract as outlined in Subsection 105.02 of the Standard Specifications for failure to carry out provisions of the Contract.

Prompt Payment of Subcontractors

Contractors are required to promptly pay all subcontractors within thirty (30) business days of receipt of payment by NJDOT (see 49 CFR § 26.29). The RE will cooperate with the DCR/AA in resolving written prompt payment complaints filed by DBE/ESDBE or SBE subcontractors. DCR/AA is the lead unit in the resolution process. If the RE receives a prompt payment complaint, immediately notify the DCR/AA. Failure of the Contractor to comply with the Contract's prompt payment provisions constitutes a material breach of the Contract and may result in remedies under the Contract. Failure of the Contractor to pay subcontractors promptly based on a determination by the DCR/AA may be just cause for progress payments to the Contractor being delayed or withheld as outlined in Subsection 105.01 of the Standard Specifications for failure to carry out provisions of the Contract.