

Add the following:

SECTION 120

DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM

120-1.01 DESCRIPTION. The work consists of providing Disadvantaged Business Enterprises (DBEs), as defined in Title 49 CFR Part 26, the opportunity to participate fairly with other contractors in the performance of contracts financed with federal funds. The Contractor and subcontractors shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Contractor will carry out applicable requirements of 49 CFR Part 26 in the award and administration of U.S. DOT assisted contracts.

120-1.02 INTERPRETATION. This section implements the requirements of 49 CFR Part 26, and the Department's federally approved DBE Program.

120-1.03 ESSENTIAL CONTRACT PROVISION. Failure to comply with the provisions of this section is a material breach of contract, which may result in contract termination or other remedy as DOT&PF deems appropriate. Failure to comply with this section is justification for debarment action as provided in AS 36.30.640(4).

120-1.04 DEFINITIONS AND TERMS.

1. **Administrative Reconsideration.** A process by which the low bidder may request reconsideration when the Department determines the Good Faith Effort (GFE) requirements have not been met.
2. **Broker.** A certified DBE for the delivery of creditable materials, supplies, equipment, transportation/hauling, insurance, bonding, etc., within its certified category, that is necessary to complete the project. A broker of materials certified in a supply category must be responsible for scheduling the delivery of materials and ensuring that the materials meet specifications before credit will be given.
3. **Civil Rights Office.** The Department's Civil Rights Office. (CRO)
4. **Contract Compliance Officer.** Individual within the **CRO** with the authority to administer the Department's compliance programs.
5. **Disadvantage Business Enterprise.** A Disadvantaged Business Enterprise (**DBE**) which is a for-profit small business concern that is certified in accordance with 49 CFR Part 26 and listed in the Alaska DBE Directory.
6. **DBE Key Employee.** A permanent, year-round employee of the DBE and whose name is on file with the **CRO** as a key employee. A key employee may act as an on-site representative when the owner is not on-site.
7. **DBE Utilization Goal.** The percent of work to be performed by certified DBEs. The goal is established by the Department and specified in the contract.
8. **DBE Officer.** Individual designated in writing as a representative of the Contractor concerning DBE issues.

9. **Manufacturer.** A DBE certified in a supply category that changes the shape, form, or composition of original material in some way. The DBE must provide that altered material to the general public or the construction industry at large on a regular basis.
10. **Race Conscious Participation.** DBE participation used to meet a specified DBE Utilization Goal.
11. **Race Neutral Participation.** DBE participation that is in excess of the specified DBE Utilization Goal or participation that does not count towards this goal.
12. **Regular Dealer.** A DBE certified in a supply category who operates in a manner consistent with industry practice and who:
 - a. maintains an in-house inventory on a regular basis of the particular product provided to this project; and
 - b. keeps an inventory in an amount appropriate for the type of work using that product; and
 - c. offers that inventory for sale to the general public or construction industry at large (private and public sectors), not just supplied as needed on a project by project basis during the construction season, except where the product requires special or heavy equipment for delivery and the DBE possesses and operates this equipment on a regular basis throughout the construction season in order to deliver the product to the general public or construction industry at large. If the distribution equipment is rented or leased, it must be on a repetitive, seasonal basis; and may additionally fabricate (assemble large components) for use on a construction project, consistent with standard industry practice, for delivery to the project.
 - d. a person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business, if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.
13. **Commercially Useful Function.** DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. The DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself.

120-2.01 MEETING THE DBE UTILIZATION GOAL. A DBE's proposed work may be used to demonstrate the successful bidder's ability to meet the DBE Utilization Goal before Contract award. The DBE must be certified in a category covering the Commercially Useful Function to be performed at the time of listing on Form 25A-325C (DBE Utilization Report).

A bidder may meet the DBE Utilization Goal through (1) the participation of certified DBE firms, or (2) documentation of required GFE (Subsection 120-3.01), or (3) a combination of participation and GFE to be eligible for contract award.

DBE participation on contingent sum items will count as Race Neutral DBE Participation and not towards fulfilling a minimum DBE Utilization Goal.

120-3.01 DETERMINATION OF COMPLIANCE.

1. **Phase I-Bid.** All DBE GFES must be completed prior to bid opening.

2. **Phase II-Award.** The apparent low bidder shall submit evidence of DBE commitment(s) within five working days after receipt of written notification by the Department of the successful low bid. The apparent low bidder may not supplement its DBE efforts after opening, nor offer new or additional DBE participation after submitting the DBE Utilization Report (Form 25A-325C).
 - a. **Written DBE Commitment.** Complete Form 25A-326 for each DBE subcontractor.
 - b. **DBE Utilization Report.** Submit a completed DBE Utilization Report Form 25A-325C. All listed DBEs must be certified in the appropriate work categories prior to bid opening to be used to meet the DBE contract goal.
 - c. **GFE Documentation.** Submit a completed Summary of Good Faith Effort Documentation Form 25A-332A (with attachments) and Contact Report Form 25A-321A if the DBE Utilization Goal is not met on Form 25A-325C.

If the bidder cannot meet the DBE Utilization Goal, and cannot document the minimum required GFE (as specified below), the Contracting Officer will determine the bidder to be not responsible.

120-3.02 GOOD FAITH EFFORT (GFE).

1. **GFE Criteria.** When a bidder fails to meet the DBE Utilization Goal, the CRO will use the following criteria to judge whether they have demonstrated sufficient GFE to be eligible for award of the contract.
 - a. **Consider All Subcontractable Items.** Before bid opening, the bidder shall, at a minimum, seek DBE participation for each of the subcontractable items with an established DBE goal as identified on Form 25A-324. It is the bidder's responsibility to facilitate DBE participation by making the work listed on the subcontractable items list available to DBE firms.

If the bidder cannot achieve the DBE Utilization Goal, then the bidder should also consider other items not listed that could be subcontracted to DBEs.

- b. **Initial DBE Notification.** All DBEs listed in the Department's Plan Holders Self-Registration List for the particular project being bid must be contacted at least seven calendar days prior to bid opening. For GFE purposes, DBEs certified to perform the work items identified on Form 25A-324 and listed as mandatory contact on the Department's Plan Holders Self-Registration List, must be contacted to solicit their interest. Each contact with a DBE firm must be logged on a Contact Report, Form 25A-321A.

The bidder must give DBEs at least seven calendar days to quote. The bidder may reject DBE quotes received after the deadline. Responsive DBE quotes must be accepted unless they are determined non-competitive. Deadline for quote submission and responsiveness determinations for DBEs and non-DBEs must be consistently applied.

The only acceptable methods of initial and follow up notification are:

- (1) By fax with a confirmation receipt of successful transmission to the DBE's fax number listed in the DBE Directory. A fax transmission without receipt of successful transmission is unsatisfactory.
- (2) By email with confirmation of successful receipt to the DBE's email address listed in the DBE Directory. Email without confirmation of successful receipt is unsatisfactory.

(3) By telephone solicitation with a record of the date and time of the telephone call made to the DBE's telephone number listed in the DBE Directory. Telephone solicitation without a record of date and time is unsatisfactory.

- c. **Non-Competitive DBE Quotes.** DBE quotes more than 10 percent higher than an accepted non-DBE quote will be deemed non-competitive, provided they are for the exact same work or service.

All evidence in support of a non-competitive **quote** determination must be provided at the time of the GFE submittal. When a DBE quote is rejected as being non-competitive, the work must be performed by the non-DBE subcontractor whose quote was used to provide the basis of the determination. Payments received by the non-DBE subcontractor during the execution of the Contract shall be consistent with the accepted quote. This does not preclude increases due to change documents issued by the Department.

- d. **Assistance To DBEs.** Contractors must provide DBEs with:

(1) Information about bonding or insurance required by the bidder.

(2) Information about securing equipment, supplies, materials, or related assistance or services.

(3) Adequate information about the requirements of the contract regarding the specific item of work or service sought from the DBE.

- e. **Follow-up DBE Notifications.** **If there is no response from the initial DBE notification, you must** contact the DBE(s) **again** to determine if they will be **quoting**. For acceptable forms of notification and required documentation see 120-3.02, subsection 1.b items 1 through **3**.

Failure to submit a **quote** by the deadline is evidence of the DBE's lack of interest in bidding. Documentation of follow-up contacts shall be logged on the Contact Report, Form 25A-321A.

- f. **GFE Evaluation.** Subsections (a) through (e) must be completed for a GFE based submission to be considered. Failure to perform and document actions contained in subsections (a) through (e) constitutes insufficient GFE. After submitting a GFE, bidders may only clarify efforts taken before opening. No new efforts or additional DBE participation is permitted after opening.

2. **Administrative Reconsideration.** 49 CFR 26.53(d) provides an opportunity for administrative reconsideration when the Department determines that GFE is insufficient. This opportunity must be exercised within three working days of notification that GFEs were unsatisfactory. For reconsideration, the bidder must provide written documentation or argument concerning efforts to meet the DBE Utilization Goal. No new or additional contact information may be provided. Only contact information the bidder provided in support of its initial request for a GFE determination by the **CRO** may be presented to support the request for administrative reconsideration.

The process for an Administrative Reconsideration is as follows:

- a. The bidder will have the opportunity to meet with the DBE Liaison Officer in person to discuss the issue. If so desired, the bidder must be ready to meet with the DBE Liaison Officer within four working days of receipt of notice that it failed to meet the requirements of this subsection.
- b. The DBE Liaison Officer will render a written decision and provide notification to the bidder within four working days after the meeting. The written decision will explain the basis for finding.
- c. The finding of the DBE Liaison Officer cannot be appealed to the U.S. DOT.

120-3.03 DBE CREDITABLE AND NON CREDITABLE WORK.

1. **DBE Creditable Work.** The Commercially Useful Function work items and creditable dollar amounts shown on the DBE Utilization Report, Form 25A-325C, shall be included in any subcontract, purchase order or service agreement with that DBE.

2. **DBE Decertification.**

a. If a DBE performing a Commercially Useful Function loses its DBE certification at any time prior to execution of a subcontract, purchase order or service agreement, as the result of a determination of ineligibility pursuant to 49 CFR Part 26.87, the work of that firm will not be credited toward the DBE Utilization Goal and the Contractor must either:

- (1) meet the contract goal by subcontracting with an eligible DBE firm or demonstrate a GFE to do so; or
- (2) continue with the decertified DBE and find other work not already committed to DBEs in an amount that meets or exceeds the DBE Utilization Goal.

b. If a DBE performing a Commercially Useful Function loses its DBE certification after execution of a subcontract, purchase order or service agreement, as the result of a determination of ineligibility pursuant to 49 CFR Part 26.87, the de-certified DBE may continue to perform, and the work may be credited toward the DBE Utilization Goal.

c. If a DBE goes out of business and cannot perform the work, the Contractor must meet the contract goal by subcontracting with an eligible DBE Firm or demonstrate a GFE to do so.

The provisions of 120-3.03(3) Termination of a DBE and 120-3.03(4) DBE Replacement or Substitution do not apply to this section.

A Contractor must notify the CRO within one business day if they become aware of any change in a DBE's circumstances that might lead to a DBE's decertification.

3. **Termination of a DBE.**

a. In accordance with 49 CFR 26.53(f)(1) the Contractor shall not terminate a DBE without good cause and the prior written consent of the Engineer. For purposes of this paragraph, good cause includes the following circumstances:

- (1) DBE defaults on their obligation for any reason;
- (2) The DBE fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE to perform its work on the subcontract results from the bad faith or discriminatory action of the Contractor.
- (3) The DBE fails or refuses to meet the Contractor's reasonable, nondiscriminatory bond requirements;
- (4) The DBE becomes bankrupt, insolvent, or exhibits credit unworthiness;
- (5) The DBE is ineligible to work on public works projects because of suspension and debarment proceedings pursuant 2 CFR Parts 180, 215, and 1,200 or applicable state law;

- (6) The Engineer determines that the DBE is not a responsible contractor.
 - (7) The DBE voluntarily withdraws from the project and provides a written notice of its withdrawal;
 - (8) The DBE is ineligible to receive DBE credit for the type of work required;
 - (9) A DBE owner dies or becomes disabled with the result that the DBE is unable to complete its work; or
 - (10) Other documented good cause that the Engineer determines, compels the termination of the DBE, provided that good cause does not exist if the Contractor seeks to terminate a DBE it relied upon to obtain the contract so that the Contractor can self-perform the work for which the DBE was engaged or so that the Contractor can substitute another DBE or non-DBE after contract award.
- b. The Contractor must give written notice to the DBE of its intent to request to terminate and/or substitute, and the reason for the request. The request to terminate and/or substitute must be submitted to the Engineer.
 - c. The Contractor must give the DBE five working days to respond to the written notice. Any response from the DBE must be submitted to the Engineer.
 - d. DBEs that are terminated must be replaced or substituted in accordance with 120-3.02(4).

4. **DBE Replacement or Substitution.**

- a. The Contractor shall submit to the Engineer a written request to replace or substitute a DBE who fails or refuses to execute a written subcontract or who is terminated under 120-3.03(3). If approved, the Contractor shall, at a minimum, replace or substitute the DBE with another eligible DBE for the same work in order to fulfill its commitment under the DBE Utilization Goal.
- b. If the Contractor cannot obtain replacement DBE participation, the DBE Utilization Goal will not be adjusted. However, the Engineer may consider the following criteria as satisfying that portion of DBE participation that cannot be replaced.
 - (1) The Contractor was not at fault or negligent and that the circumstances surrounding the replacement or substitution were beyond the control of the Contractor; and
 - (2) The Contractor is unable to find replacement DBE participation at the same level of DBE commitment and has adequately performed and documented the GFE expended in accordance with Subsection 120-3.02; or
 - (3) It is too late in the project to provide any real subcontracting opportunities for DBEs.

If the Engineer agrees that additional DBE participation is not available, the DBE may be replaced or substituted with a non-DBE or the Contractor may self-perform the work.

120-3.04 COMMERCIALY USEFUL FUNCTION.

- 1. **Creditable Work.** Measuring the DBE Utilization Goal will be based upon the actual dollars paid to the DBEs for creditable Commercially Useful Function work on this project. This is determined by the Engineer in accordance with this Section.

- a. Commercially Useful Function is limited to:
- b. Prime Contractors;
- c. Subcontractors;
- d. Manufacturers;
- e. Regular Dealers;
- f. Brokers; or
- g. Joint Ventures

2. **Determination of Commercially Useful Function.** In order for the Commercially Useful Function work of the DBE to be credited toward the goal, the Contractor will ensure that the DBE is certified in the appropriate category at the time of the submittal of the subcontract, or the issuance of a purchase order or service agreement. Subcontracts, purchase orders and service agreements shall be consistent with the written DBE commitment.

- a. The Commercially Useful Function performed by a DBE certified in a supply category will be evaluated by the Engineer to determine whether the DBE performed as either a broker, regular dealer, or manufacturer of the product provided to this project.
- b. The following factors will be used in determining whether a DBE trucking company is performing a Commercially Useful Function:
 - (1) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is performing on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
 - (2) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
 - (3) The 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.
- c. The Contractor will receive credit for the Commercially Useful Function performed by DBEs as provided in this Section. Contractors are encouraged to contact the Engineer in advance of the execution of the DBE's work or provision of goods or services regarding Commercially Useful Function and potential DBE credit.
- d. The DBE may perform work in categories for which it is not certified, but only work performed in the DBE's certified category meeting the Commercially Useful Function criteria may be credited toward the DBE Utilization Goal.
- e. DBE work shall conform to the following requirements to be a Commercially Useful Function:
 - (1) It will be necessary and useful work required for the execution of the Contract.
 - (2) The scope of work will be distinct and identifiable with specific contract items of work, bonding, or insurance requirement.
 - (3) It will be performed, controlled, managed, and supervised by employees normally employed by and under the control of the certified DBE. The work will be performed

with the DBE's own equipment. Either the DBE owner or DBE On-Site Representative will be at the work site and responsible for the work. Leased equipment may also be used provided the DBE has exclusive use of the equipment and it is operated by a driver the DBE employs. In remote locations or rare situations, a DBE may use equipment and/or personnel from the Contractor or its affiliates. Should this situation arise, a prior arrangement must be in place. The duration of the arrangement must be short term and prior written approval from the Engineer must be obtained.

- (4) The manner in which the work is sublet or performed will conform to standard industry practice within Alaska, as determined by the Department. The work or provision of goods or services will have a market outside of the DBE program (and must also be performed by non-DBE firms within the Alaskan construction industry). Otherwise, the work or service will be deemed an unnecessary step in the contracting or purchasing process and no DBE credit will be allowed.

There will be no DBE credit for lower-tier non-DBE subcontract work.

- (5) The cost of the goods and services will be reasonable and competitive with the cost of goods and services outside the DBE program within Alaska. Materials or supplies needed as a regular course of the Contractor's operations such as fuel, maintenance, office facilities, portable bathrooms, etc. are not creditable.

The cost of materials actually incorporated into the project by a DBE subcontractor is creditable toward the DBE goal only if the DBE is responsible for ordering and scheduling their delivery and fully responsible for ensuring that they meet specifications. The cost of materials purchased from the contractor or its affiliates is not creditable.

- (6) Subcontract work, with the exception of truck hauling, shall be sublet by the same unit of measure as is contained in the Bid Schedule unless approved in advance by the Engineer.
- (7) The DBE will control all business administration, accounting, billing and payment transactions. The Contractor cannot perform these functions for the DBE.

In accordance with AS 36.30.420(b), the Engineer may inspect the offices of the DBE and audit their records to assure compliance.

3. **Rebuttal of a Finding of No Commercially Useful Function.** Consistent with the provisions of 49 CFR Part 26.55(c)(4)&(5), before the Engineer makes a final finding that no Commercially Useful Function has been performed by a DBE, the Engineer will coordinate transmittal of the presumptive finding to the Contractor, who will in-turn, notify the DBE. The Contractor will provide the DBE the opportunity to provide rebuttal information. The Contractor shall present the information to the Engineer.

The Engineer will make a final determination on whether the DBE is performing a Commercially Useful Function. Under no circumstances will the Contractor take any action with respect to the DBE until the final determination is made. The Engineer's decisions on Commercially Useful Function matters are subject to review by the Department, but are not administratively appealable to the U.S. DOT.

4. **Monthly Required Reporting.** On a monthly basis, the Contractor shall submit the Monthly Summary of Disadvantaged Business Enterprise Participation, Form 25A-336, to the Engineer. Reports are due by the 15th of the following month. Also attach copies of canceled checks or bank

statements that identify payer, payee, and amount of transfer to verify payment information shown on the form.

120-4.01 DETERMINING DBE CREDIT. The Contractor is entitled to count toward the DBE Utilization Goal those monies actually paid to certified DBEs for Commercially Useful Function work performed by the DBE as determined by the Engineer. The Contractor will receive credit for the utilization of the DBEs, as follows:

1. Credit for the Commercially Useful Function of a DBE prime contractor is 100 percent of the monies actually paid to the DBE under the contract for creditable work and materials in accordance with 49 CFR Part 26.55.
2. Credit for the Commercially Useful Function of a subcontractor is 100 percent of the monies actually paid to the DBE under the subcontract for creditable work and materials.
3. Credit for the Commercially Useful Function of a subcontractor performing hauling/transportation is 100 percent of the monies actually paid to the DBE under the subcontract for creditable work for those firms certified in the 100 percent category. Credit for the Commercially Useful Function of a subcontractor performing hauling/transportation is 5 percent of the monies actually paid to the DBE under the subcontract for creditable work for those firms certified in the 5 percent credit category.
4. Credit for the Commercially Useful Function of a manufacturer is 100 percent of the monies paid to the DBE for the creditable materials manufactured.
5. Credit for the Commercially Useful Function of a regular dealer of a creditable material, product, or supply is 60 percent of its value. The value is the actual cost paid to the DBE not to exceed the bid price for such item.
6. Credit for the Commercially Useful Function of a broker performed by a DBE certified in a supply category for providing a creditable material, product or supply is limited to a reasonable brokerage fee. The brokerage fee will not exceed 5 percent of the cost of the procurement contract for the creditable item.
7. Credit for the Commercially Useful Function of a broker performed by a DBE certified in a bonding or insurance category is limited to a reasonable brokerage fee, not to exceed 5 percent of the premium cost.
8. Credit for the Commercially Useful Function of a joint venture (JV) either as the prime contractor or as a subcontractor may not exceed the percent of the DBE's participation in the JV agreement, as certified by the CRO. The DBE joint venture partner will be responsible for performing all of the work as delineated in the certified JV agreement.

120-5.01 ACHIEVEMENT OF DBE GOALS. Work under this item is subsidiary to other contract items and no payment will be made for meeting or exceeding the DBE Utilization Goal.

If the Contractor fails to utilize the DBEs listed on Form 25A-325C as scheduled or fails to submit proof of payment, requested documentation, or otherwise cooperate with a DBE review or investigation, the Department will consider this to be unsatisfactory work. If the Contractor fails to utilize GFE to replace or substitute a DBE, regardless of fault (except for Subsection 120-3.03(4)(b)(3)), the Department will also consider this unsatisfactory work. Unsatisfactory work may result in disqualification of the Contractor from future bidding under Subsection 102-1.13 and withholding or progress payments consistent with Subsection 109-1.06.