

DESIGNATED SPECIAL PROVISION

DISADVANTAGED BUSINESS ENTERPRISE (DBE) REQUIREMENTS
For Federally Funded Airport Projects

I. DBE GOAL— (%)

The Department has established, in connection with this contract, a DBE goal as specified in the proposal of the original contract amount for the utilization of firms owned and controlled by socially and economically disadvantaged individuals certified as DBEs. If the DBE goal is zero, the owner and/or contractor should make an effort to identify and use DBEs. This DBE goal remains in effect for the life of the project.

Include the following provisions (paragraphs a through d) in every subcontract, so that such provisions will be binding not only upon the prime contractor but also upon each subcontractor, supplier, service provider or consultant.

- (a) **Policy for Federally-Funded Projects.** It is the policy of the U.S. Department of Transportation (DOT) and the Department that DBEs, as defined in 49 CFR Part 26, as amended, (Part 26) and in this specification, be given the opportunity to participate in the performance of contracts financed in whole or in part with Federal funds under this contract. Consequently, the DBE requirements of Part 26 apply to this contract.
- (b) **DBE Obligation.** Take all necessary and reasonable steps to ensure that all DBEs have the opportunity to compete for and perform contracts. Do not discriminate on the basis of race, color, national origin, or sex in the award and performance of PennDOT and DOT-assisted contracts.
- (c) **Failure to Comply with DBE Requirements.** Failure to carry out the requirements as specified constitutes a material breach of contract and may result in termination of the contract, being barred from bidding on Department contracts for up to three (3) years, withholding progress payments, assessing sanctions, assessing liquidated damages, or any other remedy that the Department deems appropriate. Failure to comply with DBE requirements may include, but is not limited to, failure to submit DBE Minority Participation and Commitment within the time period specified, failure to exert a reasonable Good Faith Effort to meet the established DBE goal, or failure to realize the approved DBE participation level set forth may result in the bidder being declared ineligible for the contract.
- (d) **Small Business Enterprise (SBE) Participation.** Recruitment and utilization of certified SBEs is in addition to all other equal opportunity requirements of the contract. There is no SBE goal.

II. DEFINITIONS—

The following definitions apply for terms used in this specification:

- (a) **Disadvantaged Business Enterprise (DBE).** A for-profit small business concern:
 - 1. An entity certified by the Pennsylvania Unified Certification Program (PAUCP) as listed on www.paucp.com.
 - 2. That meets the ownership and control requirements of the DBE certification program.
 - 3. That meets the Personal Net Worth requirements of the DBE certification program.
- (b) **Small Business Enterprise (SBE).** A for-profit small business concern:
 - 1. An entity certified by the PennDOT as listed on www.dotsbe.pa.gov.

2. That meets the ownership and control requirements of the Small Business Element (SBE) certification program.
 3. That meets the Personal Net Worth requirements of the SBE certification program.
- (c) **Commercially Useful Function.** A DBE performs a Commercially Useful Function (CUF) 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. To perform a CUF, 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, installing (where applicable), and paying for the material itself.
- (d) **Interdisciplinary Review Team (IRT).** A team of three representing both the Bureau of Equal Opportunity and the Bureau of Aviation that performs the initial review of the Good Faith Effort documentation and makes the recommendation to the Director of the Bureau of Equal Opportunity.
- (e) **Committee.** The Good Faith Effort Review Committee.
- (f) **Days.** Calendar days. In computing any period of time described in this specification, 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 state holiday, the period extends to the next day that is not a Saturday, Sunday, or state holiday. Similarly, in circumstances where PennDOT offices are closed for all or part of the last day, the period extends to the next day on which PennDOT offices are open.
- (g) **Director.** Director, Bureau of Equal Opportunity.
- (h) **DBE Participation.** Minority Participation and Commitment that is documented on the EO-380AV.
- (i) **Revised DBE Participation.** Minority Participation and Commitment that is documented on the revised EO-380AV which includes new DBE firm(s) as well as those not affected by the revision.
- (j) **Supplier.** A manufacturer, regular dealer, or transaction expeditor/broker.
1. **Manufacturer.** A DBE/SBE that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
 2. **Regular Dealer.** A DBE/SBE that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. 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 as provided above 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. Whether a DBE/SBE firm meets the criteria for being treated as a regular dealer is a contract-by-contract determination to be made by the Department.
 3. **Transaction Expeditor/Broker.** A DBE/SBE packager, broker, manufacturers' representatives, or other persons who arrange or expedite transactions and who arrange for material drop-shipments.
- (k) **Service Provider.** A DBE/SBE that performs work that does not have a prequalification requirement on a project.
- (l) **Shortfall.** The difference between the dollar amount on the approved EO-380AV'(s) DBE Participation form(s) and the amount of payments to the approved DBE entities.

III. COUNTING PARTICIPATION—

COUNTING DBE PARTICIPATION TOWARD THE DBE GOAL

Utilization of certified DBEs is in addition to all other equal opportunity requirements of the contract.

Count DBE participation toward meeting the DBE goal for federal projects as follows: If a firm is a certified DBE contractor or subcontractor at the time that submission of the bids are due, the total dollar value of the contract awarded to the certified DBE is counted toward the applicable DBE goal as provided below. Any services to be performed by a DBE are required to be readily identifiable to the project.

(a) Construction.

1. **Prime Contractor.** The Department, as a recipient of Federal Aviation Administration (FAA) funds, requires that all DBE prime contractors perform at least 30% of the work on FAA funded projects. A DBE prime contractor will receive credit for all work performed with its own forces. The Department strongly encourages DBE prime contractors to make additional outreach efforts to solicit DBEs to perform subcontracting work on the project.
2. **Subcontractor.** When a DBE participates in a contract directly as a subcontractor, or as a second-tier or lower-tier subcontractor, count only the value of the work actually performed by the DBE.

Count the entire amount of that portion of a construction contract that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the subcontract, including supplies purchased or equipment leased by the DBE.

When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count.

Count expenditures to a DBE contractor only if the DBE is performing a CUF on that contract.

(b) Materials and Supplies.

1. **DBE Manufacturer.** If the materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies.
2. **DBE Regular Dealer.** If the materials or supplies are purchased from a DBE regular dealer, count 60% of the cost of the materials or supplies. There is no North American Industry Classification System (NAICS) code for regular dealer.
3. **DBE Transaction Expeditor/Broker.** If the materials or supplies are purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, provided the fees are determined to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves.

(c) **Service Providers.** Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance the contract, provided the fee is reasonable and not excessive as compared with fees customarily allowed for similar services.

(d) **Trucking Firms.** Count 100% of trucking costs using the following factors to determine what can be counted:

1. Count if the DBE is responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
2. Count if the DBE owns and operates at least one fully licensed, insured, and operational truck used on the contract.
3. Count the total value of the transportation services the DBE provides on the contract using trucks it owns, insures, and operates using drivers it employs.
4. The DBE may lease trucks from another DBE firm, including an owner-operator who is a certified DBE. If the DBE leases trucks from another DBE, count the total value of the transportation services the lessee DBE provides on the contract.
5. The DBE may also lease trucks from a non-DBE firm, including an owner-operator. If the DBE leases trucks from a non-DBE firm and the DBE operates these leased trucks (with its own forces), count the total value of the transportation services. If the DBE leases trucks from a non-DBE owner-operator, count only the fee or commission it paid as a result of the lease arrangement. Do not count the total value of the transportation services provided by the lessee (non-DBE owner-operator), since these services are not provided by a DBE.
6. For purposes of this provision, a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from being used for work for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE. A lease must explicitly state that the DBE leases trucks without operators when the counting of the total value of transportation services is desirable.

COUNTING SBE PARTICIPATION

- (a) Recruitment and utilization of certified SBEs is in addition to all other equal opportunity requirements of the contract.
- (b) There is no SBE goal.
- (c) Count SBE participation the same as DBE participation.

IV. ACTIONS REQUIRED BY THE DBE AT THE BIDDING STAGE AND PRIOR TO AWARD FOR PROJECTS WITH A DBE GOAL—

Include the applicable North American Industry Classification System (NAICS) code(s) for each type of work that the DBE firms quotes and intends to perform on the contract.

V. ACTIONS REQUIRED BY THE BIDDER AT THE BIDDING STAGE AND PRIOR TO AWARD FOR PROJECTS WITH A DBE GOAL—

- (a) **Submission Preparation.** The prime contractor is obliged to obtain and to provide all applicable NAICS codes for each proposed DBE and type of work that it will perform on the contract.
- (b) **Submission Requirements.** When the DBE goal established by the Department is met or exceeded, the apparent low bidder is required to submit evidence of such commitments at the bid opening as presented on Form EO-380AV.

When the DBE goal established by the Department is not met (the Department will not round up), demonstrate a Good Faith Effort (GFE) to meet the contract DBE goal. Demonstrate that the efforts made were those that a bidder seeking to meet the DBE goal established by the Department would make, given all relevant circumstances. All submissions must include, as a part of the GFE documentation, copies of each DBE and non-DBE subcontractor quote when a non-DBE subcontractor was selected over a DBE subcontractor for work on the contract.

(c) **Good Faith Effort Requirements.** The demonstration of GFEs is accomplished by seeking out DBE participation in the project given all relevant circumstances. The following illustrate the types of efforts that may be taken, but they are not deemed to be exclusive or exhaustive (for more guidance on GFE requirements, refer to Appendix A of Part 26. The Director and/or Committee will consider other factors and types of efforts that may be relevant:

- Efforts made to conduct market research to identify small business contractors and suppliers and solicit through all reasonable and available means (e.g., use of the PA UCP website, attendance at pre-bid 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 should provide written notification, at least 15 calendar days before the bid opening, 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.
- Efforts made to select 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 to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.
- Efforts made to provide 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.
- Efforts made to negotiate 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. 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 DBE goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in and of 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 bidder to perform the work of a contract with its own work force does not relieve the bidder of the responsibility to make a GFE. . Bidders are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.
- Bidder's determination of a DBE as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within the industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the contract DBE goal. Another practice considered an insufficient GFE is the rejection of a DBE because its quotation for the work was not the lowest received. However, nothing in this paragraph shall be construed to require the bidder or prime contractor to accept unreasonable quotes in order to satisfy the contract DBE goal.

- Efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance.
- Efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
- Efforts to effectively use the services of the Department's DBE Supportive Services Center; services of the Department's SBE Supportive Services Center; 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.

VI. ACTIONS TO BE TAKEN BY THE DEPARTMENT BEFORE AWARD—

- (a) **Approval.** If the apparent low bidder submits form EO-380AV by the bid date and meets the contract DBE goal and all other contract requirements, the Department will approve the submission.
- (b) **Good Faith Effort Review.** If the apparent low bidder fails to meet the contract DBE goal, the Department will review the GFE documentation. If, during the review of the Contractor's GFE information, the reviewers have questions, the Contractor may be contacted for clarification. The GFE steps are as follows:
1. IRT reviews and makes a recommendation to the Director.
 2. The Director either
 - a. Determines that the GFE was met and the EO-380AV will be approved, or
 - b. Disapproves the GFE and the EO-380AV. The bidder will be notified and may accept the Director's determination, or request an appeal with the Committee.
 3. If forwarded to them, the Committee meets and makes the final determination. If the Committee determines that the apparent low bidder met the GFE, the EO-380AV will be approved. If the Committee determines that the apparent low bidder has failed to make a GFE, the bid will be rejected and the apparent low bidder will be notified of the rejection.

VII. ACTION TO BE TAKEN BY THE DEPARTMENT DURING CONSTRUCTION—

To ensure that all obligations awarded to DBEs under this contract are met, the Department will review the Contractor's DBE involvement efforts during the performance of the project whether or not the DBE is listed on the approved EO-380AV. The review will include a CUF review and analysis.

Sanctions. Upon completion of the work the Department will review the actual DBE participation and make a determination regarding the Contractor's compliance with the applicable requirements. Sanctions may be imposed for noncompliance or unwarranted shortfalls in the approved DBE goal.

VIII. ACTIONS REQUIRED BY THE CONTRACTOR DURING CONSTRUCTION—

- (a) **DBE Participation.** Must continue to make GFEs for the life of the project. When the EO-380AV is approved with DBE participation less than the contract DBE goal, continue GFE toward meeting the contract DBE goal. Ensure that the Commitment is attained. Proof of attainment is provided by payments to DBEs and documented by the Owner.
- (b) **DBE Subcontractor Approval.** Firms listed on form EO-380AV are not to commence work until they are approved by the Owner.

All firms listed on the approved EO-380AV, including those business types other than subcontractors (i.e. dealers, truckers, service providers), must be submitted for approval after the contract is executed and before the DBE's actual performance of work. The subcontractor request must be equal to or greater than the committed amount. Submit for subcontractor approval any other DBE whether or not they are listed on the approved EO-380AV. When submitting request for subcontractor approval, attach a copy of the DBE subcontract or agreement.

(c) **Substitution.** Obtain approval before substituting a DBE or making any change to the DBE participation listed on the approved EO-380AV. Immediately request substitution authorization from the Owner in writing. The request must include documentation supporting the substitution and written agreement from the DBE to the change. Include proof that a certified letter giving the DBE five (5) days to respond with acceptance or to notify the Owner of non-acceptance. Demonstrate that every effort has been made to allow the DBE to perform.

1. If the arrangement to be replaced is agreeable between the Contractor and the DBE, document the following procedures:

- Make a GFE in accordance with V.(b) to subcontract the work with another DBE, or subcontract other work items to DBE firms, to make up the DBE shortfall. A prime contractor's inability to find a replacement DBE at the contract price is not, in and of itself, adequate to support a finding that GFEs have been made to replace the original DBE. The fact that the prime contractor has the ability and/or desire to perform the contract work with its own forces does not relieve the prime contractor of the obligation to make GFEs to find a replacement DBE, and it is not a sound basis for rejecting a prospective replacement DBE's reasonable quote.
- When the substitution results in meeting the DBE goal, complete a revised EO-380AV and/or a revised subcontractor approval request within seven (7) days. If the DBE performed on the project, the revised EO-380AV and/or subcontractor approval request should include the total amount paid to the DBE before the DBE substitution.
- When the substitution does not result in meeting the DBE goal, provide additional GFE documentation, including (1) a statement of efforts made to negotiate with DBEs for specific work or supplies, including the names, addresses, telephone numbers, and emails of those DBEs that were contacted; (2) the time and date each DBE was contacted; (3) a description of the information provided to DBEs regarding plans and specifications for portions of the work to be performed or the materials supplied; and (4) an explanation of why an agreement between the prime contractor and DBE was not reached. If the DBE performed on the project, the revised EO-380AV should include the total amount paid to the DBE before the DBE substitution.

Good Faith Effort Review. The Owner will review the GFE documentation for substitution. If, during the review of the Contractor's GFE information, the reviewers have questions, the Contractor may be contacted for clarification. The GFE steps are as follows:

- a. Owner reviews and makes recommendation to the IRT for their determination.
- b. The IRT either
 - Approves recommendation that the GFE was met and the substitution will be approved, or
 - Disapproves the GFE resulting in a shortfall requiring the contractor to continue GFEs.

Do not perform any of the DBE work included in the substitution request without prior approval from the Owner.

If the projected DBE participation on an approved EO-380AV meets or exceeds the DBE goal amount for the contract without replacing the DBE, then no contract shortfall exists. A revised EO-380AV and/or subcontractor approval request must be submitted to reflect the decreased dollar amount.

2. If the arrangement to be replaced is not agreeable between the Contractor and the DBE, the following procedures are required:

- Until a determination is made, do not perform the DBE work without prior approval.
- The IRT will review and make a determination and the Owner will notify both the Contractor and the DBE.
- The Contractor or the DBE may request a meeting with the Department by contacting the Bureau of Aviation.

(d) SBE Participation. SBE Firms should not commence work until they are approved by the Owner. The SBE, including those business types other than subcontractor (i.e. supplier, trucking, service provider), must be submitted for subcontractor approval after the contract is executed and approved before to SBEs actual performance of work.

(e) Additional Work. When additional work is required for any classification of work, which is identified on the EO-380AV, to be performed by the DBE, at least 50% of this additional work will be performed by the same DBE unless the DBE submits, in writing, that it cannot perform the work due to its own limitations.

(f) Progress Payments. Make payments in accordance with Section 90 of the General Provisions. Document payments on EO-406AV and submit to the Owner with each payment request.

(g) Records and Reports. Keep such project records as are necessary to determine compliance with DBE Requirements. These records can be used as GFE documentation. Design these records to indicate:

- The number of disadvantaged and non-disadvantaged subcontractors, small businesses, regular dealers, manufacturers, consultants, and service providers, and the type of work or services performed on or materials incorporated in this project.
- The progress and efforts made in seeking out DBE and SBE contractor organizations and individual DBEs and SBEs for work on this project.
- Documentation of all correspondence, personal contacts, telephone calls, etc., to obtain the services of DBEs and SBEs for this project. Submit reports, as required by the Department. Certify that the amounts were actually paid to the DBE and SBE for work performed on the project and keep cancelled checks on file in the home office to reflect payment for the specific project and for inspection and audit by the Department. Record the payment information on the EO-406AV and document the following:
 - The number of contracts awarded to DBEs and SBEs, noting the type of work and amount of each contract executed with each firm and including the execution date of each contract.
 - The amount paid to each DBE and SBE during the month and the amount paid to date. If no payments are made to a DBE/SBE during the month, enter a zero (\$0.00) payment.
 - Paid invoices or a certification attesting to the actual amount paid to each firm, upon completion of the individual DBE's and SBEs work. In the event the actual amount paid is less than the award amount, provide a complete explanation of the difference.

Maintain all such records for a period of three (3) years following acceptance of final payment. Make these records available for inspection by the Department and FAA.

If DBE credit is being claimed for material costs included in a DBE subcontract or agreement, submit purchase orders for the material along with the EO-406AV to the Owner on a monthly basis.