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Testimony of

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Committee on
Transportation and Infrastructure

on the topic of

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Disadvantaged Business Enterprise Program

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The Associated General Contractors of America (AGC) is the largest and oldest national construction trade association in the United States. AGC represents more than 33,000 firms, including 7,500 of America's leading general contractors, and over 12,500 specialty-contracting firms. More than 13,000 service providers and suppliers are associated with AGC through a nationwide network of chapters. Visit the AGC Web site at www.agc.org.

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Mr. Chairman and Members of the Committee thank you for the opportunity to present testimony on the US Department of Transportation's (DOT) Disadvantaged Business Enterprise (DBE) program. I am Amy Hall, the President of Ebony Construction Company, located in Sylvania, Ohio, representing the Associated General Contractors of America. AGC is the oldest construction association in the country representing contractors that build all forms of infrastructure, including: highways, bridges, transit systems, railways, airport terminals and runways, water and wastewater treatment facilities, underground utilities, public buildings, multi-family housing, office buildings, military facilities, water resource projects, energy production and conservation, and the many other structures that are the backbone of the US economy and provide and ensure US Citizens' quality of life.

Ebony Construction Company is a second generation family owned business that operates in Ohio, Michigan and Indiana. Ebony is an asphalt paving and milling business. We work primarily as a subcontractor and mostly on publicly funded contracts. Ebony is a certified Disadvantaged Business Enterprise. My comments will focus on how the US DOT DBE program is administered by the Federal Highway Administration (FHWA) in the Federal-aid Highway Program, and by state DOTs.

Stepping back for just a moment, I'd like to briefly address the basic premises of the program, because both this program and its many state and local counterparts have been the subject of much litigation. Today, it is well beyond dispute that the DBE program is subject to "strict scrutiny" and will survive judicial review only if Congress has a "compelling interest" in continuing it.

No industry as large, diverse and fragmented as the construction industry is entirely free of discrimination. In 2005, this highly fragmented industry had 778,000 firms and 6.8 million paid employees. In the same year, ninety-two percent of construction firms had fewer than 20 employees; only one percent of construction firms had 100 or more employees; and the average construction firm had fewer than 9 employees. In 2007, construction spending totaled $1.14 trillion, or 8.2 percent of GDP. Among these thousands of firms and millions of employees conducting such a huge proportion of the nation's business, there are certainly some bad actors.

The vast majority of the men and women who work in the construction industry are good people. They provide both honest and critical services to the nation, and for their hard work, they accept modest compensation.[1] The construction industry is part of the larger society that it serves, and no doubt, it has many of the same problems, but it manifests discrimination no more than any other segment of our society. AGC is working to foster a business climate that enhances opportunities for all businesses.

Construction is an intensely competitive industry, and that competition penalizes any firm that resorts to discrimination. To succeed, construction firms have to focus on price, quality and reliability. Most public and many private owners continue to use the traditional design-bid-build system to deliver their construction projects. And most public owners remain subject to legal requirements for open competitive bidding. Such requirements typically include a publicly announced deadline for the submission of sealed bids, the public opening of such bids, and contract award to the lowest responsive and responsible bidder. Such a process precludes public

[1] Each year, the Construction Financial Management Association (CFMA) conducts a financial survey of the construction industry. According to that survey, construction firms' net earnings margins before income taxes averaged 2.7% in 2007 and 3.9% in 2008.

owners from engaging in unlawful discrimination. And the resulting pressure on prime contractors makes it necessary to select subcontractors based on experience, price and quality. The contracting community, the states and the agencies have concerns about the interpretation of many DBE program requirements. The DBE program has been evolving over the years with many changes. Practices that were encouraged by the Federal government and state governments are no longer acceptable. Many program requirements are contradictory or ambiguous when applied to real life scenarios. There is not uniformity in the way the states handle the program's various requirements. We in the business feel that there is a sincere interest in making the program work, but in many cases contractors and many government employees are not sure how to ensure compliance with elements of the program today. Some of this uncertainty may be due to the lack of compliance guidance and other problems reside in the implementing regulations.

The uncertainty felt in how to interpret elements of the rules poses a real concern for contractors. Not only did it lead to disputes in operations on the job site, but also because stepping over the line can lead to suspension, debarment and Federal prosecution. Any of these penalties can, at the very least, put a company out of business. AGC wanted to address the real concerns about the DBE program. There was a desire to come up with common language that could be applied in everyday life. As a result, AGC requested a meeting with then- Federal Highway Administrator Mary Peters, then-DOT Inspector General Ken Meade and other DOT representatives to discuss how to make the program work better. The result of the meeting was the creation of an industry-government work group to:

- Identify contradictory, inconsistent or ambiguous DBE program requirements.
- Clarify the intent and administration of these various requirements.
- Create guidance to communicate these clarifications.
- Determine the most expeditious method for getting these clarifications implemented.

AGC's goal was to find a way to create a template that could help the industry navigate this complex regulation. After this industry-government work group met for over three years, the end result was a document that we called a "toolkit" which is intended to help contractors comply with program requirements. A copy of the "toolkit" is attached to my testimony. AGC believes the document is very helpful in clarifying for all parties involved in this program how the requirements are intended to be implemented. We believe it is important information for contractors, DBE subcontractors, state DOT officials, and frankly for FHWA personnel as well.

However, after three years of meeting on what we all agreed were contradictory, inconsistent or ambiguous DBE program requirements and completing the "toolkit", DOT informed us that they could not endorse the document. Unfortunately that renders the document useless for contractors as a compliance document. Contractors and DBEs must have confidence that decisions they make related to program compliance are based on some official guidance from DOT. Simply saying that the issues are covered in the regulations does not fully explain how they should be applied in real world situations and we don't believe they really address contractors concerns.

AGC still believes there is the need for a document clarifying what contractors and DBEs can and cannot do in meeting the DBE program requirements. We believe there are real differences of opinion about how to administer rules on how to count participation, the best way to define "commercially useful function," and how general contractors can assist their DBE subcontractor to name a few priority areas. Many of these issues serve as impediments to DBEs being

successful in the program and cause uncertainty and potential traps for contractors attempting to meet program requirements.

We spent a lot of time talking about how to calculate goal compliance. As an example, in order to count a DBE contractor's participation on a project towards the contract goal, the DBE has to be deemed to be performing a "commercially useful function." However, the contractor who has to make a decision to hire the DBE is not permitted to make a determination about whether a particular DBE will in fact be performing a "commercially useful function." In the "toolkit" AGC and FHWA agreed to a series of questions that a prudent contractor could ask a DBE firm prior to signing a subcontract agreement. The questions are related to the DBEs experience, management of the job, work force, equipment ownership, potential subcontracting and other similar questions. The questions are not unlike questions asked of non-DBE subcontractors when they are being used for the first time. We felt that if the questions result in the contractor not believing that the DBE will perform a "commercially useful function" then the contractor should reject the subcontractor. DOT, however, says that a "commercially useful function" determination cannot be made by the contractor but rather by the government and this determination cannot be made upfront. This puts the contractor in a very untenable position when trying to make good faith efforts to meet contract goals.

Another example of how the implementation of this program seems to undermine its intended purpose is the rules related to the expertise level of the DBE owner. DBE owners are being held to a different standard than non-DBEs. They are disadvantaged by the program. As part of the Commercially Useful Function reviews, DBE subcontractors are being asked to go to the field and actually perform field tasks. Running a successful contracting operation does not require you to be able to operate the machinery or perform any of the actual construction tasks. While some contractors may start out their careers operating equipment, running the business requires an entirely different set of skills. Unfortunately the DBE regulations diminish the value of management expertise which is the key to business success. Non-DBEs are not expected to perform these specific construction tasks. This differentiation seems to undermine the ability of DBEs in becoming successful businesses.

Another issue that was discussed as part of the "toolkit" is the type of assistance the general contractor is able to provide to DBE and non-DBE subcontractors. The prime contractor is ultimately responsible for the successful completion of all aspects of the contract. Typically the owner is not concerned about who performs what part of the contract, only in the successful delivery of the completed product. To ensure success, the prime contractor will do what it takes to be sure that the subcontractor performs its contract efficiently, in a timely fashion and provides a final product of the highest quality. This may include assistance with equipment, personnel and material if problems arise in performing contract requirements. However, if the prime contractor was to offer the same assistance to the DBE subcontractor, suspicions are raised that the subcontractors is not serving a "commercially useful function" and the contractor and DBE could be subject to intense scrutiny or subject to legal proceedings.

An example of a regulatory provision that works against DBE success in the program is an issue that is of direct impact to my company. The regulations allow for the cost of material that is purchased by the DBE for work on the contract to count towards goal achievement. However, if the DBE purchases the material from the prime, rather than a third party source, that portion of the contract is not counted. Being in the paving business requires my company to have access to aggregate and liquid asphalt. In many parts of the country, there are very limited sources for

these products. In some instances the prime contractor is the only source, there is no third party source that can provide the needed material. Not allowing my purchase of asphalt from the prime undermines the ability of the prime to meet the contract goal and can hurt my business from growing. This is an issue that we have discussed with DOT and we are awaiting their proposed remedy.

Although DOT determined that it was unable to endorse the "toolkit" this did not end our efforts for program clarification. Further meetings with DOT resulted in the creation of a DBE Roundtable. Through this forum issues can be raised and discussed in a public setting resulting in guidance issued by DOT on specific issues. AGC is hopeful that the Roundtable and this process for clarifying issues can be continued. While this process is extremely helpful, there remains the need for an official guidance document to assist contractors, DBEs and state DOTs in understanding how issues will be resolved. We are starting to see some positive results of our persistence. As a result of the Roundtable discussions guidance was issued clarifying some of the assistance that is permissible, and we are glad that has been issued. The assistance discussed is often provided to non-DBE subcontractors and not allowing it for a DBE can be detrimental to their business success.

The Roundtable has also addressed other confusing and counterproductive regulatory provisions. In addition to what assistance primes can provide DBEs, we've also addressed "commercially useful function" determinations, the use of joint checks, DBE owner technical expertise, certification consistency and eligibility to count DBE participation, change orders, materials purchased from non-DBE suppliers, DBE capacity and more.

We believe the program rules need to be written in a way that allows more collaboration, mentoring and assistance. Assistance with bonding, equipment, estimating, and project management can prove helpful to developing businesses no matter who is the owner. AGC has always encouraged the creation of Mentor-Protégé programs that allow contractors to work with DBE firms in a collaborative fashion to ensure a mutually beneficial result. AGC believes that this concept should become a significant part of the program as we move forward.

Mr. Chairman and members of the Committee, AGC has taken the approach that while this program is in place we will try to work to make it something that makes sense, that does not impede the successful completion of vitally needed transportation improvement projects and does not create legal concerns for participants. AGC is hopeful that the dialogue that was started over the past several years with DOT, the DBE community and the construction industry will continue. Thank you to the committee for having this hearing on the administration of the program. I would be happy to answer any questions you may have.

DISADVANTAGED BUSINESS ENTERPRISE (DBE)

CONTRACTORS' TOOL KIT

ENDORSED BY:

ASSOCIATED GENERAL CONTRACTORS OF AMERICA

NATIONAL ASSOCIATION OF MINORITY CONTRACTORS

WOMEN 1ST

DISADVANTAGED BUSINESS ENTERPRISE (DBE) TOOL KIT

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I. INTRODUCTION

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 the user's 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.

The GETTING STARTED Section provides information on the resources you will need to set up your DBE Compliance Program.

The ELEMENTS OF A CONTRACTOR COMPLIANCE PROGRAM Section offers suggestions on how to follow-up on your program to insure its running properly and remains updated.

The Tool Kit provides checklists that can serve as practical tools for contractors' day-to-day use in the management of their DBE compliance program. Your program should make use of Appendices or Attachments in the same manner as this Tool Kit. Include copies of all pertinent rules, regulation, and specifications.

Because this Tool Kit is intended as a general guide, it cannot address every situation a contractor may encounter. Each State DOT may interpret or implement the same federal DBE regulations differently. The information provided in this Tool Kit can and should be adapted to meet a contractor's particular circumstances. Several key points are emphasized in the Tool Kit:

- Know your State DOT officials responsible for administering the DBE programs in the DOT headquarters and in the project area district and understand their interpretation of the rules and regulations implementing those programs.

- This tool kit was created through Joint Cooperative efforts of the construction industry and government officials. This spirit of joint cooperation should be mirrored on the state and local level.

- The local contractor chapter organizations should be involved with the DOT in the local goal setting committee.

- Reach out to DBEs and to DBE assistance organizations to determine the availability and capabilities of DBEs in your area.

- 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.

II. GETTING STARTED

The following are some good first steps you can take to gain an understanding of your State and Federal DBE program requirements.

- Understand State and Federal Rules

  Obtain copies of, review and retain for reference:

  a. Federal Rules
  b. State Rules
  c. State DOT contract requirements
  d. State DBE Plan Program

  - Include copies of these documents with your plan.

  - Review how your State DOT counts DBE participation on various types of work including subcontracts involving installation of materials, material suppliers, truckers, joint ventures, etc.

  - Review your State DOT's rules on "commercially useful function" (CUF). Attach your State DOT DBE Special Provision as Appendix F to this Tool Kit for guidance on what constitutes a commercially useful function.

  - Review your State DOT's policy on meeting DBE goals when contract changes are made which affect the DBE's work.

- Program Officials: It is important and useful for you to know the FHWA and your State DOT DBE program officials. They can assist you in understanding what they require concerning the DBE program and how you can follow the requirements.

- Review your State DOT's rules on documenting good faith efforts towards meeting the goal. You should attach your State DOT DBE Special Provision as Appendix B to this Tool Kit for guidance concerning what constitutes adequate good faith efforts.

In the next Section ELEMENTS OF CONTRACTOR COMPLIANCE PROGRAM, you will learn about the specific items your program should address.

III. ELEMENTS OF A CONTRACTOR COMPLIANCE PROGRAM

A. RESPONSIBILITIES

- Identify and assign a responsible person or persons for:

  1. Overall management of the Compliance Program.
  2. Administrative responsibilities such as reporting.
  3. Identifying certified and capable DBEs.
  4. Preparation and submission of proposed project specific DBE participation.
  5. Oversight of DBE Subcontractor work performance.

The DBE Compliance program should clearly describe the contractor's management approach toward complying with the DBE program requirements. It should identify the individual(s) in the organization who have the overall responsibility to carry out the program and who is designated the key individual(s) that everyone in the organization can approach to deal with issues supporting the contractor's compliance. In addition, in describing this management approach, it is imperative that everyone, including field specialists and foremen, understand the roles and responsibility of working together to see that this is done.

- Develop DBE procedures to follow, including:

  a. Estimating and bidding procedures.

  b. Procedures for negotiating and writing contracts.

  c. Procedures for monitoring, inspecting and documenting a DBE's performance and progress.

THIS TOOL KIT WILL AID YOU IN DEVELOPING SUCH PROCEDURES.

B. DETERMINING AVAILABLE DBE'S

- Your program should describe the process that you routinely use to identify, interview and assess available DBEs. Your State DOT requires DBEs to be certified at the time DBE commitments are submitted so it is imperative that you have an on-going process for identifying, soliciting

and evaluating the capabilities of DBEs that have the potential to bid on work the contractor maybe subcontracting out in response to an STA advertisement. This normal business practice can be the essential support behind a good faith effort determination on a project specific basis. This Tool Kit suggests a two-step process.

STEP 1 – DBE IDENTIFICATION

- Your State DOT is required to participate in a Unified Certification Program ("UCP"). The UCP is required to make all certification decisions on behalf of all USDOT recipients in each State. Each UCP is required to maintain a unified DBE directory containing all firms certified by the UCP. The UCP is required to make the directory available on the internet, as well as in print. (See 49 CFR § 26.81.) A State's Unified Certification Program must certify DBE firms.

  Obtain a current DBE directory listing of certified firms. Your State DOT maintains and makes available to interested persons a directory identifying all firms eligible to participate as DBEs in your State DOT's program. Online directories are more up to date and a better source for obtaining information on certified DBE firms. The listing for each DBE firm will include its address, phone number and the types of work the firm has been certified to perform as a DBE. These directories are revised at least annually. Further, your State DOT will make updated information available on request.

  The UCP DBE Directory should be relied on as your primary source of firms to contact in preparation of your bid.

Step 2 – DBE Solicitation

Your State DOT requires that you not reject DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. You need to determine whether interested DBEs are certified in the work they want to bid on. Meet with DBE firms. Assess their availability, willingness and ability to perform work. Develop ongoing dialogue and relationships with DBE firms.

- As you would with any subcontractor, you should determine whether interested DBEs are capable to perform the work they are quoting consistent with the type of work they are certified to perform as a DBE.

- Use the form on page ___, DBE Interviews, to help determine whether the interested DBE is capable to perform the work it is quoting.

- A thorough investigation of a DBE's capabilities should include consideration of the following:

  a. The type and scope of work the DBE intends on quoting.

  b. The DBE's experience in performing the type of work it wishes to quote.

  c. The DBE's staff and its availability to perform on the project.

  d. The equipment the DBE has available to perform the work, or if the DBE does not own equipment, how it intends to obtain the necessary equipment.

  e. The DBE's current workload, including other contracts the DBE will be performing concurrently with this project.

  f. How the DBE plans to obtain the necessary materials, their creditworthiness and whether joint checks may be required.

  g. The DBE's intention to subcontract any of the work to a non-DBE.

  h. Information on the DBE's bonding capacity, including "Total Program" and "Largest Single Project."

  i. Your past experience working with the DBE may be considered.

  j. Ask for references from the DBE as to other prime contractors for which they have worked and check them out.

Step 3 – INVESTIGATE DBE CAPABILITIES TO PERFORM THE WORK

Now you need to determine whether interested DBEs are capable of performing the work they are interested in quoting. A DBE must perform a "commercially useful function," as defined by USDOT in 49 CFR § 26.55(c) and your State DOT DBE Special Provision. At some point the prime may be required to document that the DBE is performing a "commercially useful function."

In determining a DBE's capabilities to perform the work the following should be ascertained:

a. Is the work to be performed the DBE's usual type of work?

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" for purposes of obtaining DBE participation.

ELEMENTS OF A CONTRACTOR COMPLIANCE PROGRAM

1. **Have you identified the person responsible for managing your DBE activities?**

2. **Are you familiar with the persons responsible for administering the DBE program for your State DOT?**

3. **Are you aware of the supportive services available to assist DBEs in your area?**

4. **Are you familiar with capable DBEs in your normal subcontract solicitation geographic area?**

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

C. GOOD FAITH EFFORTS

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 non-DBE quote or self performing the work. However, if you reject an excessive DBE quote you may be determined to have not made a good faith efforts submission.

- 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 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 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 required to accept higher quotes from DBEs if the price difference is excessive or unreasonable, however, state DOT approval is necessary in determining "excessive price" for a good faith effort determination.

f. Not rejecting DBEs 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 employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.

g. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by your State DOT or contractor. Such efforts would include introducing the DBE to professionals in these fields.

h. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services. (See section on assisting DBEs below).

i. 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.

D. SPECIFIC PROJECT PARTICIPATION

1. PRE-ESTIMATE ACTIONS

The Pre-Estimate involves specific actions that you should take prior to beginning an estimate for a specific project. These actions will help in achieving your State DOT's DBE contract goals, or help in making qualifying good faith efforts.

- Review project specifications and provisions to see if there are any DBE program modifications specific to this project.

- Review the contract documents for the DBE goal on this project
- Review the online certified DBE directory for the list of certified DBEs

2. DEVELOP A DBE PARTICIPATION PLAN

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. If the likely participation well exceeds your State DOT's DBE contract goals, begin implementing your DBE Participation Plan.

2. If the likely participation does not well exceed the DBE contract goals, alternate or additional efforts are required:

   - Investigate the possibility of subcontracting to DBEs work you would traditionally self-perform.

   - DOCUMENT steps 1 – 6 and the reason(s) for the potential shortfall.

3. GOOD FAITH EFFORTS

Closely monitor the DBE Participation Plan throughout the estimate stage to ensure your ability to submit your most competitive bid that is in full compliance with your State DOT's DBE contract goals and/or your State DOT good faith efforts requirements.

1. Identify Good Faith Effort requirements (See Section C above).

2. Determine if this Project Special Provision has any additional good faith efforts it expects you to make.

3. Generally, for each project, if you document each of the actions listed in your State DOT DBE Special Provision, you should satisfy the good faith efforts requirement.

4. IMPLEMENT YOUR DBE PARTICIPATION PLAN

The next step is to implement your DBE Participation Plan. Even if obtaining the DBE participation is not a problem, the implementation of the DBE Participation Plan is a good approach to take for any bid. Implementing your plan provides a thorough and methodical approach to obtaining adequate DBE participation. This process, if documented, should demonstrate good faith efforts adequately.

- You should begin implementing your DBE Participation Plan at the start of the estimating process

- Solicit from your list of certified/capable DBEs (See Section B above). Obtain a current DBE directory listing of certified firms from your State DOT. Review certified DBEs listed on the UCP web site. See Section B above.

- Should you anticipate that your list of certified/capable DBEs may be inadequate due to the specific nature of the project, you should consider:

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

- Follow up the initial solicitation of interest by contacting the DBEs to determine with certainty whether or not they are interested. If possible, document the reason for a "no quote".

- Provide interested DBEs with needed information about the plans, specifications, estimated quantities, schedule and the contract requirements.

- Negotiate in good faith with interested DBEs, not rejecting DBEs as unqualified without reasons based on a thorough investigation of their capabilities. Recognize that FHWA and your State DOT expects prime contractors to negotiate a reasonable price with higher quoting DBEs rather than simply reject the quote. You are not required to accept an excessive or unreasonable quote. If you are unable to reach an agreement with a DBE on a reasonable price, or if you reject a DBE's quote and that causes you to be unable to meet the DBE goal, you should be able to explain the reasons why an agreement was not reached. The federal regulations give an example of what constitutes negotiating in good faith with interested DBEs as follows:

  "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, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.*" 49 CFR 26, Appendix A, § IV-D(2).

- To determine what constitutes an excessive or unreasonable quote the prime should:
  - Compare proposal to bids submitted by other subcontractors.
  - Prepare your own internal estimate of the cost of performing the work.
  - Compare the bid to prices for similar work performed on other recent contracts.

- Remember, determining adequate GFE is an after the fact decision by the State DOT. If the reason you were unable to meet the goal is based primarily on the DBEs bid being excessive but your overall bid is substantially less than the next low bidder and/or the engineer's estimate, it might not be considered adequate.
- 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, the 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.

5. QUOTE DOCUMENTATION

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.

  b. Full scope of work being quoted.

  c. Addenda acknowledgment.

  d. DBE status and evidence of certification.

  e. Schedule requirements if possible.

  f. Any exclusions or special conditions of the quotation.

  g. Bond rate.

h. Quote price.

1. Occasionally you may receive quotes from DBEs with whom you have no prior experience. In addition to the 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 in-line 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 material 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!

6. DOCUMENT THE REASONS FOR ANY REJECTED QUOTATION.

7. Include in subcontract language the full details of the scope of work that is to be performed by the DBE for the price quoted. Details such as loading and unloading materials, storage of equipment and materials, supervision and inspection of work and all other details should be written into the subcontract.

6. EXCLUSIVITY ARRANGEMENTS

The federal regulations do not explicitly prohibit a DBE from having an exclusive relationship with a general contractor. Instead the regulations state that the DBE firm's relationships with prime contractors should be examined to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.

An exclusivity arrangement involves the situation where a DBE agrees to perform work for only one entity. These arrangements may cause questions regarding the independence of the DBE and its eligibility to be certified. To be safe, prime contractors should avoid setting up an exclusivity arrangement with a DBE.

7. BID CLOSE-OUT

The process of bid close-out involves the use of a DBE summary sheet to know where you stand in the bid with respect to meeting the DBE contract goal. A sample DBE summary sheet is attached. Some State DOTs require specific DBE goal information to be submitted with the bid others do not. In either case, this process organizes your DBE quotations and makes the process more effective.

- If it would be helpful, use a DBE Summary Sheet to determine where you stand in the bid and what it will take to meet the DBE goal. See the example form DBE Summary Sheet on page ___. Instructions for using the DBE Summary Sheet are on page __.

- If the low quote is not from a DBE subcontractor/supplier and you have not yet met your goal, search for reasonable DBE quotes based on

different mixture of bid item and quantities. The DBE Summary Sheet is set up to help you do this. You should obtain the DBEs permission to alter the item quantities on its quote or to select only portions of its quote. Remember, on USDOT assisted contracts, you are not required to use 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. a description of the work that each DBE will perform;
  c. the dollar amount of the participation of each DBE firm participating;
  d. written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
  e. written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and
  f. if the contract goal is not met, evidence of good faith efforts.

- Copy all information submitted including your State DOT's DBE Listing page.

8. ADMINISTRATIVE RECONSIDERATION OF INADEQUATE GOOD FAITH EFFORTS

You may have your bid administratively reconsidered if your bid is rejected due to inadequate good faith efforts. The administrative reconsideration must provide you with the features described below.

- Under 49 CFR § 26.53 (d) your State DOT is required to have a procedure for reconsideration of good faith efforts by an official not involved in the initial determination that you did not make adequate good faith efforts to meet the DBE goal.

- If you desire to pursue administrative reconsideration of a rejected bid, then you should timely follow the reconsideration procedure in your State DOT DBE Special Provision.

ESTIMATING AND BIDDING CHECKLIST

1. **Do you have your State DOT's current DBE directory or certification list?**

2. **Do you know what qualifies as good faith efforts for your State DOT? If so, what efforts are mandatory?**

3. **Do you know how your State DOT counts DBE participation for: (1) material supply; (2) trucking; (3) joint ventures; and (4) furnish and install subcontracts?**

5. **Have you developed a plan to identify and contact DBEs, including contacting your State DOT, State supportive services or business assistance office, minority contractor associations and any other DBE Assistance Organizations?**

6. **Have you followed-up your initial written contact with DBEs and documented your contacts?**

7. **Have you selected portions of work for DBEs that will likely increase their participation?**

8. **Have you negotiated in good faith with interested DBEs?**

9. **Have you determined that the DBEs you plan to use will be able to manage, supervise and perform their work?**

10. **Have you checked DBE quotes to see if the quotes are unreasonably low or unreasonably high?**

11. **Have you completed the items on the DBE Summary Sheet?**
(See pages 27 and 28.)

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	
Familiar with your State DOT Bidding	
Familiar with your State DOT Construction	
Internet & Email	
Other	
Other	

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
PAGE TOTALS				

INSTRUCTIONS FOR DBE SUMMARY SHEET

a. Write in the contract DBE percentage goal.

b. Calculate the total dollar amount of DBE Participation that is needed to meet the contract DBE goals. This will change as your total bid amount changes.

c. List every DBE quote you receive.

   1. Company Name.

   2. Description of Work.

   3. Quoted Price.

d. If the DBE submits the low quote:

   1. Put quote amount into "DBE Total Amount In Bid" column.

   2. Write a zero in the "Add to DBE" column.

e. If the DBE's quote is <u>not</u> the low quote:

   1. Put a zero in the "DBE Total Amount In Bid" column.

   2. Put the difference between the low bidder's quote and the DBE's quote in the "Add To DBE" column. This difference may be factored into estimating the total bid amount.

E. BUILDING THE PROJECT

1. EXECUTING DBE SUBCONTRACTS

If they are not already aware:

- Call DBEs you intend to use as soon as possible after the bid opening and let them know you intend to use them.

- Advise DBEs which items you intend to subcontract to them.

a. Subcontract Language

- Include the following additional provisions in the subcontract. Review these provisions with the DBE. Advise the DBE you expect it to manage, supervise and perform the work in question with its own organization and resources.

  Subcontractor agrees to perform a "commercially useful function" as defined in 49 CFR § 26.55, in connection with the work covered by this subcontract. In doing so, subcontractor agrees that it will be responsible for and will actually perform, manage and supervise the work covered by this subcontract and agrees that it will not sub-subcontract a significantly greater portion of the work than would be expected on the basis of normal industry practices. Subcontractor certifies that it has adequate resources to perform the work covered by this subcontract. The subcontractor agrees to prepare and submit all sub-tier subcontracts and material contracts to the contractor for approval. The contractor reserves the right to review and reject any and all sub-subcontracts, equipment leases and/or use of other contractor's personnel entered into between subcontractor and third parties that do not conform or comply with the provisions of this section, the terms of the prime contract or the requirements of the owner. Neither the approval of nor the failure on the part of the contractor to reject such arrangements shall relieve the subcontractor of any of its obligations under this agreement. In the event it is determined that the subcontractor fails to perform a "commercially useful function," due in whole to the actions of the subcontractor, the contractor shall have the right to terminate the subcontract, without penalty or liability, and contractor may recover from subcontractor any damages contractor may suffer as a result of subcontractor's failure to perform a "commercially useful function."

- Make the DBE subcontract contingent on your State DOT's initial and continued approval of the commercially useful function to be performed by the subcontractor. As a result, insert the following provision in the subcontract:

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 due in whole to the actions of the subcontractor. 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

- Will the DBE provide a bond? If so, will it be for the entire project or will it be in stages?

- If a bond waiver becomes necessary and you approve, review your bond waiver form with the DBE, advising it that both the DBE and your State DOT must approve the bond waiver form. You should then obtain approval from your State DOT.

c. Contract Execution

- Make sure the DBE has copies of all pertinent documents.

- Complete the subcontract, with any necessary revisions or amendments.

- Submit the completed subcontract documents to the DBE for execution, and establish a date by which you expect to receive an executed subcontract back from the DBE.

d. Meeting DBE Goals Through Second or Multiple Tier Subcontracts

The prime contractor is ultimately responsible for the actions of its subcontractors and any DBE second or multiple tier subcontractors, such as truckers and suppliers.. You should therefore ensure that any subcontract between a subcontractor and DBE second tier subcontractor contains the provision below.

- Keep in mind that you, as the prime contractor, are responsible for the actions of your subcontractor and the DBE second or multiple tier subcontractor.

Make sure the subcontract includes the following provision and that the subcontractor meets its obligations:

Under the provisions of the prime contract, the contractor is required to meet the specified DBE participation. Subcontractor agrees, as part of its subcontract obligations, to provide $ _____ of the DBE participation through a sub-tier contract between subcontractor and _____ (Name), of _____ (Address), who subcontractor has verified as a currently certified DBE, under the owner's DBE- program. Subcontractor agrees to comply with all applicable laws, regulations, prime contract documents, and this Agreement concerning DBE participation on the project.

Subcontractor agrees to fully cooperate with the contractor and owner in every respect to assure that the DBE goals are met and that the DBE, performs a commercially useful function. Failure to provide the required participation in compliance with the applicable laws, regulations, prime contract documents, and this Agreement shall constitute failure to comply with the provisions of this Agreement as provided under Section ___ of this Agreement.

EXECUTING DBE CONTRACTS CHECKLIST

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 understand their obligation to perform a commercially useful function?**

3. **Have you included the appropriate provisions in your subcontract requiring that the DBE remain certified and perform a commercially useful function?**

4. **Have you made any of your DBE participation by second or multiple tier subcontracts? If so, have you obligated your subcontractor to ensure that the sub-tier DBE performs a commercially useful function?**

2. PAYMENT, MONITORING AND DOCUMENTATION PROCEDURES

Some DBE subcontractors and DBE material suppliers cannot secure a bond at a competitive rate. If a DBE cannot secure a bond and the DBE agrees to the use of joint checks for material payments, submit the appropriate requests to your State DOT for written approval. Each DBE subcontract or DBE material contract may need to include the lien waiver form. When beginning a project, include an administration plan for proper documentation and payment procedures involving unbonded DBE subcontractors and suppliers as you would with any unbonded subcontractor or supplier.

To avoid claims by suppliers, second-tier subcontractors or laborers, a monitoring and documentation procedure should be established to verify that the following items are received from the unbonded subcontractor after each partial payment estimate and before the next payment is made:

- Require the DBE subcontractor to timely submit a copy of its certified payroll.

- Require the unbonded subcontractor/supplier to provide written verification that payment has been made to all material suppliers and

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 no later than 30 days after the subcontractor's work is satisfactorily completed and accepted by the state DOT.

3. General Counting Rules

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 management/supervision, labor, equipment, materials and performance of the work.

- Count the entire amount of that portion of a contract that is performed by the DBE's own forces (49 CFR § 26.55 (a)). Do not count the amount a DBE subcontracts to a non-DBE firm. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE. DO NOT, however, count supplies or equipment the DBE purchases or leases from you or your affiliates (49 CFR § 26.55 (a) (1)). *Note: Even though the regulations refer to supplies or equipment purchased or leased from you or your affiliates, FHWA interprets this provision as including materials.*

- Count the entire amount of fees or commissions charged by a DBE for providing a bona fide service, such as professional, technical, consulting or managerial services, or for providing bonds or insurance specifically required for performance of a USDOT assisted contract, provided that the fee is reasonable and not excessive as compared with fees customarily charged for similar services (49 CFR § 26.55 (a) (2)).

- Does your State DOT DBE Special Provision permit a DBE subcontractor to enter into second tier subcontracts? If so, keep in mind that work subcontracted to a non-DBE does not count towards DBE goals.

DBE Material Manufacturer/Regular Dealer/Broker

This section discusses expenditures with DBEs for materials or supplies and how those expenditures are counted toward DBE goals as long as the DBE assumes the actual and contractual responsibility for the provision of the materials. If materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies toward DBE goals. If the materials or supplies are purchased from a DBE regular dealer, count 60% of the cost of the materials or supplies toward DBE goals.

The following is an example that can possibly show the difference under the requirements of the DBE program between a manufacturer, a regular dealer, and if there is a normal industry practice, a broker. The example is the furnishing of crushed aggregate meeting State DOTs specification for such items as Aggregate Base Course.

A DBE as its principal business and under its name produces on its premises crushed aggregate by taking natural rock and crushing, washing and screening such rock excavated on its premises into the size and gradation meeting certain State standard specifications. Under this set of circumstances, the DBE can be considered a manufacturer and the cost of the crushed aggregate produced can be credited 100% towards meeting the goal.

If, however, the same DBE obtains the same product from another source that performed that noted above, the DBE maybe considered a regular dealer of the product if it purchased this product in his/her name, he/she engages as its principal business in the purchase and sale of crushed aggregate to the general public, and owns and operates the necessary distribution equipment (since aggregate is considered a bulk item) to deliver the crushed aggregate. Under these circumstances, the DBE can be considered a regular dealer and 60% of the cost of the crushed aggregate purchased is credited towards the goal.

If the DBE firm doesn't meet all or any of the functions presented in defining a regular dealer in crushed aggregate but arranges or expedites transactions consistent with industry practice in the delivery of such materials, then the DBE (broker) services in the amounts of fees or commissions charged in the procurement and/or delivery of such materials can be credited towards the goal.

- If materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies toward DBE goals. For purposes of this paragraph, a manufacturer is a firm 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. See 49 CFR § 26.55(e)(i)&(ii) in Appendix A and your State DOT DBE Special Provision in Appendix B (you should attach a copy of your State DOT DBE Special Provision to Appendix B).

- If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals. For purposes of this section, a regular dealer is a firm 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. . . . Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers. See 49 CFR § 26.55(e)(iii)&(iv) in Appendix A and your State DOT DBE Special Provision in Appendix B.

- With respect to materials or supplies 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, toward DBE goals, provided you determine the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. See 49 CFR § 26.55(e)(2) in Appendix A and your State DOT DBE Special Provision in Appendix B.

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 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 non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks on the contract.(Some states do not count the non-DBE leased trucks towards the DBE credit. Make sure to verify your state's rule on this.)

4. ESTABLISHING DBE PERFORMANCE OF A COMMERCIALLY USEFUL FUNCTION ("CUF")

To refresh yourself on what constitutes a CUF refer to Section B – Step 3.

You can be better assured that the DBE will perform a commercially useful function, if you do the following.

- ***DBE Plan for Performing Work***

If you have not already done so, determine how the DBE will perform the work including:

a. Supervision (both on-site and off site).

b. Equipment utilization.

c. Negotiation of cost, determination of quality and quantity, ordering, installation and payment for materials.

d. Manpower utilization schedule.

- ***Coordination of the Work***

a. You should provide the DBE with overall project schedule information and how their work is integrated.

b. The DBE should prepare their own schedule and submit to you for approval.

5. MONITORING DBE PERFORMANCE OF A COMMERCIALLY USEFUL FUNCTION

It is important to understand what the FHWA and your State DOT considers important in determining whether a DBE has performed a commercially useful function.

To determine whether a DBE is performing a commercially useful function, your State DOT will evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

The FHWA has made clear that your State DOTs should review the following five categories to determine whether the DBE is performing a commercially useful function:

- Management and Supervision
- Labor
- Equipment
- Materials and Supplies
- DBE Trucking

a. ***Management and Supervision*** – Your State DOT will likely consider:

- Scheduling work.
- Ordering equipment, materials and supplies.
- Preparing and submitting payrolls.
- Hiring and firing employees.
- Daily supervision and control of the work by a DBE's regularly employed superintendent.

Management and Supervision "Red Flags" In a presentation on DBE fraud, the following red flags on management and supervision were identified:

- Mere Performance of Administrative Duties By 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 of 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.

Labor "Red Flags" 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

c. ***Equipment*** – Your State DOT will likely consider:

- The DBE owns or leases the equipment and has a written lease agreement.

- Only equipment that is specialized and on the project for other purposes may be utilized by the DBE with an operator who remains on the prime contractor's payroll. Approval from your State DOT must be obtained first.

- No credit towards the DBE goal is counted when the prime contractor leases equipment to the DBE.

Equipment "Red Flags" In a presentation on DBE fraud, the following red flags on equipment were identified:

- Equipment Used by DBE Firm Belongs to the Prime Contractor or Another Contractor With No Formal Lease Agreement

- Equipment Signs and Markings Cover Another Owner's Identity, Usually Through the Use of Magnetic Signs

- A DBE Trucking Business Utilizes Trucks Owned by the Prime Contractor

d. ***Materials and Supplies installed by DBE Subcontractors*** - Your State DOT will likely consider:

- DBE subcontractors installing materials must negotiate the cost, determine quantity and quality, arrange delivery, install and pay for the materials and supplies it utilizes.

- Invoices must be sent to the DBE, <u>not</u> to the prime contractor.

- Payments by joint checks must be approved in advance by your State DOT.

Materials "Red Flags" 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 it 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 non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks

6. ASSISTANCE TO DBEs

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. In order for 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 and ask your DOT for written approval. If you don't feel comfortable bringing it up to

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. If the unloading and hoisting is to be done by the prime, this should be spelled out in the DBE's subcontract. If not specified in the subcontract, your State DOT should be advised in advance that you will be providing the unloading and hoisting services.

b. Assistance with Equipment

In general, the DBE subcontractor must provide the necessary equipment to perform its work. The equipment can be owned by the DBE or leased from outside sources. If leased, there should be a written lease agreement. In most cases:

- Do <u>not</u> loan or provide your equipment to the DBE subcontractor unless your State DOT is made aware and approves of it.

- In an emergency situation (such as where equipment malfunction or unavailability make negatively impact safety, material integrity, time factors, or other concerns) you may provide your equipment to a DBE subcontractor for a short duration but be expected not to receive credit towards the goal for the amount of equipment rental.

- If the fair rental value of the equipment temporarily provided to the DBE is to be deducted from DBE participation toward the goal.

c. Assistance Ordering Materials and Supplies

- Do not count toward DBE goals the cost of materials or supplies the DBE purchased from you or your affiliate.

- Do not deal directly with the material supplier on matters that are the DBE's responsibility. For example, do not schedule, order or arrange delivery of materials for the DBE.

- The more material-intensive the DBE subcontract is, the more likely FHWA or your State DOT will carefully scrutinize the DBE's handling of the material supply portion of the subcontract.

d. Providing Early Payment or Cash Flow Assistance

Most small subcontractors and suppliers, including DBEs, run tight operations from a capital and cash flow standpoint. A DBE may have problems making budget, paying creditors and/or making payroll. Depending on the circumstances, it may be necessary to provide some financial assistance that is not in-line with the payment provisions of the subcontract. Should that happen:

- Approval from your State DOT is necessary.

- Special procedures to follow must be set up and can be worked out without sacrificing the CUF or the independence of your DBE subcontractor.

e. Mentor-Protégé Program

Within the context of the DBE Mentor-Protégé program, a mentor is typically defined as an experienced contractor acting in a position of trust whereby the contractor provides guidance, counseling and training to a DBE Protégé needing assistance in successfully pursuing highway construction work. The DBE Protégé is a firm that needs a Mentor to develop or expand the Protégé's expertise and experience.

The Mentor-Protégé program may provide incentives to you and the DBE with the goal of assisting the DBE to successfully enter the free enterprise system. The further development of DBEs includes, but is not limited to, assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from you.

Types of assistance you may provide to 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 the 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.

DBEs involved in a mentor-protégé agreement must be independent business entities which meet the requirements for certification as defined in subpart D of this part. A protégé firm must be certified before it begins participation in a mentor-protégé arrangement. If your State DOT chooses to recognize mentor/protégé agreements, it should establish formal general program guidelines.

These guidelines must be submitted to the operating administration for approval prior to your State DOT executing an individual contractor/ subcontractor mentor-protégé agreement.

The USDOT limits awarding DBE credit to a non-DBE mentor firm for using its own protégé firm for:

- more than one half of its goal on any contract let by your State DOT; and
- more than every other contract performed by the protégé firm.

However, some State DOTs have sought USDOT waivers of these limitations.

It is important that you look to your State DOT for guidance, requirements and details concerning its Mentor-Protégé program.

7. Change Orders and DBE Contract Goals

Change orders have a much different connotation and affect on the project if DOT bid the contract as a "unit price" or as a "lump sum" contract. For purposes of this tool kit the following considerations are directed towards "unit bid" contracts. A change order is a written order detailing changes to the specified work quantities or increase or modification in the contract due to such changes as additional work beyond the original contract. Some of the factors that might be considered in the application of the DBE program requirements to extra or additional work are: the nature and scope of the additional work, the degree of completion of the contract, the availability of DBEs to perform the additional work and the prime contractor's existing contractual commitments If your state DOT should broadly use change orders to cover formal modifications such as administrative changes for revisions to and clarification of contract requirements, changes in contract time, final quantity determinations, etc., such changes may not involve apply the DBE requirements from the original contract. Some of the examples on applying the DBE program requirements to contract changes are:

- If a change order involves items of work already included in a DBE's subcontract or the work is materially the same as the work included in the DBE's subcontract, the DBE is to have the opportunity to perform the work unless it is documented that the DBE is unable or unwilling to perform the work.

- Likewise, if a change order involves items of work already included in a non-DBE's subcontract or the work is materially the same as the work included in the non-DBE's subcontract, the non-DBE should be given the opportunity to perform the work.

- 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 the DBE program contract requirements.

8. EMERGENCY PERFORMANCE OF DBE WORK

A number of situations could necessitate the emergency performance of your DBE subcontractor's work. If you must use your equipment and personnel to perform part of the DBE subcontractor's work, in most cases you should follow these procedures:

- Notify your State DOT and inform it that the emergency work will be or was performed with your equipment and forces and that you will deduct an appropriate amount from the DBEs participation toward the goal.

- Document the work performed and itemize the total direct cost of equipment, labor, supplies, etc.

- Prepare a change order to reduce the DBE subcontractor's scope of work and contract dollar amount.

- Meet with the DBE subcontractor and develop procedures to eliminate the necessity for other emergency performance of work.

- Exercise good faith efforts to get additional DBE participation if there is a shortfall.

- The performance of work under these circumstances should not be routine but the exception to normal operations.

Remember documentation must be accurate and complete so that the proper reduction is made to the DBE subcontractor's scope of work and dollar amount of contract. If possible get your State DOT's approval in advance. If that is not possible notify a representative of your State DOT that you plan to perform some of the DBE's work.

9. TERMINATION OF DBE CONTRACTOR

Termination of a DBE subcontractor is not an easy process. Consider doing so only as a last resort.

- Make sure and comply with any provisions in your subcontract including any notice provisions.

- Inform your State DOT if you become concerned with a DBE subcontractor's lack of performance or declining performance.

- Use a "Show Cause" Notice Letter if necessary, sending copies to your State DOT and the DBE subcontractor's surety company.

- Document the DBE's efforts or lack of efforts to comply with the 5-Day "Show Cause" Notice Letter.

- Your State DOT DBE Special Provision likely requires that prior to terminating or removing a DBE subcontractor named in your DBE commitment, you must demonstrate to the satisfaction of your State DOT that the DBE was not able or willing to perform.

- You must obtain State DOT approval prior to any termination of a DBE.

10. REPLACEMENT OF DBE

Following the termination of, or refusal to perform by, a DBE subcontractor or supplier, it may be necessary to replace the contract DBE with one or more new DBEs.

- Under 49 CFR § 26.53(f)(2), your State DOT is required to have in its DBE Special Provision that when a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, you must make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, *to the extent needed* to meet the DBE contract goal.

- Since you are only required to replace a DBE to the extent needed to meet the contract DBE goal, thoroughly project your final DBE contract participation. This projection will indicate whether you have requirements to replace part or all of the lost DBE contract volume.

- If you will not have sufficient DBE participation to meet the contract DBE goal, meet with your State DOT to discuss the matter. Your State DOT may insist that you seek DBE participation of other work or may only require that you make good faith efforts to find a DBE subcontractor or supplier to complete the work remaining from the terminated contract.

11. FINAL DOCUMENTATION AND CERTIFICATION

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.

BUILDING THE WORK / REQUIREMENTS TO COUNT DBE PARTICIPATION TOWARDS THE DBE GOALS CHECKLIST

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?**

6. **Regarding labor:**

   a. **Are crews under the direct supervision of the DBE foreman/superintendent?**

   b. **Are they normally employed by the DBE rather than being normally employed by a non-DBE?**

7. **Regarding equipment:**

   a. **Does the DBE own or does it have a written lease for the equipment?**

   b. **Is any equipment belonging to you or another non-DBE firm being utilized by the DBE? If so, is it a specialized piece of equipment that was on the job anyway, and has your State DOT given prior approval?**

8. **Regarding materials and supplies:**

   a. **Has the DBE negotiated the price?**

   b. **Has the DBE taken care of shop drawings?**

   c. **Has the DBE arranged for delivery and received the materials?**

   d. **Has the DBE installed the materials on this job?**

   e. **Has the DBE paid for the materials directly?**

   f. **Have you used joint checks to pay for materials? If so, did you obtain your State DOT approval first?**

APPENDIX

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