

# **DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENTS**

## **I. GENERAL**

This project is subject to Title 49, Code of Federal Regulations, Part 26, entitled "Participation by Disadvantaged Business Enterprise in Department of Transportation Financial Assistance Programs," hereinafter referred to as the ("DBE Regulations") and is incorporated and made a part of this contract herein by this reference. The following shall be incorporated as part of the contract documents for compliance. If any requirements herein are in conflict with the general provisions or special provisions applicable to this project, the requirements herein shall prevail unless specifically superseded or amended in the special provisions or by addendum.

## **II. POLICY**

It is the policy of the U.S. Department of Transportation ("USDOT") and the State of Hawaii, Department of Transportation and its political subdivisions ("Department") that Disadvantaged Business Enterprises ("DBE"), as defined in the DBE Regulations, have an equal opportunity to receive and participate in federally assisted contracts.

## **III. UNDERUTILIZED DBEs**

An Underutilized DBE ("UDBE") is a firm that meets the definition of a DBE and is a member of one of the following groups:

1. Hispanic Americans;
2. Native Americans (including Native Hawaiians);
3. African Americans; and
4. Women.

References to DBEs include UDBEs, but references to UDBEs do not include all DBEs.

## **IV. DBE ASSURANCES**

Each contract signed with a contractor (and each subcontract the prime contractor signs with a subcontractor) shall include the following assurance:

"The contractor, sub-recipient, or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of USDOT assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate which may include, but is not limited to; 1) withholding monthly progress payments; 2) assessing sanctions; 3) liquidated damages; and/or 4) disqualifying the contractor from future bidding as non-responsible."

The contractor agrees to include the above statements in any subsequent contracts that it enters into with other contractors, and shall require those contractors to include similar statements in further agreements.

## **V. BIDDER/OFFEROR RESPONSIBILITIES**

All bidders/offerors are required to register with the Department's Office of Civil Rights (OCR), DBE Section, using the Bidder Registration Form which can be downloaded from the Department's website at <http://hawaii.gov/dot/administration/ocr/DBE>. Certified DBEs are considered registered with the Department and are not required to submit a Bidder Registration Form. All other bidders/offerors are required to complete this form which may be faxed to 808-587-2025, e-mailed to: [melanie.martin@hawaii.gov](mailto:melanie.martin@hawaii.gov), or mailed to the OCR DBE Section, 869 Punchbowl Street, Room 112, Honolulu, Hawaii 96813. Registered bidders/offerors are posted on the website listed above.

Bidders/offerors, suppliers, and subcontractors shall fully inform themselves with respect to the requirements of the DBE Regulations. Particular attention is directed to the following matters:

- A. Bidders/offerors shall take all necessary steps to ensure that DBEs have an opportunity to participate in this contract.
- B. DBEs may participate as a consultant, prime contractor, subcontractor, trucker, or vendor of materials or supplies. DBEs may also team with other DBE or non-DBE firms as part of a joint venture or partnership.
- C. Agreements between a bidder/offeror and a DBE in which a DBE promises not to provide subcontracting quotations to other bidders/offerors are strictly prohibited.
- D. A DBE shall be certified by the Department under the appropriate North American Industry Classification System (NAICS) code and work in their registered field of work in order for credit to be allowed.
- E. Information regarding the current certification status of DBEs is available on the Internet at <http://hawaii.gov/dot/administration/ocr/DBE>.
- F. Commercially Useful Function ("CUF"). A DBE must perform a CUF. This means that a DBE must be responsible for the execution of a distinct element of the work, must carry out its responsibility by actually performing, managing, and supervising at least 30% of the work involved by using its own employees and equipment, must negotiate price, determine quality and quantity, order and install material (when applicable), and must pay for the material itself.<sup>1</sup>

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<sup>1</sup> The use of joint checks payable to a DBE subcontractor and supplier may be allowed to purchase materials and supplies under limited circumstances. See VIII USE OF JOINT CHECKS UNDER THE DBE PROGRAM

To determine whether a DBE is performing a CUF, the Department must 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, the DBE credit claimed for performance of the work, and other relevant factors. The prime contractor is responsible to ensure that the DBE performs a CUF.

## VI. PROPOSAL REQUIREMENTS

- A. UDBEs must be certified by the bid opening date.
- B. UDBE manufacturers, suppliers and any second tier subcontractors shall be listed in the proposal in order to receive credit.
- C. Copies or faxes of all "Confirmation by DBE" forms signed by each DBE listed in the proposal shall be submitted to the Project Manager listed in the proposal **five (5) days after bid opening.**<sup>2</sup> Information to be provided on the form shall include the name of the DBE, address, project name and number, prime contractor name, appropriate NAICS code and description of the type of work the DBE is certified to perform under this contract. Failure to provide this completed form may be cause for bid/proposal rejection.
- D. The dollar amount of each subcontract (both DBE and non-DBE firms) for all subcontractors, manufacturers and suppliers listed in the proposal shall be submitted within five (5) calendar days of bid opening. Failure to comply with this requirement for all bidders, whether they are the low bidder or not, may result in bid rejection.
- E. In a negotiated procurement, including a design-build procurement, the bidder/offeror may make a contractually binding commitment to meet the goal at the time of bid submission or the presentation of initial proposals, but must provide the information required above, before the final selection for the contract is made by the Department.
- F. If the contract goal is not met, all bidders, whether the low bidder or not, are required to submit quotations for both a UDBE and non-UDBE subcontractor when a non-UDBE is selected over a UDBE for the project, five (5) calendar days after bid opening.
- G. Calculation of the UDBE contract goal for this project is the proportionate contract dollar value of work performed, materials, and goods to be supplied by UDBEs. This UDBE contract goal is applicable to all the contract work performed for this project and is calculated as follows:

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<sup>2</sup> In computing calendar days, 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 Federal or State holiday, the period extends to the next day that is not a Saturday, Sunday, or holiday.

UDBE contract goal percentage = Contract Dollar Value of the work to be performed by UDBE subcontractors and manufacturers, plus 60% of the contract dollar value of UDBE suppliers, divided by the sum of all contract items (sum of all contract items is the total amount for comparison of bids less mobilization, force account items, and allowance items).

The Department shall adjust the bidder's/offeror's UDBE contract goal to the amount of the project goal if it finds that the bidder/offeror met the goal but erroneously calculated a lower percentage. If the amount the bidder/offeror submits as its contract goal exceeds the project goal, the bidder/offeror shall be held to the higher goal.

## **VII. COUNTING UDBE PARTICIPATION TOWARDS CONTRACT GOAL**

- A. Count the entire amount of the portion of a contract (or other contract not covered by paragraph B below) that is performed by the UDBE's own forces. Include the cost of supplies and materials obtained by the UDBE for the work on the contract, including supplies purchased or equipment leased by the UDBE (except supplies and equipment the UDBE subcontractor purchases or leases from the prime contractor or its affiliate).
- B. Count the entire amount of fees or commissions charged by a UDBE 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 of a USDOT-assisted contract, toward UDBE goals, provided the Department determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
- C. When a UDBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward UDBE goals only if the UDBE's subcontractor is itself a UDBE. Work that a UDBE subcontracts to a non-UDBE firm does not count toward UDBE goals.
- D. When a UDBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the UDBE performs with its own forces toward UDBE goals.
- E. Count expenditures to a UDBE contractor toward UDBE goals only if the UDBE is performing a CUF on that contract.
- F. The following is a list of appropriate UDBE credit to be allowed for work to be performed by a UDBE subcontractor. Count expenditures with UDBEs for materials or supplies toward UDBE goals as provided in the following:
  - 1. If the materials or supplies are obtained from a UDBE manufacturer, count 100 percent of the cost of the materials or supplies toward UDBE goals;

2. For purposes of determining UDBE goal credit, 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;
3. If the materials or supplies are purchased from a UDBE regular dealer, count 60 percent of the cost of the materials or supplies toward UDBE goals;
4. For purposes of determining UDBE goal credit, 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;
5. 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;
6. 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 in the DBE Regulations, if the person both owns and operates distribution equipment for the products. Any supplementing of a regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis;
7. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers;
8. With respect to materials or supplies purchased from a UDBE, 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 UDBE goals, provided that the Department determines the fees 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 toward UDBE goals; however,
9. If a firm is not currently certified as a UBE in accordance with standards of this part at the time of the execution of the contract, do not count the firm's participation toward any UDBE goals, except as provided for in §26.87(i);
10. Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward the Department's overall goal; and
11. Do not count the participation of a UDBE subcontractor toward a contractor's final compliance with its UDBE obligations on a contract until the amount being counted has actually been paid to the UDBE.

G. The following factors are used in counting UDBE participation for trucking companies:

1. The UDBE must be 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 UDBE goals;
2. The UDBE must itself own and operate at least one (1) fully licensed, insured, and operational truck used on the contract;
3. The UDBE 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;
4. The UDBE may lease trucks from another UDBE firm, including an owner-operator who is certified as a UDBE. The UDBE who leases trucks from another UDBE receives credit for the total value of the transportation services the lessee UDBE provides on the contract;
5. The UDBE may also lease trucks from a non-UDBE firm, including from an owner-operator. The UDBE that leases trucks equipped with drivers from a non-UDBE is entitled to credit for the total value of transportation services provided by non-UDBE leased trucks equipped with drivers not to exceed the value of transportation services on the contract provided by UDBE-owned trucks or leased trucks with UDBE employee drivers. Additional participation by non-UDBE owned trucks equipped with drivers receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the appropriate Department operating administration.

EXAMPLE: UDBE firm X uses two (2) of its own trucks on a contract, leases two (2) trucks from UDBE Firm Y and six (6) trucks from non-UDBE Firm Z. UDBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four (4) of the six (6) trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight (8) trucks. With respect to the other two (2) trucks provided by Firm Z, UDBE credit could be awarded only for the fees or commissions pertaining to those trucks Firm X receives as a result of the lease with Firm Z;

6. The UDBE may lease trucks without drivers from a non-UDBE truck leasing company. If the UDBE leases trucks from a non-UDBE truck leasing company and uses its own employees as drivers, it is entitled to credit for the total value of these hauling services.

EXAMPLE: UDBE Firm X uses two (2) of its own trucks on a contract. It leases two (2) additional trucks from non-UDBE Firm Z. Firm X uses its own employees to drive the trucks leased from Firm Z. UDBE credit would be awarded for the total value of the transportation services provided by all four (4) trucks; and

7. For purposes of determining whether a trucking firm performs a CUF, a lease must indicate that the UDBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the UDBE, so long as the lease gives the UDBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the UDBE.
- H. The bidder/offeree may be a joint venture or partnership that has a certified UDBE as a partner. A "Joint Venture" means an association between a UDBE firm and one (1) or more other firms to carry out a single, for-profit, business enterprise for which the parties combine their property, capital, efforts, skills and knowledge, and in which the UDBE is responsible for a distinct, clearly defined portion of the work of the contract, and whose share in the capital contribution, control, management, risks and profits are commensurate with its ownership interest.
- I. Effects of a Summary Suspension of a UDBE. When a UDBE's certification is suspended, the UDBE may not be considered to meet a contract goal on a new contract and any work it does on a contract received during the suspension shall not be counted towards the overall goal. The UDBE may continue to perform work under an existing contract executed before the UDBE received a Notice of Suspension and may be counted towards the contract goal during the period of suspension as long as the UDBE is performing a CUF under the existing contract.
- J. Effects of Decertification of a UDBE. Should a UDBE become decertified during the term of the subcontract for reasons beyond the control of and with no fault or negligence on the part of the contractor, the work remaining under the subcontract may be credited towards the contract goal, but are not included in the overall accomplishments.

Should the UDBE be decertified after contract award and before notice to proceed, the contractor must still meet the UDBE goal by either; a) withdrawing the subcontract from the UDBE and expending good faith efforts to replace it with a UDBE that is currently certified for that same work; or b) continuing with the subcontract with the decertified firm and expending good faith efforts to find other work not already subcontracted out to UDBEs in an amount to meet the UDBE goal either by; 1) increasing the participation of other UDBEs on the project; 2) documenting good faith efforts; or 3) by a combination of the above.

### **VIII. USE OF JOINT CHECKS UNDER THE UDBE PROGRAM**

- A. The following guidelines apply to the use of joint checks:
  1. The second party (typically the prime contractor) acts solely as a guarantor;
  2. The DBE must release the check to the supplier;
  3. The use of joint checks is a commonly recognized business practice;

4. The Department must approve the use of joint checks prior to use by contractors and/or DBEs. As part of this approval process the Department will analyze industry practice to confirm that the use of joint checks is commonly employed outside of the DBE program for non-DBE subcontractors on both federal and state funded contracts. Using joint checks shall not be approved if it conflicts with other aspects of the DBE regulations regarding CUF; and
  5. The Department will monitor the use of joint checks closely to avoid abuse.
- B. Contractors and DBEs should review the following general guidelines when determining whether to use joint checks closely to avoid abuse:
1. That standard Industry practice applies to all contractors (federal and state contracts);
  2. Use of joint checks must be available to all subcontractors;
  3. Material industry sets the standard industry practice, not prime contractors;
  4. Short term, not to exceed reasonable time (i.e., one (1) year, two (2) years) to establish/increase a credit line with the material supplier;
  5. No exclusive arrangement between one (1) prime and one (1) DBE in the use of joint checks that might bring the independence of the DBE into question;
  6. Non-proportionate ratio of DBE's normal capacity to size of contract and quantity of material to be provided under the contract;
  7. The DBE is normally responsible to install and furnish the work item; and
  8. The DBE must be more than an extra participant in releasing the check to the material supplier.
- C. The Department shall allow the use of joint checks if the following general conditions are met:
1. DBE submits request to the Department for action;
  2. There is a formalized agreement between all parties that specify the conditions under which the arrangement shall be permitted;
  3. There is a full and prompt disclosure of the expected use of joint checks;
  4. The Department will provide prior approval;
  5. DBE remains responsible for all other elements of 49 CFR 26.55(c)(1);
  6. The agreement states clearly and determines that independence is not threatened because the DBE retains final decision making responsibility;
  7. The Department will determine that the request is not an attempt to artificially inflate DBE participation;
  8. Standard industry practice is only one (1) factor;
  9. The Department will monitor and maintain oversight of the arrangement by reviewing cancelled checks and/or certification statement of payment; and

10. The Department will verify there is no requirement by prime contractor that the DBE is to use a specific supplier nor the prime "contractors" negotiated unit price.

## **IX. DEMONSTRATION OF GOOD FAITH EFFORTS FOR CONTRACT AWARD**

- A. It is the sole responsibility of the bidder/offeror to submit any and all documents, logs, correspondence, and any other records or information to the Department that will demonstrate that the bidder/offeror made good faith efforts to meet the UDBE goal. In its good faith evaluation, the Department may, but shall not be required, to perform the following as part of its evaluation: a) request additional information and documents from the bidder/offeror; b) compare the bidder's/offeror's bid against the bids/offers of other bidders/offerors, and compare the UDBEs and UDBE work areas utilized by the bidder/offeror with the UDBEs listed in other bids/offers submitted for this contract; c) verify contacts by bidders/offerors with UDBEs; and e) compare the UDBE and the categories of UDBE work targeted by the bidder/offeror for participation in the contract, with the total pool of available UDBEs ready, willing and able to perform work on each particular subcontract targeted by the bidder/offeror. Actions on the part of the bidder/offeror that will be considered demonstrative of good faith efforts include, but are not limited to, the following:
  1. Whether the bidder/offeror submitted the required information at the time of bid opening (i.e. DBE name, address, NAICS code, description of work, project name, and number), and dollar amounts for all subcontractors, within five (5) days of bid opening;
  2. Whether the bidder/offeror solicited through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified UDBEs who have the capability to perform part or all of the work to be included under the contract. The Department will also consider whether the bidder/offeror solicited the participation of potential UDBEs as early in the procurement process as practicable, and allowed sufficient time for the UDBEs to properly inquire about the project and respond to the solicitation. The Department will also review whether the bidder/offeror took appropriate steps to follow up with interested UDBEs in a timely manner to facilitate participation by UDBEs in this project;
  3. Whether the bidder/offeror identified and broke up portions of work that can be performed by UDBEs in order to increase the likelihood that a UDBE will be able to participate, and that the UDBE goal could be achieved (e.g. breaking out contract items into economically feasible units to facilitate UDBE participation even when the bidder/offeror might otherwise prefer to self-perform these work items;
  4. Whether the bidder/offeror made available or provided interested UDBEs with adequate information about the plans, specifications, and requirements of the project in a timely manner, and assisted them in responding to the bidder's/offeror's solicitation;

5. Whether the bidder/offeror negotiated in good faith with interested UDBEs. Evidence of such negotiations includes documenting: a) the names, addresses and telephone numbers of UDBEs that were contacted; b) a description of the information that was provided to UDBEs regarding the plans and specifications; and c) detailed explanation for not utilizing individual UDBEs on the project;
  6. Whether the bidder/offeror solely relied on price in determining whether to use a UDBE. The fact that there may be additional or higher costs associated with finding and utilizing UDBEs are not, by themselves, sufficient reasons for a bidder's/offeror's refusal to utilize a UDBE, or the failure to meet the UDBE goal, provided that such additional costs are not unreasonable. Also, the ability or desire of a bidder/offeror to perform a portion of the work with its own forces, that could have been undertaken by an available UDBE, does not relieve the bidder/offeror of the responsibility to make good faith efforts to meet the UDBE goal, and to make available and solicit UDBE participation in other areas of the project to meet the UDBE goal;
  7. Whether the bidder/offeror rejected UDBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The UDBEs standing within the industry, membership in specific groups, organizations or associations, and political or social affiliation are not legitimate basis for the rejection or non-solicitation of bids from particular UDBEs;
  8. Whether the bidder/offeror made efforts to assist interested UDBEs in obtaining bonding, lines of credit, or insurance;
  9. Whether the bidder/offeror made efforts to assist interested UDBEs in obtaining necessary equipment, supplies, materials or related assistance or services;
  10. Whether the bidder/offeror effectively used the services of available minority/women community organizations, minority/women business groups, contractors' groups, and local, state and federal minority/women business assistance offices or other organizations to provide assistance in recruitment and placement of UDBEs; and
  11. Whether other bidders/offerors met the goal and whether the apparent successful bidder/offeror could have met the goal with additional efforts. The Department may determine that an apparent successful bidder/offeror who fell short of meeting the goal, made good faith efforts when it met or exceeded the average UDBE participation obtained by other bidders/offerors.
- B. A prime contractor's inability to find a replacement UDBE at the original price is not sufficient to demonstrate that good faith efforts have been made to replace the original UDBE. The fact that the contractor has the ability and/or desire to perform the contract work with its own forces does not relieve the contractor of the obligation to make good faith efforts to find a replacement UDBE, and it is not a sound basis for rejecting a prospective replacement UDBE's reasonable quote.

**X. ADMINISTRATIVE RECONSIDERATION.**

- A. If under the provisions of 49 CFR, Part 26.53(d), if it is determined by the Department that the apparent successful bidder/offeror has failed to meet the provisions of this subsection, the bidder/offeror may submit a protest to request an administrative reconsideration. The bidder/offeror must file this request with the Department's OCR within five (5) calendar days of notification by the Department that the bidder/offeror failed to meet the requirements of this subsection. As part of this reconsideration request, it is the bidder's/offeror's responsibility to provide to the OCR, any and all written documentation, correspondence, logs, and any other documents or evidence the bidder/offeror believes relates to the issue of whether it met the UDBE project goal or made good faith effort to do so.
- B. The OCR DBE Liaison Officer will be responsible for resolving the reconsideration dispute.
- C. Upon request by the bidder/offeror, the bidder/offeror will be allowed an opportunity to meet in person with the Liaison Officer to discuss the issue of whether it met the UDBE project goal, or made good faith effort to do so. If a meeting is requested, the bidder/offeror must be ready, willing, and able to meet with the Liaison Officer within five (5) calendar days of the bidder's/offeror's receipt of written notification that the bidder/offeror failed to meet the requirements of this subsection.
- D. The Liaison Officer will render a decision on the reconsideration, and notify the bidder/offeror in writing of the decision. The decision will explain the basis for the Liaison Officer's findings and the reasons for the decision.
- E. The decision is not appealable to the USDOT, but is appealable in accordance with Section 103D-709, Hawaii Revised Statutes.

**XI. AWARD OF CONTRACT**

- A. In a sealed bid procurement, the Department reserves the right to reject any or all bids. The award of contract, if it is awarded, will be to the lowest responsive and responsible bidder who meets or exceeds the UDBE project goal, or who makes good faith efforts to meet or exceed the UDBE project goal, as determined by the Department.
- B. If the lowest responsible bidder does not meet the UDBE project goal and does not demonstrate to the satisfaction of the Department that it made good faith efforts to meet the UDBE project goal, such bid shall be rejected as non-responsive. The Department will then consider the next lowest responsive and responsible bidder for award in accordance with paragraph A above.

## **XII. REPLACEMENT OF A UDBE ON A PROJECT WITH A CONTRACT GOAL**

Under this contract, the prime contractor shall utilize the specific UDBE listed to perform the work and supply the materials for which each is listed unless the contractor obtains written consent from the Department to replace a UDBE. If the Department's consent is not provided, the contractor shall not be entitled to any payment for work or material unless it is performed or supplied by the listed UDBE. The Department reserves the right to request copies of all UDBE subcontracts.

The Department will require a contractor to make good faith efforts to replace a UDBE that is terminated or has otherwise failed to complete its work on a contract with another certified UDBE, to the extent needed to meet the contract goal. The Department will require the prime contractor to promptly provide written notice to the project manager of the UDBE's inability or unwillingness to perform and provide reasonable documentation.

The written notice by the contractor must include the following:

1. The date the contractor determined the certified UDBE to be unwilling, unable or ineligible to perform work on the contract;
2. The projected date that the contractor shall require a substitution or replacement UDBE to commence work if consent is granted by the Department;
3. Documentation of facts that describe and cite specific actions or inactions on the part of the affected UDBE that led to the contractor's conclusion that the UDBE is unwilling, unable, or ineligible to perform work on the contract;
4. A brief statement of the affected UDBE's capacity and ability or inability to perform the work as determined by the contractor;
5. Documentation of contractor's good faith efforts to enable affected UDBE to perform the work;
6. The current percentage of work completed on each bid item by the affected UDBE;
7. The total dollar amount currently paid per bid item for work performed by the affected UDBE;
8. The total dollar amount per bid item remaining to be paid to the UDBE for work completed but for which the UDBE has not received payment, and with which the contractor has no dispute; and
9. The total dollar amount per bid item remaining to be paid to the UDBE for work completed, for which the UDBE has not received payment, and with which the contractor and UDBE have a dispute.

The prime contractor shall send a copy of the written notice to replace a certified UDBE on a contract to the affected UDBE. The affected UDBE may submit a written response within five (5) calendar days to the Department to explain its position on its performance on the committed work. The Department shall consider both the prime contractor's request and UDBE's stated position before approving the termination or substitution request, or determining if any action shall be taken against the contractor.

There shall be no substitution or termination of a UDBE subcontractor at any time without the prior written consent of the Department. The Department will provide written

consent only if the contractor has good cause, as determined by the Department, to terminate the UDBE. Good cause may include, but is not limited to the following circumstances:

1. The UDBE subcontractor fails or refuses to execute a written contract;
2. The listed UDBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards;
3. The listed UDBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements;
4. The listed UDBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;
5. The listed UDBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to 2 CFR Parts 180, 215 and 1,200 or applicable state law;
6. The Department has determined that the listed UDBE subcontractor is not a responsible contractor;
7. The listed UDBE subcontractor voluntarily withdraws from the project and provides to the Department written notice of its withdrawal;
8. The listed UDBE is ineligible to receive UDBE credit for the type of work required; and
9. A UDBE owner dies or becomes disabled with the result that the listed UDBE contractor is unable to complete its work on the contract.

Upon approval from the Department to replace a UDBE, the contractor's good faith efforts shall be documented and submitted to the Department within seven (7) calendar days. This time period may be extended for another seven (7) calendar days upon request by the prime contractor.

If a UDBE subcontractor is unable to perform work under the contract, and is to be replaced, the contractor's failure to obtain a substitute certified UDBE or to make good faith effort to obtain such a substitute UDBE subcontractor to perform said work, may constitute a breach of this contract for which the Department may terminate the contract or pursue such remedy as deemed appropriate by the Department.

### **XIII. PAYMENT**

- A. The Department will make an estimate in writing each month based on the items of work performed and materials incorporated in the work and the value therefore at the unit prices or lump sum prices set forth in the contract. All progress estimates and payments will be approximate only and shall be subject to correction at any time prior to or in the final estimate and payment. The Department will not withhold any amount from any payment to the contractor, including retainage.

- B. The contractor shall pay all subcontractors within ten (10) calendar days after receipt of any progress payments from the Department. This clause applies to both DBE and non-DBE subcontractors, and all tiers of subcontracts.
- C. The contractor shall sign and submit the “DBE Participation Report and Prompt Payment Certification” form concurrently with its invoice to the Project Manager. The Department will not process any invoices without this completed form. The form shall certify all subcontractors have been paid for the work performed and at the completion of the subcontractors work any retainage held on the subcontracts has been returned.
- D. When any subcontractor has satisfactorily completed its work as specified in the subcontract, and there are no bona fide disputes, the contractor shall make prompt and full payment to the subcontractor of all monies due, including retainage, within ten (10) calendar days after the subcontractor’s work is satisfactorily completed. A subcontractor’s work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented, as required by the Department. The contractor must obtain the prior written approval from the Department before it can continue to withhold retainage from any subcontractor who has completed its portion of the work. This clause applies to both DBE and non-DBE subcontractors, and all tiers of subcontracts.

#### **XIV. RECORDS**

The contractor shall maintain and keep all records necessary for the Department to determine compliance with the contractor’s DBE obligations. The records shall be available at reasonable times and places for inspection by the Department and appropriate Federal agencies. The records to be kept by the contractor shall include:

- 1. The names, race/ethnicity, gender, address, phone number, and contact person of all DBE and non-DBE consultants, subcontractors, manufacturers, suppliers, truckers and vendors identified as DBEs (for vendor to identify whether it is a supplier or manufacturer);
- 2. The nature of work of each DBE and non-DBE consultant, subcontractor, manufacturer, supplier, trucker and vendor;
- 3. The dollar amount contracted with each DBE and non-DBE consultant, subcontractor, manufacturer, supplier, trucker and vendor; and
- 4. Cumulative dollar amount of all change orders to the subcontract.

#### **XV. REPORTS**

The contractor shall submit the DBE Participation Report and Prompt Payment Certification form to the Department with its pay request. The Department will not prepare the monthly progress payment unless it receives a completed report.

#### **XVI. FAILURE TO COMPLY WITH DBE REQUIREMENTS**

All contractors, subcontractors, manufacturers and suppliers are hereby advised that failure to carry out all DBE requirements specified herein shall constitute a material breach of contract that may result in termination of the contract or such other remedy as deemed appropriate by the Department.