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Engineering Administrator

DBE Participation in Engineering Agreements

This directive provides an overview of Disadvantaged Business Enterprise (DBE) participation in federally-assisted consultant agreements managed by the Office of Engineering and identifies the requirement for approval and process associated with reducing or eliminating DBE participation in these agreements.

Background

Under federal regulations (49 CFR 26.53) prime contractors (including consulting engineers) may not terminate an approved DBE firm working on a federally-assisted contract for convenience. The regulations [49 CFR 26.53(f)] further require that prime consultants notify the affected DBE in writing of the intended termination and/or substitution. The terminated/reduced DBE is allowed five days to respond to the prime.

Terminology

The following terms and associated definitions are used:

DBE Goal: The value of work to be performed by DBEs, expressed as a percentage of the total for the agreement or assignment. A single goal is usually set for project-specific agreements. For task-based agreements, goals are generally set for specific assignments.

DBE Commitment: A portion of a negotiated agreement or assignment amount subcontracted to DBE(s), expressed as dollars. In context, it may refer to either the amount of an individual DBE's subcontract or the total amount of all DBE subcontracts under a single agreement or assignment.

Prime Consultant: The entity holding an agreement with the State/Department.

Overview of DBE Participation in Engineering Agreements

The Department encourages DBE participation in various contract programs, including design-related services. DBE goals are set by the DBE Screening Committee. Consultants responding to solicitations identify proposed DBE participation. After a consultant is selected and the agreement or assignment is negotiated, the level of participation by DBE subconsultant(s) is determined and documented on the DBE Certification Form. The total value (i.e., subcontract

dollar amount) of all DBE subcontracts is the initial (pre-award or pre-assignment) DBE Commitment. When expressed as a percent, the DBE Commitment should meet the goal. If it does not, the consultant must demonstrate a Good Faith Effort.

As work progresses, changes may occur that affect the scope and/or amount of work. The following situations are examples of how agreement changes can impact DBE goal attainment:

- A subconsultant was a certified DBE when the agreement was initiated, but its certification is terminated after the agreement was signed while work was being performed. Work that is under subcontract prior to certification termination but performed after termination is creditable toward the goal. However, work added to a subcontract after termination of DBE status is *not* creditable toward the goal but such work may be considered if a demonstration of Good Faith Effort is required.
- A subcontract was executed with a certified DBE but the work covered by the subcontract was terminated prior to completion. Regardless of the reason for termination, only the value of the work performed prior to termination is creditable toward the goal.
- The prime consultant's scope of services is expanded resulting in a higher agreement amount, but DBE participation is not increased. Even if all the initial DBE commitments are met, the prime may not have met the DBE requirements. A determination of final DBE goal attainment is based on DBE participation as a percent of total (final) agreement cost.

After work is complete, as part of the closeout process, the actual level of DBE participation is determined by audit. If the goal(s) was/were not achieved or other DBE irregularities are found, the prime consultant may be subject to administrative remedies. To avoid falling short of the goal at the end of an agreement, prime consultants must proactively manage DBE participation. When work is added to an agreement or assignment, the prime should provide DBE firms with appropriate opportunities for participation. Further, if the commitment to an individual DBE subconsultant is reduced or terminated, the prime consultant should seek offsetting opportunities, either for a newly-added DBE firm or one already under subcontract.

Several of the documents and processes used to facilitate management and monitoring of DBE participation are identified and discussed below:

DBE Attachment, Consultant Agreements

This multi-page document is an element of all Department-administered federally-funded consultant agreements. It establishes DBE requirements, including the agreement-specific goal, if applicable. The DBE Agreement Attachment is currently being updated to state certain requirements more explicitly.

DBE Certification Form

This form is initiated by the Department's Agreements/Negotiations unit for each DBE subcontract and includes project identification, prime and DBE consultant information, subcontract dollar value, the DBE's North American Industry Classification System

(NAICS) code(s) and scope (i.e., brief description of assignment). Both the prime consultant and DBE subconsultant are required to certify the accuracy of the information. The submitted certification is reviewed by lead Engineering unit for reasonableness and by the Office of Contract Compliance, which verifies that the subcontracted DBE is eligible to receive DBE credit for work under the NAICS code(s) identified on the DBE Certification Form. The DBE Certification Form is provided as an attachment to this directive.

Subconsultant Usage and Payment Report

This form is completed by the prime consultant in support of each invoice submitted to the Department. It identifies all subconsultant contracts and classifications (e.g., status as DBE). The information in the form is sufficient to determine the current DBE commitment and payments. The form template is currently stored in the DOTSHARE/Engineering Standard Forms/Highways-Guide folder.

Subconsultant Payment Log

This form is completed by the prime consultant for each subconsultant on a quarterly basis, reviewed and signed by the subconsultant before being submitted to the Department unit administering the agreement. The form template is currently stored in the DOTSHARE/Engineering Standard Forms/Highways-Guide folder.

Request to Reduce or Eliminate Design-Related Work Assigned to DBEs

The form and associated approval process are being promulgated by this directive. Their use is mandatory whenever a prime consultant intends to reduce or terminate a prior DBE commitment, whether it is an original (pre-award, pre-assignment) or subsequent commitment. As further explained in the next section, reduction/termination of any individual DBE commitment requires Department approval. The form is provided as an attachment to this directive. A Word version of the form will initially be available in the DOTSHARE/Engineering Standard Forms/Highways-Guide folder.

Reductions and Elimination of Commitments to DBEs

Reducing or eliminating any commitment to a DBE under a consultant agreement requires Department approval. The purpose of the Department's review is to help consultants meet DBE goals. A secondary purpose is to undertake and document measures demonstrating a Good Faith Effort by the consultant in the unavoidable event of an eventual (i.e., at conclusion of agreement) shortfall.

The "Request to Reduce or Eliminate Design-Related Work Assigned to Disadvantaged Business Enterprises (DBE)" form (attached) shall be used for all requests. Some requests will require supporting explanations and information, which should be descriptively titled and appended. The following instructions clarify certain terms, requested information and considerations involved in processing requests. The instructions are not comprehensive (i.e., they do not cover every item) since the form itself is sufficiently clear to elicit most of the requested information.

Section 1, General Information

The DBE Goal is a percent and does not change over the life of the agreement or assignment. The DBE Commitment is the total amount of DBE subcontracts under the agreement. It reflects approved post-award changes, if any, but does not include any proposed changes.

Section 2, DBE Participation Being Eliminated or Reduced

Provide the name of the DBE consulting firm that was approved to participate in the agreement and for whose assignment the prime consultant is now requesting approval to eliminate or reduce.

Describe the work that the DBE was intended to perform but is now being eliminated or reduced. Examples include: prepare Structure Type Studies, conduct hydraulic analyses, perform crash analyses, design urban drainage systems, perform traffic simulation.

State the reasons work assigned to the DBE is now being eliminated or reduced. Examples: Change in scope eliminated/reduced the required studies; DBE is unable to perform the work.

Provide the amount (dollars) and percentage (of the original agreement or assignment, at execution) of the DBE's subcontract work.

The response to the Yes/No question is critical. The prime consultant should answer "Yes" when anticipating the contract DBE goal will be met, including the effects of the reduction/elimination for which approval is being requested and other DBE adjustments previously approved or submitted for approval concurrent to this request (i.e., substitute DBE, increasing the participation level of existing DBE subconsultants). The prime consultant should answer "No" when anticipating the contract DBE goal will not be met.

Section 3, Substitution/Mitigation

The prime consultant should use each row to indicate DBE subconsultants that are being provided additional participation (i.e., new assignments). The DBEs may be "existing" (i.e., already have subcontracts for this agreement or "newly-added" (did not previously have a subcontract for this agreement). Indicate the type of work being added and value of the new/added subcontract. If additional rows are needed, state "See Attachment" in the first row and do not include any substantive information (DBE Firm Name, etc.) on the form.

Section 4, DBE Notification and Impact of Proposed Change(s)

A DBE subconsultant whose contract is being reduced or terminated must be notified. The DBE is allowed five days to object to the termination, in writing, and to provide reasons for the objection. To comply with the notification requirement, the prime consultant must indicate "Yes" and provide the associated documentation (notice and objection, if any). A "No" response and/or lack of documentation is cause for disapproval.

Information under three scenarios is requested. The “original agreement or assignment” is historical data and documented at the time of the original consultant agreement or assignment. The two columns under the “DBE Participation” heading (amount, percent) refer to total agreement or assignment participation, not any specific DBE. The second-row scenario (“With reduction/eliminated noted in Section 2”) is the level of DBE participation resulting from the requested reduction/elimination without any proposed substitution. The third-row scenario (“With reduction/eliminated noted in Section 3”) is the level of DBE participation resulting from the requested reduction/elimination and any proposed substitution.

Section 5, Certifications of Released DBE and Prime Consultants

This section provides for signatures by the affected DBE and prime consultant acknowledging the elimination or reduction in participation and related information. The signatories for the affected DBE and prime consultant must have the requisite authority to bind the respective entity (i.e., individuals that can sign agreement/contracts). Titles and dates are also required.

Section 6, Review and Action Taken

The division chief administering the consultant contract is responsible for approving or disapproving requests. When the “Yes” response is checked in Section 2, no further action is needed. When the “No” response is checked in Section 2 and the Engineering division intends to approve a request, prior concurrence from the Office of Contract Compliance is required.

The Office of Contract Compliance may be consulted on DBE topic, regardless of the need for concurrence on a DBE reduction or elimination request.

The Department unit administering the contract is responsible for reviewing the accuracy of information provided and for retaining records of requests and dispositions.

Attachments:

- DBE Certification Form
- Request to Reduce or Eliminate Design-Related Work Assigned to Disadvantaged Business Enterprises (DBE)