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Welcome!

PortGen: DBE Compliance Primes and DBE Firms

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Tamaka Thornton

Disadvantaged Business Enterprise (DBE) Program Manager

Thornton.T@portseattle.org



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- DOT has the important responsibility of ensuring that firms competing for DOT-assisted contracts for these projects are not disadvantaged by unlawful discrimination
- The Department's most important tool for meeting this requirement has been its DBE program, which originally began in 1980 as a minority/women's business enterprise program established by regulation under the authority of Title VI of the Civil Rights Act of 1964 and other nondiscrimination statutes that apply to DOT financial assistance programs

- The Department's Disadvantaged Business Enterprise (DBE) program is designed to remedy ongoing discrimination and the continuing effects of past discrimination in federally-assisted highway, transit, airport, and highway safety financial assistance transportation contracting markets nationwide
- The primary remedial goal and objective of the DBE program is to level the playing field by providing small businesses owned and controlled by socially and economically disadvantaged individuals a fair opportunity to compete for federally funded transportation contracts
- **The DBE Program's governing rules/regulations can be found within the Code of Federal Regulations (49 CFR Part 26)**

Chain of Command

U.S. Department of Transportation



Federal Aviation
Administration (FAA)



PORT OF SEATTLE



Subcontractors, Vendors/Suppliers,
Truckers, etc.

Federal Highway
Administration (FHWA)



WASHINGTON DEPT. OF
TRANSPORTATION

Federal Transit
Administration (FTA)



SOUND TRANSIT

Prime Contractor Responsibilities

- Sponsor or participate in outreach events with small, disadvantaged, minority or women-owned businesses
- Vet subcontractors to identify if they are certified and capable DBE firms
- Document good faith efforts to meet the DBE contract goal
- Ensure DBE subcontractors perform a commercially useful function on the project
- Monitor change orders and impacts to DBE contract goal
- Make prompt payment to DBE and non-DBE subcontractors as required by the Owner/Agency Prompt Payment Provision
- Request and submit termination and substitution requests that comply with DBE Program requirements
- Maintain records of DBE activities to comply with DBE Program requirements
- Communicate with Owner/Agency Representative/personnel to seek guidance regarding DBE compliance

DBE Contractor Responsibilities

- Market your firm presenting its capabilities to prime contractors and aggressively seek education on Owner/Agency contracting processes as well as each prime contractor's practices
- Take maximum advantage of training opportunities and educational programs offered by the Port of Seattle – Diversity In Contracting Dept. and industry partners
- Participate in project outreach programs for DBE firms initiated by industry partners
- Maintain up to date DBE certification
- Thoroughly review plans and specifications prior to submitting a quote
- Promptly respond to prime contractor solicitation expressing your intention/interest in quoting or not
- Consistent with effective business practices, submit quotes clearly noting which items of work your firm is certified to perform
- Maintain a log of all quotes and file of all prime contractor solicitations until contract execution
- Review bid submittals and contact prime contractor, as appropriate to your quote or business type, after contract award is complete
- Before signing a DBE contract, talk to the prime contractor and review contract documents to determine if there are special requirements, such as expedited progress schedules or non-standard items that will impact your work
- Do not agree to a commitment if you do not have the expertise, ability, or financial and equipment resources needed to complete the job
- Perform work for which you are certified, per NAICS code. If you perform work for which you do not have an assigned NAICS code, your work cannot qualify as part of the DBE goal participation
- Know your responsibility and consequences of performing a commercially useful function
- If required, promptly submit verification of all payments received by prime contractor

DBE Program Elements



- The DBE solicitation process does not require you to hire a certain number of DBE firms and does not have goals;
- The purpose of the DBE solicitation requirement is to give DBE firms an opportunity to compete for and know of upcoming work on projects.

Good Faith Efforts (GFE)

“An implied contractual term and it is defined as "what a reasonable person would determine is a diligent and honest effort under the same set of facts or circumstances.".

(49 CFR 26.53[a])

Good Faith Efforts

- A contractor must make **good faith efforts** to meet the DBE contract goal or by demonstrating (documenting) that the goal could not be met, but the contractor but exerted all “efforts” it could by sincere and aggressive efforts. (not merely pro formal)
- 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 enable DBE participation
- Additional costs in finding and using DBEs is not in and of itself a sufficient reason for failing to make the goal nor is the ability or desire of Prime to self-perform

If you document every aspect of what you do, your program will be verifiable and auditable

- Doing it is not enough
- You MUST be able to prove what you did
- Document all communications with DBEs
- GFEs
 - Appendix A to 49 CFR Part 26
- Non-exhaustive List

GFEs – Factors to be Considered

- Did the Contractor attend pre-bid meetings?
- Did the Contractor advertise or provide written notice of the contracting opportunity? (sufficient time to allow DBE response; determine with certainty if DBEs interested by follow-up initial solicitation)
- Did the contractor solicit DBE firms that appear in the DBE directory listing certified firms? (investigate capability of DBE firms)
- DOCUMENT Good Faith Efforts stating the reason(s) for the potential shortfall.

“Firm is responsible for the execution of the work of a contract or a distinct element of the work . . . by actually performing, managing, and supervising the work involved.” (49 CFR 26.55[c])

- DBE must perform at least 30% of work with its own workforce
- DBE firms must own or lease trucks and equipment it uses; leases from Primes are not countable unless the Prime firm is a DBE
- Involves Fraud Detection

These five (5) elements should be reviewed to determine whether the DBE firm is performing a commercially useful function.

1. Management and Supervision
2. Workforce
3. Equipment
4. Materials and Supplies
5. Performance

Management/Supervision:

- Scheduling Work Operations
- Receiving quotes and ordering their own equipment and materials
- Hiring and firing employees

Workforce:

- Must keep a regular workforce.
- Can not share employees with a non MWDBE contractor, especially the Prime contractor

Commercially Useful Function Elements

Equipment:

- Own or lease on a long-term basis
- Operation of the equipment must be in complete control and an employee of the DBE
- **An operator may be provided with the equipment if it is specialized**

Materials and Supplies:

- Negotiating their own cost of materials
- Arranges delivery of materials/supplies and responsible for payment
- Determining and ensuring quality of material

Performance:

- Must perform at least 30% of the contract work with their own resources

Commercially Useful Function Key Factors

- Evaluation of the amount of work subcontracted, whether it is consistent with normal industry practices;
- Whether the amount the firm is paid under the contract is commensurate with the work that is actually being performed to be credited towards the goal;
- When the DBE furnishes materials, the DBE must be responsible for negotiating the price, for determining the quality and quantity of the material, ordering the material, and paying for it.

As a contractor, a DBE firm would typically be hired to both furnish the material and install it with its own labor force;

Ask the question: In essence, was the role merely a contrived arrangement for the purpose of meeting the DBE contract goal? If yes, CUF Failure/Non-compliant

Regulatory Monitoring Requirements 49 CFR Part 26.37:

- Implement Appropriate Mechanisms to Ensure Compliance by All Program Participants
- Ensure Work Committed/Subcontracted to DBEs is Performed by DBEs as indicated in DBE Participation/Utilization/Subcontracting Plan
- Keep a running tally of DBE Participation (i.e. Excel Workbook, B2GNow, Aurigo, PRiSM)

Ensuring DBE Contracts are Compliant Key Elements of Contract Review:

- Ensure bid information including DBE name, compensation, and scope of work matches contract language for DBE subcontracts
- Verify Required DBE Contract Clauses in Prime and Sub contracts (all tiers)
- All firms must assure in contracts that they will comply with the program regulations and all requests for related information; ***Ensure lower-tier subcontracts are also compliant***
- Review everything in writing, sign, and date (Be sure to retain copies)

- ***Subcontracting (furnish and install) – 100%***
Furnish and install materials; provides labor
- ***Manufacturing/Fabricating – 100%***
Altering raw materials (e.g. structural steel)
- ***Material Supply /Regular Dealer – 60%***
Must be part of regular inventory
If bulk item (e.g. pipe), must regularly provide item and own or long-term lease
distribution equipment (e.g. flatbed truck)
- ***Manufacturer's Representative/Broker – Commission or Fee***
- ***Trucking – 100%***
Own and operate at least one truck and driver is employed by DBE Trucking firm.
Lease agreement states full control/ownership over trucks and drivers.

A DBE need not provide all the trucks on a contract to receive credit for transportation services, but it must control the entire trucking operations for which it seeks credit (49 CRF 26.55)

- Must own & operate at least one truck (licensed, insured & operational) using a driver it employs.
- Must control & manage their entire trucking operation.
- Leasing is permitted and counted 100% if leased from another DBE firm
- Leasing from non-DBE , can count/receive credit only for fees/commissions.
- Lease MUST indicate that the DBE has exclusive use of & control over truck(s).
- There can not be a false arrangement for the purpose of meeting DBE goals

Contract Language - Assurances

Part 26.13(b): Each contract you sign with a contractor (and each subcontract the prime contractor signs with a subcontractor) must 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 DOT-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.

Prompt Payment Requirements

Ensuring Prompt Payment

- Applies to ALL Federal contracts and subcontractors (DBE & non-DBE alike)
- Payment required to subcontractor firms no later than 30 days after Owner/Agency pays Prime for satisfactory completion and acceptance of work.

The Port of Seattle's Prompt Pay is 10 days

“Satisfactory Completion” is defined in (26.29(c)) as “...all the tasks called for in the subcontract have been accomplished and documented as required by the recipient. When a recipient has made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed.”

- The Davis Bacon Act (Davis Bacon, or DBA) was passed by Congress [during the Great Depression](#) to protect workers from low pay due to intense competition for public works projects

What is certified payroll reporting?

Davis Bacon requires contractors who win a bid on a federally-funded construction contract over \$2,000 to pay their laborers the local prevailing wage and fringe benefits for their work, and to complete a certified payroll report for those employees.

- Certified payroll is a federal form WH-347, submitted weekly to the agency overseeing a government contract
 - The form lists every employee, their **wages**, the benefits they're entitled to, the type of work they did, and the hours they worked. It shows withholdings and gross **wages** and includes a statement of compliance
- The primary purpose is to provide the government with a method of oversight to guarantee that its contractors compensate employees "prevailing **wages**" in accordance with **requirements**

49 CFR 26.53

DBE can not be terminated for convenience

- DBE firm fails or refuses to execute a written contract
- DBE firm fails or refuses to meet the prime contractor's reasonable, non-discriminatory bond requirements
- DBE firm becomes bankrupt, insolvent or exhibits credit unworthiness.
- DBE firm fails or refuses to perform their scope of work as in the contract with normal industry standards (including safety issues)
- DBE firm becomes ineligible to work on the project because of suspension or debarment (49 CFR 26.53[f])



Termination and Replacement Process

- Keep the Owner/Agency abreast of all issues
 - *When terminating or reducing scope of work of an DBE, project personnel must be sure to comply with the 5-day notice requirement in 49 CFR 26.53(f)(4) and any projects or Owner/Agency specific requirements. The DBE Manager and/or DBE Representative assigned must be consulted to ensure proper compliance*
 - Provide the DBE firm with written notice of the intent to terminate, copying the Owner/Agency. The DBE firm has five days to respond unless it is a safety issue which they can be removed from the job site first, then proceed with termination process
- Must make good faith effort to replace a DBE firm with a DBE firm
- Prime Contractor and/or DBE subcontractor must receive the written consent from the Owner/Agency, in order to terminate/replace a DBE



WHAT IS FRAUD??

- Involves the intent to deceive, often characterized by altering or concealing documents.
- Deliberate attempts to get around the intent of the M/W/DBE program.
- May lead to criminal prosecution of the individual or both the Prime Contractor and the M/W/DBE firm.

Note: Those who falsely claim credits under the program to obtain federal funds victimize both the businesses that the program is designed to assist and the American taxpayers.

Red Flag Indicators of DBE/ACDEBE Fraud

- Lack of expertise and technical ability
- Employee shuttling between prime & sub
- Vehicle(s) with magnetic signs or odd paintjobs
- Payment by prime for necessary supplies
- Prime facilitates purchase of DBE-owned business
- Absentee Superintendent/Foreman on worksite
- Prime always uses same DBE
- Odd Financial agreements between Prime and DBE
- Joint bank accounts (Prime/DBE firm)
- No written contracts

\$1 Million Settlement Reached With Illinois Business for Role in Alleged DBE Fraud Scheme

On May 27, 2020, Williams Brothers Construction, Inc. (WBCI) agreed to a \$1 million settlement related to disadvantaged business enterprise (DBE) fraud investigation involving the Metropolitan Airport Authority of Peoria (MAAP) in Peoria, Illinois, on an airport project funded through the American Recovery and Reinvestment Act (ARRA). The settlement resolves claims arising from WBCI's construction of a new terminal building at the MAAP using Federal Aviation Administration grant funds.

The United States contends that WBCI knowingly made false representations regarding its plans to use a DBE on the project and then falsified documents to make it appear that an eligible business performed window, glazing, and curtain wall work. Instead, WBCI allegedly used that business only as a pass-through and had the work completed by an ineligible company. The claims resolved by the settlement are allegations only, and there has been no determination of liability.

United States Department of Transportation (USDOT) –US Office of Civil Rights
DBE Program

<https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise>

Office of Minority Women’s Business Enterprise (OMWBE) Washington

<https://omwbe.wa.gov/>

49 CFR Part 26 - https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26_main_02.tpl

Department of Labor – www.dol.gov

DBE Project Oversight is a Team Effort!

The DBE Program works best when Owners, Agencies, Primes and DBE Firms know, understand and apply the regulations.

Involve DBE Manager/Representative, Project Inspectors, Construction Managers, Project Engineers, Procurement/Finance Specialists, Attorneys, etc.

Mian Rice – Diversity in Contracting Director

Rice.M@portseattle.org

Tamaka Thornton – DBE Program Manager

Thornton.T@portseattle.org

Lawrence Coleman – WMBE Program Manager

Coleman.L@portseattle.org

Tina Boyd – WMBE and Disadvantaged Business Coordinator

Boyd.T@portseattle.org

Michael Roberson – Sr. Administrative Assistant

Roberson.M@portseattle.org

