

# ALABAMA DEPARTMENT OF TRANSPORTATION

DATE: February 20, 2014

Special Provision No. 12-0095

EFFECTIVE DATE: April 1, 2015

SUBJECT: Disadvantaged Business Enterprise (DBE).

Alabama Standard Specifications, 2012 Edition, SECTION 111 shall be revised as follows:

## SECTION 111 Disadvantaged Business Enterprise (DBE)

### 111.01 Goals.

This contract contains a specific goal for the participation of certified DBEs. The goal is expressed as the percentage of the total amount of the contract that is required for DBE participation and is given in the proposal. This type of participation is defined as Race Conscious.

If no specific percentage is indicated in the proposal, then any DBE firm utilized for work in this contract is defined as Race Neutral. The requirements listed in Article 111.08 and 111.09 still apply to contracts with no specific goal. In addition, any participation by DBEs above the required goal is also defined as Race Neutral.

### 111.02 Certification.

The Department maintains a current listing of certified DBE firms by categories of work. The Department's certification extends only to the requirements of 49 CFR 26 with regard to business size, disadvantaged status, and ownership and control of business. The certification does not attest in any way to the capabilities or capacity of any business to perform satisfactorily.

DBE firms that are not on the current certification list must seek approval prior to tendering an offer on any project.

### 111.03 Low Bidder Submittal DBE Utilization Plan.

This contract will be awarded to the lowest responsible bidder. The apparent low bidder must submit within seven calendar days of the letting date the following information in writing on Form OE-110 (DBE Utilization Plan) provided by the Department:

- the name and address of the DBE firm or firms;
- the description of the work to be subcontracted;
- the dollar amount of the work;
- a written commitment from the bidder to use the DBE;
- a written confirmation from the DBE that it is participating in the contract as provided in the commitment.

### 111.04 Failure by Low Bidder to Meet DBE Goal.

In the event the apparent low bidder cannot meet the DBE goal, the low bidder must provide documentation that good faith efforts were made to meet the goal.

### 111.05 Good Faith Efforts by Low Bidder.

#### (a) Solicitation of DBE Participation.

A good faith effort is soliciting through all reasonable and available means (e.g., attendance at pre-bid meetings, advertising, written notices, corresponding with the ALDOT's DBE Program Coordinator, placing postings on the Small Business Network of Bid Express) 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 Contract Work to Facilitate DBE Participation.**

A good faith effort is 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 in to economically feasible units to facilitate DBE participation, even when the bidder might otherwise prefer to perform these work items with its own forces.

**(c) Providing Information About Contract Requirements.**

A good faith effort is 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.**

A good faith effort is 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.

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 bidder to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Bidders are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

**(e) Investigating the Capabilities of a DBE to Perform the Work.**

A good faith effort is establishing sound reasons (based on a thorough investigation of the capabilities of a DBE to perform the work) for rejecting a DBE as being unqualified. The bidder's standing within its industry, and membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. nonunion employee status) are not legitimate causes for the rejection or nonsolicitation of bids in the bidder's efforts to meet the project goal.

**(f) Providing Assistance in Obtaining Bonding, Credit, and Insurance.**

A good faith effort is providing assistance to interested DBEs in obtaining bonding, lines of credit, or insurance as required by the DBE or bidder.

**(g) Providing Assistance in Obtaining Equipment, Supplies, and Materials.**

A good faith effort is providing assistance to interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

**(h) Utilizing Industry, Governmental, and Service Groups.**

A good faith effort is effectively using the services of available 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.

## **111.06 Evaluation of Low Bidder's Good Faith Efforts.**

The Department has established a "Good Faith Efforts Committee".

If the Good Faith Efforts Committee determines the information and documentation from the bidder are satisfactory, the bid will be declared responsible. Acceptable good faith efforts may include activities in addition to those that are described in Article 111.05 and 49 CFR Part 26 Appendix A. A low bidder's good faith efforts on other ALDOT construction contracts may be considered in determining the acceptability of the low bidder's good faith efforts to meet current participation goals.

If the information and documentation are unsatisfactory, the bidder will be notified in writing within five days. The bidder will be given the opportunity to appear before the Department's Transportation Director to present additional evidence of good faith efforts. The bidder will then be given a written decision on the outcome of the consideration of this evidence.

Failure to meet the contract goal or demonstrate good faith efforts will result in the bid being declared to be in default and the bid bond shall be forfeited.

### **111.07 DBE Termination After Award of the Contract.**

#### **(a) Notification of Termination.**

A prime contractor cannot terminate a DBE subcontractor listed on the DBE Utilization Plan for convenience and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without the Department's prior written consent. If a listed DBE subcontractor fails to perform, or performs unsatisfactorily, the prime contractor will notify the Project Manager in writing, with a copy to the Construction Engineer, stating the reasons for termination with supporting documentation.

#### **(b) Substitution of New DBE for Terminated DBE.**

If the reasons for termination are satisfactory, the prime contractor will be required to obtain a substitute DBE and submit a revised DBE Utilization Plan, or demonstrate good faith efforts as described in Articles 111.05 and 111.06 in trying to obtain a substitute DBE. If the prime contractor fails or refuses to comply, the Department reserves the right to issue a warning letter as defined in the DBE Violations (Article 111.09) and/or an order stopping all or part of the payment and work until satisfactory action has been taken.

### **111.08 Credit for Work Assigned to Meet the DBE Goal.**

#### **(a) Value of Work Performed by a DBE.**

##### **1. Work Done Directly by DBE Forces.**

The dollar amount of that portion of a construction contract that is performed by the DBE's own forces will be counted towards meeting the DBE goal. This dollar amount shall include the cost of supplies and materials obtained by the DBE for the work of the contract, including equipment leased by the DBE. This dollar amount shall not include supplies, materials, and equipment the DBE purchases or leases from the prime contractor or affiliates of the prime contractor. (The term "affiliates" is defined in Subarticle 102.02(a)).

##### **2. Fees and Commissions Charged by a DBE.**

The dollar amount of fees or commissions charged by a DBE firm for providing a service, such as professional, technical, consultant, or managerial service, or for providing bonds or insurance specifically required for the performance of the contract will be counted towards meeting the DBE goal. The fee shall be reasonable and not excessive as compared with fees customarily paid for similar services.

##### **3. DBE Obtaining a Subcontract with Lower Tier Subcontractor.**

When a DBE subcontracts part of the work of its subcontract to another firm, the value of this work will be counted toward the DBE goal if the DBE's subcontractor is a DBE.

Work that a DBE subcontracts to a non-DBE firm will not be counted toward the DBE goal.

#### **(b) Joint Venture.**

When a DBE performs as a participant in a joint venture, the dollar amount of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces will be counted toward DBE goal.

#### **(c) Commercially Useful Function.**

##### **1. Requirement for a Commercially Useful Function.**

The dollar amount of contract work performed by a DBE will only count towards meeting the DBE goal if the DBE performs a "commercially useful function".

##### **2. Definition of a Commercially Useful Function.**

A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing,

and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. The determination of whether or not a DBE is performing a commercially useful function will be based on 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.

3. Extra Participation (Not a Commercially Useful Function).

A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. The determination of whether or not a DBE is an extra participant will be based on similar transactions, particularly those in which DBEs do not participate.

4. Insufficient Participation (Not a Commercially Useful Function).

If a DBE does not perform or exercise responsibility for at least 30 % of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work than would be expected on the basis of normal industry practice for the type of work involved, the DBE is not performing a commercially useful function.

5. Consideration of Trucking as a Commercially Useful Function.

The following factors will be given consideration in determining whether or not a DBE trucking company is performing a commercially useful function:

a. Responsibility for Management and Supervision of Trucking.

The DBE 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 DBE goals.

b. Truck Ownership and Operation.

The DBE must own and operate at least one fully licensed, insured, and operational truck used on the contract.

c. Credit for Transportation Services.

The DBE will receive 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.

d. Leasing from DBE Firm.

The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE will receive credit for the total value of the transportation services the lessee DBE provides on the contract.

e. Leasing from Non-DBE Firm.

The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a DBE.

f. Exclusive Use of Truck During Lease.

To receive credit for trucking, it must be clearly shown on a lease that the DBE has exclusive use of, and control over the truck. This does not preclude the leased truck from being used for work for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

g. Lease Agreement Documentation

A copy of each lease agreement, both for DBE firms and non-DBE firms, must be submitted with the DBE Utilization Plan if the DBE Trucking company intends on utilizing

a this type of trucking participation or with the first Form DBE-10 submittal after the lease agreement is executed and utilized on the contract.

6. Consideration of Appeal by DBE that Work is a Commercially Useful Function.

When it is determined that a DBE is not performing a commercially useful function the prime contractor and the DBE will be given the opportunity to provide documentation to rebut this determination.

The Department's decisions concerning commercially useful functions are subject to review by other entities but are not administratively appealable to the USDOT.

**(d) Materials and Supplies Counted Toward Meeting the DBE Goal.**

1. DBE Manufacturer.

If the materials or supplies are obtained from a DBE manufacturer, 100 % of the cost of the materials or supplies will be counted toward meeting the DBE goal.

A DBE manufacturer shall be defined as 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.

2. DBE Regular Dealer.

If the materials or supplies are purchased from a DBE regular dealer, 60 % of the cost of the materials or supplies will be counted toward meeting the DBE goal.

A DBE regular dealer shall be defined as 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.

To be a DBE regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.

A person may be a DBE regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. In addition, the regular dealer, with the exception of steel, must be certified in accordance with the Department's program for the Materials, Sources and Devices with Special Acceptance Requirements Manual.

Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not DBE regular dealers.

3. Brokers

With respect to materials or supplies purchased from a DBE which is neither a DBE manufacturer nor a DBE regular dealer, 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, will count toward the DBE goal if the fees are reasonable and not excessive as compared with fees customarily allowed for similar services.

The cost of the materials and supplies will not be counted toward the DBE goal.

**(e) Certification at the Time of the Execution of the Contract.**

If a firm is not currently certified as a DBE at the time of the execution of the contract, the firm's participation in the contract will not be counted toward the DBE goal.

When a prime contractor has made a commitment to using an ineligible firm (one decertified by the Department) and a subcontract has not been executed before the Department issued the decertification notice, work by the ineligible firm does not count toward the contract goal. The prime contractor must meet the contract DBE goal with an eligible DBE firm or demonstrate that he has made good faith efforts to do so.

If a prime contractor has executed a subcontract with an ineligible firm before the Department issued the decertification notice, the prime contractor may continue to use the firm on the contract and may continue to count the firm's participation toward the contract DBE goal.

**(f) Payments Considered Applicable to the DBE Goal.**

The participation of a DBE subcontractor toward meeting the DBE goal will only be counted toward the goal after the compensation for the work has been paid to the DBE.

**(g) Reporting DBE Performance.****1. Monthly Estimate Report.**

To document the DBE participation for the contract, the prime contractor shall furnish the Project Manager an ALDOT FORM DBE-10 for each estimate period. In the case of contracts with more than one project, a Form DBE-10 shall be submitted for each project estimate. The prime contractor shall provide the required data for each DBE active on the project during the estimate period. If no DBE was active during the time period, such indication should be made on the form.

Form DBE-10 shall be submitted on all Federal aid projects regardless of whether or not the contract contains a specific DBE goal.

The Form DBE-10 shall be submitted within sixty calendar days of the close of the estimate period for which it applies. Failure to furnish the Form DBE-10 in a timely manner may result in the withholding of further monthly estimates until the delinquent information has been submitted.

**2. Monthly Estimate Documentation.**

For DBE Manufacturers, Dealers, and Broker (including any fee/commission service work), a copy of the paid invoice shall be submitted with the DBE-10 form work for which the work performed and services provided applies. For DBE Truckers who haul materials from a commercial facility such as a quarry to the plant for stocking purposes for the production of materials for the contract, a copy of each haul ticket shall be provided to the Project Manager with the DBE-10 form. This documentation is to verify the work performed for this contract.

**3. Final Report.**

Prior to the submission of the final estimate voucher for signing, the prime contractor shall furnish a final Form DBE-10 for each DBE subcontractor. This final Form DBE-10 shall be submitted to document any changes in the quantities of work performed by the DBE since the project completion due to the final quantities review and resulting payment adjustments. This form shall be submitted with the information required in Subarticle 109.12(c).

**4. Certification of Actual Payments Form.**

Prior to the submission of the final estimate voucher for signing, the prime contractor shall furnish a Certification of Actual Payments to DBE Firms form for each DBE subcontractor. This form shall be submitted with the signature of an authorized representative of the DBE in order to document the total amount paid to the DBE firm as indicated on the final Form DBE-10. In the event that the DBE firm has gone out of business and is unavailable to sign the form, the prime contractor shall submit copies of the subcontractor estimates and cancelled checks verifying the amount paid to the DBE firm. This form shall be submitted with the information required in Subarticle 109.12(c).

**111.09 DBE Violations.****(a) Descriptions of Violations.****1. Violations by Bidders and Prime Contractors.**

Possible violations by bidders and prime contractors include, but are not limited to, failure to provide the DBE Utilization Plan within seven calendar days of the letting date, failure to meet the contract goal, failure to make good faith efforts, deleting DBE subcontractors for convenience, improper DBE participation credit reports, continued failure to furnish Form DBE-10 reports, failure to comply with Department decisions and directives concerning DBE activities, and fraud.

**2. Violations by DBE Subcontractors.**

Possible violations by DBE subcontractors include those listed in 49 CFR Part 26.107 as well as failure to fulfill contract commitments and negotiations.

**3. Determination of Violations.**

These violations are only possible examples and not all inclusive. The Department reserves the right to determine exact violations and the extent of each violation on a case-by-case basis.

**(b) Violations Prior to Award of the Contract.**

Failure by the apparent low bidder to provide the DBE Utilization Plan within the time frame specified, or failure of the apparent low bidder to make and document good faith efforts will result in the contract not being awarded to that bidder and forfeiture of its bid bond.

The next low bidder will become the new low bidder and will have seven calendar days from notification by the Department to provide the DBE Utilization Plan. Failure to provide the required DBE Utilization Plan or to make and document good faith efforts will result in the contract not being awarded to that bidder and forfeiture of its bid bond.

If the contract is awarded to the next low bidder, the original low bidder will be prohibited from doing any work relating to the contract either as subcontractor or in any other capacity.

These restrictions shall apply to any other name under which the same person, individual, partnership, company, firm, corporation, association, cooperative, affiliate, or other legal entity may be operating, and in which the principal owner(s) are involved.

**(c) Violations While the Contract is in Effect.**

For the first violation of the DBE requirements, a letter will be written to the prime contractor and/or the DBE, if applicable, citing the violation and warning that failure to rectify the violation or further violations will result in disqualification as outlined in Subarticle 102.02(b).

The second violation will result in the prime contractor and/or the DBE subcontractor being disqualified as outlined in Subarticle 102.02(b) for an indefinite period. The disqualification may be reviewed each six months, if requested in writing by the disqualified firm.

The third violation will result in the prime contractor and/or the DBE subcontractor being disqualified as outlined in Subarticle 102.02(b) for an indefinite period. The disqualification will be for at least one year. It may be reviewed after one year, if requested in writing by the disqualified firm.

An exception to the above is that an open and flagrant violation. The prime contractor and/or the DBE subcontractor will not be issued a warning letter, and the prime contractor and/or DBE subcontractor will be summarily disqualified as outlined in Subarticle 102.02(b) for at least six months. The disqualification may be reviewed after such time, if requested in writing by the disqualified firm. If applicable, the DBE subcontractor's continued status as a certified DBE will be recommended to the Department's DBE Review Committee for review.