

*Delete Section 120 in its entirety and replace with the following:*

**SECTION 120**

**DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM**

**120-1.01 DESCRIPTION.** Provide Disadvantaged Business Enterprises (DBEs), as defined in Title 49 CFR Part 26, the opportunity to participate fairly with other contractors in the performance of contracts financed with federal funds. The Contractor and subcontractors shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Contractor will carry out applicable requirements of 49 CFR Part 26 in the award and administration of U.S. DOT assisted contracts.

The Department, in coordination with the Federal Highway Administration (FHWA), adopted a Race-Neutral DBE Program with an overall DBE Utilization Goal of 8.46% for Alaska's FHWA Federal-Aid program. Although the Race-Neutral program does not establish or require individual project DBE Utilization Goals, 49 CFR establishes the Bidder is responsible to make a portion of the work available to DBEs and to select those portions of the work or material needs consistent with the available DBEs to facilitate DBE participation.

If the Department, in collaboration with our contractors, does not meet the overall program DBE Utilization Goal and cannot demonstrate good faith effort to meet the program goal, the program may be modified to Race-Conscious, with individual DBE Utilization Goals established for each Federal-Aid project. The Department and FHWA will use the data collected under Section 120 to evaluate the program for compliance with Section 120 and with 49 CFR Part 26.

**120-1.02 INTERPRETATION.** This section implements the requirements of 49 CFR Part 26, and the Department's federally approved DBE Program.

**120-1.03 ESSENTIAL CONTRACT PROVISION.** Failure to comply with the provisions of this section is a material breach of contract, which may result in cancelation of intent to award, contract termination, or other remedy as DOT&PF deems appropriate. Failure to comply with this section is justification for debarment action as provided in AS 36.30.640(4).

**120-1.04 DEFINITIONS AND TERMS.**

1. **Civil Rights Office.** The Department's Civil Rights Office. (CRO)
2. **Commercially Useful Function.** Action within the scope of the Contract where a Disadvantaged Business Enterprise (DBE) is responsible for execution of the work and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. 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.
3. **Contract Compliance Officer.** Individual within the Department's CRO with the authority to administer the Department's compliance programs.
4. **Disadvantage Business Enterprise (DBE).** A commercial entity which is a for-profit small business certified in accordance with 49 CFR Part 26 and listed in the Alaska DBE Directory.

5. **DBE Broker.** A DBE certified for the delivery of creditable materials, supplies, equipment, transportation/hauling, insurance, bonding, etc., within its certified category, that is necessary to complete the project. A DBE Broker of materials certified in a supply category must be responsible for scheduling the delivery of materials and ensuring that the materials meet specifications before credit will be given.
6. **DBE Key Employee.** Employee of the DBE who is identified by the DBE owner in the DBE's certification file at the CRO.
7. **DBE Manufacturer.** A DBE certified in a supply category that changes the shape, form, or composition of original material in some way. The DBE Manufacturer must provide that altered material to the general public or the construction industry at large on a regular basis.
8. **DBE On-Site Representative.** On-site representatives approved by the DBE owner and the CRO to represent a DBE owner. These representatives must have technical knowledge and the ability to answer questions regarding the work being performed on a project.
9. **DBE Regular Dealer.** A DBE certified in a supply category who operates in a manner consistent with industry practice and who:

- a. maintains an in-house inventory on a regular basis of the particular product provided to this project; and
- b. keeps an inventory in an amount appropriate for the type of work using that product; and
- c. offers that inventory for sale to the general public or construction industry at large (private and public sectors), not just supplied as needed on a project by project basis during the construction season, except where the product requires special or heavy equipment for delivery and the DBE possesses and operates this equipment on a regular basis throughout the construction season in order to deliver the product to the general public or construction industry at large. If the distribution equipment is rented or leased, it must be on a repetitive, seasonal basis; and may additionally fabricate (assemble large components) for use on a construction project, consistent with standard industry practice, for delivery to the project.

A person may be a DBE Regular Dealer in bulk items such 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 DBE Regular Dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

10. **DBE Utilization Goal.** The percent of work to be performed by certified DBEs.
11. **DBE Officer.** Individual designated in writing as a representative of the Contractor concerning DBE issues.
12. **Good Faith Effort (GFE).** Bidder's actions, performed prior to bid opening and demonstrated through detailed and comprehensive documentation, to take all necessary and reasonable steps to achieve DBE participation. Lower case "good faith effort", refers to the Department's and all or contractors' collaborative efforts to meet the overall program DBE Utilization Goal.
13. **Plan Holder Self-Registration List (PHSRL).** The Department's online portal that allows contractors, DBEs and non-DBEs to self-register as an interested contractor to bid.
14. **Race-Conscious Participation.** DBE participation used to meet an individual project specific DBE Utilization Goal.

15. **Race-Neutral DBE Participation.** DBE participation when no DBE Utilization Goal is specified in the Contract and DBE participation that exceeds the goal amount when an individual project specific DBE Utilization Goal is specified in the Contract.

#### **120-2.01 RESERVED.**

#### **120-3.01 DETERMINATION OF COMPLIANCE.**

1. **Phase I - Bid.** All Bidders' GFEs must be completed prior to bid opening.
2. **Phase II - Award.** The apparent low bidder shall submit evidence of DBE commitment(s) within 5 working days after receipt of written notification by the Department of the successful low bid. The apparent low bidder may not supplement its DBE efforts after opening, nor offer new or additional DBE participation after submitting the DBE Utilization Report (Form 25A-325C).
  - a. **Written DBE Commitment.** Complete Form 25A-326 for each DBE subcontractor.
  - b. **DBE Utilization Report.** Submit a completed DBE Utilization Report Form 25A-325C. All listed DBEs must be certified in the appropriate work categories prior to bid opening to be used to meet the DBE contract goal.
  - c. **GFE Documentation.** Submit a completed Summary of GFE Documentation Form 25A-332A (with attachments) and Contact Report Form 25A-321A.

**120-3.02 GOOD FAITH EFFORT (GFE).** Although evaluation of GFE for sufficiency is not a condition of award, documenting GFE is required and is necessary for the Department's and FHWA's determination of compliance with 49 CFR Part 26.

1. **GFE Criteria.** If the Department does not meet the overall program DBE Utilization Goal, the Department and FHWA will use the following criteria to judge whether the Department, in collaboration with our contractors, demonstrated good faith effort to meet the overall program DBE Utilization Goal.
  - a. **Consider All Subcontractable Items.** Before bid opening, seek DBE participation by considering those portions of the work or material needs consistent with the available DBEs to facilitate DBE participation.
  - b. **Initial DBE Notification.** Contact DBEs listed in the Department's Plan Holders Self-Registration List for the particular project being bid at least 7 calendar days prior to bid opening to solicit their interest. Log each contact with a DBE firm on a Contact Report, Form 25A-321A.

Give DBEs at least 7 calendar days to quote. The bidder may reject DBE quotes received after the deadline. Responsive DBE quotes should be accepted unless they are determined non-competitive. Consistently apply deadlines for quote submission and responsiveness determinations for DBEs and non-DBEs.

Methods of initial and follow up notification are:

- (1) By fax with a confirmation receipt of successful transmission to the DBE's fax number listed in the DBE Directory. A fax transmission without receipt of successful transmission is unsatisfactory.
- (2) By email to the DBE's email address listed in the DBE Directory, with confirmation of successful receipt. Email without confirmation of successful receipt is unsatisfactory.

- (3) By telephone solicitation made to the DBE's telephone number listed in the DBE Directory, with a record of the date and time of the telephone contact. Telephone solicitation without a record of date and time is unsatisfactory.
- (4) By publication, with the names and dates of each advertisement in which a request for DBE participation was placed. Attach copies of advertisements or proof of publication.

c. **Non-Acceptance of DBE Quotes.**

When a DBE quote is not accepted, the work must be performed by the non-DBE subcontractor whose quote was used to provide the basis of the determination or by your own forces if your forces were the basis of the determination. Include evidence in support of the determination not to use the DBE subcontractor.

Payments received by a non-DBE subcontractor during the execution of the Contract shall be consistent with the accepted quote. This does not preclude increases due to change documents issued by the Department.

d. **Assistance to DBEs.** Provide DBEs with:

- (1) Information about bonding or insurance required by the bidder.
- (2) Information about securing equipment, supplies, materials, or business development related assistance or services.
- (3) Adequate information about the requirements of the contract regarding the specific item of work or service sought from the DBE.
- (4) Document all efforts to provide assistance to DBEs on Federal-Aid projects.

e. **Follow-up DBE Notifications.** If there is no response from the initial DBE notification, contact the DBEs again to determine if they will be quoting.

Failure to submit a quote by the deadline is evidence of the DBE's lack of interest in bidding. Log follow-up contacts on the Contact Report Form 25A-321A.

f. **GFE Evaluation.** The Department will review the GFE documentation for content but will not evaluate sufficiency. Failure to provide GFE documentation may result in cancellation of the notice of intent to award and forfeiture of the bid security according to subsection 103-1.03.

2. **Reserved.**

**120-3.03 DBE CREDITABLE AND NON CREDITABLE WORK.**

1. **DBE Creditable Work.** The Commercially Useful Function work items and creditable dollar amounts shown on the DBE Utilization Report, Form 25A-325C, shall be included in any subcontract, purchase order or service agreement with that DBE.

2. **DBE Decertification.**

a. If a DBE performing a Commercially Useful Function loses its DBE certification at any time prior to execution of a subcontract, purchase order or service agreement, as the result of a determination of ineligibility pursuant to 49 CFR Part 26.87, the work of that firm will not be credited toward the DBE Utilization Goal and the Contractor must either:

- (1) meet the contract goal by subcontracting with an eligible DBE firm or demonstrate a GFE to do so; or

- (2) continue with the decertified DBE and find other work not already committed to DBEs in an amount that meets or exceeds the DBE Utilization Goal.
- b. If a DBE performing a Commercially Useful Function loses its DBE certification after execution of a subcontract, purchase order or service agreement, as the result of a determination of ineligibility pursuant to 49 CFR Part 26.87, the de-certified DBE may continue to perform, and the work may be credited toward the DBE Utilization Goal.
- c. If a DBE goes out of business and cannot perform the work, the Contractor must meet the contract goal by subcontracting with an eligible DBE Firm or demonstrate a GFE to do so.

The provisions of 120-3.03(3) Termination of a DBE and 120-3.03(4) DBE Replacement or Substitution do not apply to this section.

A Contractor must notify the CRO within one business day if they become aware of any change in a DBE's circumstances that might lead to a DBE's decertification.

### 3. **Termination of a DBE.**

- a. In accordance with 49 CFR 26.53(f)(1) the Contractor shall not terminate a DBE without good cause and the prior written consent of the Engineer. For purposes of this paragraph, good cause includes the following circumstances:
  - (1) DBE defaults on their obligation for any reason;
  - (2) The DBE fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE to perform its work on the subcontract results from the bad faith or discriminatory action of the Contractor.
  - (3) The DBE fails or refuses to meet the Contractor's reasonable, nondiscriminatory bond requirements;
  - (4) The DBE becomes bankrupt, insolvent, or exhibits credit unworthiness;
  - (5) The DBE is ineligible to work on public works projects because of suspension and debarment proceedings pursuant 2 CFR Parts 180, 215, and 1,200 or applicable state law;
  - (6) The Engineer determines the DBE is not a responsible contractor.
  - (7) The DBE voluntarily withdraws from the project and provides a written notice of its withdrawal;
  - (8) The DBE is ineligible to receive DBE credit for the type of work required;
  - (9) A DBE owner dies or becomes disabled with the result that the DBE is unable to complete its work; or
  - (10) Other documented good cause that the Engineer determines, compels the termination of the DBE, provided that good cause does not exist if the Contractor seeks to terminate a DBE it relied upon to obtain the contract so that the Contractor can self-perform the work for which the DBE was engaged or so that the Contractor can substitute another DBE or non-DBE after contract award.
- b. The Contractor must give written notice to the DBE of its intent to request to terminate and/or substitute, and the reason for the request. The request to terminate and/or substitute must be submitted to the Engineer.

- c. The Contractor must give the DBE 5 working days to respond to the written notice. Any response from the DBE must be submitted to the Engineer.

**4. DBE Replacement or Substitution.**

- a. The Contractor shall submit to the Engineer a written request to replace or substitute a DBE who fails or refuses to execute a written subcontract or who is terminated under 120-3.03(3).
- b. If the Contractor cannot obtain replacement DBE participation, the DBE Utilization Goal will not be adjusted. However, the Engineer may consider the following criteria as satisfying that portion of DBE participation that cannot be replaced:
  - (1) The Contractor was not at fault or negligent and that the circumstances surrounding the replacement or substitution were beyond the control of the Contractor; and
  - (2) The Contractor is unable to find replacement DBE participation at the same level of DBE commitment and has adequately performed and documented the GFE expended in accordance with Subsection 120-3.02; or
  - (3) It is too late in the project to provide any real subcontracting opportunities for DBEs.

If the Engineer agrees that additional DBE participation is not available, the DBE may be replaced or substituted with a non-DBE or the Contractor may self-perform the work.

**120-3.04 COMMERCIALLY USEFUL FUNCTION (CUF).**

- 1. **Creditable Work.** Measuring the DBE Utilization Goal will be based upon the actual dollars paid to the DBEs for creditable CUF work on this project. This is determined by the Engineer in accordance with this section. CUFs are limited to:
  - a. Prime Contractors;
  - b. Subcontractors;
  - c. Manufacturers;
  - d. Regular Dealers;
  - e. Brokers; or
  - f. Joint Ventures
- 2. **Determination of CUF.** In order for the CUF work of the DBE to be credited toward the goal, the Contractor will ensure that the DBE is certified in the appropriate category at the time of the submittal of the subcontract, or the issuance of a purchase order or service agreement. Subcontracts, purchase orders and service agreements shall be consistent with the written DBE commitment.
  - a. The CUF performed by a DBE certified in a supply category will be evaluated by the Engineer to determine whether the DBE performed as either a broker, regular dealer, or manufacturer of the product provided to this project.
  - b. The following factors will be used in determining whether a DBE trucking company is performing a CUF:

- (1) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is performing on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
  - (2) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
  - (3) The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
- c. The Contractor will receive credit for the CUF performed by DBEs as provided in this Section. Contractors are encouraged to contact the Engineer in advance of the execution of the DBE's work or provision of goods or services regarding CUF and potential DBE credit.
- d. The DBE may perform work in categories for which it is not certified, but only work performed in the DBE's certified category meeting the CUF criteria may be credited toward the DBE Utilization Goal.
- e. DBE work shall conform to the following requirements to be a CUF:
- (1) It will be necessary and useful work required for the execution of the Contract.
  - (2) The scope of work will be distinct and identifiable with specific contract items of work, bonding, or insurance requirement.
  - (3) It will be performed, controlled, managed, and supervised by employees normally employed by and under the control of the certified DBE. The work will be performed with the DBE's own equipment. Either the DBE owner or DBE On-Site Representative will be at the work site and responsible for the work. Leased equipment may also be used provided the DBE has exclusive use of the equipment and it is operated by a driver the DBE employs. In remote locations or rare situations, a DBE may use equipment and/or personnel from the Contractor or its affiliates. Should this situation arise, a prior arrangement must be in place. The duration of the arrangement must be short term and prior written approval from the Engineer must be obtained.
  - (4) The manner in which the work is sublet or performed will conform to standard industry practice within Alaska, as determined by the Department. The work or provision of goods or services will have a market outside of the DBE program (and must also be performed by non-DBE firms within the Alaskan construction industry). Otherwise, the work or service will be deemed an unnecessary step in the contracting or purchasing process and no DBE credit will be allowed.

There will be no DBE credit for lower-tier non-DBE subcontract work.

- (5) The cost of the goods and services will be reasonable and competitive with the cost of goods and services outside the DBE program within Alaska. Materials or supplies needed as a regular course of the Contractor's operations such as fuel, maintenance, office facilities, portable bathrooms, etc. are not creditable.

The cost of materials actually incorporated into the project by a DBE subcontractor is creditable toward the DBE goal only if the DBE is responsible for ordering and scheduling their delivery and fully responsible for ensuring that they meet specifications. The cost of materials purchased from the contractor or its affiliates is not creditable.

- (6) Subcontract work, with the exception of truck hauling, shall be sublet by the same unit of measure as is contained in the Bid Schedule unless approved in advance by the Engineer.
- (7) The DBE will control all business administration, accounting, billing and payment transactions. The Contractor cannot perform these functions for the DBE.

In accordance with AS 36.30.420(b), the Engineer may inspect the offices of the DBE and audit their records to assure compliance.

3. **Rebuttal of a Finding of No CUF.** Consistent with the provisions of 49 CFR Part 26.55(c)(4)&(5), before the Engineer makes a final finding that no CUF has been performed by a DBE, the Engineer will coordinate transmittal of the presumptive finding to the Contractor, who will in-turn, notify the DBE. The Contractor will provide the DBE the opportunity to provide rebuttal information. The Contractor shall present the information to the Engineer.

The Engineer will make a final determination on whether the DBE is performing a CUF. Under no circumstances will the Contractor take any action with respect to the DBE until the final determination is made. The Engineer's decisions on CUF matters are subject to review by the Department, but are not administratively appealable to the U.S. DOT.

4. **Monthly Required Reporting.** On a monthly basis, the Contractor shall submit the Monthly Summary of DBE Participation, Form 25A-336, to the Engineer. Reports are due by the 15<sup>th</sup> of the following month. Also attach copies of canceled checks or bank statements that identify payer, payee, and amount of transfer to verify payment information shown on the form.

**120-4.01 DETERMINING DBE CREDIT.** The Contractor is entitled to count toward the DBE Utilization Goal, monies actually paid to certified DBEs for CUF work performed by the DBE as determined by the Engineer. The Contractor will receive credit toward the DBE Utilization Goal, as follows:

1. Credit for the Commercially Useful Function of a DBE prime contractor is 100 percent of the monies actually paid to the DBE under the contract for creditable work and materials in accordance with 49 CFR Part 26.55.
2. Credit for the CUF of a subcontractor is 100 percent of the monies actually paid to the DBE under the subcontract for creditable work and materials.
3. Credit for the CUF of a subcontractor performing hauling/transportation is 100 percent of the monies actually paid to the DBE under the subcontract for creditable work for those firms certified in the 100 percent category. Credit for the CUF of a subcontractor performing hauling/transportation is 5 percent of the monies actually paid to the DBE under the subcontract for creditable work for those firms certified in the 5 percent credit category.
4. Credit for the CUF of a manufacturer is 100 percent of the monies paid to the DBE for the creditable materials manufactured.
5. Credit for the CUF of a regular dealer of a creditable material, product, or supply is 60 percent of its value. The value is the actual cost paid to the DBE not to exceed the bid price for such item.
6. Credit for the CUF of a broker performed by a DBE certified in a supply category for providing a creditable material, product or supply is limited to a reasonable brokerage fee. The brokerage fee will not exceed 5 percent of the cost of the procurement contract for the creditable item.
7. Credit for the CUF of a broker performed by a DBE certified in a bonding or insurance category is limited to a reasonable brokerage fee, not to exceed 5 percent of the premium cost.



8. Credit for the CUF of a joint venture (JV) either as the prime contractor or as a subcontractor may not exceed the percent of the DBE's participation in the JV agreement, as certified by the CRO. The DBE joint venture partner will be responsible for performing all of the work as delineated in the certified JV agreement.

**120-5.01 ACHIEVEMENT OF DBE GOALS.** Work under this item is subsidiary to other contract items and no payment will be made for meeting or exceeding the DBE Utilization Goal.

If the Contractor fails to utilize the DBEs listed on Form 25A-325C as scheduled or fails to submit proof of payment, requested documentation, or otherwise cooperate with a DBE review or investigation, the Department will consider this to be unsatisfactory work. If the Contractor fails to utilize GFE to replace or substitute a DBE, regardless of fault (except for Subsection 120-3.03(4)(b)(3)), the Department will also consider this unsatisfactory work. Unsatisfactory work may result in disqualification of the Contractor from future bidding under Subsection 102-1.13 and withholding or progress payments consistent with Subsection 109-1.06.