

NORTH DAKOTA DEPARTMENT OF TRANSPORTATION SPECIAL PROVISION: DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM

PROJECT _____

RACE/GENDER CONSCIOUS GOAL The DBE goal for this project is: _____%

NDDOT Contact Information	
Contractor Sign In & Submit Advertisements at: https://apps.nd.gov/dot/cr/csi/login.htm	Amy Conklin, DBE Program Administrator 701-328-3116 - or - aconklin@nd.gov
Submit quotes and post bid documentation to: subquotes@nd.gov	Ramona Bernard, Civil Rights Division Director 701-328-2576 - or - rbernard@nd.gov
Search DBE Directory https://dotnd.diversitycompliance.com/	All times are stated in Central Time. The day of the bid opening is not counted as one of the business days.

PURPOSE

These provisions:

1. Provide an explanation of the federal law and outline the obligations to comply with the Federal DBE requirements applicable to this contract,
2. Explain the process NDDOT will follow to evaluate bidders' efforts to obtain DBE participation
3. Provide the standards NDDOT will use to measure compliance with the requirements
4. Identify sanctions for failing to comply with DBE program requirements.

This Special Provision is written per 49 CFR Part 26 and Appendix A – Guidance Concerning Good Faith Efforts (GFE).

Contract award will be made to the lowest responsive bidder whose proposal substantially complies with the requirements prescribed herein, has submitted all required documentation and who has met the goal for DBE participation, or has demonstrated, to the satisfaction of the Department, adequate GFE to do so.

QUOTES:

All DBEs quoting on this project MUST submit all quotes and a list of contractors they quoted to NDDOT no later than 9 PM the day before each bid opening to subquotes@nd.gov

Prime contractors preparing to bid on NDDOT highway projects have requested that quotes be sent to them the day before the bid opening by:

- 2 PM Central - Suppliers (brokers/regular dealers), vendors, & manufacturers
- 5 PM Central - Subcontractors under \$500,000
- 8 PM Central - Subcontractors over \$500,000

REQUIREMENT FOR ALL BIDDERS AT TIME OF BID:

- Must submit SFN 52013 List of Businesses that Submitted Quotes (Form B)
 - Complete form listing information for each subcontractor (DBE and non-DBE) you receive quotes from for this project.
 - The NAICS code to be selected for each firm should match the type of work of the entire project. If more than one type of work is within the project, select the NAICS code that reflects the largest portion of work to be performed overall.
 - Primes may require the information to complete the form to be provided by subcontractors along with their quote. If a subcontractor refuses to provide the information needed note that in the address field. Primes may be asked to provide proof of attempt(s) to collect the data.

ADDITIONAL REQUIREMENTS FOR ALL BIDDERS:

- Must submit Form A (DBE utilization identification) with bid package at the time of bid opening. This is completed as part of your bid in the electronic bidding system, there is not a separate form for it.
 - The DBE participation will be based on the information identified on Form A at the time your bid is submitted. Additional DBE participation attained after the bid opening is acceptable and will count toward the Department's overall goal but will not be counted towards the individual project goal submitted at the time of bid.
 - Example: The project goal is 5.00%, the DBE participation listed on Form A submitted with the bid shows 4.89% and the Form C(s) identify 5.15% DBE participation at time of submission. The Department's view is the project goal has not been met, therefore GFE will be scrutinized on participation at the time of bid listed on Form A.
- Prime contractors are strongly encouraged to submit their bid documentation in one electronic file. Forms incorrectly submitted could result in a technicality, forcing the Department to award to the next responsive bidder.
- Any DBEs used on federal aid projects must be supplied a copy of the Proposed Progress Chart within 7 days of project award.

REQUIREMENTS FOR APPARENT LOW BIDDER (ALB) WHEN THE PROJECT DBE GOAL IS MET AT THE TIME OF BID OPENING:

- Follow both REQUIREMENTS FOR ALL BIDDERS sections above, and in addition, include:
 - Must submit SFN 52160 Notification of Intent to Use (Form C) for any **DBE subcontractor, trucking, manufacturer, or other** categories used in all tiers of subcontracting to meet or exceed the project goal by 4:00 pm CST 2 business days after the bid opening. Applicable quote must be attached to each Form C. Submit Form C(s) for any DBEs added after award.
 - Must submit SFN 62503 Notification of Intent to Use – DBE Regular Dealer/Distributor (Form C) for any **DBE supplier and/or distributor** used in all tiers of subcontracting to meet or exceed the project goal by 4:00 pm CST 2 business days after the bid opening. Applicable quote must be attached to each Form C. Submit Form C(s) for any DBEs added after award.
 - When the goal is met, if required documents are not submitted by the deadline or submitted incorrectly, the Department may consider the bid non-responsive and could be rejected per 102.12 Irregular Bid, NDDOT Standard Specification for Road and Bridge Construction.

REQUIREMENTS FOR ALB WHEN THE PROJECT DBE GOAL IS NOT MET AT THE TIME OF BID OPENING:

- Follow both REQUIREMENTS FOR ALL BIDDERS above, and in addition, include:
- A cover letter, submitted with SFN 60829 Contractor Good Faith Efforts Documentation explaining actions taken attempting to meet the project goal. See Page 3 & 4, questions # 1-9 to help explain your actions in the cover letter. Cover letter and form must be submitted by 4:00 pm CST 2 business days of the bid opening.
- SFN 60829 Contractor Good Faith Efforts Documentation and supporting documentation must be submitted by 4:00 pm CST 2 business days of the bid opening. Failure to demonstrate GFE may cause the Department to "Not Award".
- If a non-DBE is used over a DBE, or a prime is to self-perform, a Bid Differential (BD) table in SFN 60829 should be completed, showing a comparison of like items, (apples to apples) along with the reason for not using the DBE. Primes may need to supplement the DBE or Non-DBE quote to get an apples-to-apples comparison. Any BD that does not clearly address all items quoted by the DBE, the non-DBE, prime or combination of quotes, will not be considered. Applicable copies of quotes must be supplied for each bid differential.
- Must submit Form C (SFN 52160 and/or SFN 62503) for DBE's used in all tiers. Must submit Form C for non-DBE's used in a bid differential. All Form Cs must be received by 4:00 pm CST 2 business days after the bid opening. **Attach quotes for every Form C submitted.**
- When the goal is not met, if required documents are not submitted by the deadline, the Department may consider the bid non-responsive and could be rejected per 102.12 Irregular Bid, NDDOT Standard Specification for Road and Bridge Construction.

REQUIREMENTS FOR NON-ALBs WHEN THE PROJECT DBE GOAL IS NOT MET AT THE TIME OF BID OPENING AND/OR WHEN ALB DOESN'T SUBMIT REQUIRED PAPERWORK:

- When the ALB does not meet goal, or doesn't submit paperwork on time, other bidders may be contacted to submit the applicable ALB documentation. If other bidders are contacted, they have until 4:00 pm CST 5 business days after the bid opening to submit the required documents via email to subquotes@nd.gov to be considered.

GOOD FAITH EFFORTS

The bidder is responsible for taking actions toward achieving the project goal as required by 49 CFR Appendix A to Part 26 – Guidance Concerning Good Faith Efforts. Therefore, it is a bidder's responsibility to either achieve the project goal at the time of bid opening, or to follow a course of actions that would, by their scope, intensity, and appropriateness, reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

NDDOT will measure the bidder's efforts by actions demonstrated/taken prior to submitting their bid. The description and documentation of these efforts must adequately show NDDOT that the bidder took all necessary and reasonable steps to achieve the DBE goal.

The efforts employed by the bidder should be those that one could reasonably expect if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal.

The following questions are not intended to be a checklist or an exhaustive list of what is considered in evaluating GFE, but will help organize your explanation of your efforts to obtain DBE participation in your cover letter.

- 1) Did you use the DBE Directory to solicit DBEs who are certified to perform the work on the project?
 - a. Primes are not required to solicit DBEs that indicate they do not work within North Dakota, however, if a DBE quotes a Prime and their Directory listing indicates they do not work within North Dakota that quote must still be addressed.
- 2) Did you send timely written **email solicitation notices** to certified DBE's?
- 3) Did you maintain a follow-up log to track responses to your initial solicitations?
 - a. For firms that do not respond to your initial solicitation it is required to attempt to contact them at least one more time and document it.
 - b. Initial solicitations must be made via email.
 - i. Follow-ups can be made via email or telephone. For emails, if a read receipt was attached and the DBE firm responded as the email being "read" a follow-up is not required. If a read receipt was not attached and/or the DBE did not respond to the first email a follow-up is required.
 - c. Keep copies of emails as proof, if requested.
- 4) Did you provide DBEs with information about the plans, specifications, and requirements of the contract so they are able to respond to your solicitation in a timely manner?
- 5) Did you solicit DBE participation for work you could have self-performed?
 - a. 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. 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.
- 6) Did you ask your firm's subcontractors to solicit DBE work for the subcontractors' portion of the project?
 - a. Provide documentation within your GFE submission.
- 7) Did you receive and evaluate all DBE quotes?
 - a. The quotes **must be** converted to an acceptable format, whether the quotes are calculated by ton-mile, hour, acre, or square mile.
 - b. Any DBE quote not selected due to Bid Differential must be evaluated properly within the GFE form. **A copy of the DBE and non-DBEs quote must accompany SFN 60829 for each Bid Differential.**
 - c. Complete the
- 8) Did you advertise using one or both of the following options? Submit a copy with your GFE documentation.
OPTION 1: Place an advertisement soliciting DBE participation using the electronic DBE

Advertisement System.

- Submit the required information online at <https://apps.nd.gov/dot/cr/csi/login.htm> no later than noon, 15 calendar days before the bid opening.

OPTION 2: Directly contact by email, all DBEs certified in the specific work type (NAICS) required for the job.

- Make contact with DBEs no later than 5 pm 7 calendar days before the bid opening.
- Use the DBE Directory to determine the DBE firms certified in the work to be subcontracted.

Either method of advertisement must:

- Provide the name, email address, telephone, and fax number of the company contact who will be available to discuss and/or receive quotes.
- Offer assistance to DBEs in interpreting plans; quantities; expected overtime; project scheduling; pit and batch plan locations, length of haul, type of road; method of measurement (seeding by the mile or acre, hauling by hour or by ton-mile) or other issues that may affect a price quote.

9) Did you sign-in?

Indicate your intention to bid and/or receive quotes on specific jobs by using the Department's Bid Opening Sign in System

- The **Bid Opening Sign-In** web application located at <https://apps.nd.gov/dot/cr/csi/login.htm>.

Sign-In opens at 8 am 7 calendar days prior to the bid opening and closes at 11 AM the day before the bid opening.

- Fill in the online form fields as required.
- Log in to download the "Bid Opening Contact Report" at <https://apps.nd.gov/dot/cr/csi/public/listBidOpenings.htm>

EVALUATION OF GOOD FAITH EFFORTS

Proposals may be considered irregular and may be rejected by the Department if there is non-compliance with the DBE requirements, or submitted documentation is incorrect or received after 4:00 pm CST 2 business days after the bid opening. The Department reserves the right to waive minor irregularities and/or certain elements of this special provision.

Federal regulations require the Department to scrutinize a bidder's documented GFE (see appropriate actions on pages 3-4).

If the Committee determines the ALB has adequately demonstrated GFE, the committee will recommend "Award".

If the Committee determines the ALB has not adequately demonstrated GFE, the committee may recommend "Not Award". Some of the factors considered are:

1. Whether the ALB fails to meet the contract goal, but others meet it
2. If the ALB fails to meet or exceed the average DBE participation of other bidders
3. If the ALB fails to submit adequate GFE documentation by 4:00 pm CST 2 business days after the bid opening
4. If the ALB submits no documentation of its GFE
5. If the ALB submits incorrect forms
6. If the Bid Differentials submitted by the ALB are not excessive
7. If the ALB did not address all DBE quotes received
8. If the ALB failed to Sign-In and/or Advertise

Upon notification of a recommendation for a Not Award determination, the Director's designee(s) will consider the Committee's recommendation. If the Designee(s) agrees with the Committee's recommendation, the Designee(s) will contact the ALB to inform them of the determination, the reasons for it, and that administrative reconsideration is available.

Administrative Reconsideration 49 CFR § 26.53 (d)

- An in-person reconsideration meeting is available at the ALB's request.
- The Director's designee(s) will consider any information submitted prior to or presented at the hearing as to whether the ALB met the goal or made adequate efforts to do so.
- The NDDOT reconsideration decision will be made by the Director's designee(s), who will not have taken part in the original determination.
 - If the Director's designee(s) determines the ALB made adequate GFE to meet the goal, the job will be recommended for award.
 - If the Director's designee(s) determines that the ALB has failed to sway the decision from "Not Award", the ALB will receive written notice of the decision.
- Director will make the final decision and may exercise such discretion as deemed appropriate.
- The decision is not subject to administrative appeal to the U.S. Department of Transportation (49 CFR § 26.53(d)(5)).

POST-AWARD REQUIREMENTS

FEDERAL AUTHORITY

It is the prime contractors' responsibility to ensure all tiers of subcontractors, brokers, manufacturers, suppliers, vendors, and regular dealers comply with the requirements of this special provision. In addition, the prime contractor has the responsibility to monitor DBE performance on the project.

PRIME CONTRACTOR'S MONITORING, RESPONSIBILITIES, REPORTING

For the life of the project, the prime contractor is responsible for the DBEs listed on Form C and for the specific spec/code items or products that the prime committed to during the award process.

The prime is responsible to:

- Report payments to all DBEs and non-DBE subcontractors used on the project.
 - See Project Payments Special Provision for more information.
- Invite and encourage all subcontractors and all DBEs listed on Form C to the pre-construction conference.
- Provide minutes to any DBE not in attendance at the pre-construction conference.
- Ensure their firm as well as any subcontractors, manufacturers, and regular dealers/suppliers comply with the requirements of this special provision.
- Provide all DBE firms identified on Form Cs a copy of the Proposed Progress Chart within 7 days of award.
- Maintain project records and documentation of payments to DBEs for three years following acceptance of the final payment from NDDOT (per FHWA-1273, Section II Nondiscrimination #11).
 - This reporting requirement also applies to any certified DBE.
 - NDDOT may perform interim audits of contract payments to DBEs to ensure that the actual amount paid to DBEs equals or exceeds the dollar amount stated on Form C.
 - Make these records available for inspection, upon request, by an authorized representative of the NDDOT or USDOT.

If any requirements are not met, progress payments will be withheld from the prime until completed.

If award of the contract is made based on the contractor's GFE, the goal will not be waived; the contractor must make GFE throughout the duration of the project.

The prime contractor shall not terminate or replace a DBE subcontractor without the Department's prior written consent. 49 CFR 26.53(f)(1)i.

The Department's contract includes a provision stating:

1. That the contractor shall utilize the specific DBEs listed to perform the work and/or supply the materials unless the contractor obtains written consent; and

2. That, unless the Department's consent is provided, the contractor shall not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE.

SFN 60595 - Replacement Approval Request must be submitted and approved prior to replacement of each DBE firm(s), or Non-DBE/BD(s), or any work the prime originally intended to self-perform prior to the commencement of any replacement work. No payment will be made if work commences without written approval.

If the prime has not achieved the goal and additional work becomes available, the prime must follow the replacement approval request process using SFN 60595.

EXCEPTION FOR REPLACEMENTS DUE TO PUBLIC NECESSITY

When replacement work is required as a matter of public necessity, (e.g., safety, storm water issues), the contractor must immediately notify the project engineer and the DBE or Non-DBE/BD intended at the time of award. If the DBE or Non-DBE/BD is unable to perform the work within the time specified by permit or administrative rule, the DBE or Non-DBE/BD must notify the prime immediately; and, within one business day, a written explanation must be submitted to the prime with a copy to the project engineer. The project engineer refers all replacement approval requests to the Assistant District Engineer (ADE). In a case of public necessity, the ADE has the authority to allow the contractor to self-perform the replacement work or to find another contractor to complete it.

TERMINATION FOR CAUSE

A DBE or Non-DBE/BD may not be terminated without the Department's prior written consent. (49 CFR 26.53(f)(1)(I))

The Department will provide such written consent if the Department agrees that the contractor or subcontractor has good cause to terminate the DBE firm or Non-DBE/BD.

Circumstances which may be considered good cause for termination include when the listed DBE or Non-DBE/BD:

- Fails or refuses to execute a written contract
- Fails or refuses to perform the work of its subcontract in a way consistent with the contract and/or with normal industry standards, provided, that good cause does not exist if the failure or refusal of the listed DBE or Non-DBE/BD to perform its work on the subcontract results from the bad faith or discriminatory action of the prime or subcontractor
- Fails or refuses to meet the prime contractor's reasonable nondiscriminatory bond requirements
- Becomes bankrupt, insolvent, or exhibits credit unworthiness
- Is ineligible to work on public works projects because of Federal Highway Administration suspension and debarment proceedings.
- Is ineligible to receive DBE credit for the type of work required
- Dies or becomes disabled with the result that the listed DBE or Non-DBE/BD is unable to complete its work on the contract
- Other documented good cause that the Department determines compels the termination of the listed DBE or Non-DBE/BD

Good cause does not exist if the prime contractor or subcontractor seeks to terminate a DBE or Non-DBE/BD which was relied upon to obtain the contract so that the contractor can self-perform the work for which the DBE or Non-DBE/BD was engaged or so that the contractor can substitute another DBE or Non-DBE contractor after contract award.

The contractor must immediately give written termination notice to DBE or the Non-DBE/BD. At the same time, SFN 60595 and its supporting documentation must be provided to the project engineer for review and analysis of the reasons for the intended termination.

The contractor must give the DBE or Non-DBE/BD 5 business days to respond to the termination notice. Within that time, the DBE or Non-DBE/BD should respond with a written explanation of their reasons and/or objections to the proposed termination and specifically address why the Department should deny the contractor's request. This explanation should be submitted in reply to the contractor with a copy to the project engineer.

The project engineer will send the contractor's SFN 60595, the DBE or Non-DBE/BD's written response(s) and any other accompanying documentation to the Civil Rights Division (CRD). If the CRD concurs that a termination is warranted, the contractor must seek a DBE to perform the work.

All DBEs currently certified in the specific area of work to be performed, must be contacted in writing or by phone, and quotes solicited. If available, a DBE will be selected to perform a dollar value of work, equal to the value of the commitment not achieved, unless the contractor can demonstrate the DBE quote is unreasonable, using the same comparison in section "GFE Documentation."

Upon receipt of appropriate written GFE documentation, and prior to commencement of any replacement work, CRD will consider the contractor's efforts and provide a final written decision to the project engineer.

UNFULFILLED OBLIGATIONS

The Department requires SFN 60595 and its supporting documentation when a contractor, DBE, or Non-DBE/BD does not fulfill her or his obligations in any of the following situations:

- The prime contractor is unable to perform the full amount of work committed to be completed, by the prime's workforce and equipment, at the time of award, or
- The DBE or Non-DBE/BD to which the prime contractor committed using at the time of award, is unable to perform the full amount of work, or
- The DBE or Non-DBE/BD withdraws voluntarily from the project and provides to the prime written notice of its withdrawal.

SFN 60595 and its supporting documentation must be provided to the project engineer for review and analysis. If the DBE or Non-DBE/BD is not able to perform, the prime contractor must provide written documentation from the DBE or Non-DBE/BD as to the reasons. The Civil Rights Division will provide a written final determination to the project engineer. The project engineer informs the contractor of the approval or rejection of the replacement of work.

If the Department concurs that a substitution is warranted, the prime contractor will seek a DBE to perform the work. All DBEs currently certified in the specific area of work to be performed, must be contacted in writing or by phone, and quotes solicited. If available, a DBE will be selected to perform a dollar value of work, equal to the value of the commitment not achieved, unless the contractor can demonstrate the DBE quote is unreasonable, using the same bid differential comparison in section "GFE Documentation."

The prime contractor is responsible for any additional costs incurred as a result of the prime contractor's failure to fulfill the original commitment or the DBE or Non-DBE/BD's failure to perform.

NON-COMPLIANCE, FAILURE TO PERFORM, AND SANCTIONS

If the Department determines that a contractor should be sanctioned, the Department will provide written notice to the contractor informing them of the sanction for the following:

- Not submitting required documentation in a timely manner
- Not paying a DBE or non-DBE subcontractor in a timely manner
- Not having a DBE perform the specified dollar amount of work (subject to plan quantity changes) tasks or bid items
- For otherwise not fulfilling the requirements of this DBE special provision
- Repeated instances of failure to perform the contract requirements
- Repeated instances of late contract-related payments
- Documented fraudulent practices

If the Department determines that a DBE should be sanctioned, the Department will provide written notice to the DBE informing them of the sanction for the following:

- Failure to perform work as specified in the contract
- Failure to pay contract-related bills in a timely manner
- Failure to perform a commercially useful function

- Failure to notify the prime contractor orally and in writing if they are unable to perform a commercially useful function
- Otherwise not fulfilling the requirements of this DBE special provision

If sanctions are applied, the contractor or the DBE may make a written request to the Department for reconsideration. The contractor or the DBE must provide a written statement defending their actions within 3 business days.

If the Department does not receive a written request for reconsideration, or if the contractor or DBE does not provide sufficient evidence that the provisions have been met, the Department may suspend the contractor or the DBE bidding or quoting privileges and not allow the contractor or the DBE to participate in one or more scheduled bid openings after the date the sanction is imposed.

Other sanctions which may be imposed by the Department for failure on the part of the contractor may include, but are not limited to:

- Withhold the contractor's progress payment until the contractor complies with all DBE contract provisions
- Deduct, from the contractor's progress payments, the dollar amount of DBE participation committed to but not achieved by the contractor
- Find the contractor in default
- Liquidated damages
- Disqualifying the contractor from future bidding
- Take other corrective action determined by the Department to be appropriate
- Any combination of the above.

NDDOT MONITORING AND ENFORCEMENT MECHANISMS

The Department will bring any false, fraudulent, or dishonest conduct in connection with the DBE program to the attention of USDOT. USDOT may pursue action as provided in 49 CFR § 26.107. Actions include referral to the Department of Justice for criminal prosecution or referral to the USDOT Office of Inspector General for action under suspension and debarment, or Program Fraud and Civil Remedies rules. The Department will also consider similar action under its own legal authority, including responsibility determination in future contracts.

COMMERCIALLY USEFUL FUNCTION

A Commercially Useful Function (CUF) - SFN 62120 - must be completed by NDDOT or consultant project personal as soon as the DBE begins the work.

CUF refers to those services the DBE is certified to perform. Certified services for each DBE are listed in the online DBE Directory. It is a DBE's responsibility to immediately notify the prime contractor in writing if the DBE is unable to perform a CUF. Non-compliance of the DBE with program requirements noted on the CUF form may result in changes to and/or termination of certification.

The Department counts participation to a DBE contractor toward DBE goals only if the DBE is performing a CUF on that contract.

- A DBE performs a CUF 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 CUF, 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, installation and paying for the material itself. 49 CFR § 26.55(c)(1)
- A DBE does not perform a CUF 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. 49 CFR § 26.55(c)(2)
- The Department's decisions on CUF matters are subject to review by Federal Highway Administration, but are not administratively appealable to USDOT. 49 CFR § 26.55(c)(5)

COUNTING RACE/GENDER CONSCIOUS DBE PARTICIPATION - 49 CFR § 26.55

The Department does not count participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has been paid to the DBE. 49 CFR § 26.55 (h)

The Department will count DBE participation toward the overall annual goal as noted below:

Manufacturer: Manufacturer credit is appropriate when the DBE 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. Alterations or customization of a "stock" product would be eligible for manufacturer credit. DBE credit is awarded at 100% for this type of work. Delivery type is not relevant in this type of credit.

Broker Credit (Manufacture Representative, Procurement Specialist, Leasing): Broker credit is appropriate when the DBE arranges or expedites the transaction of materials or supplies that it does not manufacture or deliver and is never in possession of the products. In this type of transaction, a DBE would serve as a third-party intermediary between the manufacturer and the contractor providing project driven sales. The DBE assumes little to no risk in this transaction and is awarded DBE credit for the "mark-up" of the product only. Drop ship transactions would only be eligible for broker credit. There is no maintained facility where inventory is kept on a regular basis for sale.

For direction on how a specialty item can be eligible for supplier credit, see the information provide below. A specialty item that does not fully meet these requirements can only be credited at brokerage rates.

Regular Dealers/Suppliers: Supplier credit is appropriate when the DBE owns, operates, and 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 sells to the general public with inventory on hand. If a legitimate public warehouse exists, that regularly stocks, deals and sells to the walk-in public, then the method of delivery of the goods is not examined. At least 51% of materials provided by a DBE Regular Dealer/Supplier must come from their own inventory, except for Bulk Items and Specialty Products. Supplier credit would be awarded at 60% of the cost of the materials. 49 CFR 26.55 (e)(ii).

Distributor

Distributors are permitted to drop-ship from manufacturers if the firm has a distributorship agreement or assumes all responsibility for the materials after point of origin, allowing for 40% credit for the cost of materials.

Bulk Items 49 CFR 26.55 (e)(ii)

A DBE may be eligible for supplier credit in regard to non-specialty bulk items (i.e. petroleum, steel, asphalt, aggregate) without a warehouse or storefront. If bulk items are purchased directly from the manufacturer the DBE must both own and operate its own distribution equipment. The DBE may supplement its own distribution equipment through a long-term lease (defined as more than one year) but the DBE must demonstrate unimpeded access to the leased equipment and operate the equipment with the DBE's own employees. If all these circumstances do not exist, the DBE is only edible for broker credit.

Specialty Products

Specialty products are those products that are ordered contract-specific for a job. Examples may include, but are not limited to, steel beams, concrete beams, box culverts or piping. Supplier credit is available in two different scenarios:

- Supplier credit would be available if the DBE owns its own facility and is in the business of selling products and materials to the public and sells products of similar nature to the specialty item and the DBE must take possession of the specialty item to determine quality and quantity of the specialty item(s). To be eligible for supplier credit, the DBE must deliver the specialty item with its own distribution equipment and employees.
- Supplier credit would be available if the DBE does not own its own facility but does own its own distribution equipment which it uses to pick up the specialty item(s) and deliver to the job site with the DBEs own employees

Any other scenario dealing with specialty products would only be eligible for broker credit.

Regular Dealers vs. Brokers/Expeditors/Facilitators: On a case-by-case basis, DBE regular dealers may count only the fees/commissions charged for providing procurement assistance as a manufacturers' representative or expeditor of transactions. The key factor in this determination is whether the prime and/or its subcontractors could have ordered the materials without the DBE's assistance. If a non-DBE contractor could have procured the materials or supplies without the intervention of the DBE, the DBE is not performing a regular dealer capacity. To assist in determining the difference, the Department may poll each regular dealer to request their ordering and delivery process.

Trucking: The Department counts DBE trucking on a one-for-one basis. A DBE, on each of its contracts, must first own and operate at least one fully licensed, insured, and operational truck. A DBE may then supplement its fleet using lease/broker agreements. Only trucks leased from a reputable dealer count towards the firms DBE participation. Full credit is given for the transportation value of leased/brokered trucks owned, operated, and insured by other DBEs.

- Example: DBE A owns/operates 2 trucks and subcontracts to DBE B who own/operates 3 DBE trucks. All 5 DBE owned/operated trucks count towards the DBE participation on the project.

A DBE trucking firm may subcontract to non-DBE trucking firms. If a DBE subcontracts trucks from non-DBEs, the total value of trucking services provided by non-DBEs cannot exceed the value of trucking services provided by DBEs. This is referred to as the 1:1 DBE Trucking Ratio (Ratio).

- Example: DBE owns 2 trucks and subcontracts 2 non-DBE match trucks. The total number of trucks that may be counted towards DBE participation is the amount paid for all 4 trucks (100%)
- Example: DBE owns 5 trucks and subcontracts 5 trucks from non-DBE(s). The total number of trucks that may be counted towards DBE participation is the amount paid for 10 of the 10 trucks (100%)
- Example: DBE owns 1 truck and subcontracts 4 non-DBE trucks. 1 of the no-DBE trucks acts as a match truck and the other 3 are non-DBE non-match trucks. The amount of the total subcontract with the DBE that may be counted is 40%.

When a DBE leases more non-DBE than DBE trucks, only the fee or commission the DBE trucker receives is credited for the extra non-DBE trucks.

- Example: DBE owns 2 trucks and subcontracts 4 trucks from non-DBE(s). Total DBE participation is amount paid for 4 of the 6 trucks plus the brokerage or other fee may also be counted toward DBE participation for the 2 non-DBE non-match trucks.

No DBE participation is given for the use of DBE trailers without DBE trucks and DBE employed drivers. A DBE trucking firm cannot count the materials they are hauling unless they are a legitimate DBE supplier or manufacturer of the materials (see Regular Dealer/Supplier and Manufacturer sections).

A legitimate subcontract must be in place between the DBE and non-DBE trucking firm to count participation. The non-DBE trucking firm must be added to the Utilization Plan/Contract in the Certification and Compliance System (CCS) under the DBE and the DBE is required to report payments to the non-DBE trucking firm for the participation to be counted. Additional reporting lines under the DBE on the contract within CCS may also be necessary to report non-DBE non-match payments and/or brokerage/fees for non-DBE non-match trucks if applicable. Certified payroll requirements also apply.

A DBE trucking firm is responsible for identifying the number of trucks to be used on a project for DBE participation credit. If a DBE trucking firm utilizes the Ratio and is used by a Prime contractor that was the apparent low bidder, the number of trucks (DBE, non-DBE Match & non-DBE non-Match) must be identified on the Form C as well as the total dollar amount allocated to each and the non-DBE firm(s) the DBE intends to use. SFN 60781 DBE Weekly Trucking Report is required to be completed and submitted to the project engineer weekly when the Ratio is being utilized, which will indicate the number of DBE-owned trucks and the number of non-DBE trucks the DBE has provided for use on the contract. DBE trucking firms that are utilizing the 1:1 DBE Trucking Ratio must also display signage in the non-DBE match trucks on the job site that identify them as subcontracting to the DBE as part of the overall project DBE participation. The signage must be clear enough for project personnel to easily identify them while on site. The CUF form includes a section for 1:1 DBE Trucking that must also be completed by the project engineer. **Any non-DBE match trucks must be added to the contract in B2Gnow under the DBE by Civil Rights. The usage of the 1:1 Ratio may be revoked at any time if the DBE is not following all required actions.**