



Construction Policy Bulletin

CPB 12-5 Disadvantaged Business Enterprise Program Changes

References:	Code of Federal Regulations	Title 49, Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs"
	Construction Policy Bulletin	09-3, "Race-Conscious/Race-Neutral Disadvantaged Business Enterprise Program"
	Contract Special Provisions	Section 5-1.2, "Subcontractor and Disadvantaged Business Enterprise Program Records" Section 5-1.03, "Performance of Disadvantaged Business Enterprises"
	<i>Construction Manual</i>	Section 8-303, "Monitoring and Enforcement Activities During Construction"

Effective Date: October 9, 2012

Approved:

A handwritten signature in black ink, appearing to read 'Mark Leja', written over a horizontal line.

MARK LEJA
Chief
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Approval Date: October 8, 2012

Background

Contract Goals

The Department of Transportation (Caltrans) implements a Disadvantaged Business Enterprise (DBE) program for its federal-aid contracts in compliance with Title 49 Code of Federal Regulations Part 26 (49 CFR 26). On August 7, 2008, Caltrans received approval from the Secretary of the United States Department of Transportation (U.S. DOT) to implement a DBE program that set contract goals for some, but not all, DBEs. On February 27, 2009, Caltrans began setting contract goals for underutilized disadvantaged business enterprise (UDBE) firms on its federal-aid contracts. A UDBE is a firm that meets the definition of a DBE as specified in 49 CFR 26 and is in one of the following four underutilized disadvantaged groups: Black American, Asian-Pacific American, Women, and Native American. Only UDBE firms count toward a UDBE contract goal.

On April 25, 2012, the Secretary of the U.S. DOT withdrew Caltrans' approval to implement contract goals for UDBE participation. On June 15, 2012, the Federal Highway Administration directed Caltrans to ensure contracts advertised after June 15, 2012 include contract goals for all DBEs, not just the four groups

identified as UDBEs. To comply with this directive, all contracts advertised after June 15, 2012 contain revised DBE contract specifications directing contractors to use all DBE groups when soliciting participation for contract goals. These contracts will contain DBE goals only and will not contain UDBE goals.

Monitoring Requirements

On February 28, 2011, a final rule was issued by the U.S. DOT imposing additional requirements for monitoring participation and substitution of DBE firms participating on federal-aid contracts. These changes require Caltrans to certify the monitoring of paperwork and onsite performance of DBE firms. The final rule also includes additional reasons for the substitution of a DBE and requires the contractor to provide notice of a request for substitution to the DBE prior to requesting substitution approval from Caltrans.

Existing Procedure

Contracts advertised on or before June 15, 2012 contain UDBE participation goals. Resident engineers and inspectors monitor the contract work to ensure the listed UDBEs perform the items of work specified at the time of bid opening and that no improper substitutions occur. Monitoring includes documenting the work UDBEs perform by completing inspection reports. In addition, resident engineers and inspectors ensure that all UDBEs are performing a commercially useful function. A UDBE performs a commercially useful function when it is responsible for execution of the work on the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. This includes material and supply price negotiation, installation, and payment. If a contractor requests to substitute a listed UDBE, the resident engineer must require the contractor to provide one of the seven reasons listed in the special provisions and replace the original firm with another UDBE or conduct a good faith effort.

For additional information on the existing procedures for contracts with UDBE participation and determining commercially useful function, refer to Construction Policy Bulletin 09-3, "Race-Conscious/Race-Neutral DBE Program." The bulletin remains in effect for all federal-aid contracts advertised on or before June 15, 2012.

New Procedure

DBE Contract Goals

Federal-aid contracts advertised after June 15, 2012 will contain DBE participation goals. The Form DES-OE-0102.10D, "CALTRANS Bidder-DBE Commitment," identifying the DBE firms participating on the contract is provided to district construction offices with the contract award package. Resident engineers and inspectors use the information in the form to monitor DBE participation on the contract, including whether the DBE is performing a commercially useful function as defined in the existing procedure section above.

Monitoring Activities – Written Certification

Changes in 49 CFR 26.37 (b) require monitoring activities to include written certification that a field review of DBE records and monitoring of worksites occurred to ensure work committed to a DBE at contract award is actually being performed by the DBE. When a DBE firm performs work on the contract, inspection staff must continue to document in the daily inspection report the name of the DBE and the associated contract item and cross check the inspection report against the DBE commitment form to ensure no improper substitutions have occurred. If the DBE firm is a subcontractor, inspection staff should interview the workers and confirm with the district labor compliance officer that certified payroll records have been received for the DBE, if applicable. If the DBE firm is a materials supplier, inspection staff should review any available

documents such as delivery confirmation reports or weight tickets to confirm the DBE supplied the materials. If delivery documents are not available, field staff should obtain payment information such as canceled checks and invoices from the prime contractor to confirm the DBE performed the supply function. The resident engineer must withhold funds from a progress estimate for the missing documents if the contractor does not provide the requested documentation.

At contract completion, written certification will be accomplished using the Form CEM 2402F, "Final Report - Utilization of Disadvantaged Business Enterprises First Tier Subcontractors." It has been revised to include a statement certified by the resident engineer that the DBE contract records and work site were monitored during construction activities to ensure the DBE performed the work as committed at bid time. The DBE participation portion of the form is completed by the contractor and sent to the resident engineer within 90 days of contract acceptance. The resident engineer must review the information reported by the contractor and provide a signature certifying the DBE participation through onsite monitoring and record review. Return forms with incomplete or incorrect information to the contractor for correction. Send signed forms to the Office of Business and Economic Opportunity by email at SmallBusinessAdvocate@dot.ca.gov or by fax at (916) 324-1949. For additional information on required monitoring activities, refer to Section 8-303, "Monitoring and Enforcement Activities During Construction," of the *Construction Manual*.

DBE Substitutions

The resident engineer must not allow a prime contractor to terminate or substitute a listed DBE firm without prior written consent from the department. This includes allowing the prime contractor to self-perform work originally committed to a DBE firm. Requests for substitution of a listed DBE firm must be in writing. The prime contractor is required to replace the listed DBE with another certified DBE or conduct a good faith effort to do so to the extent needed to meet the original contract goal. If the prime contractor fails to conduct a good faith effort or replace a DBE with another DBE, the substitution request must be denied. For additional information regarding good faith effort, refer to Section 8-304B, "Removing and Substituting DBEs or DVBEs," of the *Construction Manual*.

Section 5-1.03, "Performance of Disadvantaged Business Enterprises," of the contract special provisions identifies the information required for a contractor-requested substitution. The resident engineer must review the contractor's written request and ensure it includes all of the following:

- One of the eleven reasons for substitution as identified in the special provisions.
- A copy of the 5-day notice from the contractor to the DBE regarding the substitution including verification that the DBE received the notice.
- The DBE's response to the 5-day notice.

If the request for substitution does not include the required information, notify the contractor of the requirement to comply with the contract special provisions and do not proceed with the substitution request.

If the DBE objects to the 5-day notice of substitution, the district must conduct a hearing on the substitution request. The prime contractor and DBE must be provided at least 5 days written notice of the scheduled hearing. If the DBE does not object to the substitution or does not respond to the contractor's notice within the 5-day timeframe, the substitution can occur with another DBE or non-DBE as a result of an approval of the good faith effort. To document written substitution approval, the resident engineer must complete Form CEM-2401, "Substitution Report for Disadvantaged Business Enterprise (DBE) or Underutilized Disadvantaged Business Enterprises (UDBE)," and provide a copy to the contractor. If the prime contractor

replaces a listed DBE without approval from the resident engineer, payment for the item(s) of work committed to the DBE must be withheld from the next progress payment. The resident engineer must send the prime contractor written notice of the improper substitution and payment withheld. In addition, if the DBE is also a subcontractor required to be listed at bid time by the Subletting and Subcontracting Fair Practices Act (the Act), the substitution process must comply with Section 3-801C (5), "Hearing Process for Substitution Violations," of the *Construction Manual*. If the substitution is found to be in violation of the Act, the hearing officer may assess the prime contractor a penalty of up to 10 percent of the subcontract amount.

At contract completion, if the contractor's DBE attainment meets or exceeds the original contract goal, the withheld contract funds must be returned. If the contractor's DBE attainment falls short of the original contract goal, only the amount of the withheld funds necessary to meet the goal is withheld. Monies withheld in excess of the goal must be returned to the contractor. Any assessed penalties are not returned.

Forms

All construction related DBE forms are revised to include the change in program requirements. In addition, forms CEM-2401, CEM-2402F, CEM-2403F, "Disadvantaged Business Enterprises (DBE) Certification Status Change" and CEM 2404F "Monthly DBE/UDBE Trucking Verification" include a required original or copy distribution to the OBEO email at SmallBusinessAdvocate@dot.ca.gov or fax at (916) 324-1949. Copies of the forms are attached to this bulletin and available at:

<http://www.dot.ca.gov/hq/construc/forms.htm>

If you have questions regarding this policy bulletin, please contact Angela Shell, Division of Construction, at angela_shell@dot.ca.gov or (916) 654-3501.

- Attachments:
1. Form CEM-2401, "Substitution Report for Disadvantaged Business Enterprise (DBE) or Underutilized Disadvantaged Business Enterprises (UDBE)"
 2. Form CEM-2402F, "Final Report - Utilization of Disadvantaged Business Enterprises First- Tier Subcontractors"
 3. Form CEM-2403F, "Disadvantaged Business Enterprises (DBE) Certification Status Change"
 4. Form CEM 2404F, "Monthly DBE/UDBE Trucking Verification"