

## **ADDITIONAL SPECIAL PROVISION 3 (DB)**

### **DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM IMPLEMENTATION (DESIGN-BUILD, DBE OPEN-ENDED PERFORMANCE PLAN (OEPP))**

#### **Authority**

Wisconsin Department of Transportation (WisDOT) is a recipient of funds from the US Department of Transportation's Federal Highway Administration. The DBE program is a federal program applicable on all contracts administered by WisDOT that include federal-aid highway funds. The authority for the DBE program is the Transportation Bill as approved by Congress periodically. DBE program guidance and requirements are outlined in the Code of Federal Regulations at 49 CFR Part 26. This contract is subject to DBE provisions because it is financed with federal-aid-highway funds. Additionally, this contract is subject to the *State of Wisconsin Standard Specifications for Highway and Structure Construction* and all applicable contract documents.

49 CFR Part 26.53 has been revised to require the use of DBE Open-Ended Performance Plans (OEPPs) on design-build projects. This modification of ASP-3 has been adjusted to comply with this new federal requirement.

#### **Requirements**

Pursuant to the federal DBE program regulation at 49 CFR Part 26, a design-builder's failure to comply with any provision of the DBE program regulatory provisions will be considered a material breach of contract. This is nonnegotiable.

If a design-builder fails to carry out the DBE program requirements and/or the Required Contract Provisions for Federal Aid Contracts (FHWA 1273) referenced in this document, sanctions will be assessed depending upon the facts, reasoning, severity, and remedial efforts of the design-builder that may include: termination of contract, withholding payment, assessment of monetary sanctions, and/or suspension/debarment proceedings that could result in the disqualification of the design-builder from bidding or proposing on WisDOT projects for a designated period of time.

- (1) A DBE Open-Ended Performance Plan will be submitted using ITP Form 7 as described in Section 2.
- (2) The Department requires this DBE OEPP from all proposers at the time price proposals are submitted to ensure fairness to other proposers and subcontractors or subconsultants. Bid shopping is prohibited.
- (3) The proposer must submit a completed ITP Form 7 detailing how the proposer will (1) achieve the goal; (2) ensure compliance; (3) conduct outreach; and (4) report/track DBE participation, .
- (4) At the time(s) required in the project Request for Proposals (RFP), the design-builder will submit the Commitment to Subcontract to DBE (Form DT1506-DB), and Attachments A, as necessary. The design-builder must utilize the specific DBE firms listed in the approved DBE Commitment to perform the work and/or supply the materials for which the DBE firm is listed unless the contractor obtains written consent in advance from WisDOT. The contractor will not be entitled to payment for any work or materials on the approved DBE Commitment that is not performed or supplied by the listed DBE without WisDOT's written consent.
- (5) Submit modifications to the OEPP as necessary. At a minimum, submit a revision prior to NTP 1 and a second revision prior to request for NTP 2. NTP 1 and NTP 2 will not be issued until these respective revisions are approved by the Department. Planned work submitted in the OEPP will not be required to use a specific DBE firm, unless a commitment (Attachment A) has been made to that firm.
- (6) An attachment A form must be submitted for each newly secured commitment included on a revision to Attachment 1 of the OEPP.
- (7) A revised Attachment A form must be submitted any time a reduction or elimination of a DBE work commitment is planned, as detailed in Section 9.

- (8) A Design-builder may not terminate or reduce a listed DBE commitment without written approval from WisDOT. The Design-builder must provide the affected DBE 5 days to respond with any objections.

## Description

The Wisconsin Department of Transportation is committed to the compliant administration of the DBE Program. The DBE provisions work in tandem with FHWA 1273 and WisDOT's *Standard Specifications for Highway and Structure Construction* and *Construction and Materials Manual*. The WisDOT Secretary is signatory to assurances of department-wide compliance.

For this design-build project, WisDOT is implementing an Open-Ended Performance Plan (OEPP) to meet Federal DBE requirements. The OEPP is defined in Section 1.

The Department assigns the contract DBE goal as a percentage of work items that could be performed by certified DBE firms on the contract. The assigned DBE goal is expressed in the Request for Proposals (RFP) as a percentage applicable to the total contract amount. For design-build contracts, that amount includes both design and construction cost.

- (1) WisDOT identifies the assigned DBE goal in the project RFP Instructions to Proposers (ITP) Form 6. The design-builder can meet the assigned contract DBE goal by subcontracting design or construction work to a DBE firm or by procuring services or materials from a DBE firm. DBE participation is required on this project from both design professional services and construction subcontracts.
- (2) Under the contract, the design-builder should inform, advise, and develop participating DBE firms to be more knowledgeable contractors and consultants who are prepared to successfully complete their contractual agreement through the proactive provision of assistance in the following areas:
  - § Produce accurate and complete quotes
  - § Understand highway plans applicable to their work
  - § Understand specifications and contract requirements applicable to their work
  - § Understand contracting reporting requirements
  - § Understand WisDOT's design-build procurement process
  - § Understand the non-linear project approach associated with design-build projects
- (3) The Department encourages design-builders to assist DBE subcontractors and DBE subconsultants more formally by participating in WisDOT's Business Development program as a mentor, coach, or resource. For comprehensive information on the Disadvantaged Business Enterprise Program, visit the Department's Civil Rights and Compliance Section website at: <http://wisconsindot.gov/Pages/doing-bus/civil-rights/dbe/default.aspx>

## 1. Definitions

Interpret these terms, used throughout this additional special provision, as follows:

- a. **Assigned DBE Contract Goal:** The percentage shown on the Highway Work Proposal form included in the project RFP (ITP Form 6) that represents the feasible level of DBE participation for each contract. The goal is calculated using the Department's Estimate and DBE Interest Report. Goal assignment includes review of FHWA funds and analyzes work types for subcontract opportunity and compatibility with DBE certified firm work codes. Additional factors considered include proximity, proportion, and regulations. For design-build projects, the goal is a percentage of the full contract amount, including design and construction costs.
- b. **Bid Shopping:** In construction law, bid shopping is the practice of divulging a subcontractor's bid to another prospective contractor(s) before or after the award of a contract to secure a lower bid.

- c. **DBE:** Disadvantaged Business Enterprise – A for-profit small business concern where socially and economically disadvantaged individuals own at least a 51% interest and control management and daily business operations.
- d. **DBE Commitment:** The DBE Commitment is identified in the Commitment to Subcontract to DBE (Form DT1506-DB) and is expressed as the amount of DBE participation the design-builder has secured. The DT1506-DB, is required to be completed by the design-builder at the time(s) listed in the RFP.
- e. **DBE Utilization:** The actual participation of a DBE subcontractor or DBE subconsultant on a project. WisDOT verifies DBE utilization through review of the DBE Commitment, payments to subcontractors and subconsultants, and contract documentation. The design-builder receives DBE credit for payments made to the DBE firms performing the work listed on the approved DBE Commitment, and those submitted after approved commitment with Attachment A.
- f. **Design-builder:** A private legal entity, consortium, or joint venture that proposes to or executes a contract with the office to design, engineer, and construct a design-build project.
- g. **Distributor:** An established business that engages in the regular sale or lease of the items specified by the contract.
- h. **Good Faith Effort:** Legal term describing a diligent and honest effort taken by a reasonable person under the same set of facts or circumstances. For DBE subcontracting, the design-builder must show that it took all necessary and reasonable steps to achieve the assigned DBE goal by the scope, intensity, and appropriateness of effort that could reasonably be expected for a design-builder to obtain sufficient DBE participation.
- i. **ITP:** Instructions to Proposers. Document included with a design-build Request for Proposals that gives instructions for submitting a proposal on a design-build project.
- j. **Manufacturer:** 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.
- k. **NTP 1/2:** Notice to Proceed 1 and Notice to Proceed 2, as defined in the project RFP.
- l. **OEPP:** The DBE Open Ended Performance Plan (OEPP) is a modified, open-ended DBE commitment plan that, instead of naming DBEs to perform specific work at a specific price, allows the proposer to list anticipated work types for planned DBE participation throughout the life of the project. This type of plan, specifically for design-build contracting, serves as a roadmap detailing how the DBE goal can be achieved. A DBE OEPP is now required on design-build projects by 49 CFR Part 26.53.
- m. **Reasonable Price:** Design-builders are expected to assess reasonable price by analyzing the contract scope for DBE subcontract feasibility and comparing common line items in DBE and non-DBE subcontract quotes for the same work. Per federal regulation, reasonable price is not necessarily the lowest price.
- n. **Regular Dealer:** An established business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.
- o. **RFP:** Request for Proposals. Document including the instructions for proposers, contract requirements, technical requirements, applicable standards and reference information documents needed to develop a proposal for a design-build project.

- p. **Supplier:** A firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment required under the contract are bought, kept in stock, and regularly sold or leased to the public.
- q. **Tied quote:** Subcontractor/Subconsultant quote that groups multiple bid/line items at a bundled/package price with a notation that the items within the quote will not be separated.

## 2. WisDOT DBE Program Compliance

### a. Documentation Submittal

- The OEPP (ITP Form 7) must be submitted as an attachment to the design-build cost proposal by all proposers at the date and time identified as the Proposal Due Date in the project ITP.
- The Commitment to Subcontract to DBE (Form DT1506-DB) must be submitted by the successful proposer at the time the first DBE commitments (Attachments A) are submitted to the Department..
- Attachments A OR quotes from all DBEs included in the Commitment must be submitted by the successful proposer at the time(s) identified in the project RFP and for each new commitment.
- A revised OEPP Attachment 1 form must be submitted as a precondition of receiving NTP 1, as a precondition of receiving NTP 2, and at any time a design-builder wishes to add a DBE commitment.

The Bureau of Project Development will consider the proposal nonresponsive if the proposer fails to furnish the OEPP on the proposal due date.

Initial OEPPs that do not include a plan to meet the assigned DBE goal do not demonstrate good faith effort and will be considered non-responsive. Form DT1202 (Documentation of Good Faith Efforts) will not be accepted for design-build projects.

### b. Verification of DBE OEPP

The OEPP submitted prior to contract award is evaluated as follows:

#### (1) OEPP Accepted

The DBE office will evaluate the OEPP submitted at the time of proposal submittal. If ITP Form 7 is included, found to be complete, and indicates a reasonable plan to achieve the required DBE commitment, the proposer is eligible for award consideration with respect to the DBE commitment plan. The Department may comment on the OEPP, and these comments must be resolved by the design-builder, in consultation with the Department, prior to execution of the contract.

#### (2) OEPP Not Accepted

If the OEPP submitted at the time of proposal submittal is found to be missing, incomplete, or does not indicate a reasonable plan to achieve the required DBE commitment, the associated proposal is considered nonresponsive by the Bureau of Project Development, and the proposer is not eligible for award.

### c. Evaluation of Compliance with Contract DBE Requirements

The design-builder's compliance with DBE requirements of this contract will be evaluated as follows:

The design-builder must work together with the WisDOT Project Manager and DBE office to monitor the submitted OEPP. If the design-builder follows the OEPP throughout the project, with DBE commitments

submitted and participation confirmed, WisDOT will evaluate the confirmed DBE participation to verify the actual DBE percentage calculation. If the DBE participation is verified, the design-builder will be found to be compliant with DBE requirements under the awarded contract.

If the design-builder is unable to follow the submitted OEPP at any point during the project, the design-builder will work with the WisDOT Project manager and DBE office to modify the OEPP to continue to meet the overall project goal. The Design-Builder may request modifications, but DBE office must approve them.

If after working with WisDOT and making approved modifications to the OEPP the design-builder is unable to meet the overall goal by the time no sub-contractable opportunities remain on the project, a GFE Summary of good faith efforts made to meet the goal must be submitted to the WisDOT Project Manager and DBE office via e-mail. The Department will evaluate the design-builder's good faith efforts submission. Following evaluation of the design-builder's Good Faith Effort (GFE) summary the design-builder will be notified that the Department intends to:

1. *Approve* the summary (adequate documentation of GFE has been submitted) - no conditions placed on the contract with respect to the DBE Commitment; or
2. *Reject* the summary (inadequate documentation of GFE has been submitted) - the contract is viewed as out of compliance with the project RFP.

If the Department rejects the design-builder's summary, the design-builder will be held to be in breach of the contract and must work with the WisDOT PM and DBE office to submit additional GFE documentation. Payment may be withheld by the Department from a design-builder in breach of contract. The Department will provide a written explanation for rejecting the summary to the design-builder. The design-builder may appeal the Department's rejection (see Section 4). A good faith efforts summary submitted prior to the exhaustion of all potential sub-contractable opportunities will be rejected.

If at any time during the project the design-builder is found to be not following or attempting to follow the approved OEPP, they may be found to be in breach of the contract.

### 3. Department's Criteria for Good Faith Effort Documentation

The Federal-aid Construction Contract Provision, referenced as FHWA-1273, explicitly states that the design-builder shall be responsible for all work performed on the contract by piecework, station work, or subcontract. The design-builder shall take all necessary and reasonable steps to ensure nondiscrimination in the administration of the contract including assurances of equal employment opportunity laws, DBE regulations, and affirmative action. Compliance encompasses responsible and responsive action, documentation, and good faith effort.

Contractually, the design-builder, all subcontractors, subconsultants and service providers on the contract are bound by FHWA 1273 and DBE program provisions. **Design-builders should encourage subcontractors and subconsultants to utilize DBE firms whenever possible to contribute to the assigned DBE contract goal.**

Design-builders are required to document good faith effort. Per 49 CFR Part 26.53, good faith effort is demonstrated in one of two ways. The design-builder:

- (1) Documents that it has obtained enough DBE participation to meet the goal; OR
- (2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed

Appendix A of 49 CFR Part 26 provides guidance concerning good faith efforts. WisDOT evaluates good faith effort on a contract basis just as each contract award is evaluated individually.

The efforts employed by the design-builder should be those that WisDOT can reasonably expect a design-builder to take to actively and aggressively obtain DBE participation sufficient to meet the DBE contract goal. The Department will only approve demonstration of good faith effort if the design-builder documents the quality, quantity, and intensity of the variety of activities undertaken that are commensurate with expected efforts to meet the stated goal and the reasons the design-builder was unable to follow the approved OEPP.

The Department, in conjunction with industry stakeholders, has developed the following guidance for design-builder good faith effort activity. The guidance and the attached appendices provide a framework for the actions required by all parties in the processing and evaluation of a design-builder's total efforts to achieve the project specific DBE goal.

**a. Solicitation Guidance for Design-Builders:**

- (1) Document all efforts and decisions made toward achieving the DBE goal on the contract. The design-builder should use WisDOT-approved DBE outreach tools, including the UCP DBE Directory and the Bid Express Small Business Network to foster DBE participation on all applicable contracts.
- (2) As needed, request assistance with DBE outreach and follow-up by contacting the Department's DBE Support Services Office by phone or email request at least 14 days prior to the proposal due date. Phone numbers are (414) 438-4584 and/or (608) 267-3849; Fax: (414) 438-5392; E-mail: [DBE\\_Alert@dot.wi.gov](mailto:DBE_Alert@dot.wi.gov)
- (3) Participate in and document a substantive conversation with at least one DBE firm per design-build project, to discuss questions, concerns, and any other contract related matters that may be applicable to the DBE firm. Guidelines for this conversation are provided in Appendix A of ASP-3 (DB).
- (4) Request quotes by identifying potential items to subcontract and solicit. In their initial contacts, design-builders are strongly encouraged to include a single page, detailed list of items or work types for which they are accepting quotes related to the design-build project. *See attached sample entitled "Sample Design-Builder Solicitation Letter" in Appendix B.* Design-builders should also indicate a willingness to accept quotes in areas they are planning to perform themselves, as required by federal rules. In some cases, it might be appropriate to use DBE firms to do work in a design-builder's area of specialization.
  - i. Solicit quotes from certified DBE firms who match possible items to subcontract using all reasonable and available means. Additionally, forward copies of solicitations highlighting the work areas for which quotes are being sought to [DBE\\_Alert@dot.wi.gov](mailto:DBE_Alert@dot.wi.gov)
  - ii. Acceptable outreach tools include SBN (Small Business Network, see Appendix C): <https://www.bidx.com/wi/main>, postal mail, email, fax, and phone.
    - a. Design-builders must ask DBE firms for a response in their solicitations. *See Sample Design-Builder Solicitation Letter*, Appendix B. This letter may be included as an attachment to the sub-quote request.
    - b. Solicit quotes at least 10 calendar days prior to the proposal due date or the final date listed in the RFP for submittal of commitments to allow DBE firms sufficient time to respond. Design-builders should contact DBE firms early, asking if they need help organizing their quote, assistance confirming equipment needs, or other assistance supporting their submission of a competitive quote for their services.
    - c. A follow up solicitation should take place within 5 calendar days of the proposal or commitment submittal date. Email and/or SBN are the preferred method for the solicitation.
  - iii. Upon request, provide interested DBE firms with adequate information about the project RFP, plans, specifications, and the requirements of the contract by letter, information session, email, phone call, and/or referral.
  - iv. When potential exists, the design-builder should advise interested DBE firms on how to obtain bonding, line of credit, or insurance if requested.

- v. Document DBE firm's interest in quoting by taking appropriate steps to follow up initial solicitation with:
  - a. Email to all prospective DBE firms in relevant work areas
  - b. Phone call log to DBE firms who express interest via written response or call
  - c. Fax/letter confirmation
  - d. Signed copy of record of subcontractor/subconsultant outreach effort

#### **b. Guidance for Evaluating DBE Quotes**

- (1) Quote evaluation practices required to evaluate DBE quotes:
  - i. Reasonable Price: Design-builders are expected to assess reasonable price by analyzing the contract scope for DBE subcontract feasibility and comparing common line items in DBE and non-DBE subcontract quotes for the same work. Per federal regulation, reasonable price is not necessarily the lowest price. See 49 CFR Part 26, Appendix A. IV.D(2).
- (2) Documentation submitted by the design-builder of the following evaluation is required to evaluate DBE quotes by subcontractors/subconsultants:
  - i. Evaluation of DBE firm's ability to perform "possible items to subcontract" using legitimate reasons, including but not limited to, **a discussion** between the design-builder and DBE firm regarding its capabilities prior to the commitment submittal. If lack of capacity is the reason for not utilizing the DBE firm's quote, the design-builder is required to contact the DBE by phone and email regarding their ability to perform the work indicated in the UCP directory listed as their work area by NAICS code. Only the work area indicated by the NAICS code(s) listed in the UCP directory can be counted toward DBE credit. Documentation of the conversation is required.
    - a. In striving to meet an assigned DBE contract goal, design-builders are expected to use DBE quotes that are responsive and reasonable. This includes DBE quotes that are not the low quote.
    - b. Additional evaluation - Evaluation of DBE quotes with tied bid items. Typically, this type of quoting represents a cost saving but is not clearly stated as a discount. Tied quotes are usually presented as an 'all or none' quote. When non-DBE subcontractors submit tied bid items in their quotes, the DBE firm's quote may not appear competitive. In such a case, the following steps are taken in comparing the relevant quotes. These are qualitative examples:
      - i. Compare bid items common to both quotes, noting the reasonableness in the price comparison.
      - ii. Review quotes from other firms for the bid items not quoted by the DBE firm to see if combining both can provide the same competitive advantage that the tied bid items offered.

See Appendix D – *Good Faith Effort Evaluation Measures* and Appendix E - *Good Faith Effort Best Practices*.

- c. Requesting Good Faith Effort Evaluation** If the DBE goal is not met in full, the design-builder must submit via e-mail to the WisDOT Project Manager and the DBE office a summary of its good faith efforts, including an explanation of why they were unable to follow the approved OEPP. This GFE Summary must include the following:
  - (1) Solicitation Documentation: The names, addresses, email addresses, and telephone numbers of DBE firms contacted along with the dates of both initial and follow-up contact; electronic copies of all written solicitations to DBE firms. A printed copy of SBN solicitation is acceptable.
  - (2) Selected Work Items Documentation: Identify economically feasible work units to be performed by DBEs to include activities such as: list of work items to be performed; breaking up of large work items into smaller tasks or quantities; flexible time frames for performance and delivery schedules.

- (3) Documentation of Project Information provided to interested DBEs: A description of information provided to the DBE firms regarding the plans, specifications, and estimated quantities for portions of the work to be performed by that DBE firm.
- (4) Documentation of Negotiation with Interested DBEs: Provide sufficient evidence to demonstrate that good faith negotiations took place. Merely sending out solicitations requesting bids from DBEs does not constitute sufficient good faith efforts.
- (5) Documentation of Sound Reasoning for Rejecting DBEs and copies of each quote received from a DBE firm and, if rejected, copies of quotes from non-DBEs for same items.
- (6) Documentation of Assistance to Interested DBEs- Bonding, Credit, Insurance, Equipment, Supplies/Materials
- (7) Documentation of outreach to Minority, Women, and Community Organizations and other DBE Business Development Support: Contact organizations and agencies for assistance in contacting, recruiting, and providing support to DBE subcontractors, subconsultants, suppliers, manufacturers, and truckers at least 14 days prior to the performance of potential DBE work items. Participate in or host activities such as networking events, mentor-protégé programs, small business development workshops, and others consistent with DBE support.

If the Good Faith Effort Summary is deemed adequate, the request will be approved and the DBE office will promptly notify the design-builder and Bureau of Project Development.

If the DBE Office rejects the summary, the design-builder will receive written correspondence outlining the reasons. The Department encourages the design-builder to communicate with DBE staff throughout the project to modify the OEPP if necessary, and to clarify any questions related to meeting goals and/or design-builder demonstration of good faith efforts. The design-builder may request Administrative Reconsideration as described in Section 4.

The design-builder must obtain written consent from the DBE Office to modify their approved OEPP, or to change or replace any DBE firm listed on the approved DBE Commitment. No design-builder, contractor, prime or subsequent tier, shall be paid for completing work assigned to a DBE subcontractor on an approved DBE Commitment unless WisDOT has granted permission for the reduction, replacement, or termination of the assigned DBE in writing. If a design-builder or a subcontractor/subconsultant on any tier uses its own forces to perform work assigned to a DBE on an approved DBE Commitment, **they will not be paid for the work**. Any changes to a DBE Commitment after the approval of the DBE Commitment must be reviewed and approved by the DBE Office prior to the change (see Section 9).

Additional resources for demonstrating and tracking good faith effort can be found on the “Contracting with a DBE” webpage in the [ASP-3 and Good Faith Effort Guidance](#) section.

#### 4. Design-Builder’s Documentation of Good Faith Effort Evaluation Request Appeal Process

A design-builder can appeal the Department's decision to reject the design-builder's demonstration of Good Faith Effort through Administrative Reconsideration. The design-builder must provide a written justification refuting the specific reasons for rejection as stated in the Department's rejection notice. The design-builder may meet in person with the Department if so requested. Failure to appeal within 5 business days after receiving the Department's written notice denying the request constitutes a forfeiture of the design-builder's right of appeal. Receipt of appeal is confirmed by email date stamp or certified mail signed by WisDOT staff.

The Department will appoint a representative who did not participate in the original good faith effort determination, to assess the design-builder's appeal. The Department will issue a written decision within 5 business days after the design-builder presents all written and oral information. In that written decision, the



Department will explain the basis for finding that the design-builder did or did not demonstrate an adequate good faith effort to meet the contract DBE goal. The Department's decision is final. If the GFE denial is upheld in Administrative Reconsideration, additional GFE documentation may be required, or the design-builder may be held in breach of contract. If the GFE denial is overturned, the design-builder will be deemed in compliance with respect to the contract DBE program requirements.

## 5. Determining DBE Eligibility

### Directory of DBE firms

- a. The only resource for DBE firms certified in the State of Wisconsin is the Wisconsin Unified Certification Program (UCP) DBE Directory. WisDOT maintains a current list of certified DBE firms at: <http://wisconsindot.gov/Documents/doing-bus/civil-rights/dbe/dbe-ucp-directory.xlsx>
- b. The DBE Program office is available to assist with contracting DBE firms:(608) 267-3849.
- c. DBE firms are certified based on various factors including the federal standards from the Small Business Administration that assigns a North American Industrial Classification (NAICS) Codes. DBE firms are only eligible for credit when performing work in their assigned NAICS code(s). If a DBE subcontractor or DBE subconsultant performs work that is not within its assigned NAICS code, the design builder should contact the DBE Office to inquire about compatibility with the Business Development Program.

## 6. Counting DBE Participation

### Assessing DBE Work

The Department will only count the DBE usage towards the contract DBE goal if the DBE firm is certified as a DBE by one of the UCP agencies. The Department only counts the value of the work a DBE actually performs towards the DBE goal. The Department assesses the DBE work as follows:

- a. The Department counts work performed by the DBE firm's own resources. The Department includes the cost of materials and supplies the DBE firm obtains for the work. The Department also includes the cost of equipment the DBE firm leases for the work. The Department will not include the cost of materials, supplies, or equipment the DBE firm purchases or leases from the design-builder or its affiliate, with the exception of non-project specific leases the DBE has in place before the work is advertised.
- b. The Department counts fees and commissions the DBE subcontractor/subconsultant charges for providing bona fide professional, technical, consultant, or managerial services. The Department also counts fees and commissions the DBE charges for providing bonds or insurance. The Department will only count costs the program engineer deems reasonable based on experience or prevailing market rates.
- c. If a DBE firm subcontracts work, the Department counts the value of the work subcontracted to a DBE subcontractor/subconsultant.
- d. The design-builder will maintain records and may be required to furnish periodic reports documenting its performance under this item.

- e. It is the design-builder's responsibility to determine whether the work that is committed and/or contracted to a DBE firm can be counted for DBE credit by referencing the work type and NAICS code listed for the DBE firm on the Wisconsin UCP DBE Directory.
- f. It is the design-builder's responsibility to assess the DBE firm's ability to perform the work for which it is committing/contracting with the DBE. Note that the Department encourages the design-builder to assist and develop DBE firms to become fully knowledgeable contractors to successfully perform on its contracts.
- g. The design-builder will inform the DBE office via email of all DBE subcontractors or DBE subconsultants added to the project following Department acceptance of the OEPP. The design-builder may omit submission of another form DT1506, but must submit signed Attachment A forms for additional DBE firms, along with an updated OEPP.
- h. See Section 7 for DBE credit evaluation for Trucking and Section 8 for DBE credit evaluation for Manufacturers, Suppliers, and Brokers

Naming conventions: When emailing files, please use the following language to identify your submission- "Design-Build Project #, Proposal due date, Design-builder Business Name, Attachment A" Email: [DBE\\_Alert@dot.wi.gov](mailto:DBE_Alert@dot.wi.gov)

\*Note: A sublet request is required for DBE work, regardless of subcontract tier, and also for reporting materials or supplies furnished by a DBE.

- Sublet Requests via form DT1925 or WS1925 are required for 1st Tier DBEs
- For all 2nd Tier and below notification of DBE sublet is indicated by the design-builder entering them in CRCS
- For DBE subconsultants, the design-builder must inform the DBE office of their participation and track their payments in the WisDOT Contract Administration Reporting System (CARS).

## 7. Credit Evaluation for Trucking

All design-builders are expected to adhere to the Department's current trucking policy posted on the HCCI website at: <http://wisconsindot.gov/Documents/doing-bus/civil-rights/dbe/trucking-utilization-policy.pdf>

The design-builder is responsible for ensuring that all subcontractors and subconsultants, including trucking firms, receive Form FHWA 1273: <https://www.fhwa.dot.gov/programadmin/contracts/1273/1273.pdf>

See Section 8 for Broker credit.

## 8. Credit Evaluation for Manufacturers, Suppliers, Brokers, and Distributors

The Department will calculate the amount of DBE credit awarded to a design-builder using a DBE firm for the provisions of materials and supplies on a contract-by-contract basis. The Department will count the material and supplies that a DBE firm provides under the contract for DBE credit based on whether the DBE firm is a manufacturer, supplier, or broker. Generally, DBE credit is determined through evaluation of the DBE owner's role, responsibility, and contribution to the transaction. Maximum DBE credit is awarded when the DBE firm manufactures materials or supplies. DBE credit decreases when the DBE firm solely supplies materials, and minimal credit is allotted when the DBE firm's role is administrative or transactional. It is the design-builder's responsibility to confirm that the DBE firm is considered a supplier, distributor or a manufacturer before listing them on Commitment to Subcontract to DBE form DT1506-DB or an additional Attachment A .

**a. Manufacturers**

- (1) A manufacturer is 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 and of the general character described by the specifications.
- (2) If the materials or supplies are obtained from a DBE manufacturer, **100%** percent of the cost of the materials or supplies counts toward DBE goals.

**b. Regular Dealers of Material and/or Supplies**

- (1) A regular dealer is 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.
- (2) If the materials or supplies are purchased from a DBE regular dealer, count **60%** percent of the cost of the materials or supplies toward DBE goals.
- (3) If the materials or supplies are purchased from a DBE distributor, count **40%** percent of the cost of the materials or supplies toward DBE goals.
- (4) At a minimum, a regular dealer must meet the following criteria to be counted for DBE credit:
  - i. The DBE 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.
  - ii. The DBE firm must both own and operate distribution equipment for the product-bulk items such as petroleum products, steel, cement, gravel, stone, or asphalt. If some of the distribution equipment is leased, the lease agreement must accompany the DBE Commitment form for evaluation of the dealer's control before the DBE office approves the DBE credit.
- (5) When DBE suppliers are contracted, additional documentation must accompany the DBE Commitment and Attachment A forms. An invoice or bill-of-sale that includes names of the design-builder and the DBE supplier, along with documentation of the calculations used as the basis for the purchase agreement, subcontract, or invoice. WisDOT recognizes that the amount on the Attachment A form may be more or less than the amount on the invoice per b.(1) above.
  - i. The design-builder should respond to the following questions and include with submission of form DT150-DB or additional Attachment(s) A :
    - a. What is the product or material?
    - b. Is this item in the design-builder's inventory or was the item purchased when contract was awarded?
    - c. Which contract work types were referenced to develop this quote?
    - d. What is the amount of material or product used on the project?
- (6) Supplies purchased in **bulk** from DBE firms at the beginning of the season may be credited to current contracts if submitted with appropriate documentation to the DBE office.
  - i. To ensure that the appropriate credit is assigned, follow the procedure below:
    - a. When DBE suppliers are contracted for bulk supply or commodity purchases, an invoice or bill-of-sale that includes names of the design-builder and the DBE supplier should be submitted to the DBE Office via the DBE\_Alert email box. The supply/commodity credit may be applied during the federal fiscal year (October- September) in which the purchase was made.
    - b. When the design-builder intends to apply the credit to a particular project, submit a copy of the original invoice, documentation of the calculations for supplies/commodities to be used on the project, and an Attachment A. Indicate on the Attachment A:
      - 1 This supply/commodity is in the design-builder's inventory or pre-paid in case of commodities
      2. The full value of the original invoice submitted to the DBE Office, above in (1)
      3. The amount of material or product used on this project

4. Fuel estimate listed on Attachment A will be recorded as a deduction from the full fuel purchase amount shown on the invoice
- ii. DBE Office Process (Applies only to bulk purchases)
  - a. Supply/Commodity commitment is received
  - b. Engineer verifies amount listed on invoice and enters the full amount into spreadsheet
  - c. The amount of credit applied for each project is updated on the spreadsheet until the bulk purchase is exhausted
  - d. Engineer informs design-builder when full amount of bulk purchase has been applied
- c. **Brokers, Transaction Expeditors, Packagers, Manufacturers' Representatives**
  - (1) No portion of the cost of the materials, supplies, services themselves will count for DBE credit. However, WisDOT will evaluate the fees or commissions charged when a design-builder purchases materials, supplies, or services from a DBE certified firm which is neither a manufacturer nor a regular dealer, namely: brokers, packagers, manufacturers' representatives, distributors, or other persons who arrange or expedite transactions.
  - (2) Brokerage fees are calculated as **10%** of the purchase amount.
  - (3) WisDOT may count the amount of fees or commissions charged for assistance in the procurement of the materials and supplies, fees, or transportation charges for the delivery of materials or supplies required on a job site.
  - (4) Evaluation of DBE credit includes review of the contract need for the item/service, the sub-contract or invoice for the item/service, and a comparison of the fees customarily allowed for similar services to determine whether they are reasonable.

## 9. DBE Commitment Modification Policy (Formerly "DBE Replacement Policy")

### a. Commitment Modifications

The Design-Builder should work with the Department to update the OEPP whenever changes to the plan become necessary. Once the Department has approved the design-builder's DBE commitments, the DBE office must provide consent for reduction, termination, or replacement of subcontractors or subconsultants approved on the DBE Commitment *in advance* of the modification for the design-builder to receive payment for work or supplies. Any changes or modifications to the contract once executed are considered contract modifications and as such require a change order. Additions to the DBE Commitment do not require advance notification of the DBE office, but do require an approved update to the OEPP, along with revised or additional Attachment(s) A. (see below e. DBE Utilization beyond the approved DBE Commitment)

### b. Design-Builder Considerations

- (1) A design-builder cannot modify the DBE Commitment through reduction in participation, termination, or replacement of a DBE subcontractor/subconsultant listed on the approved DBE Commitment without prior written consent from the DBE Office. This includes, but is not limited to, instances in which a design-builder seeks to perform work originally designated for a DBE subcontractor/subconsultant with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.
- (2) If a design-builder reduces participation, replaces, or terminates a DBE subcontractor/ subconsultant who has been approved for DBE credit toward its contract, the design-builder is required to provide documentation supporting its inability to fulfill the contractual commitment made to the Department regarding the DBE utilization.
- (3) The design-builder is required to demonstrate efforts to find another DBE subcontractor/ subconsultant to perform at least the same amount of work under the contract as the DBE subcontractor/subconsultant that was terminated, to the extent needed to meet the assigned DBE contract goal. When additional opportunity is available by contract modifications, the design-builder must utilize DBE subcontractors/subconsultants that were committed to equal work items, in the original contract.

- (4) In circumstances when a DBE subcontractor or DBE subconsultant fails to complete its work on the contract for any reason, or is terminated from a contract, the design-builder must undertake efforts to maintain its commitment to the assigned DBE goal.
- (5) The DBE subcontractor/subconsultant should communicate with the design-builder regarding its schedule and capacity in the context of the contract. If the DBE firm anticipates that it cannot fulfill its subcontract, they will advise the design-builder and suggest a DBE subcontractor/subconsultant that may replace their services and provide written consent to be released from its subcontract.
  - i. Before the design-builder can request modification to the approved DBE Commitment, the design-builder must:
    - a. Make every effort to fulfill the DBE Commitment by working with the listed DBE subcontractor/subconsultant to ensure that the firm is fully knowledgeable of the design-builder's expectations for successful performance on the contract. Document these efforts in writing.
    - b. If those efforts fail, provide written notice to the DBE subcontractor/subconsultant of the design-builder's intent to request to modify the Commitment through reduction in participation, termination, and/or replacement of the subcontractor/ subconsultant including the reason(s) for pursuing this action.
    - c. Copy the DBE Office on all correspondence related to changing a DBE subcontractor/ subconsultant who has been approved for DBE credit on a contract, including preparation and coordination efforts.
    - d. Clearly state the amount of time the DBE firm has to remedy and/or respond to the notice of intent to replace/terminate. The DBE must be allowed five days from the date notice was received as indicated by email time stamp or signed certified mail, to respond, in writing. EXCEPTION: The design-builder must provide a verifiable reason for a response period shorter than five days. For example, a WisDOT-directed change order eliminates a portion of the work the DBE subcontractor/subconsultant was contracted for.
    - e. The DBE subcontractor/subconsultant must acknowledge the contract modification with written response to the design-builder and the DBE Office. If objecting to the subcontract modification, the DBE subcontractor/subconsultant must outline the basis for objection to the proposed modification, providing sound reasoning for WisDOT to reject the design-builder's request.

### **c. Request to Modify DBE Subcontracting Commitment**

The written request referenced above may be delivered by email or fax. The request must contain the following:

1. Project ID number (referenced as "Design-Build Project #####-##-##")
2. WisDOT Contract Project Engineer's name and contact information
3. DBE subcontractor/subconsultant name and work type and/or NAICS code
4. Contract's progress schedule
5. Reason(s) for requesting that the DBE subcontractor/subconsultant be replaced or terminated
6. Attach/include all communication with the DBE subcontractor/subconsultant to deploy/address/resolve work completion

Naming conventions: When emailing files, please use the following language to identify your submission- "Design-Build Project #, proposal due date, Design-Builder Business Name, MODIFICATION." Email: [DBE\\_Alert@dot.wi.gov](mailto:DBE_Alert@dot.wi.gov) and the Project Manager.

WisDOT will review the request and any supporting documentation submitted to evaluate if the circumstance and the reasons constitute good cause for replacing or terminating the approved DBE subcontractor or DBE subconsultant.

*Good Causes to Replace a DBE subcontractor according to the federal DBE program guidelines {49 CFR part 26.53}*

- The listed DBE subcontractor or DBE subconsultant fails or refuses to execute a written contract
- The listed DBE subcontractor or DBE subconsultant 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 subcontractor or DBE subconsultant to perform its work on the subcontract results from the bad faith or discriminatory action of the design-builder
- The listed DBE subcontractor or DBE subconsultant fails or refuses to meet the 'design-builder's reasonable, nondiscriminatory bond requirements
- The listed DBE subcontractor or DBE subconsultant becomes bankrupt, insolvent, or exhibits credit unworthiness
- The listed DBE subcontractor or DBE subconsultant 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
- The design-builder has determined that the listed DBE subcontractor or DBE subconsultant is not a responsible contractor
- The listed DBE subcontractor or DBE subconsultant voluntarily withdraws from the project and provides written notice of its withdrawal
- The listed DBE subcontractor or DBE subconsultant is ineligible to receive DBE credit for the type of work required
- A DBE firm owner dies or becomes disabled with the result that the listed DBE subcontractor or DBE subconsultant is unable to complete its work on the contract.

**d. Evaluation and Response to the Request**

WisDOT's timely response to the design-builder's request for modification of the approved DBE Commitment will be provided to the design-builder and the WisDOT project engineer via email.

If WisDOT determines that the design-builder's basis for reduction in participation, replacement, or termination of the DBE subcontractor or DBE subconsultant is not consistent with the good cause guidelines, the DBE office will provide a response via email within 48-hours of receipt of request from the design-builder as indicated by email time stamp. The communication will include: the requirement to utilize the committed DBE, actions to support the completion of the contractual commitment, a list of available WisDOT support services, and administrative remedies, including withholding payment to the design-builder, that may be invoked for failure to comply with federal DBE guidelines for DBE replacement.

The WisDOT contact for all actions related to modification of the approved DBE Commitment is the DBE Program Engineer who can be reached at [DBE\\_Alert@dot.wi.gov](mailto:DBE_Alert@dot.wi.gov) or (414) 335-0413.

**e. DBE Utilization beyond the approved DBE Commitment**

When the design-builder or a subcontractor/subconsultant increases the scope of work for an approved DBE subcontractor/subconsultant or adds a DBE subcontractor/subconsultant who was not on the approved form DT1506-DB, or added at any time after DBE commitment approval, this is referred to as voluntary DBE contract goal achievement. The design-builder must follow these steps to ensure that the participation is accurately credited toward the DBE goal:

- (1) Forward a complete, signed Attachment A form along with a revised OEPP to the DBE Office. A complete Attachment A includes DBE subcontractor/subconsultant contact information, signatures, subcontract value, and description of the work areas to be performed by the DBE. The DBE Office will verify the DBE participation and revise the DBE Commitment based on the email/discussion, the revised OEPP, and the new Attachment A.

- (2) OR Submit a final Attachment A to DBE Alert during the Finals Process when Compliance receives notice of “Substantially Complete”

Naming conventions: When emailing files, please use the following language to identify your submission- “Design-Build Project #, Proposal due date, Design-Builder Business Name, New Attachment A” Email: DBE\_Alert@dot.wi.gov

### Special note on trucking

- DBE truckers added to the sublets in CRCS *will* be approved without DBE credit (You will see a “N” in CRCS instead of “Y”)
- Design-builders may enter a “place holder” e.g. \$1000.00, for DBE Trucking in CRCS if the full amount of trucking is unknown for sublet purposes only
- The hiring contractor/consultant may obtain the Attachment A with DBE signature included but the **design-builder** must sign the Attachment A before submitting.
- DBE truckers need to be added to the DBE commitment once. If the DBE trucker is on the initial commitment (DT1506/E1506) there is no requirement to submit another Attachment A for that trucker for that contract.

## 10. Commercially Useful Function

- a. Commercially Useful Function (CUF) is evaluated after the contract has been executed, while the DBE certified firm is performing contracted work items.
- b. The Department uses Form DT1011, DT1013, and DT1014 DBE Commercially Useful Function Review and Certification to evaluate if the DBE is performing a commercially useful function. WisDOT counts expenditures of a DBE toward the DBE goal only if the DBE is performing a commercially useful function on that contract.
- c. A DBE firm is performing a commercially useful function if the following conditions are met:
  - (1) For contract work, the DBE is responsible for executing a distinct portion of the work and is carrying out its responsibilities by actually performing, managing, and supervising that work.
  - (2) For materials and supplies, the DBE is responsible for negotiating price, determining quality and quantity, ordering, and paying for those materials and supplies.
- d. Offsite Hauling – when DBE truck will haul between a pit and plant or location other than the construction site associated with the commitment
  - (1) Indicate Offsite Hauling on Attachment A
  - (2) Discuss offsite hauling at weekly progress meetings with Project Engineer (PE)
  - (3) PE conducts spot checks of pits/plants to verify DBE truck is hauling and/or verifying hauling log
  - (4) Design-builder should be prepared to submit haul tickets, plant/pit tickets, timecards, and other pertinent documentation if requested by PE or DBE Office

## 11. Credit Evaluation for DBE Design-Builders

WisDOT calculates DBE credit based on the amount and type of work performed by DBE certified firms for work submitted with required documentation. If the design-builder is a DBE certified firm, the Department will only count the work that the DBE design-builder performs with its own forces for DBE neutral credit. The Department will also calculate DBE credit for work performed by any other DBE certified subcontractor, DBE certified subconsultant, DBE certified supplier, and DBE certified manufacturer on the contract in each firm’s

approved NAICS code/work areas that are submitted with required documentation. Crediting for manufacturers and suppliers is calculated consistent with Section 8 of this document and 49 CFR Part 26.

## 12. Joint Venture

A joint venture is an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest. If a DBE performs as a participant in a joint venture, the Department will only credit the portion of the total dollar value of the contract equal to the portion of the work that the DBE performs with its own forces.

## 13. Mentor-Protégé

- a. If a DBE performs as a participant in a mentor-protégé agreement, the Department will credit the portion of the work performed by the DBE protégé firm.
- b. DBE credit is evaluated and confirmed by the DBE Office for any contracts on which the mentor-protégé team identifies itself to the DBE Office as a current participant of the Mentor-Protégé Program.
  - (1) DBE credit may only be awarded to a non-DBE mentor firm for using its own protégé firm for less than one half of its goal on any contract; and
  - (2) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than every other contract performed by the protégé firm.
- c. A DBE protégé firm may be eligible for conditional NAICS code extension for training with the mentor. Request permission from the DBE Office- Certification area.
- d. Refer to WisDOT's Mentor-Protégé guidelines for guidance on the number of contracts and amount of DBE credit allowed on WisDOT projects.

## 14. Use of Joint Checks

The use of joint checks is allowable if it is a commonly recognized business practice in the material industry. A joint check is defined as a two-party check between a DBE subcontractor or DBE subconsultant, a design-builder, and the regular dealer or materials supplier who is neither the design-builder nor an affiliate of the design-builder. Typically, the design-builder issues one check as payor to the DBE subcontractor or DBE subconsultant and to the supplier jointly (to guarantee payment to the supplier) as payment for the material/supplies used by the DBE firm in cases where the DBE subcontractor and materials have been approved for DBE credit. The DBE subcontractor or DBE subconsultant gains the opportunity to establish a direct contracting relationship with the supplier to potentially facilitate a business rapport that results in a line of credit or increased partnering opportunities.

The cost of material and supplies purchased by the DBE firm is part of the value of work performed by the DBE to be counted toward the goal. To receive credit, the DBE firm must be responsible for negotiating price, determining quality and quantity, ordering the materials, and installing (where applicable) and "paying for the material itself." See 49 CFR 26.55(c)(1).



The approval to use joint checks constitutes a commitment to provide further information to WisDOT, upon request by staff. WisDOT will allow the use of joint checks when the following conditions are met:

- a. The design-builder must request permission to use joint checks from the DBE Office by submitting the Application to Use Joint Checks.
  - (1) Request should be made when the DBE Commitment or the Request to Sublet is submitted; the request will not be considered if submitted after the DBE Subcontractor/subconsultant starts its work.
  - (2) Approval/Permission must be granted prior to the issuance of any joint checks.
  - (3) The payment schedule for the supplier must be presented to the DBE office before the first check is issued.
  - (4) The joint check for supplies must be strictly for the cost of approved supplies.
- b. The DBE subcontractor or DBE subconsultant is responsible for furnishing and/or installing the material/work item and is not an 'extra participant' in the transaction. The DBE firm's role in the transaction cannot be limited solely to signing the check(s) to release payment to the material supplier. At a minimum, the DBE subcontractor's/subconsultant's tasks should include the following:
  - (1) The DBE subcontractor/subconsultant (not the design-builder/payor) negotiates the quantities, price, and delivery of materials.
  - (2) The DBE subcontractor/subconsultant consents to sign/release the check to the supplier by signing the [Application to Use Joint Checks](#) after establishing the conditions and documentation of payment within the subcontract terms or in a separate written document.
- c. The design-builder/payor acts solely as a guarantor.
  - (1) The design-builder agrees to furnish the check used for the payment of materials/supplies under the contract.
  - (2) The design-builder/payor cannot require the subcontractor/subconsultant to use a specific supplier or the design-builder's negotiated unit price.

## 15. Payment

Costs for conforming to this Additional Special Provision (ASP) and any associated DBE requirements are incidental to the contract.

## Appendix A

### Substantive Conversation Guidelines

The substantive conversation is critical to all design-builder's demonstration of good faith effort to meet the DBE goal prior to submittal of DBE Commitments. Relationship building between design-builders and subcontractors/subconsultants is crucial to DBE goal attainment. Responsible design-builders seek to build rapport with potential DBE subcontractors/subconsultants to understand capacity, areas of expertise, and assess contracting feasibility. Design-Builders who compete for WisDOT contracts are specialty contractors responding to a growing and changing contract environment. Just as these specialists are responsible for care of the roads, they are likewise responsible for contributing to the health of the industry. The substantive conversation drives collaboration that will build industry health and capacity. The following is intended to provide guidance for such discussions but is not an exhaustive list. Design-builders are encouraged to incorporate their existing strategies for cultivating business relationships as well.

#### Prior to DBE Commitment Submittal- this discussion should happen as early as possible

- Determine DBE subcontractor's/subconsultant's interest in quoting
- If response indicates inexperience with quoting- offer support/assistance to the DBE in understanding the industry including fundamentals a subcontractor or subconsultant needs to know, required reading and/or resources.
- Assess their interest and experience in the road construction industry by asking questions such as:
  1. Have you competed for other WisDOT contracts? Ratio of competed/to wins
  2. Have you performed on any transportation industry contracts (locally or with other states)?
  3. What is the largest contract you've completed?
  4. Have you worked in the industry: apprentice, journeyman, safety, inspection etc.?
  5. Does this project fit into your schedule? Are you working on any contracts now?
  6. Have you reviewed a copy of the Request for Proposals? Are you comfortable performing within the scope and quantity considerations of this contract?
  7. What region do you work in? Home base?
  8. Which work items/tasks are you considering?
  9. Have you read/are you familiar with WisDOT Standard Specifications? Construction Material Manual? Facilities Development Manual?
  10. Do you understand where your work fits in the project schedule, project phases?

#### Following DBE Commitment Submittal - this discussion can happen at any time

1. After reviewing their quote, note the following in your discussion:
  - Does the quote look complete? Irregular?
  - Are there errors in the quote? Are items/tasks very high or very low?
  - In general, does the quote look competitive?
2. Questions and Advice for the design-builder to share with the potential DBE subcontractor or DBE subconsultant:
  - What line items would typically be in a competitive quote for a subcontractor/subconsultant of their specialty?
  - How many employees and what is their role/experience/expertise in your firm?
  - Do you have resources for labor (union member, family-based, community-resourced) and capital (banking relationship, bond agent, CPA)?
  - Where have you worked: cities, states, government, commercial, residential/private sector, etc. Explain similarities or differences.
  - Refer them to reliable, trusted, industry resources that can educate or connect them to relevant resources, education/certification resources, more appropriate contract opportunities.
  - Discussion about design-build contract and subcontract liability, critical path items, contract work types, quantities, schedule risks, and potential profit/loss (for upcoming known projects or in general).
  - Discussion of bonding, insurance, and overall business risk considerations.

## APPENDIX B

### Sample Design-Builder Solicitation Letter Page 1

*(This sample is provided as a guide, not a formatting requirement)*

#### DBE Solicitation - [Month] [Day], [Year] WisDOT Design-Build Project Number

Attention all DBEs. [Design-Builder] is actively seeking your quote for the [Month][Day], [Year] Design-build project submittal. [Proposer] is considering submitting (or has submitted) a proposal on the projects listed on page 2 as a design-builder. Please see page 2 for instructions and the sub-contractable opportunities for each proposal.

***Does [Design-Builder] accept quotes in areas we might self-perform?*** Yes, we do! We support this federal rule and (if needed) we consider areas we might self-perform an opportunity to provide in the field assistance and training if we award your quote.

***Where can DBEs find the plans, specifications, RFP & addenda?*** Please visit the design-build section of WisDOT's Highway Construction Contract Information HCCI website: [Wisconsin Department of Transportation Highway Construction Contract Information \(wisconsindot.gov\)](http://wisconsin DOT of Transportation Highway Construction Contract Information (wisconsindot.gov)). This same website can be checked for the contract status. DBE firms can obtain additional project-specific needs from the proposer.

***What should your quote include?*** All the costs required to complete the items/tasks you propose to perform including labor, equipment, material, and related bonding or insurance. The quote should also note items that you are DBE certified to perform, tied items, and any special terms. Please use page 2 as your cover sheet for your quote.

***Do you have a question regarding bonding, credit, insurance, equipment, or supplies/materials?*** We welcome all DBE questions! Please call [Design-Builder] and ask to speak with [Contact]. [Design-Builder] can provide basic information as well as a referral to a trusted industry partner for insurance and bonding needs.

***When are quotes due?***

**[Month] [Day], [Year] at [Time].** We accept quotes via SBN, email, or fax. Please make every effort to have your quotes in by this time or earlier. Quality check your quote so it includes the correct proposal due date, design-build project ID, unit price and extension.

***Who can DBEs contact for questions, information, clarification or for a quote evaluation?*** [Project Manager Name] [Phone] [Email]. If you are quoting [Design-Builder] for the first time, we encourage you to come meet with us in person to discuss the project. Our office hours are [HOURS].

***Why partner with [Design-Builder]?***

DBE partnership is a core part of [Design-Builder's] mission. Including DBEs at the beginning of each project is essential in the success of each project. We consider DBEs to be important industry partners who bring dedication and knowledge at various stages during construction. We are proud to be an industry leader with our DBE partnership. Your success as a DBE is our success.

**Sample Design-Build Solicitation Letter Page 2**  
*(This sample is provided as a guide, not a formatting requirement)*  
REQUEST FOR QUOTE

**[Design-Builder]**  
**DBE Commitment Due Date: [Month] [Day], [Year]**  
**Project IDs: Design-Build 1234-56-00 & Design-Build 1234-01-78**

Please check all that apply:

- ☐ Yes, we will be quoting the projects & items/tasks listed below  
☐ No, we are not interested in quoting on the project or its items/tasks referenced below  
☐ Please take our name off your monthly DBE contact list  
☐ We have questions about quoting this project. Please have someone contact me at this number:

Design-Build Contact: \_\_\_\_\_ DBE: \_\_\_\_\_  
Phone: \_\_\_\_\_ Fax: \_\_\_\_\_  
Email: \_\_\_\_\_

**Please circle the proposals and items/tasks you will be quoting below and contact us with any questions**

Proposal County	1 Dane County	6 Crawford County
Clearing & Grubbing	X	X
Dump Truck Hauling	X	X
Curb/Gutter/Sidewalk	X	
Erosion Control Items		X
Excavation	X	X
Pavement Marking		X
Traffic Control	X	
Sawing	X	X
QMP, Base		X
Pipe Underdrain	X	
Landscape		X
Beam Guard	X	
Electrical	X	
Signs/Posts/Markers		X
Survey/Staking		X
Design Services	X	X

Again, please make every effort to have your quotes into our office by time deadline prior to the DBE Commitment due date.

## Sample Design-Builder Solicitation Email - Simplified

*(This sample is provided as a guide, not a formatting requirement)*

### ATTENTION DBEs

- [Design-Builder] specializes in municipal projects in the XX Region(s)
- We have successfully competed for and completed XX WisDOT projects over the past XX years
- Consider [Design-Builder] your partner on WisDOT Projects

[Design-Builder] is seeking your subcontractor/subconsultant quote for the WisDOT design-build project proposal on the below projects:

Project	County	Region
1234-56-00	Dane	SW
1234-01-78	Crawford	SW

- Please review the attachments [**attach Solicitation Letter**] and respond with your intent to quote (or not) along with the work items/tasks you are interested in performing and respond via fax or email by date. The quote should note items that you are DBE certified to perform, tied items, and any special terms. Please include labor, equipment, material, and related bonding or insurance.
- If you have any questions regarding bonding, credit, insurance, equipment and/or materials/supplies, please feel free to call [Design-Builder] and ask for [Contact]. (**Include if your company is willing to answer these types of DBE questions**)
- Request for Proposals can be found at: **WisDOT HCCI Website: List webpage where plans are located**
- If you do choose to quote, please make every effort to have your quote into our office by time and date. Make sure the correct proposal due date, design-build project number, unit price and extension are included in your quote.
- Should you have questions regarding the mentioned project, please call our office at (414) 555-5555 and we will direct you to the correct estimator/project manager.  
Our office hours are 7:30 a.m. - 5:00 p.m.

**Thank you – we look forward to working with your company on this project!**

Design-Builder  
Project Manager  
Direct: 414-555-5555  
Cell: 414-555-5556

## Sample Design-Builder Solicitation Email to **non-DBE** WisDOT Subcontractors/Subconsultants - Simplified

*(This sample is provided as a guide, not a formatting requirement)*

### ATTENTION WisDOT SUBCONTRACTORS/SUBCONSULTANTS

[Design-Builder] is considering submitting (or has submitted) a proposal on the below WisDOT design-build projects, with DBE Commitments due on XX/XX/20XX:

Project	County	Region	DBE Goal
1234-56-00	Dodge	SW	6.00%
1234-01-78	Adams	NC	3.00%
1234-00-99	Buffalo	NW	5.00%
1234-00-98	Portage	NC	6.00%

The above projects have DBE goals and [Design-Builder] is committed to DBE inclusion with every project. As such, we are requesting:

- All WisDOT Subcontractors/Subconsultants to **solicit and utilize** DBEs in your quotes.
- DBE participation can be achieved through purchasing materials from DBE suppliers, using DBE subcontractors/subconsultants and/or DBE trucking firms or any combination of these.
- If there is an opportunity to untie an item in your quote so a DBE can be utilized, please look for those opportunities as well.
- Your quote will be evaluated based on the amount of DBE participation your company is able to provide when compared to other quotes for the same work.

If you do choose to quote, please make every effort to have your quote into our office by **time and date**. Please submit all quotes to [Email]. Make sure the correct proposal due date, design-build project number, unit price and extension are included in your quote.

Should you have questions regarding the mentioned project, the Project Manager contact is: [Name]  
[Phone Number] [Email]

Thank you for utilizing DBEs who are trusted industry partners with WisDOT projects.

**Design-Builder**

**Project Manager**

Direct: 414-555-5555

Cell: 414-555-5556

## Appendix C

### Small Business Network (SBN) Overview

The Small Business Network is a part of the Bid Express® service that was created to ensure that prime bidders have a centralized online location to find subs - including small and disadvantaged business enterprises (DBEs). It is available to use as part of their Basic Service subscription. Design-build projects will not be posted in Bid Express. It is up to the proposer to utilize other methods or a more general solicitation within SBN to locate interested DBE firms. Within the Small Business Network, **Design-Builders** can:

1. Easily select proposals, work types and items:
  - a. After adding applicable work types, select items that you wish to quote. Enter the sub-quote quantities and add comments, if desired. Adding or removing items and work types can be done quickly. If needed, you can save the sub-quote for later completion.
2. Create sub-quotes for the subcontracting community:
  - a. Create sub-quotes with ease using the intuitive sub-quote creator. In seven short steps, you can rapidly create a custom sub-quote directed to all subcontractors or subconsultants that bid on the applicable work types. Steps include: provide contact information and sub-quote expiration date, select letting and proposal, add work types and items, specify terms and conditions, upload attachments, and select vendors.
  - b. Create a sub-quote to send to subcontractors, subconsultants, or suppliers that lists the items in a proposal that you want quoted
  - c. Create an unlimited number of sub-quotes for items you want quoted, and optionally mark them as a DBE preferred request.
  - d. Add attachments to sub-quotes.
3. View sub-quote requests & responses:
  - a. After logging into the Bid Express service, you can quickly review all of your sub-quote requests and all unsolicited sub-quote requests from subcontractors or subconsultants. To simplify the Small Business Network home screen, sub-quote requests can be hidden with one click if they are not applicable.
  - b. View or receive unsolicited sub-quotes that subcontractors or subconsultants have posted, complete with terms, conditions and pricing.
4. View Record of Subcontractor/Subconsultant Outreach Effort:
  - a. For each sub-quote produced, a *Record of Subcontractor Outreach Effort* is generated that shows the response statistics for a particular sub-quote. If accepted by the letting agency, this report may serve as proof of a “Good Faith” effort in reaching out to the DBE community.
  - b. Easily locate pre-qualified and certified small and disadvantaged businesses.
  - c. Advertise to small and disadvantaged businesses more efficiently and cost effectively.
  - d. Document your interactions with subs/DBEs by producing an Outreach Report (may be accepted as proof of DBE outreach at the discretion of each agency).

The Small Business Network help small businesses learn more about opportunities, compete more effectively, network with other contractors and subcontractors, and win more jobs. The DBE office will provide free SBN accounts to DBEs when requested. Use [DBE\\_Alert@dot.wi.gov](mailto:DBE_Alert@dot.wi.gov) to request an account.

**DBE firms can:**

1. View and reply to sub-quote requests from design-builders:
  - a. After logging into the Bid Express service, you can quickly review all incoming sub-quote requests and all unsolicited sub-quotes created by your company. Receive notifications by selected work type. To simplify on the Small Business Network home screen, sub-quote requests can be filtered by work types relevant to your interests or hidden with one click if they are not applicable.
2. Select items when responding to sub-quote requests from design-builders:
  - a. You have the freedom to choose and price any number of items when responding to a sub-quote request. Quantities can be modified, and per-item comments are also available.
  - b. View requests for sub-quotes for work that design-builders have posted for projects they are bidding, add your pricing, terms, and conditions, and submit completed sub-quotes to the requesting design-builders.
  - c. Add attachments to a sub-quote.
3. Create and send unsolicited sub-quotes to specific contractors:
  - a. Create unsolicited sub-quotes with ease using the intuitive sub-quote creator. In eight short steps, you can rapidly create a custom sub-quote directed at any number of specific vendors of your choosing. Steps include: provide contact information and sub-quote expiration date, select letting and proposal, add work types and items, specify terms and conditions, upload attachments, and select vendors.
4. Easily select and price items for unsolicited sub-quotes:
  - a. After adding applicable work types, select items that you wish to quote. The extended price calculates automatically, cutting out costly calculation errors. Comments can be provided on a per-item basis as well.
  - b. Create an unsolicited sub-quote that lists the items from a proposal that you want to quote, include pricing, terms and conditions, and send it to selected prime/plan holder/proposer/design-builder.
  - c. Add attachments to a sub-quote.
  - d. Add unsolicited work items to sub-quotes that you are responding to.
5. Easy Access to Valuable Information
  - a. Receive a confirmation that your sub-quote was opened by a prime/proposer/design-builder.
  - b. View Bid Tab Analysis data from past bids, including the high, average and low prices of items.
  - c. View important notices and publications from DOT targeted to small and disadvantaged businesses.
6. Accessing Small Business Network for WisDOT contracting opportunities
  - a. If you are a contractor not yet subscribing to the Bid Express service, go to [www.bidx.com](http://www.bidx.com) and select "Order Bid Express." The Small Business Network is a part of the Bid Express Basic Service.



## APPENDIX D

### **Good Faith Effort Evaluation Measures *by categories referenced in DBE regulations***

Bidders must demonstrate that they took all necessary and reasonable steps to achieve the assigned DBE contract goal. For each contract, all bidders must submit documentation indicating the goal has been met or if falling short of meeting the assigned goal, must request a DBE Goal Waiver and document all efforts employed to secure DBE subcontractor participation on Form DT1202.

DBE staff analyze the bidder's documented good faith efforts to determine if action taken was sufficient to meet the goal. Sufficiency is measured contract-by-contract. WisDOT evaluates active and aggressive efforts, quality, quantity, scope, intensity, and appropriateness of the bidder's efforts as a scale of the principles of Good Faith outlined in 49 CFR Part 26, Appendix A. Additional emphasis is placed on the bidder's demonstration of timely submission of documentation and communication with DBE subcontractors, and business development initiatives undertaken to support DBE firm growth.

The following is a sample of good faith effort activities that are rated according to the accompanying rubric. Contractors are encouraged to identify additional activities that align with their business type(s).

- Personal, tailored solicitation to firms that specialize in work types planned or desired for subcontracting
- Follow up to initial solicitation via email or phone
- Substantive conversation including topics such as contract liability, critical path work items, schedule risks, and potential profit/loss
- SBN utilization including posting quotes
- Review and response to DBE quotes including provision of information about plans, specifications, and requirements as applicable
- Documentation requesting subcontractors support DBE goal by solicitation and inclusion of DBE subcontractor quotes
- Responsive and timely submission of organized documentation
- Analysis of number of DBE firms who do work types that you typically subcontract
- Analysis of number of DBE firms who reside in geographical areas where prime seeks work
- Analysis of firms who express interest in bidding/quoting including the number of firms who declined your solicitation
- Reference check of DBE subcontractor work or training (documentation of questions and response required)
- Number of different efforts undertaken to meet the assigned DBE goal as documented in accompanying Form DT1202
- Submission of all DBE quotes received matched with a variety of work to be performed by DBEs
- Number and names of DBE firms provided written advice, or referral to industry-specific business development resources
- Overall pattern of DBE utilization on all WisDOT contracts which may include contracting with municipalities
- Documentation of resources expended to meet assigned DBE goal (#of hours, staff titles, average pay rate, actions taken)
- Analysis of subcontractable work items to be completed by prime beyond prime contractor's 30%
- Risk analysis of work items that are typically in tied quotes that could be unbundled
- List of contract work items in smallest economically feasible units, identifying schedule impact
- Submission of a Gap Analysis identifying DBE skillset and/or industry needs
- Staff training in EEO and Civil Rights laws as documented in training logs
- Written Capacity Assessment completed with DBE firm documenting its ability to perform the work quoted
- DBE engagement efforts beyond simple solicitation that include a substantive discussion, initiated as early in the acquisition process as possible (*points added for each day prior to letting*)
- Outreach and marketing efforts with minority, women, and veteran-focused organizations at least 10 days prior to bid opening
- Active involvement in WisDOT's Business Development Program, TrANS training, facilitated networking efforts, workshops
- Customized teaching/training efforts for future opportunities with DBE subcontractor, contract specific and/or annually
- Introduction and reference provided for DBE subcontractor to a prime who has not previously contracted with the DBE firm
- Prime utilization of a DBE subcontractor the prime has not contracted with previously
- Written referral/recommendation to bond/insurance agents, manufacturer, supplier
- Documented efforts fostering DBE participation through administrative and/or technical assistance
- Evidence of negotiation with the DBE firm about current and future Let opportunities
- Recommendation of local and state services that support small business and access to opportunity: DOA, SBA, WEDC, WPI, etc.
- Advice on bonding, lines of credit, or insurance as required to complete the items quoted and contract requirements

## GFE SUMMARY GUIDANCE

GFE Summary	Examples	Rating	OBOEC Feedback
<b>Solicitation Documentation</b>	Identify all reasonable and available activities performed to solicit the interest of all certified DBEs who have capacity and ability to perform work on the project.  <i>Such as: Updated solicitation letter and email, timely solicitation, and follow-up, and/or utilized various methods to communicate solicitation (ex: letter, email, publication, posting and/or website)</i>		
<b>Selected Work Items Documentation</b>	All work items are broken out into economically feasible units to facilitate DBE participation.  <i>Such as: Selected work items are specific to each proposal and clearly identified in all solicitation(s)</i>		
<b>Documentation of Project Information provided to Interested DBEs</b>	Provide interested DBEs with adequate information about the plans, specifications, and any other contractual requirements in a timely manner to assist DBEs in response to solicitation.  <i>Such as: Project information is clearly identified in all solicitation(s)</i>		
<b>Documentation of Negotiation with Interested DBEs</b>	Provide sufficient evidence demonstrating that good faith negotiations took place prior to proposal submittal.  <i>Such as: Documented attempts with DBEs or on behalf of DBEs to increase DBE participation</i>		
<b>Documentation of Sound Reason for Rejecting DBEs</b>	Provide sufficient evidence demonstrating that DBEs are rejected for sound reasons.  <i>Such as: Detailed and thoughtful analysis that considers both the percentage and dollar difference when rejecting a DBE including past performance, relevant business experience and stability, safety record, business ethic and integrity, technical capacity, and other tangible factors.</i>		
<b>Documentation of Assistance to Interested DBEs- bonding, credit, insurance, equipment, supplies/materials</b>	Documented assistance in both solicitation(s) and outreach to DBEs.		
<b>Documentation of Outreach to Minority, Women, and Community organizations and other DBE Business Development Support</b>	Effectively use the services of minority, women, and community organizations as well as contractors' groups, local, state, and federal business assistance offices and organization that provide assistance in recruiting and supporting DBEs, as well participation in activities that support DBE business development.  <i>Such as: Variety of activities that translate into meaningful DBE participation</i>		
<b>Documentation of other GFE activities</b>	<i>Such as: Diversity &amp; Inclusion company policy, Mentor-Protégé participant, awarded neutral DBE after bid submission, included company GFE overview/strategy information and/or company website highlights DBE opportunities and participation</i>		
<b>Overall Demonstration of GFE</b>			

**GFE SUMMARY EVALUATION RATING LEGEND – PHASE 1 – Initial Review**

The GFE Summary provided by the design-builder is evaluated and rated on the rubric. Design-Builders should include activities characterized by the following types of effort:

**ACTIVE & AGGRESSIVE:** Demonstrated through engaged and assertive activity

**QUALITY:** Demonstrated through essential character of conscientious and serious activity

**QUANTITY:** Demonstrated through a measurable number of activities

**SCOPE & INTENSITY:** Demonstrated through a rigorous approach to an appropriate and purposeful range of activities

**TIMING:** Demonstrated through engagement efforts beyond simple solicitation, initiated early in the process

**GFE SUMMARY EVALUATION – PHASE 2 – Team Review**

GFE Team completes:

- Review of activities included on the rubric
- Review of the intent to award and sound reasoning submitted by Design-Builder
- Cost analysis to confirm if any cost proposal submitted met the DBE goal
- Team review of combined efforts documented in Phase 1 and 2 constitute final GFE determination

Rating Scale:

- **GFE Approval:**  
**Bona Fide = 6 or more categories color coded green.**  
Genuine effort characterized by sincere and earnest activities – “Solicitation” and “Sound Reasoning” must be green
- **GFE Approval:**  
**Sufficient = 5 or more categories color coded green or yellow**  
Adequate effort documented with a variety of quality activities – “Solicitation” and “Sound Reasoning” must be green or yellow
- **GFE Denial:**  
**Pro Forma efforts = 4 or less categories color coded green or yellow.** Perfunctory effort characterized by routine or superficial activities

**Green = Exceeds expectations**

**Yellow = Meets expectations**

**Red = Areas in need of attention and/or absence of documentation**

**See OBOEC Rubric Analysis\_Feedback**

Excerpt from Appendix A to 49 CFR Part 26:

V. In determining whether a bidder has made good faith efforts, it is essential to scrutinize its documented efforts. At a minimum, you must review the performance of other bidders in meeting the contract goal. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts. As provided in §26.53(b)(2)(vi), you must also require the contractor to submit copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract to review whether DBE prices were substantially higher; and contact the DBEs listed

<b>GFE SUMMARY RUBRIC ANALYSIS</b>	
OBOEC DECISION	APPROVAL OR DENIAL
Design-Builder	
Proposal	
Project	
Design-Build DBE Commitment Due Date	
DBE Goal Amount	
DBE Goal Amount Achieved	
<b>Goal Analysis</b>	
Goal %	Achieved %
Design-Builder	%
<b>DBE Quotes Received</b>	
<b>DBE Quotes Awarded</b>	
<b>DBE Quote(s) Rejected</b>	<b>Rejected Quote Analysis</b>
<b>DBE Quote(s) Awarded</b>	<b>Awarded DBE Amount</b>

## **APPENDIX E**

### **Good Faith Effort Best Practices**

This list is not a set of requirements; it is a list of potential strategies

#### **Design-Builders**

- Ø Design-Builder open houses inviting DBE firms to see the “war room” or providing technical assistance.
- Ø Participate in speed networking and mosaic exercises as arranged by DBE office.
- Ø Host information sessions.
- Ø Participate in a formal mentor protégé or joint venture with a DBE firm.
- Ø Participate in WisDOT advisory committees i.e. TRANSAC, or Mega Project committee meetings.
- Ø Facilitate a small group DBE ‘training session’ clarifying how your firm prepares for proposal submission, evaluates subcontractors/subconsultants, preferred qualifications, and communication methods.
- Ø Encourage subcontractors/subconsultants to solicit and highlight DBE participation in their quotes to you.
- Ø Quality of communication, not quantity creates the best results. Design-builders should be thorough in communicating with DBE firms before the proposal submittal and the submittal of DBE Commitments, and provide any assistance requested to assure best possible quote.
- Ø Consult WisDOT Design-Build website for a list of firms who have notified WisDOT of their interest in collaborating on design-build projects. This list can be found at <https://wisconsindot.gov/Documents/doing-bus/designbuild/contact-list-firms-interested-in-db.pdf>.

#### **DBE**

- Ø DBE firms should contact design-builders as soon as possible with questions regarding their quotes or bid; seven days prior is optimal.
- Ø Continually check for RFP addendums on the HCCI website through the proposal due date to stay abreast of changes.
- Ø Review the status of contracts on the HCCI website
- Ø Prepare a portfolio or list of related projects and prime and supplier references; be sure to note transportation related projects of similar size and scope, firm expertise and staffing.
- Ø Participate in DBE office assessment programs.
- Ø Participate on advisory and mega-project committees.
- Ø Sign up to receive the DBE Contracting Update.
- Ø Consider membership in relevant industry or contractor organizations.
- Ø Active participation is a must. Quote as many projects as you can reasonably work on; quoting the design-builder and submitting as a proposer with the Department are the only ways to get work.
- Ø Consult WisDOT Design-Build website for a list of firms who have notified WisDOT of their interest in collaborating on design-build projects. This list can be found at <https://wisconsindot.gov/Documents/doing-bus/designbuild/contact-list-firms-interested-in-db.pdf>.

**APPENDIX F**  
**Good Faith Effort Evaluation Guidance**  
*Appendix A of 49 CFR Part 26*  
*For Information Only*

I. When, as a recipient, you establish a contract goal on a DOT-assisted contract for procuring construction, equipment, services, or any other purpose, a bidder must, in order to be responsible and/or responsive, make sufficient good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

II. In any situation in which you have established a contract goal, Part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, you have the responsibility to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made, based on the regulations and the guidance in this Appendix.

The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call. Determinations should not be made using quantitative formulas.

III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (i.e., obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. This rule specifically prohibits you from ignoring bona fide good faith efforts.

IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

A. (1) Conducting market research to identify small business contractors and suppliers and soliciting through all reasonable and available means the interest of all certified DBEs that have the capability to perform the work of the contract. This may include attendance at pre-bid and business matchmaking meetings and events, advertising and/or written notices, posting of Notices of Sources Sought and/or Requests for Proposals, written notices or emails to all DBEs listed in the State's directory of transportation firms that specialize in the areas of work desired (as noted in the DBE directory) and which are located in the area or surrounding areas of the project.

(2) The bidder should solicit this interest as early in the acquisition process as practicable to allow the DBEs to respond to the solicitation and submit a timely offer for the subcontract. The bidder should determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

B. 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 into economically feasible units (for example, smaller tasks or quantities) to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces. This may include, where possible, establishing flexible timeframes for performance and delivery schedules in a manner that encourages and facilitates DBE participation.

C. 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 with their offer for the subcontract.

D. (1) 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.

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

E. (1) Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal. Another practice considered an insufficient good faith effort is the rejection of the DBE because its quotation for the work was not the lowest received. However, nothing in this paragraph shall be construed to require the bidder or prime contractor to accept unreasonable quotes in order to satisfy contract goals.

(2) A prime contractor's inability to find a replacement DBE at the original price is not alone sufficient to support a finding that good faith efforts have been made to replace the original DBE. The fact that the contractor has the ability and/or desire to perform the contract work with its own forces does not relieve the contractor of the obligation to make good faith efforts to find a replacement DBE, and it is not a sound basis for rejecting a prospective replacement DBE's reasonable quote.

F. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.

G. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

H. Effectively using the services of available minority/women community organizations; 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.

V. In determining whether a bidder has made good faith efforts, it is essential to scrutinize its documented efforts. At a minimum, you must review the performance of other bidders in meeting the contract goal. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts. As provided in §26.53(b)(2)(vi), you must also require the contractor to submit copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract to review whether DBE prices were substantially higher; and contact the DBEs listed on a contractor's solicitation to inquire as to whether they were contacted by the prime. Pro forma mailings to DBEs requesting bids are not alone sufficient to satisfy good faith efforts under the rule.

VI. A promise to use DBEs after contract award is not considered to be responsive to the contract solicitation or to constitute good faith efforts except in design-build procurement.

[79 FR 59600, Oct. 2, 2014, as amended at 89 FR 24979, Apr 9, 2024]



## **APPENDIX G**

**Form DT 1506-DB, DT 1506-A**

**Official Form DT1506-DB can be found here:**

**<https://wisconsindot.gov/Documents/formdocs/dt1506-DB.pdf>**

**Official Form DT 1506-A Commitment to Subcontract to DBE Attachment A can be found here: <https://wisconsindot.gov/Documents/formdocs/dt1506A.pdf>**