

## **Chapter 8**

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### **Section 3 Disadvantaged Business Enterprises and Disabled Veteran Business Enterprises**

#### **8-301 General**

Caltrans' policy is to ensure equal opportunity in the award and performance of its contracts. Part of this policy includes programs designed to increase the use of disadvantaged business enterprises (DBEs) on federally funded contracts and disabled veteran business enterprises (DVBEs) on state-funded contracts.

Federal regulations define DBEs as firms owned and controlled by individuals who are both socially and economically disadvantaged. For the state's federally assisted transportation program, Caltrans establishes an annual overall participation goal for DBEs. Caltrans strives to meet the annual goal through varying individual contract goals that contractors must either meet or conduct a good faith effort to meet during the bidding process.

State law defines DVBEs as firms owned, managed, and controlled by one or more disabled veterans. State law requires Caltrans to ensure at least 3 percent DVBE participation in its contracting dollars expended annually. Caltrans strives to meet this requirement by establishing individual DVBE participation requirements on state-funded contracts. Contractors must meet the contract requirement to be awarded a state-funded contract.

Contract goals are set based upon the type of work in the contract and the availability of DBE firms to participate in the bidding process in the geographical area of the contract. DVBE contract participation requirements vary from 3 percent to 5 percent depending on the dollar value of the overall project. Contracts may also include a DVBE bid incentive based on the percentage of the commitment made by the bidder.

For every advertised contract containing goals or percentage requirements, the contractor must submit information to Caltrans during the bidding process regarding the proposed use of DBEs or DVBEs. The contractor's proposal is evaluated prior to award of a contract to see if the contract requirement has been met or if a good faith effort to use DBEs has been made, as applicable. If the low bidder has not met the contract requirement or shown good faith efforts to do so, the contract may be awarded to the next low bidder that meets these requirements. Once a contract is awarded, the bidder's statement of intent or good faith effort is a commitment that becomes a contract requirement.

Projects funded only with state funds have no specific requirement for the use of DBEs. Likewise, projects funded with federal transportation funds have no specific requirement for the use of DVBEs. DBEs and DVBEs are not interchangeable. Consequently, projects funded only by the state cannot use a DBE to meet the DVBE requirement, and projects funded with federal transportation funds cannot use a DVBE to meet the DBE goal.

Some contracts do not have DBE or DVBE goals. However, Caltrans still encourages the use of DBEs and DVBEs on these contracts, and bidders are urged to obtain DBE or DVBE participation.

The contract contains the Caltrans DBE or DVBE requirements. Specific restrictions exist regarding the removal and replacement of both DBEs and DVBEs listed on the contractor's commitment documents provided at the time of bid submission. DBE or DVBE requirements are in addition to the requirements of Sections 4100–4114, “Subletting and Subcontracting Fair Practices Act” (Fair Practices Act), of the Public Contract Code, which are described in Section 3-507C, “The Subletting and Subcontracting Fair Practices Act,” of this manual.

## **8-302 Terms Used in Construction**

### **8-302A Commercially Useful Function**

- DBE—a DBE performs a commercially useful function when it does all of the following (as detailed in the Code of Federal Regulations Section 26.55[c]):
  1. Performs at least 30 percent of the total cost of its contract with its own work force and does not subcontract out portions of its contract work that are greater than normal industry practices for the type of work performed.
  2. Performs, manages, and supervises the work involved.
  3. Negotiates prices, determines quantity and quality, orders materials and supplies, pays for the materials and supplies, and installs the materials where applicable.
- DVBE—a DVBE performs a commercially useful function when it does all of the following (as detailed in California Military and Veterans Code, Section 999[b][5][B]):
  1. Is responsible for the execution of a distinct element of the contract
  2. Carries out the obligation by actually performing, managing, or supervising the work involved
  3. Performs work that is normal for its business services and functions
  4. Is responsible with respect to products, inventories, materials, and supplies required for the contract; for negotiating price; determining quality and quantity; and ordering, installing, if applicable, and making payment
  5. Is not further subcontracting a portion of the work that is greater than that expected to be subcontracted by normal industry practices

A DBE or DVBE firm does not perform a commercially useful function if its role on the contract is limited to being an extra participant in a transaction or contract through which funds are passed in order to obtain the appearance of participation.

### 8-302B Underutilized Disadvantaged Business Enterprises

An underutilized disadvantaged business enterprise (UDBE) is a certified DBE firm that is recognized as being in one or more of the following DBE categories: Black American, Asian-Pacific American, Native American, or Women.

In a 2007 Caltrans-led disparity study conducted to determine if disparity existed in the use of one or more DBE categories, the four categories above were determined to be underutilized in the construction industry. To achieve greater participation in the four groups, Caltrans set UDBE goals on contracts advertised on or after February 27, 2009 through June 15, 2012. UDBE contract goals were not set on projects advertised after June 15, 2012.

## **8-303 Before Work Begins**

### 8-303A Disadvantaged Business Enterprise and Disabled Veteran Business Enterprise Commitment Form

The DBE or DVBE commitment form provides the resident engineer with a listing of specific work to be done or materials to be furnished by specific DBEs or DVBEs and is based on information the contractor submitted during the bidding process. The resident engineer will receive the approved commitment of DBE or DVBE participation in the award package. For DBE participation commitments, bidders use Form DES-OE-0102.10D, "DBE-Commitment." For DVBE participation commitments, bidders use Form DES-OE-0102.5, "Certified DVBE Summary." For DBE good faith efforts, bidders use Form DES-E-0102.11A, "DBE Good Faith Efforts Documentation." The percentage specified in the original contract advertisement may differ from the approved listing, which is a specific contract commitment from the contractor. The contractor must meet the DBE or DVBE commitment, regardless of the contract percentage.

Review the commitment forms with inspection staff before work begins to ensure that field staff knows who should be performing DBE or DVBE contract work. If the commitment form has not been provided in the award package or is incomplete, the resident engineer must contact the district labor compliance officer or the office engineer.

### 8-303B Subcontractor List Versus Disadvantaged Business Enterprise and Disabled Veteran Business Enterprise Commitment Form

Do not construe the commitment of DBE or DVBE subcontractors as a request to subcontract or a notice of intent to subcontract as required by Section 5-1.13, "Subcontracting," of the *Standard Specifications*. However, the approved form does equate to a commitment from the contractor to meet the DBE or DVBE requirements of the contract. In those instances where a DBE or DVBE subcontractor exceeds the dollar threshold (one-half of 1 percent of the total bid, or \$10,000, whichever is greater) specified in the Fair Practices Act, the DBE or DVBE must also be listed on the "subcontractor list." Conversely, a DBE or DVBE whose value of work falls below the threshold will not be listed on the subcontractor list, in accordance with the Fair

Practices Act. Because the DBE or DVBE may not be on the subcontractor list, the DBE or DVBE listing and the subcontractor list may not match. First-tier subcontractors listed on the contractor's DBE or DVBE use plan must be listed on Form CEM-1201, "Subcontracting Request." Refer to Section 3-507D, "Procedure for Approval or Acknowledgment of Subcontractors," of this manual for additional information on first-tier subcontractors.

To cross-check DBE or DVBE commitments, compare the subcontractors and contract items listed on the subcontractor list and Form CEM-1201, "Subcontracting Request," with the approved DBE or DVBE commitment forms. Identify any irregularities during the preconstruction conference.

### 8-303C Disadvantaged Business Enterprise Joint Check Agreement Request Form

Form CEM-2407, "Disadvantaged Business Enterprise Joint Check Agreement Request," must be used to track and monitor the use of joint checks. The form acts as a written agreement among parties providing full and prompt disclosure of the expected use of joint checks and must be completed and submitted to the resident engineer who must approve and sign prior to the use of joint checks. The resident engineer verifies the form is complete and signed by all parties, the DBE subcontractor is performing a commercially useful function (CUF), and the DBE subcontractor has retained final decision-making responsibility concerning the procurement of materials and supplies. For additional information, refer to Section 5-1.23B, "Action Submittals," of the Standard Specifications. The form is available at:

<https://dot.ca.gov/programs/construction/forms>

Place the completed and approved original Form CEM-2407 in the project file. Distribute copies to the prime contractor, DBE subcontractor, Office of Business and Economic Opportunity (OBEO), and district Labor Compliance Office.

A joint check is a two-party check between a contractor or lower-tier subcontractor and a DBE subcontractor who purchases materials from a material supplier. Joint check arrangements may be requested for a variety of reasons, such as providing the DBE subcontractor an opportunity to establish a direct contracting relationship with the supplier that could result in a line of credit or increased partnering opportunities.

A joint check agreement may be initiated by any party; however, all parties must agree to the use of a joint check. When a prime contractor issues a joint check, it must be delivered or mailed to the DBE subcontractor for presentation and payment to the material supplier.

Joint checks may only be used between the prime contractor and a DBE subcontractor and the DBE subcontractor must furnish and install all of the material it supplies. Prime contractor payments made directly to a supplier on behalf of the DBE subcontractor will not count toward DBE credit on the project.

Resident engineers are responsible for monitoring the DBE subcontractor's performance of a CUF. When joint checks are used, DBE credit toward the contract

goal will only be allowed when the DBE subcontractor is performing a CUF in accordance with the Code of Federal Regulations, Title 49, Section 26.55 (c)(1) [49CFR 26.55 (c)(1)], “How is DBE participation counted toward goals?”:

*“A DBE performs a commercially useful function when it is responsible for execution of the work on the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself.”*

All parties involved in a joint check agreement must provide, upon request, any documentation Caltrans has deemed necessary to verify compliance. Refer to Section 5-1.24C, “Record Inspection, Copying, and Auditing,” of the Standard Specifications for more information.

Failure to follow these procedures will disqualify DBE participation or adversely affect a contractor’s bidding status. The use of joint checks is subject to review by OBEO and Division of Construction.

#### 8-303D Preconstruction Conference

During the preconstruction conference, review the commitment details with the prime contractor and other attending parties. Inform the contractor of the contract requirements to use the committed DBE or DVBE firms or go through the applicable substitution process. Also inform the contractor that unless the work is performed or supplied by the listed DBEs or DVBEs or a substitution is approved, the contractor is not entitled to any payment for work or materials or may be subject to a 10 percent contract withhold. The preconstruction conference is a good opportunity for the prime contractor to inform Caltrans staff of any known issues prior to the work starting. If the contractor identifies any issues, follow the process identified in Sections 8-304B, “Substitution of Listed Firms,” and 8-304C, “Adding Disadvantaged Business Enterprises or Disabled Veteran Business Enterprises,” of this manual.

### **8-304 Activities During Construction**

#### 8-304A Monitoring and Enforcement

Caltrans is required by federal and state regulations to monitor worksites to ensure work committed to a DBE or DVBE is being performed by the respective firms and ensuring a commercially useful function. For federally funded projects, the resident engineer must certify in writing that a field review of DBE records occurred and the worksite was monitored by Caltrans staff.

The following procedures must be used by field staff to monitor and enforce the DBE or DVBE requirements of the contract, including prompt payment:

1. When a DBE or DVBE firm performs work on the contract, inspection staff must document in the daily inspection report the name of the firm and the associated contract items performed. Cross-check the inspection reports against

commitment forms to ensure the appropriate firm is performing the work or providing the materials.

2. Interview workers of DBE or DVBE subcontractors. For additional information on conducting interviews, refer to Section 8-102A (3), "Interviews With Contractor Personnel," of this manual.
3. Confirm with the district labor compliance officer that certified payroll records have been received for the DBE or DVBE, if applicable.
4. If the DBE or DVBE firm is a materials supplier, request that the contractor provide documents such as delivery confirmation reports and canceled payment checks to confirm that the DBE or DVBE supplied the materials.
5. Ensure the contractor submits Form CEM-2406, "Monthly Disadvantaged Business Enterprises (DBE) Payment," by the 15th of the month for the previous month's activities.
6. If trucking is part of the contractor's DBE commitment, identify trucking firms and drivers and associated items of work for each trucking firm on daily inspection reports. In addition, ensure the contractor submits Form CEM-2404F, "Monthly DBE/UDBE Trucking Verification," by the 15th of the month for the previous month's trucking activities. Randomly confirm the information on these forms by requesting copies of weighmaster certificates and canceled payment checks from the contractor. Cross-check the information against daily inspection reports as well. Refer to Section 8-304A (1), "Monthly DBE/UDBE Trucking Verification Form," of this manual for additional information.
7. Do not allow a contractor to terminate or substitute a listed DBE or DVBE from the contract without written consent. For information on the substitution process, refer to Section 8-304B, "Substitution of Listed Firms," of this manual.
8. Withhold contract funds, as applicable, for improper substitutions, terminations, or failure to meet contract commitments.
9. Bring to the attention of the district labor compliance officer any complaints of failure by the contractor to promptly pay DBE or DVBE firms.
10. Require the contractor to notify you in writing of any changes in DBE certification status; that is, a DBE becomes decertified or a business entity becomes certified as a DBE. For additional information on changes in DBE certification status, refer to Section 8-304B (2), "Disadvantaged Business Enterprise Substitutions," of this manual.
11. Consult with the district labor compliance officer for questions on implementing enforcement activities.

#### ***8-304A (1) Monthly DBE/UDBE Trucking Verification Form***

When DBE trucking is approved on the commitment list, the contractor must submit to the resident engineer Form CEM-2404F, "Monthly DBE/UDBE Trucking Verification," before the 15th of each month. The form must include the following for all trucking performed during the reporting period:



- The truck owner's name
- The California identification (CA) number issued by the California Highway Patrol
- The truck owner's DBE certification number
- The company name and address
- The commission or amount paid
- The date paid
- The lease arrangement if applicable

If the prime contractor fails to submit the form, the resident engineer must hold an administrative deduction for missing documents.

In determining how much credit percentage to allow for the trucking company toward the DBE contract goal, use the following factors:

- The listed DBE must own and operate at least one fully licensed, insured, and operational truck used on the contract.
- The DBE receives credit for the total value of the transportation services it provides on the contract, using trucks it owns, insures, and operates, and using drivers it employs.
- The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE that leases trucks from another DBE firm receives credit for the total value of the transportation services the lessee DBE provides on the contract.
- The DBE may also lease trucks from a non-DBE firm or a non-DBE owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee because a DBE is not providing these services.
- A lease must indicate that the DBE has exclusive use of and control over the truck. The leased truck may work for others during the term of the lease with the consent of the DBE, as long as the lease gives the DBE absolute priority for use of the leased truck. (Generally, the lease must be long term and not for the specific project.)

#### *8-304A (2) When the Listed DBE or DVBE Does Not Perform the Work*

If Caltrans personnel observe that firms other than those listed are doing the work or providing the materials, promptly notify the contractor in writing that an apparent violation is taking place. If you make an initial verbal warning, note this fact in the resident engineer's daily report. Also, for this work, hold an administrative deduction on the next estimate for the dollar amount of work that should have been performed to date as listed on the DBE commitment for the specific firm. For DVBEs, hold an administrative deduction for 10 percent of the DVBE commitment for the specific firm.

If the first notice is ineffective for any reason, send another written notice describing the violation to the contractor. Include a warning that failure to comply with the DBE or DVBE contract requirements will result in a withhold in the full amount of the items of work listed and a referral to the Department of General Services (DGS) for investigation for contracts with DVBE commitments. For a sample copy of such a letter, refer to Example 8-3.1, "Second Notice, Contractor Has Failed to Respond to Verbal Notice on Nonuse of DBE or DVBE," at the end of this section.

If the written notice fails to achieve results, submit to the district labor compliance office a memorandum noting the following:

- The apparent violation
- Actions taken
- The contractor's subsequent action or inaction
- Documentation of the notices sent to the contractor

The district labor compliance office reviews for consistency the actions taken and forwards this documentation to the Division of Construction, Labor Compliance Unit, and the construction field coordinator. Include any district recommendations for action. The Division of Construction will notify the Caltrans Office of Business and Economic Opportunity (OBEO) when necessary. OBEO will notify the federal or state authorities as appropriate.

The actions described above are in addition to any that must be taken for violations of the subcontracting provisions of the *Standard Specifications* and of the Subletting and Subcontracting Fair Practices Act.

#### 8-304B Substitution of Listed Firms

The resident engineer must not allow a prime contractor to remove or substitute a listed DBE or DVBE firm without prior written consent from Caltrans. This includes allowing the prime contractor to self-perform work originally committed to a DBE or DVBE firm. Requests for substitution of a listed DBE or DVBE firm must be in writing.

##### *8-304B (1) Underutilized Disadvantaged Business Enterprise Substitutions*

The UDBE substitution procedures apply to contracts advertised on or after February 27, 2009 through June 15, 2012. For contracts with UDBE participation, follow the process described below. The prime contractor is required to replace the listed UDBE with another certified DBE firm identified as underutilized or conduct a good faith effort to do so to the extent required to meet the original contract goal. For additional information on those DBE firms considered to be underutilized, refer to Section 8-302, "Terms Used in Construction," of this manual.

Require the contractor to submit a written request for substitution of a listed UDBE. Ensure the request cites one of the seven reasons listed in Section 5, "General, Performance of UDBEs," of the special provisions. If the prime contractor requests substitution with a non-UDBE, the good faith effort must be included with the request

and must address the eight information and supporting document items identified in the contract under “Disadvantaged Business Enterprises.” The prime contractor’s good faith effort must be reviewed and approved by the district construction division chief before approval of a substitution request. If the prime contractor fails to conduct a good faith effort to replace a listed UDBE with another UDBE, deny the substitution request.

Provide the listed UDBE with written notice, including confirmation of receipt, of the prime contractor’s request to substitute upon receipt of a request for substitution. The written notice must allow the listed UDBE at least 5 days to object to the substitution. If the UDBE objects and provides a timely response, the district must conduct a hearing on the substitution request. Provide the prime contractor and UDBE with written notice at least 5 days before the scheduled hearing. If the UDBE does not object to the substitution or does not respond within the 5-day timeframe, give the prime contractor written notice of the substitution approval. For approval of the substitution, complete Form CEM-2401, “Substitution Report for Disadvantaged Business Enterprise (DBE) or Underutilized Disadvantaged Business Enterprise (UDBE).”

If the prime contractor replaces a listed UDBE without approval, temporarily withhold payment for the items of work committed to the UDBE from the next progress payment. Send the prime contractor written notice of the improper substitution and payment withhold. If the UDBE is also a listed subcontractor pursuant to the Fair Practices Act, the substitution process must comply with the Fair Practices Act and with Section 3-507C (5), “Hearing Process for Substitution Violations,” of this manual. If the prime contractor is found in violation of the Fair Practices Act, the hearing officer may also assess a penalty of up to 10 percent of the subcontract amount. Any temporary withholds become permanent when a violation is confirmed.

#### *8-304B (2) Disadvantaged Business Enterprise Substitutions*

For DBE substitutions, follow the process listed below. The prime contractor is required to replace the listed DBE with another certified DBE or conduct a good faith effort to do so to the extent needed to meet the original contract goal.

Require the contractor to submit a written request for substitution of a listed DBE. Section 5 “General, Performance of Disadvantaged Business Enterprises,” of the contract identifies the information required for a contractor-requested substitution.

Review the contractor’s written request and ensure it includes all of the following:

- One of the 11 reasons for substitution as identified in the special provisions
- A copy of the 5-day notice from the contractor to the DBE regarding the substitution, including verification that the DBE received the notice
- The DBE’s response to the 5-day notice
- If applicable, the contractor’s good faith effort documentation addressing the eight requirements found in Section 2-1.12B(3), “DBE Good Faith Efforts Submittal,” of the *Standard Specifications*

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

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

If the prime contractor replaces a listed DBE without written approval from the resident engineer, payment for the items of work committed to the DBE must be temporarily withheld from the next progress payment. Send the prime contractor written notice of the improper substitution and payment withhold. In addition, if the DBE is also a subcontractor required to be listed at bid time by the Fair Practices Act, the substitution process must comply with Section 3-507C (5), "Hearing Process for Substitution Violations," of this manual. If the substitution is found to be in violation of the Fair Practices Act, the hearing officer may assess the prime contractor a penalty of up to 10 percent of the subcontract amount. Any temporary withholds become permanent when a violation is confirmed.

Federally funded contracts require the contractor to report a DBE firm that becomes certified or decertified during the course of the project. A DBE subcontractor that becomes decertified during the course of the project must notify the contractor in writing with the date of decertification. In the same manner, a subcontractor that becomes a certified DBE during the course of the project must notify the contractor in writing with the date of certification.

The prime contractor must notify the resident engineer if the contractor becomes aware of a DBE obtaining or losing its certification during construction.

The contractor must still honor contractual commitments with a DBE firm performing work on the contract even if the DBE loses its certification during construction. No substitution is required.

For federal reporting purposes only, DBE credit for Caltrans will be limited to payments made while the firm was certified. This has no effect on the Form CEM-2402F, "Final Report - Utilization of Disadvantaged Business Enterprises First-Tier Subcontractors," which should show the total paid to the DBE. For additional information on the final report, refer to Section 8-305A, "Final Report, Use of Disadvantaged Business Enterprises or Disabled Veteran Business Enterprises," of this manual.

### *8-304B (3) Disabled Veteran Business Enterprise Substitutions*

DVBEs must be substituted with another DVBE unless there is a demonstrated absence of available DVBEs. Caltrans must receive approval from DGS before allowing a contractor to proceed with the substitution.

Require the contractor to submit a written request for substitution. Review the request to ensure compliance with the requirements of Section 5-1.13C, "Disabled Veteran Business Enterprises," of the Standard Specifications. This includes citing one or more of the allowed reasons for substitution and providing copies of the following:

- Written notice of the substitution request provided to the DVBE with proof of delivery
- The DVBE's response to the notice
- Names and certification numbers of the listed DVBE and proposed DVBE substitute
- The commitment quote from the replacement firm
- The business information, items of work, and corresponding dollar value for the replacement firm.

A contractor's request for a non DVBE substitute must include additional documentation, including copies of the following:

- Correspondence with DVBE advocates from Caltrans and the Department of Veteran Affairs
- Search results from the Department of General Services' website of available DVBEs
- Documented communications with a DVBE community organization nearest the job site
- Documented communication with DVBEs describing the work to be performed, the percentage of the total bid, the corresponding dollar amount, and any responses to the communication

The allowable reasons for substitution are as follows:

1. When the DVBE becomes bankrupt, insolvent, or goes out of business.
2. When the DVBE does not perform as listed in the Bidder Declaration.
3. When the DVBE does not meet the bond requirements of the contractor.
4. When the DVBE's name is incorrect due to an inadvertent clerical error. In the case of public works contracts, compliance with Section 4107.5 of the Public Contract Code is required.
5. When the DVBE is not licensed as required by any California regulatory agency.
6. When the awarding department, or its duly authorized officer, determines that the DVBE: (a) did not perform in accordance with the plans and specifications; or, (b) has delayed or disrupted the progress of the work.

For contracts advertised prior to April 1, 2013, Caltrans provides the DVBE with written notice of the substitution request, using a traceable mailing method such as registered, overnight, or certified mail, if the contractor's request does not already include documentation of such notice. The written notice gives the DVBE 5 working days to object, in writing, to the substitution and request a hearing with Caltrans.

Return to the contractor for correction requests that do not include the required information.

If the listed DVBE provides a written objection to a contractor's substitution request, within 5 working days of receipt of the objection, set a date for a hearing and send a notice to the contractor and DVBE of the date and location. Conduct the hearing in compliance with Section 3-507C (3), "Hearing Process for Substitutions," of this manual. If the listed DVBE does not respond to the notice of a contractor's request to substitute within 5 working days or does not object to the substitution, no hearing is required.

After resolving any issues with the substitution request and determining that the substitution may occur, complete Form CEM-2405, "Disabled Veteran Business Enterprise (DVBE) Substitution Request to the Department of General Services (DGS)," and send it to the Division of Construction, to the attention of the labor compliance program manager. Also send a copy to the district labor compliance manager. Include all supporting documents such as the contractor's substitution request; notice to the DVBE; DVBE's response, as applicable; request for hearing; and hearing decision. The Division of Construction labor compliance program manager reviews and signs the DVBE substitution form and forwards it to DGS for final review and approval or denial. DGS responds to the request within 3 business days. The Division of Construction notifies the district of DGS' final decision upon receipt.

Provide the contractor with notice of DGS' decision. If the substitution is approved by DGS and the new firm is a first-tier subcontractor, ensure the prime contractor completes and submits an updated Form CEM-1201, "Subcontracting Request." If the substitution is denied by DGS, do not allow substitution of the DVBE originally listed.

Do not allow the proposed substitute firm's work to occur until a substitution request has been approved by DGS.

If the contractor improperly substitutes a listed DVBE withhold 10 percent of the dollar value of the original listed DVBE participation. Send the prime contractor written notice of the improper substitution and payment withhold. In addition, if the DVBE is also a subcontractor required to be listed at bid time by the Fair Practices Act, the substitution process must comply with Section 3-507C (5), "Hearing Process for Substitution Violations," of this manual. Substitution of a listed DBE or DVBE may be a lengthy process. However, contractors are not entitled to either time adjustments or increased costs as a result of substituting the DBE or DVBE firm.

Consult with the district labor compliance program manager for assistance with the substitution process for DBE or DVBE firms.

### 8-304C Adding Disadvantaged Business Enterprises or Disabled Veteran Business Enterprises

Caltrans permits and encourages the contractor to increase the amount of work to DBEs or DVBEs over what was originally listed for contract commitment. If a portion of the work will be subcontracted, the contractor must comply with Section 5-1.13, "Subcontracting," of the *Standard Specifications* and with the Fair Practices Act. For the procedures for subcontracting, refer to Section 3-507, "Subcontracting," of this manual. Place a copy of the contractor's request in the project file for later reference when approving Form CEM-2402F, "Final Report - Utilization of Disadvantaged Business Enterprises (DBE) First-Tier Subcontractors," or Form CEM-2402S, "Final Report - Utilization of Disabled Veteran Business Enterprises (DVBE) State Funded Projects Only."

### **8-305 Forms Required After Contract Acceptance**

The following forms are required after contract acceptance. Refer to the *Standard Specifications* for the specific due date of each form.

### 8-305A Final Report, Use of Disadvantaged Business Enterprises or Disabled Veteran Business Enterprises

The specifications require the contractor to submit to the resident engineer either Form CEM-2402F, "Final Report - Utilization of Disadvantaged Business Enterprises (DBE) First-Tier Subcontractors," or Form CEM-2402S, "Final Report - Utilization of Disabled Veterans Business Enterprises (DVBE) State Funded Projects Only," upon completion of the contract work. These final reports provide key information required to certify that DBE and DVBE firms participated on the contract and were paid for the work performed.

Ensure the final utilization report includes the following information:

- The names and addresses of DBE or DVBE firms and first-tier subcontractors for federal-aid projects
- The date each of the firms completed the work
- The date of final payment to the firms
- The total dollar figure paid to each firm
- All actual expenditures (not the contract item prices) paid to DBEs or DVBEs
- Any lower-tier DBEs or DVBEs that were used, even if the firms were not originally listed in the bid submittals for the purposes of goal attainment

If the prime contractor is a DBE or DVBE firm, the reports must also show the date of work performed by its own forces, along with the corresponding dollar value of the work claimed toward DBE or DVBE commitments. Require the contractor to submit a complete form if any of the required information is not included.

Compare the contractor's original dollar commitment with the amount shown on the final DBE or DVBE report. Review the contractor's calculations to verify that the

appropriate amount is credited for participation of DBE suppliers and truckers. Below are the criteria for crediting DBE supplier and trucker participation:

- One hundred percent credit if the materials or supplies are obtained from a DBE manufacturer.
- Sixty percent credit if the materials or supplies are obtained from a DBE regular dealer.
- Only fees, commissions, and charges for assistance in the procurement and delivery of materials or supplies, if they are obtained from a DBE that is neither a manufacturer nor regular dealer. Code of Federal Regulations, Title 49, Section 26.55, "How is DBE Participation Counted Toward Goals?," defines "manufacturer" and "regular dealer."
- One hundred percent credit for the total value of the transportation services the DBE provides on the contract using trucks it owns, insures, and operates using drivers it employs or leases from another DBE.
- Actual fee or commission amount for participation by non-DBE trucks leased by DBEs.

DVBE subcontractors, suppliers and truckers receive full participation credit as long as the entity has performed a commercially useful function on the project.

If any question exists concerning the report's accuracy, require a written explanation from the contractor. The response must explain any differences between the initial plan and the final summary, unless the contractor's comments on the final DBE or DVBE report are in sufficient detail to provide the explanation. Examples of items the contractor would need to explain in writing include why the names of lower-tier subcontractors, the work items, or dollar figures do not match the contractor's initial plan. Attach the explanation to the final DBE or DVBE report. The written explanation is not required for projects that do not have specific percentage goals for DBE or DVBE participation or final projects that show no change from the DBE or DVBE commitment.

For federally funded projects only, if the contractor's DBE attainment falls short of the contract commitment, hold only the amount of contract funds necessary to meet the original DBE contract goal. If funds were previously withheld from the contractor for failure to meet DBE participation requirements, continue to hold only the amount of contract funds necessary to meet the original DBE contract goal. Any penalties previously assessed for violations of the Fair Practices Act are not returned to the contractor, even if the contractor meets the DBE commitment with other DBE firms. For contracts with DVBE participation commitments, do not return previously withheld funds to the contractor. If the contractor does not attain the original goal for reasons beyond their control, then no funds should be withheld. For example, if a change order eliminates all or a portion of an item originally designated to be performed by a DBE or DVBE, this situation is beyond the contractor's control. Conversely, if a change order increases the work allocated to a DBE or DVBE, the contractor is not required to have the DBE or DVBE perform the work, but should be



encouraged to do so. Consult with the district labor compliance manager for questions regarding withheld funds for DBE or DVBE participation.

If no issues with the final utilization reports are identified, the resident engineer signs the final report. For federally funded contracts, the signature of the resident engineer provides written certification of DBE participation through onsite monitoring and record review activities. The final DBE or DVBE report (together with the contractor's narrative) must be sent to the Office of Business and Economic Opportunity (OBEO) by email at [Business.Support.Unit@dot.ca.gov](mailto:Business.Support.Unit@dot.ca.gov). A copy should also be sent to the district construction office.

If the contractor does not submit the final utilization reports, take the appropriate deduction on the after-acceptance estimate. For federal-aid contracts, withhold \$10,000. For state-funded contracts, initiate an "other outstanding document" (OOD) withhold. For more information on these withholds refer to Section 3-907A, "Payment Before Final Estimate," of this manual. Return the withhold when a completed report is submitted and verified.

#### **8-305B Disadvantaged Business Enterprises Certification Status Change (Federal-Aid Contracts)**

To document and report changes to DBE certification, the contractor must complete Form CEM-2403F, "Disadvantaged Business Enterprises (DBE) Certification Status Change." The form must list the amount of money paid to the DBE while it was certified.

The contractor must submit the form at the contract's completion, regardless of any changes in DBE status. If no change in DBE status occurs during the life of the contract, the contractor must write, "no change" across the fields of Form CEM-2403F. If the prime contractor fails to submit the form, include this report as part of the OOD deduction when preparing the after-acceptance payment.

#### **8-305C Monthly Disadvantaged Business Enterprises (DBE) Payment**

The purpose of monthly DBE payments is to comply with the uniform report of DBE awards or commitments and payments to ensure "real time" payments and breakdown of participation by minority-owned DBEs.

The resident engineer ensures the contractor submits a completed Form CEM-2406, "Monthly Disadvantaged Business Enterprises (DBE) Payment," including explanation of differences between the original commitment and payment to the DBE in the comment section. A copy is emailed to the Office of Business and Economic Opportunity at [Business.Support.Unit@dot.ca.gov](mailto:Business.Support.Unit@dot.ca.gov).

### **8-306 Caltrans Office of Business and Economic Opportunity**

Caltrans OBEO develops policy related to and generally administers and oversees the DBE program for Caltrans. Additionally, among other duties, OBEO certifies DBEs, publishes the lists of the certified firms, and determines whether those firms meet the requirements of applicable federal regulations. DGS certifies DVBEs, and

determines whether these firms meet the requirements of applicable state regulations.

OBEO also approves contract goals, determines goal attainment during the contract award process, and performs external equal employment opportunity compliance reviews of Caltrans' contractors, including use of DBE and DVBE firms.

Although overall program responsibility rests with OBEO, specific construction project responsibility rests with district construction and the Division of Construction. Be aware of the general contract requirements related to use of DBE and DVBE firms and equal employment opportunity, and when a question arises about the requirements or when a violation of the requirements has apparently occurred, immediately notify the district construction office.

If the district needs assistance, the district contacts the Division of Construction labor compliance manager. If a complaint is received from a DBE or DVBE firm regarding treatment on the project, and the firm alleges that the claimed mistreatment is due to its DBE or DVBE status, promptly notify the district labor compliance officer. If an investigation or other action is appropriate, the district labor compliance officer will make a request to the Division of Construction.

The Division of Construction will arrange for any necessary additional steps, including assistance from other functions, such as the Legal Service Center, OBEO, or Audits and Investigations. District construction should only take additional actions that may be necessary after receiving the Division of Construction's advice and guidance.

## Example 8-3.1. Second Notice, Contractor Has Failed to Respond to Verbal Notice on Nonuse of Disabled Veteran Business Enterprise

[Contract Identification]  
[Today's Date]  
[Contractor's Superintendent]  
[Prime Contractor]  
[Job Site Address]

Dear [Superintendent]:

On [date], the work on Contract Item [contract item ##, description of item] apparently was being done by employees of [name of firm]. Our records indicate that your company stated in its DVBE use plan that this work would be done by [name of DVBE firm]. On [notification date], I called your attention to this apparent violation of the contract, yet [name of firm] has continued to perform work on curbs and gutters. Be advised that, pursuant to the paragraph titled "Subcontracting" in Section 5 of the contract provisions, no payment will be made for the work that was allocated to the listed subcontractor, but performed by [name of firm].

To avoid the possibility of further consequences for violating the provisions of the contract, we suggest that you either comply with your company's original DVBE use plan or submit a request in writing to make a change. Any request for change must detail your company's reasons for that change, and those reasons must be one of those allowable under the contract provisions. If your request to remove the originally listed subcontractor is approved, you are further advised that you must either replace the value of work to be done by DVBEs with other DVBEs or small businesses, subject to Caltrans and the Department of General Services approval. This process can be fairly lengthy, and we urge you to immediately take such steps as are necessary. You are cautioned that we will be unable to authorize either increased costs or time due to your failure to comply with your original contractual commitment.

We are sending copies of this letter to your company's home office and to Caltrans headquarters office in Sacramento. Please contact me if I can assist you in your efforts to fulfill your contract.

Sincerely,

Resident Engineer

cc: Prime Contractor, Home Office  
HQ Construction Program  
District Construction Office  
RE File

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Note 1: The above letter concerns the least complicated situations in which the prime contractor is doing work planned to be sublet to a DVBE. If a second subcontractor is involved, other contract specifications are probably being violated; for instance, the following:

- *Standard Specifications* Section 5-1.13, "Subcontracting"—Lack of prior notice of subcontract (if state funded).
- Sections 4100–4114, "Subletting and Subcontracting Fair Practices Act," of the Public Contract Code—Substitutions for listed subcontractors without the engineer's approval will result in a penalty of up to 10 percent of the contract item amount.

Note 2: When subcontractor approval or notice requirements are involved, the letter to the prime contractor should refer to "subcontracting and DVBE provisions" rather than merely "DVBE provisions." When the subcontractor listing law is involved, the letter must clearly address both the Subletting and Subcontracting Fair Practices Act and DVBE violations.