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Section 4 Disabled Veteran Business Enterprises

8-401 General

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

State law defines DVBEs as firms owned, managed, and controlled by one or more disabled veterans. State law requires Caltrans to include 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 that vary from 3 percent to 5 percent, depending on the dollar value of the overall project. Contractors must meet the contract requirement to be awarded a state-funded contract. 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 DVBEs. The contractor's proposal is evaluated before award of a contract to verify that the contract requirement has been met or if a good faith effort to use DVBEs 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.

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

Specific restrictions exist regarding the removal and replacement of DVBEs listed on the contractor's commitment documents provided at the time of bid submission. 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.

8-402 Terms Used in Construction

8-402A Commercially Useful Function

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][i]:

1. Takes responsibility for the execution of a distinct element of the contract
2. Carries out the obligation by performing, managing, or supervising the work involved

3. Performs work that is normal for its business services and functions
4. Takes responsibility for the 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. Does not subcontract any of the work that is greater than that expected to be subcontracted by normal industry practices

A DVBE firm does not perform a commercially useful function if its role on the contract is limited to simply passing funding along in order to obtain the appearance of participation.

8-403 Before Work Begins

8-403A Disabled Veteran Business Enterprise Commitment Form

The DVBE commitment form provides the resident engineer with a listing of specific work to be done or materials to be furnished by specific DVBEs. It is based on information the contractor submitted during the bidding process. The resident engineer will receive the approved DVBE participation in the award package. For DVBE participation commitments, bidders use Form DES-OE-0102.5, "Certified DVBE Summary." 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 DVBE commitment, regardless of the contract percentage.

Review the commitment forms with inspection staff before work begins to make sure that field staff knows who should be performing 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.

8-403B Subcontractor List Versus Disabled Veteran Business Enterprise Commitment Form

Do not construe the commitment of 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 DVBE requirements of the contract. If a DVBE subcontractor exceeds the dollar threshold of one-half of 1 percent of the total bid, or \$10,000, whichever is greater, specified in the Fair Practices Act, the DVBE must also be listed on the "subcontractor list." Conversely, a 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 DVBE may not be on the subcontractor list, the DVBE listing and the subcontractor list may not match. First-tier subcontractors listed on the contractor's 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 DVBE commitments, compare the subcontractors and contract items listed on the subcontractor list and Form CEM-1201, "Subcontracting Request," with the approved DVBE commitment forms. Identify any irregularities during the preconstruction conference.

8-403C 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 DVBE firms or go through the applicable substitution process. Also inform the contractor that unless the work is performed or supplied by the listed 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 before work is started. If the contractor identifies any issues, follow the process identified in Sections 8-404C, "Substitution of Listed Firms," and 8-404D, "Adding Disabled Veteran Business Enterprises," of this manual.

8-404 Activities During Construction

8-404A Monitoring and Enforcement

Caltrans is required by federal and state regulations to monitor worksites to verify that work committed to a DVBE is performed by the respective firms and that the work is a commercially useful function.

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

1. When a 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 check that the appropriate firm is performing the work or providing the materials.
2. Interview workers of 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 DVBE, if applicable.
4. If the 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 DVBE supplied the materials.
5. Do not allow a contractor to terminate or substitute a listed DVBE from the contract without written consent. For information on the substitution process, refer to Section 8-404C, "Substitution of Listed Firms," of this manual.

6. Withhold contract funds, as applicable, for improper substitutions, terminations, or failure to meet contract commitments.
7. Bring to the attention of the district Labor Compliance officer any complaints of failure by the contractor to promptly pay DVBE firms.

Consult with the district Labor Compliance officer for questions on implementing enforcement activities.

8-404B When the Listed 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. For DVBEs, take 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 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.

If the written notice fails to achieve results, submit to the district Contract 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 Contract 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 Civil Rights when necessary. The Office of Civil Rights will notify the federal or state authorities as appropriate.

The actions described 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.

8-404C Substitution of Listed Firms

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

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 citing one or more of the allowed reasons for substitution. Review the request for compliance with the requirements of Section 5-1.13C, "Disabled Veteran Business Enterprises," of the *Standard Specifications*.

The district Labor Compliance office must submit to the Caltrans Labor Compliance Unit copies of the following:

- Contract award summary.
The contractor's written notice to Caltrans requesting substitution, sent by certified mail. Include proof of delivery with required signature. This notice must include an allowable substitution reason.
- Contractor's written notice to the original, listed DVBE notifying them and confirming substitution, sent certified mail. Include proof of delivery with required signature.
- Response from original, listed DVBE to the substitution, within 5 days of the contractor's written notice. If there is no response, provide returned and unopened certified mail.
- Contractor's written notice to the replacement DVBE requesting substitution.
- Response from replacement DVBE to contractor's substitution request, including the new DVBE's quote.
- Printed Certified DVBE Summary Page to verify replacement DVBE certification. See [California State Government Marketplace](#).
- Replacement DVBE Subcontractor Agreement. Use updated Form DES-OE-0102.5, if any, or updated Bidders Declaration for STD 213.
- Written notice to listed DVBE of hearing, if a substitution is not agreed to by the listed DVBE.
- Written objections submitted by listed DVBE, if a substitution is not agreed to by the listed DVBE.

If a DVBE cannot be identified as a replacement, include copies of the following:

- Correspondence with DVBE advocates from Caltrans and the Department of Veteran Affairs regarding the absence of replacement DVBEs to perform the work.
- Search results from the DGS website of available DVBEs.
- Documented communications with a DVBE community organization nearest the worksite verifying the absence of replacement DVBEs to perform the work.
- Documented communication with DVBEs describing the work to be performed, the DVBE percentage of the total contract bid amount, the corresponding dollar amount, and any responses to the communication.

Allowable reasons for substitution include:

- If the DVBE becomes bankrupt, insolvent, or goes out of business.
- If the DVBE does not perform as listed in the Bidder Declaration.
- If the DVBE does not meet the bond requirements of the contractor.
- If the DVBE's name is incorrect because of an inadvertent clerical error. Compliance with Section 4107.5 of the Public Contract Code is required for public works contracts.
- If the DVBE is not licensed as required by any California regulatory agency.
- If 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 before 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, make sure 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 DVBE may be a lengthy process. However, contractors are not entitled to either time adjustments or increased costs as a result of substituting the DVBE firm.

Consult with the district Labor Compliance program manager for assistance with the substitution process for DVBE firms.

8-404D Adding Disabled Veteran Business Enterprises

Caltrans permits and encourages the contractor to increase the amount of work to 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-2402S, "Final Report - Utilization of Disabled Veteran Business Enterprises (DVBE) State Funded Projects Only."

8-405 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.

8-405A Final Report, Use of Disabled Veteran Business Enterprises

The specifications require the contractor to submit to the resident engineer Form CEM-2402S, "Final Report - Utilization of Disabled Veterans Business Enterprises (DVBE) State Funded Projects Only," upon completion of the contract work. This final report provides key information required to certify that DVBE firms participated on the contract and were paid for the work performed.

Make sure the final report includes the following information:

- The names and addresses of 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 paid to DVBEs
- Any lower-tier 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 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 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 DVBE report.

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 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 DVBE report. The written explanation is not required for projects that do not have specific percentage goals for DVBE participation or final projects that show no change from the DVBE commitment.

If the report reflects non-utilization or underutilization of a DVBE, the district Contract Compliance Unit must complete an investigation into the factors and include the contractor's explanation within 60 days of the identified violation. The assigned compliance staff must also complete a DGS Investigation Findings report to include all information reviewed and action recommended in accordance with the Military and Veterans Code, Section 999. The report and all supporting records must be submitted to Headquarters Labor Compliance to submit to DGS.

If no issues with the final utilization reports are identified, the resident engineer signs the final report. The final DVBE report and the contractor's narrative must be sent to the Office of Civil Rights by email at 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 DVBE reports, take the appropriate deduction on the after-acceptance estimate and initiate an "other outstanding document" withhold. For more information, refer to Section 3-907A, "Payment Before Final Estimate," of this manual. Return the withhold when a completed report is submitted and verified.

8-406 Caltrans Office of Civil Rights

The Department of General Services certifies DVBEs, and determines whether these firms meet the requirements of applicable state regulations.

The Office of Civil Rights 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 DVBE firms.

Although overall program responsibility rests with the Office of Civil Rights, specific construction project responsibility rests with district Construction and the Division of

Construction. Be aware of the general contract requirements related to use of 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 DVBE firm regarding treatment on the project, and the firm alleges that the claimed mistreatment is because of its 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 the Legal Division, the Office of Civil Rights, or the Independent Office of 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 8-4.1. 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 because of 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

Note 1: This example presents the least complicated situations in which the contractor is doing work planned to be done by a DVBE. If a second subcontractor is involved, other contract specifications may be violated; for example:

- *Standard Specifications* Section 5-1.13, "Subcontracting"—Lack of 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 as much as 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.