

Chapter 9 Civil Rights & Disadvantaged Business Enterprise

OFFICE BULLETIN #20-04 **SECTIONS 9.6 - 9.8**

9.6 Local Agency Responsibilities under Caltrans DBE Program Plan

Local agency recipients of federal financial assistance must comply with all the elements of Title 49 CFR 26 entitled Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs. These provisions apply to all federal-aid transportation projects. Local agency responsibilities are detailed in the Caltrans DBE Program Plan. A copy of this plan is available from the DLA DBE [website](#).

As an initial step, each local agency must submit [Exhibit 9-A](#) form to formally acknowledge the local agency's commitment to implement the Caltrans DBE program, and to comply with all the prescribed responsibilities detailed in the LAPM.

Each local agency must also submit the [Exhibit 9-B: Local Agency DBE Annual Submittal Form](#), which is explained in the subsection below. ~~This annual form provides information for the upcoming Federal Fiscal Year (FFY), which will include:~~

- ~~1. Identification of the DBE Liaison Officer~~
- ~~2. Plan of race-neutral measures to implement for the forthcoming FFY~~
- ~~3. Prompt payment provisions to be used in contracts~~
- ~~4. Monitoring and enforcement mechanisms to ensure that subcontractors are promptly paid~~

DBE Implementation Agreement for Local Agencies

[Exhibit 9-A: DBE Implementation Agreement for Local Agencies](#) form must be completed and submitted to the DLAE for execution by each agency before a request for authorization is processed. This agreement must be signed by a representative who is authorized by the governing body to take such action.

Some of the elements of the Agreement are highlighted below.

Objective/Policy Statement

Each agreement contains a policy statement expressing a commitment to the Caltrans DBE Program, stating its objectives, and outlining responsibilities for its implementation. Each local agency will circulate the statement throughout its organization and to the DBE and non-DBE business communities that perform work on its federal-aid contracts.

Local Agency DBE Annual Submittal Form

Each local agency must provide the DLAE with a completed [Exhibit 9-B](#), by June 30 of each year for the following Federal Fiscal Year. This form must be received prior to submitting a Request for Authorization to proceed with a federal-aid project.

This form will include:

1. Designated DBE Liaison Officer Information (name, address, phone number, and e-mail address).
2. Detail of planned race-neutral measures to be implemented as required by 49 CFR 26.51 and as outlined in the local agency's [Exhibit 9-A](#).
3. The local agency's choice for method of Prompt Payment of Withheld Funds to Subcontractors, as well as a brief explanation of the monitoring and enforcement

mechanisms the local agency has in place to ensure that all subcontractors, including DBEs, are promptly paid.

Overall Statewide DBE Goal

The overall statewide DBE goal is obtained through race-conscious and race-neutral components. The overall statewide goal is shown on the OCR DBE [website](#).

Race-Neutral Component

The race-neutral component of the overall statewide DBE goal is important because the race-neutral methods recipients can promote the participation of DBEs and other small businesses in their contracting programs by allowing all small business to compete with each other, including DBEs, to meet the DBE goal. The race-neutral component of the overall statewide DBE goal is accomplished when the prime consultant is a DBE firm or when DBE participation exceeds the contract DBE goal. Examples of race-neutral DBE participation are:

- A DBE wins a prime contract through customary competitive procurement procedures.
- A DBE is awarded a subcontract on a prime contract that does not carry a DBE goal.
- The DBE commitment exceeds the DBE contract goal.

Race-neutral means include, but are not limited to, the following:

- Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE and other small business participation (e.g., unbundling large contracts to make them more accessible to small businesses, and requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces).
- Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs and other small businesses obtain bonding and financing).
- Providing technical assistance and other services.
- Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs and other small businesses on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors, provision of information in languages other than English, where appropriate).
- Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capabilities for DBEs and other small businesses.
- Providing services to help DBEs and other small businesses, improve long-term development, increase opportunities to participate in various types of work, handle increasingly significant projects, and achieve eventual self-sufficiency.
- Establishing a program to assist new start-up firms, particularly in fields in which DBE participation has historically been low.

- Ensuring distribution of the DBE directory through print and electronic means to the widest feasible universe of potential prime contractors.
- Assisting DBEs and other small businesses to develop their capability to utilize emerging technology and conduct business through electronic media.

Race-Conscious Component

The use of contract goals is the primary example of a race-conscious measure in the DBE program. Local agencies must establish contract goals on each federal-aid contract where there are sub-contractable opportunities for DBEs.

DBE Liaison Officer

Each local agency must designate a Disadvantaged Business Enterprise Liaison Officer (DBELO) who must have direct independent access to the local agency's Chief Executive Officer concerning DBE program matters. This person must be responsible for the duties as described in [Exhibit 9-A: DBE Implementation Agreement for Local Agencies](#). Annually, the DBELO designation will be reported to Caltrans when the local agency completes its [Exhibit 9-B: Local Agency DBE Annual Submittal Form](#).

Required Contract Clauses

These and other requirements of this chapter are included in the [Exhibit 10-R: A&E Boilerplate Agreement Language](#) and [Exhibit 12-G: Required Federal-aid Contract Language](#).

Contract Assurance

DBE regulations require the following contract assurance statement in every federal-aid contract and subcontract:

- The contractor or subcontractor must not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor must carry out applicable requirements of 49 CFR 26 in the award and administration of **federal-aid DOT-assisted** contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract, or such other remedy as recipient deems appropriate.

Prompt Payment from the Agency to the Contractors

Section 20104.50 of California Public Contract Code requires that local agencies pay contractors no more than 30 days after receipt of contractor's request for payment. The penalty is assessed, on the balance owed at 10% per annum. Section 7107 of California Public Contract Code provides that the Agency must pay the prime contractor within 60 days after the date of completion (retention payment due). The penalty for failing to comply with this statute is the assessment of 2% per month on the balance owed in lieu of interest. In the event a lawsuit is filed, the prevailing party is entitled to attorneys' fees and costs.

Section 3329 of California Civil Code requires that local agencies pay design professionals within 30 days of their demand if it is progress payment, and within 45 days if retention is due. A penalty of 1½ % per month in lieu of interest plus attorneys' fees accrue to the prevailing party. If there is a good faith dispute as to an amount due, the local agency may withhold from the retention payment an amount not to exceed 150% of the disputed amount.

Prompt Progress Payment to Subcontractors

~~Attention is directed to Section 7108.5 of the California Business and Professions Code and Section 10262 of the California Public Contract Code which require a prime contractor or subcontractor to pay any subcontractor not later than seven (7) days of receipt of each progress payment, unless otherwise agreed to in writing.~~

~~These requirements apply to both DBE and non-DBE subcontractors.~~

As the implementing agency of federal funds, the DBELO or their designee (e.g. resident engineer, project manager, contract manager, etc.) must ensure that prompt progress payments are made by prime contractors, subcontractors, lead consultants, and subconsultants.

Section 7108.5 of the California Business and Professions Code (CBPC) requires a prime contractor or subcontractor (i.e. builders) to pay any subcontractor not later than seven (7) days after receipt of each progress payment received, unless otherwise agreed to in writing. The payment cannot be delayed because of disagreements on other contracts. This requirement applies to both DBE and non-DBE subcontractors.

Section 3321 of the California Civil Code (CCC) requires prime design professionals (prime consultants directly in contract with a public agency) to pay any subconsultant not later than fifteen (15) days after receipt of each progress payment or final retention payment. The payment cannot be delayed because of disagreements on other contracts. This requirement applies to both DBE and non-DBE subcontractors.

Prompt Payment of Withheld Funds to Subcontractors

Federal ~~Regulation~~ law (49 CFR 26.29) requires one of the following three methods be used in federal-aid contracts to ensure prompt and full payment of any retainage kept by the prime contractor or subcontractor to a subcontractor:

1. The local agency may decline to hold retainage from prime contractors and prohibit prime contractors and subcontractors from holding retainage from subcontractors.
2. The local agency may decline to hold retainage from prime contractors and include a contract clause, obligating the prime contractor and subcontractors to make prompt and full payment of any retainage kept by the prime contractor or subcontractor to all subcontractors within ~~thirty (30) days after the subcontractor's work is satisfactorily completed~~ the following timeframes:
 - a. For construction subcontracts, retainage must be paid within seven (7) days of receipt unless otherwise agreed to in writing for construction work completed (Section 7108.5 of the CBPC and Section 10262 of the CPCC), and
 - b. For consultant contracts, retainage must be paid not later than fifteen (15) days after receipt of final retention received after the subconsultant's work is satisfactorily completed (Section 3321 of the CCC).
3. The local agency may hold retainage from the prime contractor and provide for prompt and regular incremental acceptances of portions of the contract, pay retainage to prime contractors based on the acceptances and include a contract clause obligating the prime contractor and subcontractors to pay all retainage owed to all subcontractors: ~~for satisfactory completion of the accepted work within thirty (30) days of local agency payment to the contractor within~~ the following timeframes:

- a. For construction subcontracts, retainage must be paid within seven (7) days of receipt unless otherwise agreed to in writing for construction work completed (Section 7108.5 of the CBPC and Section 10262 of the CPCC), and
- b. For consultant contracts, retainage must be paid not later than fifteen (15) days after receipt of final retention received after the subconsultant's work is satisfactorily completed (Section 3321 of the CCC).

In the above methods, a subcontractor's work is satisfactorily completed when all tasks called for in the subcontract have been accomplished and documented as required by the agency. The work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed when a local agency has made an incremental acceptance of a portion of the contract work. Annually, the local agencies choose one of the above three methods to ensure prompt pay. The local agency's choice will be reported to Caltrans when it completes [Exhibit 9-B: Local Agency DBE Annual Submittal Form](#).

Monitoring and Enforcement Mechanism for Prompt Payment

Per 49 CFR 26.29(d), the Agency is required to stipulate the monitoring and enforcement mechanisms in the contract to ensure that all subcontractors, including DBEs, are promptly paid. These mechanisms may include appropriate penalties for failure to comply with the terms and conditions of the contract. The mechanisms may also provide that any delay or postponement of payment among the parties may take place only for good cause with the Agency's prior written approval.

9.7 DBE Participation on the Contract

Participation Opportunities

The local agency should structure its contracts and cost estimates by task to provide opportunities for DBE participation. Participation by DBEs is possible during the Preliminary Engineering, Environmental, Final Design, Right of Way, and Construction phases of the project, and includes work as lead consultants, prime contractors, sub-consultants, subcontractors, suppliers, vendors and truckers.

DBE Contract Goals

All federal-aid contracts that have subcontracting opportunities must have a DBE goal set. This includes, but is not limited to: construction, consultant services such as project specific Architectural & Engineering (A&E), and master on-call A&E contracts. A DBE contract goal is a percentage of the total contract amount that is expected to be performed by certified DBE firms. The DBE contract goal will vary depending on the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract.

The contract goal may be zero in situations such as extremely limited subcontracting opportunities, the lack of certified DBEs available in the District for the work to be performed, or other reasons. The local agency will need to keep documentation in the project file when a zero percent DBE contract goal is deemed appropriate.

Some contracts, such as Emergency Opening, Sole-source, and Nonprofit do not require a DBE goal. Work performed through Force Account also does not need a DBE goal. In these cases, there is no contract goal (different from zero percent goal).

Setting the DBE Contract Goal

When setting a DBE goal, the Agency may use contract goals only on those federal-aid contracts that have subcontracting possibilities. The goal for a specific contract may be higher or lower than the percentage level of the statewide overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by the State's overall goal, the Agency must set contract goals, and these individual contract goals will cumulatively result in meeting any portion of the state's overall goal. The actual DBE participation for each of the local agency's contracts contributes to the calculation used to determine if the statewide goal has been met.

Caltrans approval of each contract goal is not necessarily required. However, Caltrans may review and approve or disapprove any contract goal the Agency establishes. The Agency's contract goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

DBE contract goals are established to encourage more participation of DBEs for federal-aid transportation contracts. The bullets below provide a summary guidance of how to set the DBE contract goal. For a detailed set of instructions and a template example, please refer to [Exhibit 9-D: DBE Contract Goal Methodology](#).

- The project analysis starts with finalizing the cost estimate and determining potential sub-contractable items of work in the Exhibit 9-D: DBE Contract Goal Methodology template.
- The local agency must consider the type of work involved (Work Category Code), location of the work (by Caltrans District number), and the potential number of DBEs listed in the database. For each work category code, determine the number of available DBE subcontractor / subconsultants by conducting a search in the California Unified Certification Program (CUCP) database geographically by Caltrans District only. Use the District where the work will take place.
- Determine the DBE Work Factor for each task:
 - If the number of available DBE subcontractors or sub-consultants is 7 or more, use 100 percent.
 - If there are less than 7 DBEs available: for consultant contracts, use 0 Work Factor; for construction projects, determine whether or not there is a component of trucking or material supply, and apply a 10 or 12 percent DBE Work Factor, respectively, otherwise use 0.

Submitting Exhibit 9-D

All federal-aid contracts must have an [Exhibit 9-D: DBE Contract Goal Methodology](#) submitted to the DLAE. The following are responsibilities and a flowchart for local agencies, DLAEs, and HQ DLA.

Local Agency Responsibilities

- Local agencies must submit an [Exhibit 9-D: DBE Contract Goal Methodology](#) in Microsoft Excel format to their DLAE for all federal-aid contracts, including master on-call A&E contracts, prior to advertisement and/or with the request for authorization (RFA) package as applicable.

- Local agencies may not advertise the contract before receiving DLAE feedback on the DBE goals and notification from the DLAE that the authorization to proceed (E-76) has been issued ([for construction contracts only](#)).
 - For construction contract estimates greater than \$2 million and consultant contract estimates greater than \$500,000, the DBE goal will need to be reviewed and approved by Caltrans. Local agencies will have an opportunity to discuss and resolve any differences in the respective goal calculations; however, the final decision rests with Caltrans.

DLAE Responsibilities

- For construction contract estimates greater than \$2 million and consultant contract estimates greater than \$500,000, e-mail the Exhibit 9-D: DBE Contract Goal Methodology in Microsoft Excel format to HQ DLA: DBEgoal.GFE@dot.ca.gov.
 - Once the [Exhibit 9-D: DBE Contract Goal Methodology](#) has been reviewed by the Office of Civil Rights (OCR), send a confirmation e-mail to the local agency with the recommended DBE contract goal.
- For construction contract estimates less than or equal to \$2 million and consultant contract estimates less than or equal to \$500,000, conduct a cursory review of the Exhibit 9-D and send an email to the local agency to confirm the DBE contract goal.

DLA Responsibilities

The following applies to DBE goal setting for construction contract estimates greater than \$2 million or consultant contract estimates greater than \$500,000:

- Send confirmation to the DLAE that Exhibit 9-D is being processed.
- After processing, reply to the DLAE with the recommended DBE contract goal.
- If the agency disagrees with the DBE contract goal, review the reasoning and make a decision if the goal needs to be adjusted. [The OCR is involved in the decision process to make an adjustment in the DBE contract goal.](#)

It will not take more than 15 business days to review the Exhibit 9-D after receipt from the District. If there is no response from DLA after 15 days, the DLAE has the discretion to move forward

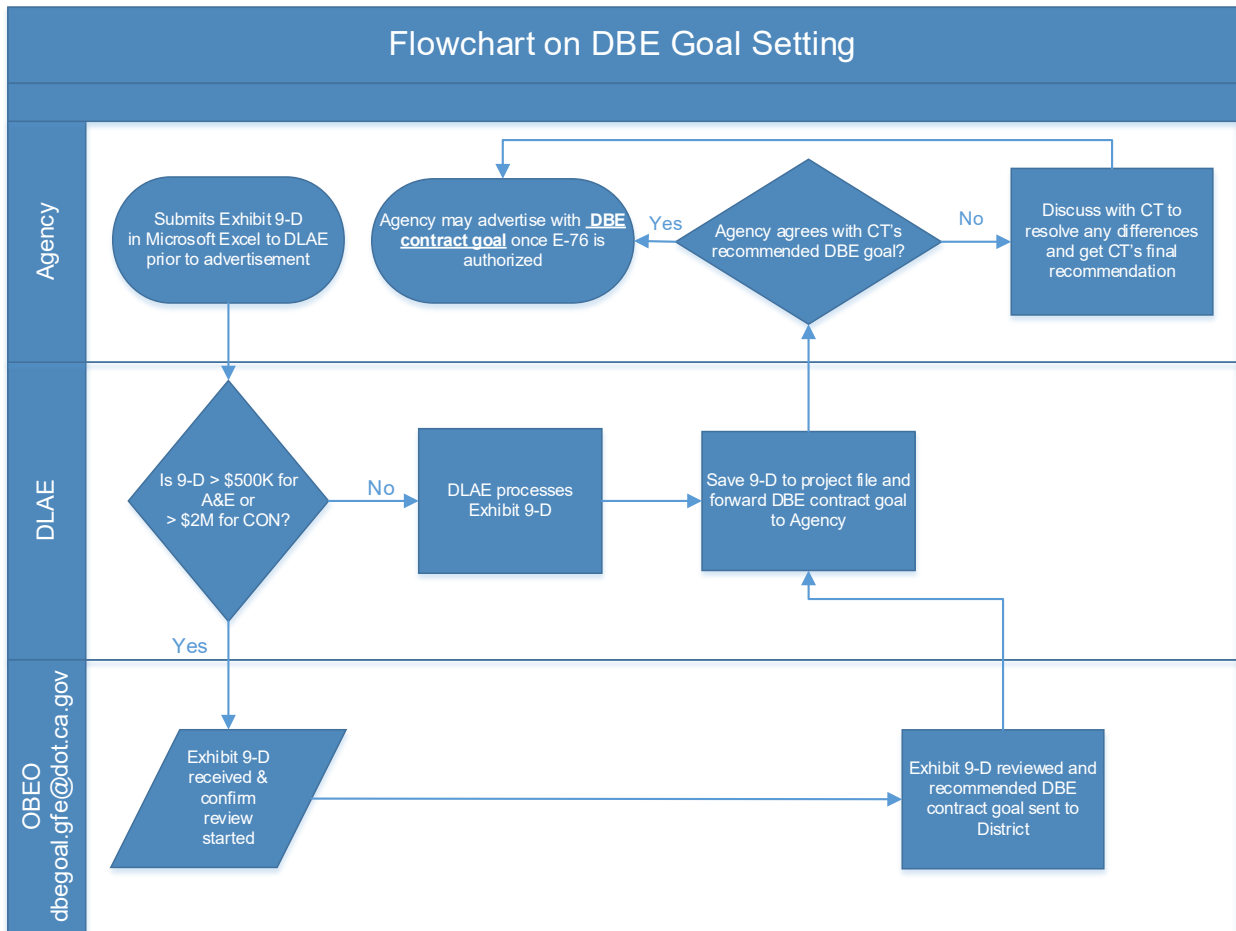


Figure 9-1: DBE Goal Setting Flowchart

Local Agency Bidder or Proposer DBE Commitment and DBE Information Forms

On construction contracts, the [Exhibit 15-G: Construction Contract DBE Commitment](#) must be provided by each bidder and submitted no later than 4pm on the 5th day after bid opening. On consultant contracts, [Exhibit 10-O1: Consultant Proposal DBE Commitment](#) must be included in each consultant’s proposal and the [Exhibit 10-O2: Consultant Contract DBE Commitment](#) form must be included in best qualified consultant’s executed consultant contract. [Exhibits 15-G](#), [Exhibit 10-O1](#) and [Exhibit 10-O2](#) must include the names, addresses and phone numbers of DBE firms that will participate, and a complete description of work or supplies to be provided by each. [Exhibits 15-G](#) and [Exhibit 10-O2](#) must also include the dollar value of each DBE work item or service to be performed ([Exhibit 10-O1](#) will not have the dollar values since they are not known prior to consultant contract negotiation).

When 100% of a contract item of work is not to be performed or furnished by a DBE, a description of the exact portion of that work to be performed or furnished by that DBE should be included in the DBE information, including the planned location of that work. A bidder certified as a DBE should describe the work it has committed to perform with its own forces, as well as any other work that it has committed to be performed by DBE subcontractors, suppliers, and trucking companies. The bidder or proposer is required to provide written confirmation from each DBE participating in the contract. A copy of a DBE's quote will serve as written

confirmation that the DBE is participating in the contract. If a DBE is participating as a joint venture partner, the bidder or proposer is encouraged to submit a copy of the joint venture agreement. [Exhibit 15-G](#) or [Exhibit 10-O2](#) must be included in the construction or consultant contract whether or not there is a DBE goal on the contract. The local agency must submit this form to the DLAE within 30 days of contract execution for timely reporting. The purpose of these forms is to capture all DBE proposed participation, or in instances when there is no DBE contract goal, DBE proposed participation acquired through normal contracting procedures as required under 49 CFR 26.

Final Report

Upon completion of the construction or consultant contract, regardless of whether DBE participation was obtained, a summary of the DBE records must be prepared, certified correct, and submitted on the [Exhibit 17-F: Final Report-Utilization of DBE and First-Tier Subcontractors](#), or equivalent by the contractor to the local agency showing total dollars paid to each subcontractor and supplier whether DBE or non-DBE. [Exhibit 17-F](#) is reviewed by the local agency and certified as complete and accurate. The information in this report is required by the DBE Program and the FHWA to demonstrate DBE participation on local agency projects.

The local agency must send one copy of the completed [Exhibit 17-F](#) to the DLAE as part of its Final Report of Expenditure package before final payment (see [LAPM Chapter 17: Project Completion](#)).

Counting DBE Participation

Actual payment to subcontractors that are certified DBEs performing a commercially useful function will be counted as DBE participation. If the prime contractor is a qualified DBE, his/her work is reported and counted.

Work Performed by DBEs

When a DBE participates in a contract, count only the value of the work actually performed by the DBE.

- Count the entire amount of that portion of a contract that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).
- Count the entire amount of fees or commissions charged by the DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a federal-aid contract, provided that the local agency determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
- When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted towards DBE participation only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE participation.

Joint Venture

When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces towards the DBE participation. The DBE's share of each of the following must commensurate with its ownership interest in the joint venture: capital contribution, control, management, risks and profits.

Commercially Useful Function

Count expenditures to a DBE contractor, only if the DBE is performing a commercially useful function on that contract. The following examples explain what is considered to be performing a commercially useful function:

- A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a 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. To determine whether a DBE is performing a commercially useful function, the local agency must evaluate the amount of work subcontracted; industry practices; whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work; and other relevant factors.
- A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, the local agency must examine similar transactions, particularly those in which DBEs do not participate.
- If a DBE does not perform or exercise responsibility for at least 30% of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, one must presume that it is not performing a commercially useful function.
- When a DBE is presumed not to be performing a commercially useful function, as provided in the previous bullet, the DBE may present evidence to rebut this presumption.
- The local agency's determination as to whether the firm is performing a commercially useful function [to accurately credit DBE services](#) should be based upon the [amount and type of work involved and normal industry practices](#). [A resident engineer should certify CUF in writing, and a signed and documented CUF review would meet the monitoring requirement of the agency.](#)
- Local agencies' decision on commercially useful function matters are subject to review by the DLAE.

DBE Trucking

Use the following factors in determining whether a DBE trucking company is performing a commercially useful function:

- The DBE must be responsible for the management and supervision of the entire trucking operation for which it is getting credit on a particular contract, and there cannot be a contrived arrangement for the purpose of counting DBE participation.
- The DBE must itself 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 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 who leases trucks from another DBE 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, including an 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, since these services are not provided by a DBE.
- A lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck.

Materials and Supplies

Count expenditures with DBEs for materials or supplies toward DBE participation as provided in the following:

- If the materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies toward DBE participation.
Note: For purposes of counting DBE participation, a manufacturer is a firm that operates or maintains a factory or establishment that produces on the premises, materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
- If the materials or supplies are purchased from a DBE regular dealer, count 60% of the cost of the materials or supplies toward DBE participation.
Note: For purposes of counting DBE participation, 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.
- To be a regular dealer, the firm must be an established business that regularly engages, as its principal business and under its own name in the purchase and sale or lease of the products in question.

- A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business, if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment must be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not considered regular dealers for purposes of counting DBE participation. With respect to materials or supplies purchased from a DBE, which is neither a manufacturer nor a regular dealer, count the entire 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 toward DBE participation, provided the local agency determines the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. However, do not count any portion of the cost of the materials and supplies themselves toward DBE participation.

DBE Participation Not Counted

If a firm is not currently certified as a DBE at the time of the execution of the contract, do not count the firm's participation, except as provided for under Decertification of this section.

Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified. Do not count the participation of a DBE subcontractor toward the prime contractor's DBE achievements or the local agency's overall participation until the amount being counted toward the participation has been paid to the DBE.

Apparent Lack of Control

In order for a firm to become a certified DBE, it should meet the various requirements prescribed in the CFR, as administered by the California Unified Certification Program (CUCP). The DBE must possess the power to direct or cause (49 CFR 26.71(d)).

Some situations may arise where the work to be performed by the DBE is being performed by someone else. The local agency will have to use discretion on when to investigate or report apparent cases of fraud to Caltrans. Caution is needed because those involved in performing the work may legitimately be doing so.

The three areas are as follow:

1. Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.
2. The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable. The socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be, such that the recipient can reasonably conclude that the socially and economically

- disadvantaged owners actually exercise control over the firm's operations, management, and policy.
3. The socially and economically disadvantaged owners must have an overall understanding of, and managerial, technical competence and experience directly related to the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in each critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities; to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

DBE Eligibility

The CUCP certifies and determines the eligibility of DBE consultant and contractor firms. The CUCP can also remove the eligibility of a firm and issue a written notice of ineligibility. A directory of certified DBE firms is available [here](#).

Certification

A potential DBE may request certification from Caltrans by requesting an application form at:

Department of Transportation
Office of Civil Rights
Certification Unit
1823 14th Street, MS-79
Sacramento, CA 95811

DBE_Certification@dot.ca.gov

The form may also be downloaded at this [website](#).

Decertification

If a DBE firm becomes ineligible in the middle of a contract (i.e., due to decertification), ~~only that portion of work performed while certified will count toward DBE participation claimed by the local agency and Caltrans. If the DBE is already under contract prior to becoming ineligible, its participation is eligible to be counted toward meeting the contract goal by the prime contractor/consultant.~~ the prime contractor may continue to use the DBE firm on the contract and may continue to receive credit toward its DBE goal for the DBE firms' work. In this case, or in a case where the DBE firm is already under contract prior to becoming ineligible, the portion of the ineligible DBE firm's performance of the contract remaining after the notice of its ineligibility must not count toward the State-wide DBE overall goal, but may count toward the contract goal.

If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, the local agency may continue to count its participation on that contract toward overall and contract participation.

Appeal

When the CUCP makes an administratively final removal of a firm's eligibility, the firm may appeal the removal to the DOT under Section 26.89 of 49 CFR 26. Caltrans will provide information for an appeal with the removal of eligibility.

9.8 GOOD FAITH EFFORTS

Note: For purposes of this section bidder also includes proposer, contractor includes consultant and subcontractor includes subconsultant.

When a local agency establishes a DBE contract goal on a federal-aid contract, a bidder must, in order to be responsive, make Good Faith Efforts (GFEs) to meet the DBE contract 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 to meet the goal. Second, if the bidder does not meet the goal, the bidder can provide documentation in support of their adequate GFEs. This means that the bidder must show that they took all necessary and reasonable measures to achieve the DBE contract goal. The bidder could reasonably be expected to obtain maximum possible DBE participation even if they were not fully successful in meeting the DBE contract goal. A local agency must require a bidder to meet the DBE contract goal or meet the burden of proof of GFEs in order to be awarded a contract. In any situation in which a DBE contract goal has been established, the use of GFEs must be allowed. [The local agency can adopt a sample GFE procedure \(Exhibit 9-G\) to use verbatim or revise as necessary.](#)

Each local agency must make a fair and reasonable judgment whether a bidder that did not meet the set goal made adequate GFEs. It is important to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. 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 GFEs to meet the DBE contract requirements. ~~We emphasize~~ [It is important to note](#) that the local agency's determination concerning the sufficiency of the bidder's GFEs is a judgment call, ~~and meeting quantitative formulas is not required~~ [and the determination should not be made using quantitative formulas](#). Caltrans strongly cautions local agencies against requiring that a bidder meet a DBE contract goal in order to be awarded a contract, even though the bidder makes an adequate GFE showing. Title 49 CFR 26 specifically prohibits federal-aid recipients from ignoring bona fide GFEs.

Anticipated Good Faith Efforts

The following types of actions should be considered by a local agency as part of the bidder's Good Faith Efforts (GFEs) to obtain DBE participation. It is not intended to be exclusive or exhaustive. Determining the adequacy of a bidder's GFEs to achieve DBE contract goals is a judgment call. Other factors or types of efforts may be relevant in appropriate cases.

- Soliciting through all reasonable and available means (e.g., attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs that are capable of performing the work of the contract. The bidder must solicit this interest by allowing the DBEs sufficient time to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up the initial solicitation to the DBEs.

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- Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE contract goal will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with their own forces.
- 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.
- 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: 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 agreements could not be reached with the DBEs who were not selected to perform the work.

- 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 the DBE 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 DBE contract 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 GFEs. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.
- 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 employee status) are not legitimate causes for the rejection or non-solicitation of bids or proposals in the contractor's efforts to meet the DBE contract goal.
- Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.
- Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
- Effectively using the services of available minority or women community organizations; minority or women contractors or consulting groups; local, state, and Federal minority or 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.

The above actions are typically documented by the bidder on [Exhibit 15-H: DBE Information - Good Faith Efforts](#), which is to be submitted no later than 4pm on the 5th day after bid opening. This information is used by the local agencies to determine if the GFE was adequate or not prior to awarding the contract. In determining whether a bidder has made GFEs, the local agency

may take into account the performance of other bidders in meeting the DBE Contract Goal. The local agency should evaluate GFEs considering the DBE commitments of the 2nd and 3rd bidders. For example, when the apparent successful bidder fails to meet the DBE contract goal, but the 2nd and 3rd bidders meet it, it may reasonably raise the question of whether, with additional reasonable 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 DBE participation obtained by the 2nd and the 3rd bidders, this along with other supporting factors may be viewed as evidence of the apparent successful bidder having met the burden of proof of GFEs. See the Civil Rights Disadvantaged Business Enterprise Evaluating Good Faith Efforts video on the FHWA Federal-aid Essentials for Local Public Agency [website](#).

The local agency should ensure that the following is included in the bid documents:

- The local agency may consider the DBE commitments of the 2nd and 3rd bidders when determining whether the low bidder made Good Faith Efforts to meet the DBE contract goal.
- For projects awarded based on a GFE, the local agencies must prepare and submit with the award package [Exhibit 9-E: Sample Evaluation of Good Faith Efforts](#), that cites reasons as to why the GFE is adequate. In addition, [Exhibit 15-H](#), without supporting documentation, should be included in the award package.

Note: [Exhibit 15-H](#) and [Exhibit 9-E](#) need not be submitted with the award package, if the low bidder has met the DBE contract goal. However, bidders should be encouraged to submit [Exhibit 15-H](#) with their bid package, even if they believe they have met the DBE contract goal, in case errors are found in the [Exhibit 15-G: Construction Contract DBE Commitment](#).

Bidder/Offeror's Requirements for Good Faith Efforts

Good faith efforts documentation must include the following information, and supporting documents, as necessary:

1. The bidder/offeror's overall DBE commitment.
2. Items of work the bidder/offeror has made available to DBE firms. The bidder/offeror identifies and describes those items of work the bidder/offeror might otherwise perform with the bidder/offeror's own forces and those items that have been broken down into economically feasible units to facilitate DBE participation. For each item listed, the bidder/offeror must show the dollar value and percentage of the total contract. It is the bidder/offeror's responsibility to demonstrate that sufficient work to meet the goal was made available to DBE firms.
3. Names of certified DBEs and dates on which they were solicited to bid on the project. The bidder/offeror must include the items of work offered. The bidder/offeror must describe the methods used for following up initial solicitations to determine with certainty if the DBEs were interested, and the dates of the follow-up. The bidder/offeror must attach supporting documents such as copies of letters, memos, facsimiles sent, telephone logs, telephone billing statements, and other evidence of solicitation. The bidder/offeror is reminded to solicit certified DBEs through all reasonable and available means and provide sufficient time to allow DBEs to respond.
4. Name of selected firm and its status as a DBE for each item of work made available. The bidder/offeror must include name, address, and telephone number of each DBE that provided a quote and their price quote. If the firm selected for the item is not a DBE, the

- bidder/offeror must provide the reasons for the selection.
5. Name and date of each publication in which the bidder/offeror requested DBE participation for the project. The bidder/offeror must attach copies of the published advertisements.
 6. Names of agencies and dates on which they were contacted to provide assistance in contacting, recruiting, and using DBE firms. If the agencies were contacted in writing, the bidder/offeror must provide copies of supporting documents.
 7. List of efforts made to provide interested DBEs with adequate information about the plans, specifications, and requirements of the contract to assist them in responding to a solicitation. If the bidder/offeror has provided information, they must identify the name of the DBE assisted, the nature of the information provided, and date of contact. The bidder/offeror must provide copies of supporting documents, as appropriate.
 8. List of efforts made to assist interested DBEs in obtaining bonding, lines of credit, insurance, necessary equipment, supplies, and materials, excluding supplies and equipment that the DBE subcontractor purchases or leases from the bidder/offeror or its affiliate. If such assistance is provided by the bidder/offeror, they must identify the name of the DBE assisted, nature of the assistance offered, and date assistance was provided. Provide copies of supporting documents, as appropriate.
 9. Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal.
 10. Written confirmation from each listed DBE firm that it is participating in the contract in the kind and amount of work provided in the bidder/offeror's commitment.
 11. Written documentation of reason(s) for rejecting DBE quotes.
 12. Any additional data to support demonstration of good faith efforts.

The Agency may consider DBE commitments from other bidders when determining whether the low bidder made good faith efforts to meet or exceed the DBE goal.

Administrative Review and Reconsideration

An administrative review (see 49 CFR 26.53) and evaluation of the Good Faith Efforts (GFEs) should be made prior to award in each instance by the local agency. If the local agency determines that the apparent successful bidder has failed to meet the GFEs requirements, the local agency, before awarding the contract, must provide the apparent successful bidder the opportunity for administrative reconsideration in accordance with 49 CFR 26.53. [A sample procedure for reconsideration hearing \(Exhibit 9-H\) can be found here.](#)

Termination and Substitutions of DBE Subcontractors

After a contract, which specified goals for the DBE participation, has been executed, adequate Good Faith Efforts (GFEs) are required for any **necessary needed** substitution of DBE subcontractors to the extent needed to meet the DBE contract goal.

Local agencies must require a prime contractor not to terminate for convenience a DBE subcontractor listed in [Exhibit 15-G: Construction Contract DBE Commitment](#) or an approved substitute DBE subcontractor **and have the work performed** in order to perform the work of the terminated subcontract with its own forces or those of an affiliate without the local agency's prior written consent.

The local agency must include in each prime contract a provision stating that the contractor must utilize the specific DBEs listed to perform the work and supply the materials for which each is listed unless the contractor obtains the local agency's written consent due to the following, but not limited to, good reasons such as:

- The listed DBE subcontractor fails or refuses to execute a written contract,
- The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards,
- The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements, or
- The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness, as stated in 49 CFR 26.53(f).

Before transmitting to the local agency its request to terminate and/or substitute a DBE subcontractor, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to the local agency, of its intent to request to terminate and/or substitute, and the reason for the request.

The prime contractor must give the DBE five days to respond to the prime contractor's notice and advise the local agency and the prime contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why the local agency should not approve the prime contractor's action.

When a DBE subcontract is terminated or when a DBE subcontractor fails to complete its work on the contract for any reason, the local agency must require the prime contractor to make GFEs to find another DBE subcontractor to substitute for the original DBE subcontractor. These GFEs must be directed at finding another DBE subcontractor to perform at least the same amount of work under the contract as the DBE subcontractor that was terminated to the extent needed to meet the DBE contract goal.

Monitoring and Enforcement Mechanism for DBE Termination and Substitution

Local agencies are required to implement appropriate mechanisms to ensure compliance with the requirements related to the termination and substitution of subcontractors by all program participants. The local agency needs to stipulate legal and contractual remedies available under federal, state and local law in the contract and must set forth these mechanisms in the local agency's DBE program.

The local agency's DBE program must also include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently (e.g., as the result of modification to the contract) is actually performed by the DBEs to which the work was committed. This mechanism must include a written certification that the local agency has reviewed contracting records and monitored work sites in the local agency's jurisdiction for this purpose (for example, a resident engineer certifies CUF in writing).

Noncompliance

Local Agencies must include in each prime contract a provision for appropriate sanctions that will be involved if the prime contractor fails to fulfill the DBE commitments made at the time of execution of the contract. The local agency must deny payment to the prime contractor for the portion of the contract that was committed at the time of contract execution to be performed by a

DBE subcontractor but was completed by the prime contractor or a substitute non-DBE subcontractor, unless agreed by the local agency in writing.

Submitting the GFE and Supporting Document for Review

For construction contracts less than or equal to \$2 million and consultant contracts less than or equal to \$500,000, the agency must perform the GFE review if DBE goal is not met.

For construction contracts greater than \$2 million and consultant contracts greater than \$500,000 that had their DBE goal approved by Caltrans, if the low bidder or the most qualified consultant did not meet or exceed the DBE contract goal, the local agency must submit the GFE documentation to their DLAE for review.

The following are responsibilities and a flowchart on Good Faith Effort Review (see Figure 9.3) for local agencies, DLAEs, and DLA.

Local Agency Responsibilities

- The local agency must obtain, complete, and review all of the following documentation prior to determining if the low bidder or the most qualified consultant made a GFE:
 - A bid tabulation summary sheet such as included in [Exhibit 15-D: Bid Tabulation Summary Sheet](#) or [Exhibit 10-O1: Consultant Proposal DBE Commitment](#).
 - All bidders' [Exhibits 15-G: Construction Contract DBE Commitment](#) or [Exhibit 10-O1: Consultant Proposal DBE Commitment](#).
 - All bidders' [Exhibit 15-H: Proposer/Bidder Good Faith Efforts](#) or other documentation that all bidders' submit in lieu of Exhibit 15-H. If bidders did not submit GFE documentation within five (5) days after bid opening, it should be noted in [Exhibit 9-E: Local Agency Good Faith Effort Review](#).
 - [Exhibit 9-E: Local Agency Good Faith Effort Review](#).
- For construction contracts less than or equal to \$2 million and consultant contracts less than or equal to \$500,000, the agency has responsibility to perform the GFE review.
- For construction contracts greater than \$2 million and consultant contracts greater than \$500,000 [that had their DBE goal approved by Caltrans](#), if the low bidder or the most qualified consultant did not meet or exceed the DBE contract goal, the local agency must submit the above GFE documentation to their DLAE **prior to awarding a contract or starting the negotiation**.
 - Local agencies **may not** award a contract to the low bidder or negotiate with the most qualified consultant without first receiving a memorandum from their DLAE that Caltrans has determined that they made a GFE.
 - If Caltrans determines the GFE was inadequate, the local agency will take Caltrans feedback on GFE into consideration and re-evaluate the GFE. After the re-evaluation:
 - If the local agency still thinks the GFE is adequate, they can award the contract or start the negotiation process.
 - If the local agency concludes that the GFE is inadequate, they must invite the low bidder or the most qualified consultant to an Administrative Reconsideration.

DLAE Responsibilities

- For construction contracts greater than \$2 million and consultant contracts greater than \$500,000 [that had their DBE goal approved by Caltrans](#), e-mail all completed GFE documentation including the local agency's bid summary (Exhibit 15-D or Exhibit 10-O1), DBE commitments (Exhibit 15-G or Exhibit 10-O1), the bidders' GFEs (Exhibit 15-H), and the local agency's GFE evaluation (Exhibit 9-E) to DBEgoal.GFE@dot.ca.gov.
- Communicate the outcome of Caltrans GFE review to local agencies.

DLA Responsibilities

The following applies to the GFE evaluation for construction contracts greater than \$2 million and consultant contracts greater than \$500,000 [that had their DBE goal approved by Caltrans](#):

- After receiving a complete GFE package from the DLAE, reply to the DLAE when evaluation starts on the GFE review.
- Once the GFE review has been finished, reply to the DLAE with Caltrans' GFE review conclusion in a memorandum.

The process will not take more than 15 business days after receipt of the GFE package from the District. If there is no response from DLA after 15 days, the DLAE has the discretion to move forward.