

NORTH DAKOTA DEPARTMENT OF TRANSPORTATION SPECIAL PROVISION DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM

PROJECT _____

RACE/GENDER NEUTRAL GOAL: 0%

NDDOT Contact Information	
Contractor Sign In & Submit Advertisements https://apps.nd.gov/dot/cr/csi/login.htm	Amy Conklin, DBE Program Administrator 701-328-3116 - or - aconklin@nd.gov
Submit quotes and post-bid documentation to: subquotes@nd.gov or Fax: 701-328-0343	Ramona Bernard, Civil Rights Division Director 701-328-2576 - or - rbernard@nd.gov
DBE Directory https://dotnd.diversitycompliance.com/	All times are stated in Central Time. The day of the bid opening is not counted as one of the business days.

PURPOSE

These provisions:

1. Provide an explanation of the federal law and outline the obligations to comply with the Federal DBE requirements applicable to this contract,
2. Explain the process NDDOT will follow to evaluate bidders' efforts to obtain DBE participation
3. Provide the standards NDDOT will use to measure compliance with the requirements
4. Identify sanctions for failing to comply with DBE program requirements.

QUOTES:

All bidders and all subcontractors over \$500,000 (regardless of whether they are apparent low bidder or their quote was used on a project in this bid opening) should submit a completed [SFN 52013-List of Businesses Submitting Quotes](#) by 4:00 pm CST, within 5 business days after the bid opening. **(Copies of quotes are no longer accepted).** This process is necessary in identifying "ready, willing, and able" contractors upon which to base the NDDOT Triennial DBE Goal. The number of contractors and the types of work they have bid/quoted will be used in the calculation of the DBE goal for each goal setting period.

All subcontractors, suppliers, manufacturers, regular dealers, vendors, and brokers should fax or email quotes to the Department no later than 9 PM the day before each bid opening.

All DBEs quoting on this project should submit all quotes and a list of contractors they quoted to NDDOT no later than 9 PM the day before each bid opening.

Prime contractors preparing to bid on NDDOT highway projects have requested that quotes be sent to them the day before the bid opening by:

- 2 PM Central - Suppliers (brokers/regular dealers), vendors, & manufacturers
- 5 PM Central - Subcontractors under \$500,000
- 8 PM Central - Subcontractors over \$500,000

REQUIREMENTS FOR ALL BIDDERS:

- ALL BIDDERS are strongly encouraged to submit all documentation at the time of bid opening.
- Must submit Form A with bid package at the time of bid opening.
- Must submit [Form C \(Notification of Intent to use\)](#) for DBE (if used) by 4:00 pm CST, within 2 business days after the bid opening. If no DBE's are used, Form C is not required.
- Completed [Form B](#), or a spreadsheet containing all the information on Form B, should be submitted by 4:00 pm, CST within 5 business days after the bid opening.
- Prime contractors are strongly encouraged to submit their bid documentation in one electronic file. Forms incorrectly submitted could result in a technicality, forcing the Department to award to the next responsive bidder.

To maximize subcontracting opportunities the following actions are encouraged.

ADVERTISE

All DBE and Non-DBE prime contractors and all subcontractors (over/under \$500,000), vendors, regular dealers/suppliers, and manufacturers, are encouraged to advertise using one of the two options:

OPTION 1: Place an advertisement soliciting DBE participation using the electronic [DBE Advertisement System](#).

- Submit the required information online at <https://apps.nd.gov/dot/cr/csi/login.htm> no later than noon, 15 calendar days before the bid opening.

OPTION 2: Directly contact by email or fax, all DBEs certified in the specific work type (NAICS) required for the job.

- Make contact with DBEs no later than 5 PM 7 calendar days before the bid opening.
- Use the DBE Directory to determine the DBE firms certified in the work to be subcontracted.

Either method of advertisement should:

- Provide the name, email address, telephone, and fax number of the company contact who will be available to discuss and/or receive quotes.
- Offer assistance to DBEs in interpreting plans; quantities; expected overtime; project scheduling; pit and batch plan locations, length of haul, type of road; method of measurement (seeding by the mile or acre, hauling by hour or by ton-mile) or other issues that may affect a price quote.

Indicate your intention to bid and/or receive quotes on specific jobs by using the Department's Bid Opening Sign in System

- The **Bid Opening Sign-In** web application located at <https://apps.nd.gov/dot/cr/csi/login.htm>. Sign-In opens at 8 AM 7 calendar days prior to the bid opening and closes at 11 AM the day before the bid opening.
- Fill in the online form fields as required.
- Log in to download the "Bid Opening Contact Report" at <https://apps.nd.gov/dot/cr/csi/public/listBidOpenings.htm>

RECEIVE & EVALUATE ALL QUOTES GIVEN

All prime contractors and all subcontractors over \$500,000 should receive and evaluate all quotes offered.

All quotes given for each job should be faxed or emailed to prime contractors or subcontractors no later than the day before the bid opening. Subcontractors interested in work on the advertised jobs are encouraged to quote all contractors on the Sign-In report.

POST-AWARD REQUIREMENTS

FEDERAL AUTHORITY

The following paragraph must be included in all subcontracts of all tiers in accordance with 49 CFR § 26.13(b):

The contractor or all tiers of subcontractors shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR § 26.13 in the award and administration of 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 NDDOT deems appropriate which may include, but is not limited to:

- (1) Withholding monthly progress payments;
- (2) Assessing sanctions;
- (3) Liquidated damages; and/or
- (4) Disqualifying the contractor from future bidding as non-responsible

It is the prime contractors' responsibility to ensure all tiers of subcontractors, brokers, manufacturers, suppliers, vendors, and regular dealers comply with the requirements of this special provision. In addition, the prime contractor has the responsibility to monitor DBE performance on the project, and to ensure that the DBE performs a commercially useful function (CUF).

PRIME CONTRACTOR'S MONITORING, RESPONSIBILITIES, REPORTING

For the life of the project, the prime contractor is responsible for the DBEs listed on Form C and for the specific spec/code items or products that the prime committed to during the award process.

The prime contractor is responsible to:

- Report payments to DBEs used to meet the project goal. **Payments on the contract must be entered and stored in the CCS. Use of CCS on the project eliminates the requirement to submit SFN 60638 and SFN 14268.**
- Invite and encourage all subcontractors and all DBEs listed on [Form C](#) to the pre-construction conference.
- Provide minutes to any DBE not in attendance at the pre-construction conference.
- Ensure their firm as well as any subcontractors, manufacturers, and regular dealers/suppliers comply with the requirements of this special provision.
- Provide all subcontractors with Proposed Project Schedules and any necessary updates.
- Monitor DBE performance on the project.
 - Submit [SFN 60597, DBE Performance – Commercially Useful Function \(CUF\)](#) Certification to the project engineer with [SFN 5682, Prime Contractor's Request to Sublet](#). Project engineers will not approve Requests to Sublet without the CUF Certification.
- Maintain project records and documentation of payments to DBEs for three years following acceptance of the final payment from NDDOT (per FHWA-1273, Section II Nondiscrimination #11).
 - This reporting requirement also applies to any certified DBE.
 - NDDOT may perform interim audits of contract payments to DBEs to ensure that the actual amount paid to DBEs equals or exceeds the dollar amount stated on Form C.
 - Make these records available for inspection, upon request, by an authorized representative of the NDDOT or USDOT.

If SFN 60597, and reports of payment are not received in a timely manner, progress payments will be withheld from the prime until submitted.

NDDOT MONITORING AND ENFORCEMENT MECHANISMS

The Department will bring any false, fraudulent, or dishonest conduct in connection with the DBE program to the attention of USDOT. USDOT may pursue action as provided in 49 CFR § 26.107. Actions include referral to the Department of Justice for criminal prosecution or referral to the USDOT Inspector General for action under suspension and debarment, or Program Fraud and Civil Remedies rules. The Department will also consider similar action under its own legal authority, including responsibility determination in future contracts.

COMMERCIALLY USEFUL FUNCTION

DBEs are required to perform a commercially useful function (CUF). CUF refers to those services the DBE is certified to perform. Certified services for each DBE are listed in the online DBE Directory. It is a DBE's responsibility to immediately notify the prime contractor in writing if the DBE is unable to perform a CUF or the services indicated on [Form C](#).

The contractor must certify that DBEs working on the prime's contract are performing a commercially useful function. Submit [SFN 60597, DBE Performance – Commercially Useful Function Certification](#) to the project engineer with [SFN 5682 -Contractor's Request to Sublet](#). Project engineers will not approve the Requests to Sublet without the CUF Certification. A review of the certification must be performed by the project engineer to determine whether the contract dollar value of the DBE's work may be counted toward the project goal.

The Department counts participation to a DBE contractor toward DBE goals only if the DBE is performing a CUF on that contract.

- A. A DBE performs a CUF 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 CUF, 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, installation and paying for the material itself. 49 CFR § 26.55(c)(1)
- B. A DBE does not perform a CUF 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. 49 CFR § 26.55(c)(2)
- C. If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, the Department must presume that it is not performing a CUF. 49 CFR § 26.55(c)(3)
- D. When a DBE is presumed not to be performing a CUF as provided in paragraph C (above), the DBE may present evidence to rebut this presumption. 49 CFR § 26.55(c)(4)
- E. The Department's decisions on CUF matters are subject to review by Federal Highway Administration, but are not administratively appealable to USDOT. 49 CFR § 26.55(c)(5)

COUNTING RACE/GENDER NEUTRAL DBE PARTICIPATION - 49 CFR § 26.55

The Department does not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE. 49 CFR § 26.55 (h)

The Department will count DBE participation toward our overall annual goal as provided in 49 CFR § 26.55 as noted below.

1. The Department will use the following factors in counting DBE trucking participation.
 - A. For purposes of this section, 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. Leased trucks must display the name and identification number of the DBE. 49 CFR § 26.55(d)(7)

- B. The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract. 49 CFR § 26.55(d)(1)
- C. The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract and 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. 49 CFR § 26.55(d)(2-3)
- D. The DBE may lease trucks and drivers from another DBE firm and receives credit for the total value of the transportation services the lessee DBE provides. 49 CFR § 26.55(d)(4)
- E. The DBE may also lease trucks with drivers and is entitled to credit for the total value of transportation services provided by non-DBE leased trucks equipped with drivers not to exceed the services under items 1C and 1D. Additional participation by non-DBE owned trucks equipped with drivers receives credit only for the fee or commission it receives as a result of the lease arrangement. 49 CFR § 26.55(d)(5)

Example to 1D: DBE Firm X uses two of its own trucks on a contract. It leases two trucks with drivers from DBE Firm Y and six trucks with drivers from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. DBE credit could be awarded only for the fees or commissions pertaining to the remaining trucks Firm X receives as a result of the lease with Firm Z.

- F. The DBE may lease trucks without drivers from a non-DBE truck leasing company and if the DBE uses its own employees as drivers, it is entitled to credit for the total value of these hauling services.

Example to paragraph 1F: DBE Firm X uses two of its own trucks and drivers on a contract. It leases two additional trucks and drivers from non-DBE Firm Z. Firm X uses its own employees to drive the trucks leased from Firm Z. DBE credit would be awarded for the total value of the transportation services provided by all four trucks. 49 § 26.55(d)(6)

- 2. Only the value of the work actually performed by the DBE counts toward the project goal when a DBE participates in a contract provided the DBE is certified in this work.
 - A. The Department counts the entire amount of that portion of a construction contract, or other contract not covered by item 2. B, that is performed by the DBE's own forces. Included are the cost of supplies and materials obtained by the DBE for the work of the contract, including 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). 49 CFR § 26.55 (a)(1)
 - B. The Department counts the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service for which they are certified, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a USDOT-assisted contract, toward DBE goals, if the Department determines the fee to be reasonable and not excessive. 49 CFR § 26.55 (a)(2)
 - C. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is also a DBE. 49 CFR § 26.55 (a)(3)
- 3. The Department counts expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:
 - A. If the materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies toward DBE goals. 49 CFR § 26.55 (e)(1)(i)
 - B. If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals. 49 CFR § 26.55 (e)(2)(i)
 - C. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of 3B (above) 49 CFR § 26.55 (e)(2)(ii)(C)
 - D. 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, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, if the Department determines the fees to be reasonable and not excessive. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals, however.

49 CFR § 26.55 (e) (3)

- E. The Department determines the amount of credit awarded to a firm for the provisions of materials and supplies (e.g., whether a firm is acting as a regular dealer or a transaction expediter) on a contract-by-contract basis. 49 CFR § 26.55 (e)(4)
4. If a firm is not currently certified in ND at the time of the execution of the contract, the Department does not count the firm's participation toward any DBE goal. 49 CFR § 26.55 (f)
5. The Department does not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward the Department's overall annual goal. 49 CFR § 26.55 (g)

DEFINITIONS

The definitions specified below apply only to this Special Provision and may contain differences from NDDOT Standard Specifications.

Achievement means any DBE certified service dollar amount committed to at the time of award. Any achievement must be supported by a request to sublet and Monthly DBE Payment Records for each DBE.

Aggregate providers are considered subcontractors rather than regular dealers/suppliers, regardless of the amount of their quote.

Apparent low bidder (ALB) means the bidder whose bid is read as low bid at the bid opening.

Bid Opening Sign-In System means the Department's online system to which all prime contractors and subcontractors must register to indicate their interest in quoting or bidding prior to each bid opening.

Bidder means a contractor intending to serve as the prime contractor for highway construction projects.

Blanket quote means when a business provides the same quote, for all projects, at a bid opening, using the same price at one rate, which is not project specific. Blanket quotes for the construction season are not allowed, i.e. trucking, striping, signing, construction supplies, etc.

Commercially Useful Function (CUF) describes a DBE's responsibilities and involvement in a project, see section Commercially Useful Function of this SP.

Commitment means the dollar amount of work the DBE will complete as stated in the bidder's proposal.

Contractor means all DBE and non-DBE firms, including prime contractors, brokers, vendors, regular dealers/suppliers, and manufacturers at any tier.

DBE Goal means a percentage of the total DBE contract targeted for the hiring of DBE subcontractors to do specific bid items for which the DBE has been certified to perform. Project goals are set by assessing the project's bid items, location, whether DBEs are available to do the work.

DBE Participation means the percentage achieved when the dollar amount committed to the DBE is divided by the dollar amount of all contract items.

DBE Participation Review summarizes the prime's participation at the time of award. A replacement approval request must be submitted to substitute a firm for any DBEs reported as being used at the time of award.

Department means the project owner regardless of whether the owner is NDDOT, a city or a county project.

Disadvantaged business enterprise or DBE means a for-profit small business concern that is certified by the Department and listed in the DBE Directory available on the Department's web site. DBEs must first be certified in the work intended before any DBE achievement may be counted toward the project goal.

Equipment supplier is a firm which provides equipment for sale or lease, without operators, and whose primary business function is equipment sales or leasing.

Manufacturer means a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications. 49 CFR § 26.55 (e) (1) (ii)

Materials means aggregate, steel, petroleum products, concrete, asphalt, and other construction supplies.

NAICS Codes means industry codes assigned by North American Industry Classification System. When certified, DBE businesses are assigned NAICS codes which are identified in the DBE Directory.

NDDOT Certification & Compliance System (CCS) refers to the online compliance reporting system whereby contractors report/submit job related payments, commitments, and Utilization Plan documentation.

Positive Contact means active and documented solicitation of DBE and other subcontractors. Advertising the prime's intention to bid, using the Contractor sign in to notify DBEs and other subcontractors of the jobs the prime is interested in, and contacting individual DBEs is deemed positive contact.

Prime contractor means bidders who are submitting proposals on this project, regardless of the size of the project.

Project owner means any political subdivision such as a city or county which provides match to federal highway funds and uses NDDOT's electronic bidding system to let their projects to bid. The Department "owns" state projects.

Quoter means DBE or a non-DBE subcontractors, brokers, vendors, regular dealers/suppliers, and manufacturers at any tier who submits quotes to another contractor.

Race/Gender Neutral (RGN) means a zero (0) percent goal that is used to assist all small businesses. Please note, NDDOT intends to achieve its overall DBE goals via RGN means; 3.47 percent is the Department's RGN goal.

Responsible Bid Proposal means a bidder's proposal in which the project goal has been achieved, or the bidder demonstrates Good Faith Efforts (GFE) as outlined in this Special Provision timely.

Subcontractor means any firm intending to perform work, or intending to perform work and supply the materials, which were intended for their work on the project. All subcontractors must attach a list of DBE subcontractors intended for use to their quote when submitting it to the prime contractor.

Supplier means a party providing goods, services, and supplies on the project.

Broker means an agent who, without having custody of the property, a) negotiates contracts of purchase, work, lease, or sale; b) buys and sells goods; or c) negotiates between buyers and sellers. See Counting DBE Participation section.

Regular Dealer means a DBE 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. See Counting DBE Participation section.

Tier means various levels of contractors on the job. For example a prime contractor's subcontractor (B) is referred to as the second tier. When B subcontracts with C, C becomes the third tier, etc.

Tied quote means the quote will be considered only if all of the bid items are included.

Untied quote means that any item or group of items quoted may be used for price noted on the quote whether one or all are used.