NORTH DAKOTA DEPARTMENT OF TRANSPORTATION
SPECIAL PROVISION: DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

PROJECT_____

RACE-CONSCIOUS GOAL The Disadvantaged Business Enterprise (DBE) goal for this project is: _____%

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INTRODUCTION

49 Code of Federal Regulations Part 26 (CFR) states that the contractor, subrecipient, or subcontractor shall not discriminate on the basis of race, color, national original, or sex in the performance of this contract. Contractors shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of USDOT-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 the recipient deems appropriate.

The paragraph above applies to every contractor on the project, including every tier of subcontractor. <u>It is the prime contractor's or subcontractor's responsibility to include the above paragraph in every subcontract.</u>

In this special provision:

"Aggregate providers" are considered subcontractors rather than suppliers, regardless of the amount of their quote. This term is applicable for Steps 1-13 of the good faith efforts process.

"Apparent low bidder" means the bidder whose bid is read as low bid at the bid opening.

"Bid differential" means written documentation that clearly explains the difference in the bid calculations for each item of work affected, including a comparison by total dollar value and percentage of difference between DBE(s) and non-DBE quotes and copies of all quotes used in the bid differential process which demonstrate the date and time the documents were received.

"Blanket quote" means when a business provides the same quote, for all projects, at a bid opening, using the same price or when a business provides one quote for an entire season, at one rate, that is not project specific. Generally this is done by trucking firms.

"Contractor" means ALL DBE (including MBE and WBE) and non-DBE firms, including prime contractors, subcontractors (under/over $500,000), suppliers, brokers, vendors, regular dealers, and manufacturers.

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

"Prime Contractor" means bidders or contractors who are submitting proposals on this project, regardless of the size of the project.

"Quoter" means a DBE or a non-DBE subcontractor (under/over $500,000), supplier, broker, vendor, regular dealer, or manufacturer who submits quotes to another contractor.

"Subcontractor quoting over $500,000" means a subcontractor whose quote is over $500,000 on any project and who is not a supplier, broker, vendor, regular dealer, or manufacturer. All aggregate providers are considered subcontractors, regardless of the amount of their quote.

When counting DBE participation the following definitions will apply as per 49 CFR Part 26:

"Broker" means an agent who negotiates contracts of purchase, work, lease, or sale; or buys and sells goods; or negotiates between buyers and sellers; but without having custody of the property. A broker may assist in the procurement of facilities, materials, or supplies required for the performance of the contract. A broker is not regarded as a supplier, manufacturer, or regular dealer for the purposes of this program.

"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.

"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.

- To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.

- 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 as provided above if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

"Supplier" means 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.

- The firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.

- "Materials" is defined as aggregate, steel, petroleum products, concrete, asphalt, and other construction materials.

PREBID REQUIREMENTS

IN ORDER FOR THE BIDDER'S PROPOSAL TO BE CONSIDERED RESPONSIVE, ONE OF THE FOLLOWING MUST BE ACHIEVED PRIOR TO THE BID OPENING;

- **THE DBE GOAL LISTED ON PAGE ONE OF THIS SPECIAL PROVISION IS MET**. (Submit the required information on Form A at the time of bid submittal); or

- **THE DBE GOAL IS NOT MET AND THE BIDDERS DEMONSTRATES GOOD FAITH EFFORTS (GFE) AS FOUND BELOW**. (Submit the required information on Form A at the time of bid submittal); or

GOOD FAITH EFFORTS

If award of the contract is made based on the contractor's good faith efforts, the goal will not be waived. The contractor must make good faith efforts throughout the duration of the contract.

The following is a list of actions to be taken or documentation to be provided by all bidders (including DBE primes) to obtain DBE participation. Efforts shall include, but are not limited to, the following steps:

STEP 1: ADVERTISE

- The prime contractor must place an advertisement soliciting DBE participation in either general circulation media or the supportive services newsletter before the bid opening.

- Prime contractors who submit their proposals by mail must indicate in their advertisement that they will be mailing their bid, must provide a date and time by which all quotes must be received for consideration, and must indicate where quotes should be sent.

- Advertisements placed in general circulation media must be run once at least seven calendar days before the bid opening date. "General circulation media" **means a newspaper in the area of the project** or a trade association publication such as the Construction Bulletin.

- The supportive services newsletter is published two weeks before each bid opening. Requests for ads in the newsletter must be received, in writing, by the Civil Rights Division no later than noon (Central time), 2 weeks before the bid opening date. Advertisements maybe be emailed to: subquotes@nd.gov or faxed to 701-328-0343, 701-328-1965, or mailed to the Civil Rights Division, 608 East Boulevard, Bismarck, ND 58505-0700. Bidders are also

encouraged to publish an email address for their company where subcontractors and suppliers can email their quotes to.

STEP 2: OFFER OF ASSISTANCE

In the advertisement and all other phases of pre-bid activities, the prime contractor must offer assistance to disadvantaged businesses in the areas of (but not limited to) interpreting plans, preparing proposals, providing advice to obtain bonding and insurance, project scheduling, pit and batch plant locations, etc. After the bid opening, the apparent low bidder must document that the offer of assistance appeared in the advertisement.

STEP 3: ASSIST DISADVANTAGED BUSINESSES

The prime contractor and subcontractors must respond to any requests, from disadvantaged businesses that are submitting quotes, concerning; interpreting plans; preparing proposals; providing advice to obtain bonding and insurance; quantities; expected overtime, project scheduling; pit information (location, length of haul, type of road); method of measurement (seeding by the mile or acre, hauling by the ton-mile or by the hour, etc.); payment schedule; items of work included in the quote; or any other project-related issues. After the bid opening, the apparent low bidder must state, in writing, whether such discussions were requested, and must report and document any assistance provided.

STEP 4: GUIDELINES FOR SUBMITTING QUOTES TO BIDDERS

All DBE and non-DBE businesses **strongly encouraged to** follow these guidelines when quoting.

- Indicate the date of the bid opening, job number, or project number being quoted.
- Include bid item numbers and units or quantities.
- Use bid items and quantities from the proposal rather than from the Notice to Bidders.
- Show all calculations on the quote.
- Indicate whether mobilization is included; cost of bond, if required; and any other special conditions.
- Indicate if a quote does not include something required by the specifications for a particular bid item.
- Include on all trucking quotes the type and number of units available and their capacity.
- Provide separate quotes for each project (each quote on a separate page).

STEP 5: SIGN IN

DBE and non-DBE prime contractors, who are bidding by paper only or subcontractors over $500,000, (excluding suppliers, brokers, vendors, regular dealers, and manufacturers) who are quoting non-electronically are required to sign-in utilizing one of the following:

- Sign-in as specified in third paragraph below: "Prior to 11 a.m. (Central),…"

- Prior to 10:30 a.m. (Central), the day before the bid opening, he or she may call the Civil Rights Division, 701-328-3116 or 701-328-2637 if assistance is needed to sign-in electronically.

DBE and non-DBE prime contractors and subcontractors over $500,000, (excluding suppliers, brokers, vendors, regular dealers, and manufacturers) who are bidding or quoting electronically, (fax or email), are required to do the following:

- Prior to 11 a.m. (Central), the day before the bid opening date, **must** electronically sign-in at: http://www.dot.nd.gov/dbebidinfo.html and click on "**Sign-in for Prime Contractor and Subcontractor Quoting Over $500,000,"** providing information (location, phone, email and/or fax number) where they can be contacted by businesses wishing to submit quotes, to them, between 11:00 a.m. and 8 p.m. that same day.

- Designate at that time which jobs they are bidding or quoting on.

- Between 11:00 a.m. and 8 p.m. (Central), the day before the bid opening the prime contractor and subcontractors over $500,000 **must** have a representative available to receive and discuss quotes at the contact location, phone/fax numbers, or email, as required above.

DBE and non-DBE suppliers, brokers, vendors, regular dealers, manufacturers, and subcontractors both over/under $500,000 are not required but are strongly encouraged to:

- After 11:00 a.m. (Central), the day before the bid opening, retrieve the **"Report for Prime Contractor and Subcontractor Quoting Over $500,000,"** which will be posted electronically at: http://www.dot.nd.gov/dbebidinfo.html A copy can be obtained by fax, by calling 701-328-3116, 701-328-2637, or 701-328-2576.

STEP 6: RECEIVE AND EVALUATE ALL QUOTES OFFERED

All prime contractors and subcontractors are responsible for receiving and evaluating all quotes offered, regardless of whether the quotes are calculated by the ton-mile, hour, acre or square mile, and regardless of whether work elements intended to be subcontracted. It is not acceptable to limit the use of DBEs because of a larger amount of work is intended to be subcontracted to a non-DBE. It is also not acceptable to require that quotes be given in a particular format. It is the responsibility of any person receiving quotes to convert the quotes to an acceptable format, if necessary.

STEP 7: DBE AND NON-DBE QUOTERS' RESPONSIBILITIES

- The night before a bid opening, all DBE and non-DBE subcontractors (under/over $500,000), suppliers, regular dealers, vendors, manufacturers, or brokers **must provide quotes by the times listed in the chart below**. Quotes received by the times specified below will be used in the department's bid differential analysis between a DBE and non-DBE. Quotes submitted after **the times specified below** may not be considered in the bid differential analysis. (See definition on page 2 and reference in Step 13, page 8.)

- By the times listed in the chart below, the night before a bid opening, all DBE and non-DBE subcontractors (under/over $500,000), suppliers, regular dealers, vendors, manufacturers, or

brokers **must submit a copy** of all phone or paper quotes they provide for each project. They must either be emailed to: subquotes@nd.gov or faxed to: the DBE Liaison Officer, 701-328-1965 and 701-328-0343.

DBE AND NON-DBE	MUST PROVIDE QUOTES BY TIMES SPECIFIED	MUST PROVIDE QUOTES TO DEPARTMENT BY
Suppliers, brokers, vendors, regular dealers, and manufacturers	2:00 p.m. (Central)	3:00 p.m. (Central)
Subcontractors **under** $500,000	5:00 p.m. (Central)	6:00 p.m. (Central)
Subcontractors **over** $500,000	8:00 p.m. (Central)	9:00 p.m. (Central)

- All subcontractors quoting over $500,000 **must** attach a completed copy of Form A to their quote when submitting it to the prime contractor.
- All quotes by DBE or non-DBE subcontractors, suppliers, regular dealers, vendors, or brokers for more than one bid item **must indicate** whether the bid items are **tied or not tied**.
- DBEs **must** state on their quote the dollar value of the work to be actually performed by their own forces or other DBEs they intend to use.
- Blanket quotes for an entire bid opening or the construction season are not allowed (i.e. trucking, striping, signing, etc.)
- Faxed quotes must clearly indicate the date and time the fax was sent.

STEP 8: FORM A: MUST BE SUBMITTED AT THE TIME OF BID SUBMITTAL

- At the time of bid submittal, all prime contractors must complete Form A and attach it to their bid proposal.
- The prime contractors Form A **must** list all the DBEs intended for use on the project, including DBEs intended to perform work, in all tiers of subcontracting. The prime contractor must also include Form A information for all subcontractors over $500,000.
- If the assigned goal has not been achieved and the prime contractor indicates he or she intends to do the work themselves, the prime contractor is committed to doing the specific bid items or tasks listed, with their own employees and equipment. Own employees are individuals who are on the prime contractors payroll and for which the prime contractor contributes to unemployment, social security, and workers compensation. Equipment is that which is titled, licensed, and insured in the prime contractors' name or leased from a bona-fide equipment supplier. It is not acceptable to use equipment or employees from another firm, an affiliate or subsidiary firm in lieu of the prime contractor's equipment and employees.
- If during the project, the prime contractor is unable to perform, the prime contractor will be required to complete the termination of use and then the unfulfilled obligations process. In an emergency situation, after completing the unfulfilled obligations process, a contractor may be allowed to rent from another contractor for the life of this project.

- In instances where the prime contractor indicated he or she would do the work with their own employees and equipment, and then are unable to perform, the prime contractor will be required to go through the termination of use and then the unfulfilled obligations process.

- The DBE firms not used **must** be noted on Form A either under the area where the prime designates work they will do themselves or under the DBE firms not used due to bid differential area.

- Within 5 working days after the bid opening, the prime contractor **must** also provide to the department a bid differential analysis between the DBE and non-DBE quoters.

STEP 9: Form B: SUBMIT WITHIN 5 WORKING DAYS OF BID OPENING

Within 5 working days after the bid opening, all bidders must either:

- Submit Form B to include all tiers of subcontracting on the project or
- Provide copies of all quotes received to include all tiers of subcontracting on the project to the address in Step 10 below or emailed to subquotes@nd.gov

When submitting a Form B, copies of all quotes **must** be retained, by each bidder, for **45 days after the bid opening date**. If a quoter refuses to provide a copy of their quote, as required in Step 7 above, the bidder **must** provide a copy of their quote upon request by the Department.

Bidders who fail to provide a copy of the quotes may be sanctioned.

STEP 10: FORM C: SUBMIT WITHIN 10 WORKING DAYS AFTER BID OPENING

Within 10 working days after the bid opening, the apparent low bidder **must** submit a Form C for each DBE listed on Form A or a non-DBE used in a bid differential, to the address below, unless NDDOT grants a time extension.

No award will be made on a project until Form C's for each DBE or a non-DBE used in a bid differential, are submitted to NDDOT. The contractor and DBE or a non-DBE used in a bid differential, **must** sign the form. Form C applies to all tiers of subcontractors working with DBEs.

Form Cs may be faxed to the DBE Liaison Officer, at 701-328-0343 or 701-328-1965, mailed to the Civil Rights Division, NDDOT, 608 East Boulevard Avenue, Bismarck, ND 58505-0700 or emailed to subquotes@nd.gov

Signatures need not be original; faxed signatures are acceptable.

If Form C contains additional pages or an attachment, each page or attachment must be signed by the DBE or a non-DBE used in a bid differential.

If Form A and Form C contain different information (e.g., bid item numbers, quantities, or dollar amounts), the contractor or subcontractor must explain the difference in writing to NDDOT when submitting Form C.

STEP 11: DEADLINES FOR SUBMITTING DOCUMENTATION TO NDDOT

Information must be submitted to the DBE Liaison Officer, North Dakota Department of Transportation (NDDOT), 608 East Boulevard, Bismarck, ND, 58505-0700, as follows:

- Within 5 working days after the bid opening, the apparent low bidder must submit information on Steps 1, 2, 3, 5, and 6.

- Within 5 working days after the bid opening, any apparent low bidder who submits their proposal by mail must submit information on Steps 1, 2, 3, and 6.

- Within 5 working days after the bid opening, the prime contractor **must** also provide to the department a bid differential analysis between the DBE and non-DBE quoters as required in Step 13.

- Within 5 working days after the bid opening, all bidders must submit a completed Form B or copies of all quotes received for the project. Form B must include all tiers of subcontracting on the project.

- Within 10 working days after the bid opening, the apparent low bidder must submit required Form Cs to the address above, unless NDDOT grants a time extension.

STEP 12: DEMONSTRATION OF GOOD FAITH EFFORTS

If the apparent low bidder did **not** meet the established DBE goal, good faith efforts documentation will be required as noted in Step 11 above and Step 13 below.

STEP 13: BID DIFFERENTIAL ANALYSIS

- If DBE quotes were rejected, based on the bid differential concept, this must be so noted by listing the DBEs name in the appropriate area on Form A. The bid differential analysis must be provided to the Department within 5 working days after the bid opening.

- Bid differential comparisons are only made between a DBE(s) and a non-DBE.

- Quotes received by the times specified in Step 7 will be used in the bid differential analysis. Quotes submitted **after** the times specified in Step 7 may not be considered in the bid differential analysis.

- Bid differential explanations **must** include each item quoted by a DBE and be compared to like items quoted by a non-DBE. The bidder **must** provide written documentation that clearly explains the difference in the bid calculations for each item of work affected, including a comparison by total dollar value and percentage of difference between the DBE and non-DBE. The low bidder must provide copies of all quotes used in the bid differential process which clearly demonstrate the date and time the documents were received.

- If a DBE was used for a portion of a bid item, the prime contractor must show why the DBE was not used for the entire bid item. For example, if there was $1 million worth of trucking in a project and the DBE or non-DBE was used for $100,000 of the trucking, the prime contractor

must show why another DBE, if available, was not used for the remaining $900,000 of the trucking.

- If it is determined that the DBE quote should have been selected, the bidder will have the opportunity to commit to using the DBE, resubmit a corrected Form A, and complete a Form C prior to award. The bidder is responsible for all additional costs incurred.

- If the Department determines that a non-DBE's quote is reasonable, the low bidder or subcontractor over $500,000 must commit, to using the non-DBE used in the bid differential, by completing a Form C, at the price provided in the quote, for the bid items or products to be supplied, as listed, including any stipulations. The non-DBE used in the bid differential must commit to doing the specific bid items or tasks listed with their own employees and equipment. Own employees are individuals who are on the non-DBE used in the bid differential payroll and for which the non-DBE used in the bid differential contributes to unemployment, social security, and workers compensation. Equipment is that which is titled, licensed, and insured in the non-DBE used in the bid differential's name or leased from a bona-fide equipment supplier. It is not acceptable to use equipment or employees from another firm, an affiliate, or subsidiary firm in lieu of the non-DBE used in the bid differential's equipment and employees.

- If during the project, the non-DBE used in the bid differential is unable to perform, the bidder or subcontractor over $500,000 will be required to complete the termination of use process and then the unfulfilled obligations process. In an emergency situation, after completing these two processes, a contractor may be allowed to rent from another contractor for the life of this project.

LIST OF DBE PARTICIPATION

Generally, two working days after the bid opening, the DBE participation list is posted to the NDDOT website: http://www.dot.nd.gov/dbebidinfo.html To request a paper copy of the DBE participation web site listing, contact the Civil Rights Division, North Dakota Department of Transportation, 608 East Boulevard Avenue, Bismarck, ND 58505-0700, and fax 701-328-1965 or 701-328-0343, phone 701-328-2637 or 701-328-3116.

PENALTIES FOR FAILURE TO PROVIDE REQUIRED DOCUMENTATION

Prime contractors and subcontractors are encouraged to discuss the requirements of this special provision with all businesses providing quotes on a specific project.

If the apparent low bidder fails to submit good faith efforts (GFE) documentation on a project in question, the Department will consider the bid non-responsive.

Prime contractors may be denied future quoting or bidding privileges if they failed to provide copies of documentation, as required under Form B.

Apparent low bidders may be denied future quoting or bidding privileges for failure to submit Form A and Form C as required.

Subcontractors, suppliers, or regular dealers may be denied future quoting privileges for failure to provide copies of their quotes, timely, as required in Step 7.

EVALUATION OF GOOD FAITH EFFORTS (GFE)

After each bid opening, NDDOT will evaluate DBE participation on each project. If good faith efforts (GFE) documentation is required or requested, it will be reviewed. If the apparent low bidder fails to meet GFE, the DBE Participation Review Committee will recommend to the NDDOT Director that the bid be considered non-responsive.

ADMINISTRATIVE RECONSIDERATION

When a contractor misses any one step in the good faith efforts process, the DBE Participation Review Committee (Committee) makes a preliminary recommendation to not award. The process is:

- The contractor is contacted and allowed to comment or make explanations for the record, either in person or through a conference call.
- The contractor is told that the Department Director makes the final decision after considering the recommendations of the Committee and the Department Deputy Director for Engineering.
- The contractor may choose to visit with the Director and Deputy Director for Engineering, but may not give them any information that has not previously been given to the Committee.
- The Committee makes a written recommendation to the Director, which includes comments provided by the contractor. The Committee also provides a copy of the written recommendation to the Deputy Director for Engineering.
- The Deputy Director for Engineering also makes a written recommendation to the Director.
- The Director makes the final written decision.
- The result of the reconsideration process is not administratively appealable to the US Department of Transportation.

CONSTRUCTION PROGRESS CHART

Before the award of the contract, the apparent low bidder must create a construction progress chart for each DBE and each non-DBE used in a bid differential to be used on the contract (excluding oil haulers, suppliers, brokers, vendors, regular dealers, or manufacturers). The chart must state the type of work to be performed and when it will be performed.

The apparent low bidder must supply all charts to the Department and the appropriate chart to each non-DBE used in a bid differential and each DBE to be used on the contract. Any subsequent charts, noting a change in schedule, **must** also be provided to the Department and each non-DBE used in a bid differential and each DBE.

AWARD OF CONTRACT

Contract award will be made to the bidder who submits the lowest responsive proposal meeting the pre-bid and pre-award requirements.

PRE-JOB CONFERENCE

It is the prime contractors' responsibility to invite all DBEs listed on Form C to the pre-job conference and to encourage attendance. **If the DBE is unable to attend the pre-job conference it is the prime contractors' responsibility to provide a copy of the pre-job conference minutes to each DBE.** In addition, it is the prime contractors' responsibility to discuss any project issues necessary for joint DBE program compliance on the part of the prime contractor, non-DBEs subcontractors and their DBE subcontractors, manufacturers, or regular dealers.

CONTRACT MONITORING, RESPONSIBILITIES, AND REPORTING

It is the prime contractors' responsibility to:

- monitor DBE performance on the project, to ensure that the DBE performs a commercially useful function, and

- to ensure both the prime contractor and their subcontractors, suppliers, manufacturers, and regular dealers comply with the requirements of this special provision.

DBEs are responsible for performing a commercially useful function. Should the DBE be unable to perform a commercially useful function or perform as stated on Form C it is their responsibility to **immediately notify** the prime contractor orally and in writing. See pages 15-17 of this special provision for information regarding commercially useful function.

The prime contractor must submit a completed copy of the DBE Participation Certification (SFN 14268**),** signed by the prime contractor, and the DBE to the project engineer upon completion of the contract to verify DBE participation. This includes DBEs used that were not included on Form A. The project will be monitored to ensure the DBE is performing a commercially useful function.

MAINTAINING RECORDS AND TRACKING PAYMENTS

The Department will require prime contractors and subcontractors to maintain records and documents of payments to DBEs for three years following the performance of the contract. The three year period will commence upon acceptance of the final payment from NDDOT. These records will be made available for inspection, upon request, by an authorized representative of the NDDOT or USDOT. This reporting requirement also applies to any certified DBE.

Prime contractors and subcontractors must keep a running tally of actual payments to DBEs for work committed to them at any time during the life of the contract. Prime contractors and subcontractors will be required to complete the Record of DBE Project Payments (SFN 53664) on a semi-annual basis. The record must be submitted to the NDDOT by the tenth working day after the October-March period, and the tenth working day after the April-September period. The form must be signed by a company representative. Send the record to the Civil Rights Division, North Dakota Department of Transportation, 608 East. Boulevard Avenue, Bismarck, ND 58505-0700, fax 701-328-0343 or 701-328-1965.

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.

TERMINATION OF USE

The contractor is expected to make good faith efforts throughout the duration of the contract.

The prime contractor or subcontractor over $500,000 may not terminate a listed DBE or non-DBE used in the bid differential process, as listed on Form C, or an approved substitute DBE firm without the Department's prior written consent. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a listed DBE or a non-DBE used in the bid differential process with the prime contractor's own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.

The Department will provide such written consent if the Department agrees, for reasons stated in the concurrence document, that the prime contractor or subcontractor over $500,000 has good cause to terminate the DBE firm or non-DBE used in a bid differential.

Good cause includes the following circumstances:

- The listed DBE or non-DBE used in a bid differential fails or refuses to execute a written contract.
- The listed DBE or non-DBE used in a bid differential fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the listed DBE or non-DBE used in a bid differential to perform its work on the subcontract results from the bad faith or discriminatory action of the prime or subcontractor.
- The listed DBE or non-DBE used in a bid differential fails or refuses to meet the prime contractor's reasonable nondiscriminatory bond requirements
- The listed DBE or non-DBE used in a bid differential becomes bankrupt, insolvent, or exhibits credit unworthiness;
- The listed DBE or non-DBE used in a bid differential is ineligible to work on public works projects because of suspension and debarment proceedings pursuant 2 CFR Parts 180, 215, and 1,200 or applicable state law;
- The Department has determined that the listed DBE or non-DBE used in a bid differential is not a responsible contractor;
- The listed DBE or non-DBE used in a bid differential voluntarily withdraws from the project and provides to the Department written notice of its withdrawal;
- The listed DBE is ineligible to receive DBE credit for the type of work required;
- A DBE owner dies or becomes disabled with the result that the listed DBE is unable to complete its work on the contract;
- Other documented good cause that the Department determines compels the termination of the listed DBE or non-DBE used in a bid differential. Provided, that good cause does not exist if the prime contractor or subcontractor seeks to terminate a DBE or non-DBE used in a bid

differential it relied upon to obtain the contract so that the contractor can self-perform the work for which the DBE or non-DBE used in a bid differential was engaged or so that the contractor can substitute another DBE or non-DBE contractor after contract award.

Before the contractor notifies the Department of its request to terminate and/or substitute a listed DBE or non-DBE used in a bid differential, the contractor **must** give notice in writing to the listed DBE or non-DBE used in a bid differential, with a copy to the Department, of its intent to request to terminate and/or substitute, and the reason for the request.

The contractor ***must*** give the DBE or non-DBE used in a bid differential, five days to respond to the contractor's notice and advise the Department and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why the Department should not approve the contractor's request. If required in a particular case, as a matter of public necessity (e.g., safety), the Department may provide a response period shorter than five days.

UNFULFILLED OBLIGATIONS PROCESS

The Department will use the following process when a contractor, DBE, or non-DBE used in a bid differential **does not fulfill her or his obligations in any of the following situations:**

- The contractor believes the DBE is unable to perform the contract, or
- The prime contractor is unable to perform the full amount of work committed to be completed, by the prime's workforce and equipment, at the time of award, or
- The non-DBE used in the bid differential whom the prime contractor committed to using at the time of award, is unable to perform the full amount of work.

The prime contractor, non-DBE used in a bid differential, or DBE subcontractor or supplier shall each **immediately** give oral and written notice to the project engineer of the failure to perform, stating the nature of the failure.

If the Department concurs that a substitution is warranted, the prime contractor will seek a DBE to perform the work instead. All DBEs currently certified in the specific area of work needed to be performed, will be contacted in writing or by phone, and quotes solicited. If available, a DBE ***will*** be selected to perform a dollar value of work, equal to the value of the commitment not achieved, unless the contractor can demonstrate the DBE quote is unreasonable, using the same bid differential comparison process as found in Step 13.

In instances where trucking replacements are sought, either DBEs and/or non-DBEs must be selected until enough trucks can be provided to cover **all** the trucking required on the project.

Documentation of the efforts made by the prime contractor will be provided to the Civil Rights Division for review, analysis, and final determination. The Civil Rights Division will provide a written final determination to the prime contractor and the Project Manager or Project Engineer.

The prime contractor is responsible for any additional costs incurred as a result of either the prime contractor or subcontractor quoting over $500,000 failure to fulfill the original commitment or the DBE or non-DBE used in the bid differential's failure to perform.

NON-COMPLIANCE, FAILURE TO PERFORM, AND SANCTIONS

If the Department determines that a contractor (prime or sub) should be sanctioned for:

- Not paying a DBE in a timely manner,
- Not having a DBE perform the specified dollar amount of work (subject to plan quantity changes), tasks or bid items, or
- For otherwise not fulfilling the requirements of this DBE special provision,

the Department will provide written notice to the contractor informing them of the sanction.

If the Department determines that a DBE should be sanctioned for:

- Failure to perform,
- Failure to pay contract-related bills in a timely manner,
- Failure to perform a commercially useful function,
- Failure to notify the prime contractor orally and in writing if they are unable to perform a commercially useful function, or
- Otherwise not fulfilling the requirements of this DBE special provision

the Department will provide written notice to the DBE informing them of the sanction.

The contractor or the DBE has 14 calendar days, from receipt of the certified notification, to make a written request for a hearing.

If the Department does not receive a written request for a hearing, or if the contractor or DBE does not provide sufficient evidence at the hearing that the provisions have been met, the Department may suspend the contractor or the DBE bidding or quoting privileges and not allow the contractor or the DBE to participate in one or more scheduled bid openings after the date the sanction is imposed.

Other grounds for sanctions may include, but are not limited to: repeated instances of failure to perform the contract requirements, repeated instances of late contract-related payments, or documented fraudulent practices.

Further sanctions which may be imposed by the Department for failure on the part of the contractor may include:

- Withhold the contractor's progress payment until the contractor complies with all DBE contract provisions,
- Deduct, from the contractor's progress payments, the dollar amount of DBE participation committed to but not achieved by the contractor,
- Find the contractor in default,

- Take other corrective action determined by the Department to be appropriate, or
- Any combination of the above.

MONITORING AND ENFORCEMENT MECHANISMS

The Department will bring to the attention of the USDOT any false, fraudulent, or dishonest conduct in connection with the DBE program, so that USDOT can take the steps (e.g., 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) provided in subsection 26.107 of 49 CFR Part 26. The Department will also consider similar action under its own legal authorities, including responsibility determination in future contracts.

COUNTING DBE PARTICIPATION

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

1. When a DBE participates in a contract, the Department counts only the value of the work actually performed by the DBE toward DBE goals.

    A. The Department counts the entire amount of that portion of a construction contract (or other contract not covered by paragraph 1B of this section) 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).

    B. The Department counts the entire amount of fees or commissions charged by a 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 USDOT-assisted contract, toward DBE goals, if the Department determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

    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. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

2. When a DBE performs as a participant in a joint venture, the Department counts 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 toward DBE goals.

3. The Department counts expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.

    A. 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 Department 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.

B. 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 Department must examine similar transactions, particularly those in which DBEs do not participate.

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, 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, the Department must presume that it is not performing a commercially useful function.

D. When a DBE is presumed not to be performing a commercially useful function as provided in paragraph 3C of this section, the DBE may present evidence to rebut this presumption. The Department may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.

E. The Department's decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to USDOT.

4. The Department will use the following factors in determining whether a DBE trucking company is performing a commercially useful function:

A. The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.

B. The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.

C. 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.

D. The DBE may lease trucks from another DBE firm, including an owner-operator certified as a DBE. The DBE leasing trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.

E. The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit for the total value of the transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks on the contract. Additional

participation by non-DBE lessees receives credit only for the fee or commission it receives as a result of the lease arrangement.

Example to this paragraph (d)(5): DBE Firm X uses two of its own trucks on a contract. It leases two trucks from DBE Firm Y and six trucks 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. With respect to the other two trucks provided by Firm Z, DBE credit could be awarded only for the fees or commissions pertaining to those trucks Firm X receives as a result of the lease with Firm Z.

F. For purposes of this paragraph (4), 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.

5. 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.

(1) For purposes of this paragraph (5A), a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

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.

(1) For purposes of this section, 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.

a. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.

b. 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 as provided in this paragraph (5B[1]) if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

c. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph (5B).

C. 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 as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals, however.

6. If a firm is not currently certified as a DBE in accordance with the standards of subpart D of this part at the time of the execution of the contract, the Department does not count the firm's participation toward any DBE goals, except as provided for in 49 CFR Part 26.87(i).

7. 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.

8. 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.

DISADVANTAGED BUSINESS ENTERPRISE PARTICIPATION (RC)

North Dakota Department of Transportation, Civil Rights Division
SFN 52750 (Rev. 12-2011)

FORM A

Contractor		Phone
Job No.	Project No.	Bid Opening Date

All DBE firms who quoted this project must be listed in either 1, 2, or 3 below.

At the time of bid submittal, all bidders must provide a list of the DBE firms intended for use on this project, including all tiers of subcontracting. The information provided may be submitted on this Form A or on a computer-generated form, giving the same information, attached to this Form A. If the bidder intends to use DBE quotes received from a subcontractor over $500,000, the bidder **must** include the subcontractor's Form A information in the bidder's Form A.

PRINT ALL NUMBERS CLEARLY AND LEGIBLY.

1. **If the assigned project goal has not been achieved, and the bidder intends to do specific bid items with their own employees and equipment, or products to be supplied by the bidder, the specific bid items or products and DBE firms not used must be listed below.**

- Own employees are individuals who are on the primes payroll, for which the prime contractor contributes to unemployment, social security, and workers compensation.
- Equipment is that which is titled, licensed, and insured in the prime contractors name or leased from a bonafied equipment supplier. It is not acceptable to use equipment or employees from an affiliate or subsidiary firm in lieu of the prime contractors own equipment and employees.

Name of DBE Firm	Bid item numbers or products to be supplied by the bidder
1.	
2.	
3.	
4.	

2. **DBE firms not used due to bid differential are listed below.**

DBE Firm	DBE Firm
DBE Firm	DBE Firm
DBE Firm	DBE Firm
DBE Firm	DBE Firm

3. **For each DBE firm, list the specific bid item numbers to be performed and the total dollar value of the contract.**

- If the DBE firm will perform only a portion of a bid item (supply, haul, etc.), this **must** be so noted, in parenthesis, after the bid item number. **The bidder must state why the DBE was not used for the entire bid item.**
- For DBE subcontractors, suppliers (regular dealers), and manufacturers, **list only the amount of work to be completed with each DBE's own employees and equipment.**
- For DBE trucking firms, **list the amount of hauling to be performed by the DBE with its own trucks and employees;** or the fees or commissions earned on non-DBE leased trucks. However, if the DBE is leasing trucks from a non-DBE firm, including an owner-operator, you can count the total value of the services provided by the non-DBE, not to exceed the total value of the services provided by the DBE-owned trucks). (See page 14, number 4, of this special provision for more detailed information.)

FORM A (continued)

If the information provided on Form C **differs** from the information provided on this Form A (bid item numbers, quantities, or dollar amounts), the apparent low bidder or subcontractor **must** provide, with the Form C, a written explanation for the difference.

The apparent low bidder or subcontractor **must** use the DBEs listed for the intended work indicated on Form C.

DBE bidders **must** list the work they will perform with their **<u>own employees and equipment</u>** and any work subcontracted to or materials purchased from other DBEs.

Name of DBE Firm		
List Specific Bid Item Numbers or Products to be Supplied		Total Contract Dollar Value $
Percent DBE will do with own employees/equipment Percent Non-DBE will do (trucking only)	% = %	If Regular Dealer, X 60% = $

Name of DBE Firm		
List Specific Bid Item Numbers or Products to be Supplied		Total Contract Dollar Value $
Percent DBE will do with own empoyees/equipment = Percent Non-DBE will do (trucking only)	% = %	If Regular Dealer, X 60% = $

Name of DBE Firm		
List Specific Bid Item Numbers or Products to be Supplied		Total Contract Dollar Value $
Percent DBE will do with own empoyees/equipment = Percent Non-DBE will do (trucking only)	% = %	If Regular Dealer, X 60% = $

Name of DBE Firm		
List Specific Bid Item Numbers or Products to be Supplied		Total Contract Dollar Value $
Percent DBE will do with own empoyees/equipment = Percent Non-DBE will do (trucking only)	% = %	If Regular Dealer, X 60% = $

Name of DBE Firm		
List Specific Bid Item Numbers or Products to be Supplied		Total Contract Dollar Value $
Percent DBE will do with own empoyees/equipment = Percent Non-DBE will do (trucking only)	% = %	If Regular Dealer, X 60% = $

Name of DBE Firm		
List Specific Bid Item Numbers or Products to be Supplied		Total Contract Dollar Value $
Percent DBE will do with own empoyees/equipment = Percent Non-DBE will do (trucking only)	% = %	If Regular Dealer, X 60% = $

Use additional pages, following the same format, if necessary.

The NDDOT DBE Liaison Officer can be contacted at:

CIVIL RIGHTS DIVISION
ND DEPARTMENT OF TRANSPORTATION
608 E BOULEVARD AVE
BISMARCK ND 58505-0700

dlaub@nd.gov
phone (701) 328-2576
fax (701) 328-1965, (701) 328-0343

LIST OF BUSINESSES THAT SUBMITTED QUOTES (RC)

North Dakota Department of Transportation, Civil Rights Office
SFN 52751 (Rev. 12-2011)

FORM B

Contractor		Phone
Job No.	Project No.	Bid Opening Date

SUBMIT WITHIN 5 WORKING DAYS OF BID OPENING

Within 5 working days after the bid opening, all bidders must either:

- Submit Form B to include all tiers of subcontracting on the project or
- Provide copies of all quotes received to include all tiers of subcontracting on the project to the DBE Liaison Officer, fax to 701-328-1965, or 701-328-0343, or mail to the Civil Rights Division, NDDOT, 608 East Boulevard Avenue, Bismarck, ND, 58505-0700 or emailed to subquotes@nd.gov

List below the names of all businesses, including subcontractors, suppliers, vendors, regular dealers, manufacturers, and brokers who provided you quotes for this project. This includes information from any large subcontractor who also provided you a quote on this project and their subcontractors, suppliers, vendors, regular dealers, manufactures, and brokers.

When submitting a Form B, copies of all quotes **must** be retained, by each bidder, for **45 days** after the bid opening date. If a firm refuses to provide a copy of their quote, as required in Step 7 of the Good Faith Efforts, the bidder must provide a copy of the quote, upon request by the Department.

Name of Business	Contact Person	Phone
Mailing Address		Type of Work (See Reverse Side for Codes)
Name of Business	Contact Person	Phone
Mailing Address		Type of Work (See Reverse Side for Codes)
Name of Business	Contact Person	Phone
Mailing Address		Type of Work (See Reverse Side for Codes)
Name of Business	Contact Person	Phone
Mailing Address		Type of Work (See Reverse Side for Codes)
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Mailing Address		Type of Work (See Reverse Side for Codes)
Name of Business	Contact Person	Phone
Mailing Address		Type of Work (See Reverse Side for Codes)
Name of Business	Contact Person	Phone
Mailing Address		Type of Work (See Reverse Side for Codes)

Use additional pages, following the same format, if necessary.

FORM B (continued)

A-1	**Engineering -** Professional services such as design or construction inspections performed by an engineering firm.
A-5	**Other -** Other professional services such as supportive services and research contracts.
B-1	**Grading/Drainage -** Grading, drainage, clearing, and related construction items.
B-2	**Paving -** Construction of base course, pavements, and related items.
B-3	**Structures/Buildings -** Bridge construction operations, including piling, substructure, superstructure, etc.; and building construction, including plumbing, heating, electrical, etc.
B-4	**Trucking -** Hauling of earthwork or other materials for a construction project.
B-5	**Traffic Control -** Permanent traffic control items such as signs, signals, and markings; and temporary traffic control items such as barricades and flagging.
B-6	**Landscaping -** Landscaping, seeding, sodding, erosion control, and related items.
B-7	**Other -** Other construction activities such as lighting contracts and guardrail.
C-	**Supplies -** The packaging and shipment of a product (materials, goods, and supplies) and the furnishing of BULK ITEMS which are incorporated into a construction project. C-1 Aggregate C-2 Concrete C-3 Electrical C-4 General C-5 Petroleum Products C-6 Pipe C-7 Ready Mix
D	**Manufacturing -** The physical production of materials and supplies through standard manufacturing processes obtained by a contractor for incorporation into a construction project.
E	**Equipment -** Purchases and rental of equipment for use on a specific construction project.

The DBE Liaison Officer can be contacted at:

CIVIL RIGHTS DIVISION
ND DEPT OF TRANSPORTATION
608 E BOULEVARD AVE
BISMARCK ND 58505-0700

E-mail: dlaub@nd.gov
Phone: (701) 328-2576
Fax: (701) 328-1965, (701) 328-0343

NOTIFICATION OF INTENT TO USE A NON-DBE IN AN APPROVED BID DIFFERENTIAL OR A DBE

North Dakota Department of Transportation, Civil Rights Division

SFN 52752 (Rev. 12-2011)

FORM C

1. The prime contractor and any subcontractors who listed DBE Participation on Form A or used a non-DBE in an approved bid differential, **must** complete a Form C in each of these respective situations. The prime contractor is responsible for the subcontractors completion and submission of a Form C for each DBE commitment or use of a non-DBE in an approved bid differential.
2. If the information on a Form C **differs** from the information provided on Form A (bid item numbers, quantities, or dollar amounts), a written explanation for the difference **must** be provided by the prime contractor or subcontractor with the Form C.
3. The Form C **must be signed** by the prime contractor or subcontractor and their respective, intended firms. If Form C contains additional pages or an attachment each page must be signed by the intended DBE. Signatures do not have to be original (faxed signatures are acceptable).
4. The forms **must** be returned to the NDDOT Civil Rights Division **within ten working days** after the bid opening. Forms may be faxed to the Civil Rights Division at (701) 328-0343. **Award will not be made** until a Form C is received for each intended DBE listed on Form A or for each non-DBE in an approved bid differential.

This form is NOT a contract and does not take the place of any contract. It is an indication to the NDDOT that all DBEs listed on Form A or non-DBEs used in an approved bid differential understand they will be used on the project.

Prime Contractor or Subcontractor	Project No.	
Intended DBEor non-DBE	Bid Opening Date	Job No.

Bid Item Nos.	Work Description	Units	Approx. Quantity	Unit Costs	Amount
Percentage of work to be done by DBE or non-DBE _____ %				**Total**	

Comments

Prime Contractor/Subcontractor Signature	Title	Date
Intended DBE or non-DBE Signature	Title	Date

The NDDOT DBE Liaison Officer can be contacted at the Civil Rights Division, ND Department of Transportation, 608 E. Boulevard Ave., Bismarck, ND 58505-0700, dlaub@nd.gov, phone (701) 328-2576, or fax (701) 328-1965 or (701) 328-0343.