

# Chapter 8

# Employment Practices

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### Section 3 Disadvantaged Business Enterprises

#### 8-301 General

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

Code of Federal Regulations, Part 49, Section 26 provides the requirements of the DBE Program on federally funded projects. DBEs are defined as firms owned and controlled by individuals who are both socially and economically disadvantaged. For the state's federally assisted transportation program, Caltrans establishes an annual overall participation goal for DBEs. Caltrans strives to meet the annual goal through varying individual contract goals that contractors must either meet or conduct a good faith effort to meet during the bidding process.

Contract goals are set based upon the type of work in the contract and the availability of DBE firms to participate in the bidding process in the geographical area of the contract.

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

Projects funded only with state funds have no specific requirement for the use of DBEs. Likewise, projects funded with federal transportation funds have no specific requirement for the use of disabled veteran business enterprises (DVBEs). DBEs and DVBEs are not interchangeable.

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

When the contract contains the Caltrans DBE requirements, the contractor is obligated to use the DBE firm in accordance with the commitment, including the dollar value for the work performed. Specific restrictions exist regarding the termination and replacement of DBEs listed on the contractor's commitment documents provided at the time of bid submission, and they require the DBE to perform a commercially useful function (CUF). DBE requirements are in addition to the requirements of Sections 4100–4114, "Subletting and Subcontracting Fair Practices Act" (Fair Practices Act), of the Public Contract Code, which are described

in Section 3-507C, “The Subletting and Subcontracting Fair Practices Act,” of this manual.

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

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

DBE—a DBE performs a CUF when it does the following, as detailed in the Code of Federal Regulations, Part 49, Section 26.55 (49 CFR 26.55):

1. Performs at least 30 percent of the total cost of its contract with its own workforce and does not subcontract out portions of its contract work that are greater than normal industry practices for the type of work performed
2. Performs, manages, and supervises the work involved
3. Negotiates prices, determines quantity and quality, orders materials and supplies, pays for the materials and supplies, and installs the materials where applicable

A trucking company performs a CUF when it:

1. Manages and supervises the entire trucking operation.
2. Owns and operates at least one fully licensed, insured, and operational truck used in the contract.

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

Specific categories of DBE firm, such as trucking, manufacturer, and regular dealers, have other required activities to determine their performance of a CUF. Refer to 49 CFR 26.55(d) for trucking and 26.55(e)(1)-(2) for manufacturers and regular dealers.

An evaluation of the DBE firms on the project must be completed by Caltrans to verify that the DBE is performing a CUF. Section 8-304A, “Disadvantaged Businesses Enterprises Program Requirements,” in this manual describes the process.

### **8-302B Underutilized Disadvantaged Business Enterprises**

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

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

### 8-302C Good Faith Efforts

When there is an established DBE contract goal, the contract may be awarded to a contractor who provides documentation they made a good faith effort (GFE) to hire a DBE. During the bid process, contractors provide either:

- Documents showing the contractor has obtained enough participation to meet the goal.
- Documents showing adequate efforts were made to meet the goal, even though the bidder did not succeed in obtaining enough participation to do so.

After a contract award, a contractor may be required to submit documentation of GFE as part of DBE replacement efforts in accordance with Section 5-1.13B, “Disadvantaged Business Enterprises,” of the *Standard Specifications*.

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

#### 8-303A Disadvantaged Business Enterprise Commitment Form

The DBE commitment form provides a listing of specific work to be done or materials to be furnished by specific DBEs and is based on information the contractor submitted during the bidding process. The resident engineer will receive the approved commitment of DBE participation in the award package. For DBE participation commitments, bidders use Form OCR-0006, “DBE-Commitment.” For DBE good faith efforts, bidders use Form OCR-0008, “DBE Good Faith Efforts Documentation.” The percentage specified in the original contract advertisement may differ from the approved listing, which is a specific contract commitment from the contractor.

The contractor must meet the DBE commitment in work items and dollar value committed to specific DBE firms, regardless of the contract percentage.

Review the commitment forms with inspection staff before work begins to make sure that field staff knows who should be performing DBE contract work. If the commitment form has not been provided in the award package or is incomplete, request documentation from the Division of Engineering Services Office Engineer for major construction projects and the Division of Design for Construction Management General Contractor contracts.

For design-build contracts, there is no commitment to individual DBEs, but the contractor must meet the DBE goal for the contract. A DBE plan must be submitted and approved by the resident engineer, and updates must include documents showing compliance or good faith efforts.

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

Do not construe the commitment of DBE as a request to subcontract or a notice of intent to subcontract as required by Section 5-1.13, “Subcontracting,” of the *Standard Specifications*. However, the approved form does equate to a commitment from the contractor to meet the DBE requirements of the contract. If a DBE

subcontractor exceeds the dollar threshold the greater of one-half of 1 percent of the total bid, or \$10,000, specified in the Fair Practices Act, the DBE must also be listed on the subcontractor list. Conversely, a DBE whose value of work falls below the threshold will not be listed on the subcontractor list, in accordance with the Fair Practices Act.

First-tier subcontractors listed on the contractor's DBE use plan must be listed on Form CEM-1201, "Subcontracting Request." Refer to Section 3-507D, "Procedure for Approval or Acknowledgment of Subcontractors," of this manual for additional information on first-tier subcontractors.

DBE firms hired to meet the contract goal may be materials suppliers and other entities that are not considered subcontractors. These firms would not be present on the subcontractor list.

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

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

Form CEM-2407, "Disadvantaged Business Enterprises (DBE) Joint Check Agreement Request," must be used to track and monitor the use of joint checks. The form documents among the parties the full and prompt disclosure of the expected use of joint checks and must be completed and submitted to the resident engineer, who approves and signs the form before the use of joint checks. The resident engineer verifies the form is complete and signed by all parties, the DBE subcontractor is performing a commercially useful function (CUF), and the DBE subcontractor has retained final decision-making responsibility for procurement of materials and supplies. For additional information, refer to Section 5-1.13B(3), "Use of Joint Checks," and Section 5-1.23B, "Action Submittals," of the *Standard Specifications*. The form is available at:

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

Place the completed and approved original Form CEM-2407 in the project file. Distribute copies to the prime contractor, DBE subcontractor, Office of Civil Rights, and district Labor Compliance office.

A joint check is a two-party check between a contractor or lower-tier subcontractor and a DBE subcontractor who purchases materials from a material supplier. Joint check arrangements are intended to help the DBE subcontractor establish a direct contracting relationship with the supplier that could result in a line of credit or increased partnering opportunities.

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

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

Resident engineers are responsible for monitoring the DBE subcontractor's performance of a CUF. When joint checks are used, DBE credit toward the contract goal will only be allowed when the DBE subcontractor is performing a CUF in accordance with the 49 CFR 26.55 (c)(1), "How is DBE participation counted toward goals?":

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

All parties involved in a joint check agreement must provide, upon request, any documentation Caltrans has deemed necessary to verify compliance. Refer to Section 5-1.27C, "Record Inspection, Copying, and Auditing," of the *Standard Specifications* for more information.

Failure to follow these procedures will disqualify DBE participation or adversely affect a contractor's bidding status and will result in no credit and no payment to the contractor for DBE participation in the amount of the joint check. Use of joint checks is subject to review by the Office of Civil Rights and the Division of Construction.

### 8-303D Preconstruction Conference

During the preconstruction conference, review the commitment details with the prime contractor and other attending parties. Inform the contractor of the contract requirements to use the committed DBE firms or go through the applicable termination and replacement processes. Also inform the contractor that unless the work is performed or supplied by the listed DBEs, or a replacement is approved, the contractor is not entitled to any payment for work or materials. The preconstruction conference is a good opportunity for the prime contractor to inform Caltrans staff of any known issues before work is started. If the contractor identifies any issues, follow the process identified in Sections 8-304D, "Termination and Replacement of Listed Firms," and 8-304E, "Adding Disadvantaged Business Enterprises," of this manual.

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

### 8-304A Disadvantaged Business Enterprises Program Requirements

Federal regulations require Caltrans to monitor worksites to verify that work committed to a DBE is being performed by the respective firms and that the DBE performs a CUF. The resident engineer must certify in writing that a CUF review of

DBE performance was conducted and records were evaluated and that the worksite was monitored by Caltrans staff.

Designated compliance staff responsible for monitoring and enforcing the DBE requirements of the contract, must:

- Complete, at a minimum, one CUF evaluation for each DBE firm as described in Section 8-304B, “Commercially Useful Function Performance and Evaluation,” of this manual.
- Make sure the contractor submits Form CEM-2406, “Monthly Disadvantaged Business Enterprises (DBE) Payment,” by the 15th of the month for the previous month’s activities.
- Monitor payments made to subcontractors and DBE firms to confirm prompt-payment requirements are met.
- If trucking is part of the contractor’s DBE commitment, identify trucking firms and drivers and associated items of work for each trucking firm on daily inspection reports. In addition, verify that the contractor submits Form CEM-2404F, “Monthly DBE/UDBE Trucking Verification,” by the 15th of the month for the previous month’s trucking activities. Randomly confirm the information on these forms by requesting copies of weighmaster certificates and canceled payment checks from the contractor. Cross-check the information against daily inspection reports as well. Refer to Section 8-304C (1), “Monthly DBE/UDBE Trucking Verification Form,” of this manual for additional information.
- Require the contractor to notify you in writing of any changes in DBE certification status; that is, a DBE is decertified, or a business entity becomes certified as a DBE. For additional information on changes in DBE certification status, refer to Section 8-304D, “Termination and Replacement of Listed Firms,” of this manual.
- When a DBE firm performs work on the contract, inspection staff must document in the daily inspection report the name of the firm and the associated contract items performed. Cross-check the inspection reports against commitment forms to make sure the appropriate firm is performing the work and providing the materials.
- Interview workers of DBE subcontractors. For additional information on conducting interviews, refer to Section 8-102A (3), “Interviews with Contractor Personnel,” of this manual.
- Confirm with the district Labor Compliance officer that certified payroll records have been received for the DBE, if applicable.
- Do not allow a contractor to replace a listed DBE from the contract without written consent from Caltrans. For information on the termination of a DBE and replacement processes, refer to Section 8-304D, “Termination and Replacement of Listed Firms,” of this manual and Section 5-1.13B(2)(c) “Termination,” and Section 5-1.13B(2)(d) “Replacement,” of the specifications.
- Withhold contract funds, as applicable, for improper substitutions, terminations, or failure to meet contract commitments.



- Bring to the attention of the designated Contract Compliance officer any complaints of failure by the contractor to promptly pay DBE firms.
- Consult with the district Contract Compliance officer about implementing enforcement activities.

#### 8-304B Commercially Useful Function Performance and Evaluation

DBEs must perform a CUF under 49 CFR 26.55. The value of work will only count toward the DBE commitment if the DBE performed a CUF.

On a federally funded project, CUF evaluations must be performed by Caltrans-designated Construction staff on every DBE firm listed on the contractor's commitment. The evaluator will assess the performance of each DBE to verify compliance with 49 CFR 26.55.

#### *8-304B (1) Commercially Useful Function Evaluation 2022 Standard Specifications*

For contracts subject to Section 5-1.13B(2)(b) "Commercially Useful Function" of the specifications and the *State Highway Project Procedures Disadvantaged Business Enterprise Commercially Useful Function Compliance and Monitoring Guide* posted on Construction's Labor Compliance intranet page, use the following steps:

1. 15 days before a DBE's initial performance of work, the contractor must notify the resident engineer of the DBE firm's name, work to be performed, location, date, and time the work will occur.
2. Within 10 days of the DBE initially performing work or supplying materials, the contractor must submit an initial evaluation using Form CEM-2410, "Disadvantaged Business Enterprise Commercially Useful Function Evaluation," and include supporting documentation to the designated contract compliance officer.
3. Caltrans designated Construction staff will review submitted documentation and records from Caltrans field staff to verify CUF performance.
4. The contractor will continue to submit quarterly evaluations while the DBE firm performs work under the commitment.

If additional documents are required, the designated Construction staff will submit a DBE Program Request for Records. The contractor has 5 business days to provide the supplemental records requested.

Failure by the contractor to submit the required evaluation forms and requested records will result in a withhold of payment for the value of work completed by the DBE.

#### *8-304B (2) Commercially Useful Function Evaluation for Contracts Subject to Standard Specifications Before 2022*

For any contract governed by *Standard Specifications* before the 2022 edition, when an evaluation is required, the designated Caltrans Construction staff must coordinate with the resident engineer and field staff to perform a CUF evaluation and send a

request for records to the prime contractor and include all documents as identified in the Form CEM-2410, "Disadvantaged Business Enterprise Commercially Useful Function Evaluation." Provide the contractor 10 business days to respond with requested documentation.

Upon receipt of the requested documentation, Caltrans-designated Construction staff will perform an evaluation of field observations and submitted records to determine performance of CUF.

### *8-304B (3) Commercially Useful Function Monitoring Reviews*

In addition to the Form CEM-2410 process, throughout the contract, the district may initiate periodic DBE monitoring reviews using the appropriate monitoring review form depending on the type of DBE the firm is. The available forms are:

- Form CEM-2415, "Commercially Useful Function Monitoring Review Contractor, Subcontractor, Trucker"
- Form CEM-2416, "Commercially Useful Function Monitoring Review Regular Dealer/Manufacturer/Broker"
- Form CEM-2417, "Commercially Useful Function Monitoring Review Regulator Professional Services"

To initiate the monitoring reviews, the compliance staff performing the review will request from the contractor any needed records that are not on file and have the resident engineer verify any activities performed on the project.

If there is a finding of non-performance of commercially useful function for the work being evaluated, identify the deficiencies and notify the resident engineer and contractor. Withhold the dollar value of the work for which non-performance of CUF was identified and require the contractor to submit a corrective action plan to resolve the identified deficiencies.

### 8-304C Monthly Reports

Caltrans tracks and reports on use of DBE firms under federal requirements.

Caltrans uses the monthly Form CEM-2404F, "Monthly DBE/UDBE Trucking Verification," and Form CEM-2406, "Monthly Disadvantaged Business Enterprises (DBE) Payment," to track use of the DBE.

This form may also track whether a contractor is using DBEs not originally listed on the commitment toward race-neutral credit. DBEs listed on the payment form do not count toward the commitment at award unless Caltrans has authorized a termination and subsequent replacement of a DBE firm listed on the commitment.

Once received, a copy must be sent to the Office of Civil Rights by email at [Business.Support.Unit@dot.ca.gov](mailto:Business.Support.Unit@dot.ca.gov).

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

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

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

If the prime contractor fails to submit the form, the resident engineer must hold \$10,000 as an administrative deduction for missing documents.

Use the following factors to determine how much credit percentage to allow for the trucking company toward the DBE contract goal:

For 100 Percent Credit:

- The listed DBE must own and operate at least one fully licensed, insured, and operational truck used on the contract.
- The DBE receives credit for the total value of the transportation services it provides on the contract, using trucks it owns, insures, and operates, and using drivers it employs.
- The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE that leases trucks from another DBE firm receives credit for the total value of the transportation services the lessee DBE provides on the contract.
- The DBE may also lease trucks from a non-DBE firm or a non-DBE owner-operator. The DBE that leases trucks from a non-DBE is entitled to credit for the total value of the transportation services provided by the lessee, up to the value of services provided by DBE-owned trucks or leased trucks with DBE employee drivers.

For Partial Credit:

- The DBE who leases trucks from a non-DBE with drivers who exceed the value of services by DBE-owned trucks or leased trucks with DBE employee drivers, receives 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 excess transportation services provided by the lessee because a DBE is not providing these services.
- A lease must indicate that the DBE has exclusive use of and control over the truck. The leased truck may work for others during the term of the lease with the consent

of the DBE, as long as the lease gives the DBE absolute priority for use of the leased truck. Generally, the lease must be long term and not only for the specific project.

Once received, a copy must be sent to the Office of Civil Rights by email at [Business.Support.Unit@dot.ca.gov](mailto:Business.Support.Unit@dot.ca.gov).

#### *8-304C (2) Monthly Disadvantaged Business Enterprise Payment*

The contractor must submit to the resident engineer Form CEM-2406, "Monthly Disadvantaged Business Enterprise (DBE) Payment" each month by the 15th. The form must include:

- Items of work performed by DBE
- DBE business name and address
- DBE certification number
- Date of payment
- Amount paid
- Total paid
- Whether payment was final
- Any comments

Once received a copy must be sent to the Office of Civil Rights by email at [Business.Support.Unit@dot.ca.gov](mailto:Business.Support.Unit@dot.ca.gov).

#### *8-304C (3) Payment Reporting Using Caltrans DBE System*

State and federal regulations require subcontractors and DBE firms to be paid promptly. The contractor must pay its subcontractors, regardless of their status as a DBE, within 7 days. All other entities, such as materials suppliers, must be paid within 30 days of receipt of each progress payment.

For contracts subject to the 2022 *Standard Specifications*, contractors are required to report all payments made to subcontractors and DBE firms using Caltrans' DBE system [Caltrans - Disadvantaged Business Enterprise System \(dbesystem.com\)](https://dbesystem.com).

Designated Caltrans staff enter payments from Caltrans into the DBE system at the beginning of each month. The contractor must submit all payment information for all subcontractors and DBE firms from the 15th through the 20th day of each month. The subcontractors and other entities are required to validate the payments by confirming the information or disputing the payment within the system.

If a payment dispute occurs, Caltrans-designated compliance staff will request further documentation to determine if there is a prompt payment violation, or if there appears to be a good faith effort dispute. This documentation may include:

- Copies of payment source records, such as invoices, cancelled checks, or transfers
- Review of the payments made by Caltrans

- Copies of subcontracts or agreements
- Other documentation the disputing parties would like to submit

If the contractor fails to provide the requested documentation within 10 days, the resident engineer must be notified by the designated compliance officer to initiate a withhold in the amount being disputed.

If, after review, there is an identified prompt payment violation, Caltrans designated staff will issue a violation letter to the contractor and initiate a withhold for the same amount from future progress payments. Staff also will apply a 2 percent penalty on the withhold amount for every month payment is not made. The letter will include direction that the contractor must pay the subcontractor, or DBE firm, in the amount due plus a 2 percent penalty for each month payment was not made.

Once the contractor submits documentation showing proof of payment in the disputed amount plus calculated penalties to Caltrans, the withhold may be released.

EXAMPLE: If by September, contractor XYZ failed to pay subcontractor 123 \$1,000 due to them for the July payment, Caltrans will withhold the \$1,000 plus \$40 for the 2 months payment was late.

#### *8-304C (4) When the Listed DBE Does Not Perform the Work*

If Caltrans personnel observe that firms other than those listed are doing the work or providing the materials, promptly notify the designated compliance officer for the project of the apparent violation. The compliance officer will initiate an evaluation to determine if there has been an illegal termination or if there is a non-performance of CUF.

If the compliance officer determines there is a violation of the DBE program, they will initiate a withhold for the dollar value of the work not performed by the listed DBE. The actions described are in addition to any that must be taken for violations of the subcontracting provisions of the *Standard Specifications* and of the Subletting and Subcontracting Fair Practices Act.

#### 8-304D Terminations and Replacement of Listed Firms

Do not allow a prime contractor to terminate a listed DBE firm without written consent from Caltrans. This includes allowing the prime contractor to perform work originally committed to a DBE firm.

Do not allow a different DBE firm, or the prime contractor, to perform work dedicated to the original DBE without having approved a replacement plan or good faith effort submittal (GFE).

#### *8-304D (1) Underutilized Disadvantaged Business Enterprise Terminations*

The UDBE substitution procedures apply to contracts advertised February 27, 2009, through June 15, 2012. For contracts with UDBE participation, the prime contractor is required to replace the listed UDBE with another certified DBE firm identified as

underutilized or conduct a good faith effort to meet the original contract goal. For additional information on DBE firms considered to be underutilized, refer to Section 8-302, “Terms Used in Construction,” of this manual.

Require the contractor to submit a written request for substitution of a listed UDBE. Make sure the request cites one of the seven reasons listed in Section 5, “General, Performance of UDBEs,” of the special provisions. If the prime contractor requests substitution with a non-UDBE, the good faith effort documentation must be included with the request and must address the eight information and supporting document items identified in the contract under “Disadvantaged Business Enterprises.” The prime contractor’s good faith effort must be reviewed and approved by the district Construction division chief before approval of a substitution request. If the prime contractor fails to provide documentation of a good faith effort to substitute a UDBE, deny the request.

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

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

#### *8-304D (2) Disadvantaged Business Enterprise Terminations*

The contractor must provide written notice to the DBE of intent to use other forces or materials sources. Justification must fall within the justifiable reasons under 49 CFR 26.53. The contractor must give the DBE firm 5 business days to respond.

- If the DBE firm agrees to the termination, the contractor may move forward with the request to Caltrans.
- If the DBE firm objects to the termination, the contractor may move forward with the request to Caltrans and include the DBE firm’s response.

- If the DBE firm does not respond after 5 business days, the contractor may move forward with the request.

Requests for termination of a listed DBE firm must be submitted in writing. Requests must include documentation showing good cause for the termination request and include copies of the notification to the DBE firm, proof of transmission the notice, and any responses. If the DBE did not respond to the written notice, the termination request must include a statement to that effect.

If the DBE has agreed or has not responded, and the termination request complies with a justifiable reason, issue authorization in writing within 2 business days of receipt of the request. Include a requirement for the contractor to provide a replacement plan as described in section 8-304D, "Termination and Replacement of Listed Firms," of this manual.

If the DBE has objected to the termination, within 5 business days of receipt schedule a hearing and notify the contractor and DBE firm of the scheduled date and time. The hearing must be scheduled at least 5 days after the written notice is issued. Issue findings within 5 business days of the hearing. If the termination request is approved, require the prime contractor to provide a replacement plan as described in Section 8-304D of this manual.

If the request for termination is incomplete or there are identified deficiencies with the request, provide written response within 5 business days of required actions needed to complete the request.

If the contractor uses another firm to perform the work or performs it without authorization, initiate an administrative deduction for the dollar value of the work associated with the noncompliant DBE commitment. In addition, if the DBE is a subcontractor, apply an additional penalty of as much as 10 percent of the value of the subject work.

#### 8-304E Disadvantaged Business Enterprises Replacement

Within 7 days of receiving an authorized approval for termination, the prime contractor must submit a replacement plan identifying a DBE replacement firm to perform the work or provide documentation of a good faith effort to find a replacement DBE firm to perform the same dollar value of the work as the terminated DBE firm to the extent needed to meet the DBE commitment. The DBE replacement firms are not required to perform the same work as the terminated DBE. The contractor should include any self-performed work when seeking DBE replacement firms.

The contractor may request in writing an additional 7 days to conduct a good faith effort to seek a substitution.

The DBE firms identified in the replacement plan must possess the appropriate North American Industry Certification System (NAICS) codes and work codes for the type of work the DBE firm will perform. The work does not need to be the same type of work listed for the terminated DBE. Contractors should identify work they intend to do themselves.

The replacement plan must include all of the following:

1. A written letter that includes description of the remaining uncommitted item work made available for the replacement DBE solicitation and participation
2. The proposed DBE firm's business information
3. The proposed DBE firm's quote for bid item work and description of the work they would perform
4. A copy of the proposed subcontract agreement and written confirmation from the proposed DBE of agreement to perform the contract work
5. A revised Form CEM-1201, "Subcontracting Request"

Upon receipt of a replacement plan, respond within 2 business days if all records have been received and a replacement DBE firm has been proposed. If a replacement firm has not been identified, but the contractor submitted GFE documentation, respond within 5 business days of authorization.

If the replacement plan is incomplete, or it has been determined the documentation submitted to support a GFE is insufficient, return the request within 5 business days identifying the deficiencies that need to be corrected.

If the contractor uses a DBE replacement firm or performs the work without authorization of the replacement plan, initiate an administrative deduction for the dollar value of the work associated with the noncompliant DBE commitment. In addition, if the DBE is a subcontractor, apply an additional penalty of as much as 10 percent of the value of the subject work.

#### *8-304E (1) Post-Award Good Faith Effort*

Post-award GFE documentation is required to assure sufficient DBE participation to meet the contract goal. GFE documentation should be completed when:

- A termination of a DBE has been authorized and the prime subcontractor is unable to find a DBE replacement firm
  - This includes change orders that reduce or terminate work for a committed DBE causing remaining participation to fall short of meeting the contract goal
- Change orders increase the dollar value of the contract

GFE documentation is considered case by case depending on the circumstances of the contract at the specific time a GFE is required.

Documentation submitted by the prime contractor must include all efforts made to find DBE replacement firm. The GFE documentation will be evaluated for compliance with 49 CFR 26 Appendix A and may include documents such as:

- Any search results for certified DBEs for the terminated DBE's work, or other work items the contractor intended to self-perform
- Copies of solicitations sent to DBEs for the different work
- Any correspondence and negotiation efforts made with DBEs



- Any documentation showing an agreement with solicited DBEs was not reached or a quote was rejected by the prime contractor
- Explanation of the reason for rejection of a quote by the prime contractor
- Any other records showing solicitation of DBE firms

Other factors that affect how a GFE is performed may include:

- How far along the contract is and what work remains unassigned to a subcontractor or DBE
- Type of work available for DBEs
- Number of available DBEs in the geographical location who have the necessary NAICS codes and DBE certification to perform the work
- Method chosen by the prime to solicit DBEs, including phone calls, e-mails, or newspaper ads
- Solicitation information, such as how much or little information was provided to the DBEs when they solicited the work
- Timeframe for DBEs to respond

Upon receipt of the GFE documentation, staff should evaluate the submitted records to determine the overall effort the prime contractor made and whether they demonstrate actively and aggressively attempting to obtain DBE participation needed to meet the contract goal. The reviewer should evaluate the submitted records and consider:

1. Quality
2. Quantity
3. Intensity
4. Scope
5. Appropriateness to the objective

Reviewing staff may consider as part of the GFE, for example:

- How much work remains to be done under the contract that has not already been committed to a subcontractor or DBE, for which the contractor can reasonably seek participation?
- Did the contractor unbundle remaining work into a feasible unit to facilitate DBE participation?
- Did the contractor do research to identify certified DBEs in the area of work for the type of work?
- How many DBEs were contacted by the contractor?
- Did the prime contractor provide DBEs with plans, specifications, and requirements to sufficiently allow DBEs to provide a response?

- Did the prime contractor give the solicited DBEs enough time to respond to their solicitation?

Reviewers may find grounds for rejecting GFE or find it is insufficient if:

- The prime contractor rejected DBEs based on their:
  - Standing in the industry
  - Memberships in organizations
  - Political affiliation
  - Social affiliation
- DBEs who do not possess the correct NAICS and work codes for the type of work requested were solicited
- DBEs were rejected during negotiation solely because their quote for work was not the lowest bid received
- Solicitations to DBEs were missing documentation
- Solicitation to DBE for work was too narrow or too vague for DBEs to respond
- Only a fraction of DBEs who perform the type of work in the geographical area were solicited for bids
- DBEs were not given enough time to respond to the solicitation for a bid

Once the GFE has been evaluated, the authorization or rejection must be sent in writing via letter to the prime contractor.

If the GFE documentation is rejected, the letter must include the reasons it was determined insufficient to meet the requirements of 49 CFR 26.53 Appendix A.

#### 8-304F Adding Disadvantaged Business Enterprises

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

Added DBE firms do not count toward DBE goals and commitments without having an authorized termination and authorized replacement plan. Any work completed by additional DBE firms will be counted toward the race-neutral participation.

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

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

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

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

Check that the final DBE report includes the following information:

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

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

Compare the contractor's original dollar commitment with the amount shown on the final DBE report. Review the contractor's calculations to verify that the appropriate amount is credited for participation of DBE suppliers and truckers. The criteria for crediting DBE supplier and trucker participation are:

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

If any question exists concerning the report's accuracy, require a written explanation from the contractor. The response must explain any differences between the initial plan and the final summary, unless the contractor's comments on the final DBE report provide sufficient detail. Examples of items the contractor would need to explain in writing include why the names of lower-tier subcontractors, the work items, or dollar figures do not match the contractor's initial plan. Attach the explanation to

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

For federally funded projects only, if the contractor's DBE attainment falls short of the contract commitment, hold only the amount of contract funds necessary to meet the original DBE contract goal. If funds were previously withheld from the contractor for failure to meet DBE participation requirements, continue to hold only the amount of contract funds necessary to meet the original DBE contract goal. Any penalties previously assessed for violations of the Fair Practices Act are not returned to the contractor, even if the contractor meets the DBE commitment with other DBE firms.

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

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

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

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

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

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

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

The resident engineer verifies that the contractor submits a completed Form CEM-2406, "Monthly Disadvantaged Business Enterprises (DBE) Payment," including explanation of differences between the original commitment and payment to the

DBE in the comment section. A copy is emailed to the Office of Business and Economic Opportunity at [Business.Support.Unit@dot.ca.gov](mailto:Business.Support.Unit@dot.ca.gov).

### **8-306 Caltrans Office of Civil Rights**

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

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

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

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

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