

Workshop for HDOT Staff and Local Public Agencies

March 2013

Disadvantaged Business Enterprise Program

Course Objectives

- Learn how HDOT is planning to set its DBE participation goal over the next three years
- Understand why HDOT received approval from USDOT to set contract goals contrary to the DBE regulations
- Find out more about DBE rule changes
- Obtain information about updated DBE Provisions relating to requirements

DBE Goals

- Overall Goals (Race Neutral + Race Conscious)
 - Set every three years beginning in 2013
 - Review attainment annually and adjust accordingly
 - Provide explanation to USDOT
- Race-Neutral Component
 - Includes all small business
 - Bid Specifications Goal – “None Specified”
- Race Conscious Component
 - Includes DBE participation percentage on federal-aid projects with subcontracting possibilities

Disparity Study and Waiver Approval

- Results of the Disparity Study
 - Statistically significant disparities found against Native Americans (Hawaiians), Hispanic Americans, and Women
- Waiver Approval
 - HDOT received approval of a waiver to the section of the DBE regulations which prohibits group-specific goals (FHWA only)
 - Include all underutilized groups in race conscious goals, and exclude Asian male owned firms

Impact of Disparity Study

- Increases the goal and will change the method in which we attain the goal
- Only certain ethnic groups will be allowed to be counted for DBE credit on contract goals
- Asian male owned firms may still be counted towards race neutral portion of goal
- Increase outreach to certify DBEs owned by underutilized ethnic groups and women

What is a UDBE?

- A DBE firm that is owned by:
 - Hispanic Americans (including Portuguese)
 - Native Americans (including Hawaiians)
 - African Americans
 - Women

DBE Regulations – Final Rule

- Effective February 28, 2011
- Termination of DBE Firms
- Personal Net Worth of DBE Owners
- Accountability and Goal Submission
- Program Oversight
- Fostering Small Business Participation

Final Rule - Termination of DBEs

- Final rule modifies language in the regulations to state that good cause includes “a situation where the DBE subcontractor has failed or refused to perform the work on the subcontract in accordance with standard industry practice.”
- Good cause does not mean that prime contractor dismissed the DBE because the prime can self-perform the work, or substitute another DBE or non-DBE firm.

Final Rule - Adjusted Personal Net Worth

- Personal Net Worth of \$750,000 adjusted for inflation to \$1.32 million
- Excludes equity in primary residence and ownership interest



Final Rule - Accountability and Goal Submission

- USDOT requires all recipients to set DBE participation goals once every three years
- Each year, recipients must review DBE attainment, and determine if meeting goal
- If shortfall exists, recipients are required to analyze and explain how it will resolve it
- Must establish specific steps and milestones to correct the shortfall
- May be found in noncompliance if these steps are not taken

Final Rule – Program Oversight



- Final rule requires that recipients monitor federal aid contracts and subcontracts to ensure that work committed to DBEs are actually performed by DBEs
- Mechanism must include written certification that contracting records reviewed and work sites monitored
- Review may be performed in conjunction with monitoring contract performance for other purposes such as contract close-outs

Final Rule - Fostering Small Business Participation

- Small business set-asides for prime contracts
- For multi-year design build contracts have bidders specify portion of contracts or subcontracts that are of the size that small businesses, including DBEs can reasonably perform
- Require prime contractors to provide subcontracting opportunities to small businesses rather than self-performing the work
- Identify alternative procurement strategies that facilitate the ability of consortia or joint ventures consisting of small businesses to compete for prime contracts

Special Provisions

- DBE Regulatory Requirements
- Proposal Requirements
- UDBE Project/Contract Goals
- Administrative Reconsideration
- Award of Contract
- Replacement of a DBE
- Use of Joint Checks
- Payment
- Records and Reports

Special Provisions – DBE Regulatory Requirements

- Policy
- Assurances
- Failure to Comply
- Bidder Responsibilities
- Commercially Useful Function
- Effect of Decertified DBEs

Special Provisions - Policy

- “it is the policy of the U.S. Department of Transportation (“U.S.DOT”), the State of Hawaii, Department of Transportation, and all of its political subdivisions (“Department”) that Disadvantaged Business Enterprises (“DBE”), as defined in the DBE Regulations, have an equal opportunity to receive and participate in federal assisted contracts.”

Special Provisions - Assurances

- Each contract signed with a contractor and each subcontract the prime contractor signs with a subcontractor shall include assurance of nondiscrimination based on race, color, national origin, or sex in the performance of the contract.



Special Provisions - Failure to Comply with DBE Requirements

All contractors and subcontractors are required to comply with the DBE requirements. Failure to comply may result in termination of the contract, or other remedies as deemed appropriate by HDOT.



Special Provisions - Bidder Responsibilities

- Bidder registration form to place on bidders list
- DBEs may be consultants, contractors, truckers, vendors, manufacturers, and suppliers
- Need to know if the project has a race conscious (i.e. project DBE goal)
- Understand good faith efforts

Special Provisions - Commercially Useful Function (CUF)

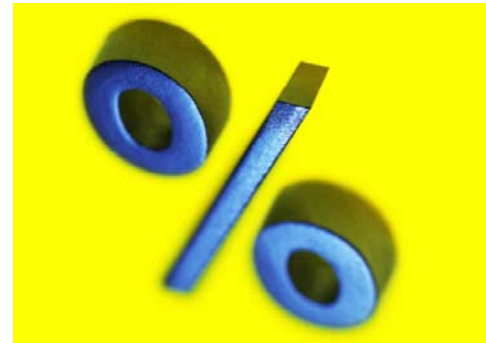
- DBE must be responsible for executing a distinct portion of work and must carry out this work by actually performing, managing, and supervising the work
- The DBE must perform at least 30% of the contracted work with its own forces
- Project managers responsible for ensuring that DBE performs a commercially useful function and field inspectors responsible for completing CUF Checklist (draft)

Special Provisions - Effects of Decertification of a DBE

- Prior to contract/subcontract award - may not count ineligible DBE portion. Prime may find another DBE for other types of work, or demonstrate that it made a good faith attempt to do so
- After contract/subcontract award – may continue to count remaining portion of DBE participation towards contract goal, but should not be included in overall accomplishments
- Exception – If DBE decertified due to the size of the contract/subcontract, may continue to count towards contract and overall goal accomplishments

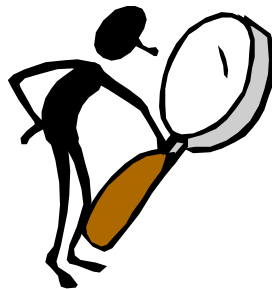
Special Provisions – Proposal Requirements

- DBEs certified at bid opening
- DBE percentage
 - None specified
 - Numerical goal based on subcontracting opportunities
- Counting DBE participation
- Good faith efforts



Special Provisions – Administrative Reconsideration

- Good faith efforts – evaluated at two levels
 - DBE Coordinator
 - DBE Liaison Officer
 - Bidder may meet with DBELO in person
 - Written decision not appealable to USDOT
 - Appealable under HRS 103-D-709



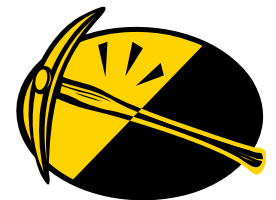
Special Provisions – Award of Contract

- Lowest responsible bidder awarded contract
- Did the lowest bidder meet goal?
- Sufficient evidence of good faith efforts?



Special Provisions - Replacement of a DBE

- Prime contractor required to provide written notice to HDOT to replace a DBE
- HDOT to provide written consent to allow the DBE to be replaced by the prime contractor
- Good cause limited to certain circumstances
 - DBE failed to execute a written contract
 - Failed or refused to perform work
 - DBE failed to meet minimum bond requirements
 - DBE goes bankrupt
 - DBE debarred or suspended
 - HDOT determined DBE not responsible contractor
 - DBE owner dies or becomes disabled



Special Provisions – Use of Joint Checks

- Following conditions must be met:
 - Second party, typically prime, acts solely as guarantor
 - DBE must release check to supplier
 - Consistent with standard industry practice
 - Arrangement require HDOT approval
 - Monitored by HDOT

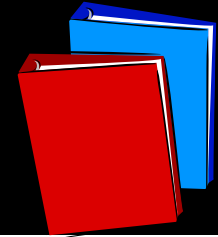


Special Provisions - Payment

- For federal aid Projects– NO RETAINAGE!!!!
 - The bidder shall pay all subcontractors, both DBE and non-DBE, within 10 calendar days of receipt of progress payment from the HDOT.
 - DBE Participation Report and Prompt Payment Certification Form
 - After subcontractor has completed all the work on the subcontract, and there are no bona fide disputes, the contractor must pay the subcontractor including retainage



Special Provisions – Records and Reports



- . The names, race/ethnicity, gender, address, phone number, and contact person of all DBE and non-DBE consultants, subcontractors, manufacturers, suppliers, truckers and vendors identified as DBEs (for vendor indicate also if a supplier or manufacturer);

The nature of work of each DBE and non-DBE consultant, subcontractor, manufacturer, supplier, trucker and vendor;

The dollar amount contracted with each DBE and non-DBE consultant, subcontractor, manufacturer, supplier, trucker and vendor; and

Cumulative dollar amount of all change orders to the subcontract.



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Questions?

