



# Disadvantaged Business Enterprise Program Plan



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### Appendices

Appendix A: DBE Requirements (DSP7)

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## Introduction

The Pennsylvania Department of Transportation (Department) submits this Disadvantaged Business Enterprise (DBE) Program Plan to the United States Department of Transportation (US DOT), acting through the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA)<sup>1</sup> in accordance with 49 Code of Federal Regulations (CFR) Part 26, as amended (Part 26).

The DBE Program described within this manual has been designed and implemented by the Department to satisfy the DBE regulations codified at 49 CFR Part 26, as amended. The program also complies with 49 CFR Part 23, as amended, where applicable and which is incorporated by reference. The following sections of this Publication **follow the numbering of 49 CFR Part 26**, as amended, and incorporate, by reference the language and requirements of 49 CFR Part 26.

Please note that links in this document are live (clickable) for first reference/use only. A URL Summary table is provided at the end of the document for ease of reference to each provided link.

## SUBPART A – GENERAL REQUIREMENTS

### Section 26.1 Objectives

The Department's DBE Program aims to achieve the following DBE regulatory objectives:

- To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs.
- To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts.
- To ensure that the Department's DBE Program is narrowly tailored in accordance with applicable law.
- To ensure that only firms that fully meet the eligibility standards of Part 26 are permitted to participate as DBEs.
- To help remove barriers to the participation of DBEs in DOT-assisted contracts.
- To promote the use of DBEs in all types of DOT-assisted contracts and procurement activities conducted by recipients.
- To assist the development of firms that can compete successfully in the marketplace outside the DBE Program.
- To provide appropriate flexibility to recipients of federal financial assistance in establishing and providing opportunities for DBEs.

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<sup>1</sup> The Federal Railroad Administration (FRA) does not currently have statutory authority to administer a DBE program. The FRA fully supports the objectives of DBE programs and all FRA's grantees are required to avoid discrimination in contracting. The FRA Office of Civil Rights has a small business specialist who can provide additional information.

Section 26.25, in this publication, identifies the Department’s designated DBE Liaison Officer. In that capacity, the DBE Liaison Officer is responsible for implementing all aspects of the DBE program. **Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by the Department** and its subrecipients in its financial assistance agreements with the Department of Transportation.

This document and policy statement have been disseminated to the Department’s Secretary of Transportation, the Secretary of the Pennsylvania Department of Conservation and Natural Resources (DCNR), subrecipients, as applicable, and all of the components of the Department. The Bureau of Equal Opportunity (BEO) has distributed this statement to DBE and non-DBE business communities that perform work for the Department on DOT-assisted contracts through the Department’s website and *ProRank Academy* (more details follow).

### Section 26.3 Applicability

The DBE Program is applicable to the Department as a primary recipient of federal funds as well as any subrecipient to whom the Department extends federal financial assistance. The DBE program requirements in this publication do not apply to projects with no federal assistance.

The Department is the recipient of Federal-Aid highway and transit funds authorized under various transportation funding bills, including:

- Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240 of 1991
- Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178 of 1998
- Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA- LU), Pub. L. 109-59 of 2005
- Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141 of 2012
- Fixing America’s Surface Transportation Act (FAST Act), Pub. L. 114-94 of 2016
- Infrastructure Investments and Jobs Act (IIJA), Pub. L. 117-58 of 2021

The Department is the recipient of federal airport funds authorized by 49 U.S.C. 47101, et seq.

### Section 26.5 Definitions

The Department uses the definitions contained in 49 CFR Part 26, Section 26.5, for this program.

### Section 26.7 Non-discrimination Requirements

The Department shall not exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by Part 26 on the basis of race, color, sex, or national origin.

In administering its DBE Program, the Department shall not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin.

**Section 26.11 Recordkeeping Requirements**

PennDOT will report DBE participation by submitting the [Uniform Report](#) of DBE Awards or Commitments and Payments by the scheduled due date.

PennDOT maintains a bidders list (in the Engineering and Construction Management System (ECMS)), consisting of information about all DBE and non-DBE firms that bid or quote on DOT-assisted contracts. The bidder list will include the name, address, DBE non-DBE status, age, and annual gross receipts of firms.

The Department will collect this information via a contract clause requiring prime bidders/contractors/vendors to report DBE use information in the following ways:

- PennDOT's ECMS<sup>2</sup>
- PennDOT's eGrants site<sup>3</sup>
- PennDOT's Bureau of Planning and Research, Research Program Management System (RPMS) database<sup>4</sup>
- Pennsylvania Department of General Services eMarketplace system<sup>5</sup>

The Bureau of Public Transportation (BPT) captures DBE uniform report data manually by soliciting information from subrecipients. DCNR maintains a listing of grantees, contractors, their DBE status, and the amount of work performed in relation to the projects funded through the Recreation Trails Program.

The Department will submit the report required under Part 26, Section 26.11(e) of the CFR, on behalf of the PA Uniform Certification Program<sup>6</sup> (PA UCP) to the DOT Office of Civil Rights by January 1 of each year.

Records will be maintained by PennDOT for a minimum of three years, as outlined in 49 CFR 26.11(d).

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<sup>2</sup> Engineering and Construction Management System (ECMS) is the web-based application used by the Department for project delivery and management (<https://www.ecms.penndot.gov/>)

<sup>3</sup> EGrants (<https://www.penndot.pa.gov/Doing-Business/Aviation/AviationGrants/Pages/default.aspx>) is a web-based grant management system to award and track grants that involve DOT funding.

<sup>4</sup> <https://www.penndot.pa.gov/ProjectAndPrograms/Planning/Research-And-Implementation/Pages/default.aspx>

<sup>5</sup> <http://www.emarketplace.state.pa.us/>

<sup>6</sup> <https://www.penndot.pa.gov/about-us/EqualEmployment/Pages/UnitedCertificationProgram.aspx>

**Section 26.13 Required DBE Contract Assurances**

The Department and its subrecipients have signed the following assurance, which is applicable to all DOT-assisted contracts and their administration:

*The undersigned agency/organization shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE Program or the requirements of 49 CFR Part 26. PennDOT shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. PennDOT's DBE Program, as required by 49 CFR Part 26 and as approved by DOT, is incorporated by reference in this agreement.*

*Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to PennDOT of its failure to carry out its approved program, the DOT may impose sanctions as provided for under 49 CFR part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).*

Each DOT-assisted contract that the Department signs with a contractor and each subcontract the prime contractor signs with a subcontractor must include the following assurance:

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

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

Subrecipients must similarly require that each DOT-assisted contract that is signed with a contractor (and each subcontract the prime contractor signs with a subcontractor) includes the above assurances.



## SUBPART B – ADMINISTRATIVE REQUIREMENTS

### Section 26.21 DBE Program Requirements

The Department, as a direct recipient of federal funds, is required to establish a DBE program and must apply the DBE Program to all expenditures of federal highway, aviation, and transit funds. These expenditures include construction contracts, professional services, management services, and research. The Department's subrecipients, as indirect recipients of federal funds, must comply with the Department's DBE program.

The Department administers its DBE Program as required and submits periodic updates to US DOT regarding significant changes in its program. If a program update is required to comply with US DOT regulatory changes, the Department will undertake an update effort.

### Section 26.23 Policy Statement

The Department's [DBE Policy Statement](#) applies to the Department as well as its subrecipients. It is disseminated each year Department-wide, to subrecipients, and to numerous minority and woman contractor associations along with general trade associations as a reminder of the Department's commitment to employing DBE firms on DOT-assisted projects. When updates are made to the DBE Program, notice is given to affected business units of the Department and subrecipients; information and training is provided as needed.

### Section 26.25 DBE Liaison Officer

The Department has designated the following individual as the DBE Liaison Officer:

Deputy Secretary for Administration

Pennsylvania Department of Transportation

Commonwealth Keystone Building, 8<sup>th</sup> Floor, 400 North Street

Harrisburg, PA 17101

(717) 787-5628

In this capacity, the Deputy Secretary or designee is responsible for directing all aspects of the DBE Program and for ensuring that the Department complies with all provisions of Part 26.

This includes ensuring adequate staff to administer the program in compliance with Part 26 of the CFR. The Deputy Secretary has direct independent access to the Pennsylvania Secretary of Transportation concerning DBE Program matters. *See this footnote<sup>7</sup> for the PennDOT Organization Chart.* The Department's BEO assists in the administration of the program.

Subrecipients have access to the DBE Liaison Officer through BPT and BEO. On a yearly basis, subrecipients are notified of the DBE Liaison Officer and the methods of communicating with BPT, BEO, and the DBE Liaison Officer for DBE-related questions and concerns.

The BEO Director, Deputy Director and the DBE Program Manager are responsible for

<sup>7</sup> <https://www.oa.pa.gov/Policies/Documents/Transportation.pdf>

administering and monitoring the DBE Program, in coordination with other appropriate personnel. Duties and responsibilities include but are not limited to the following:

- Gathering and reporting statistical data and other information required by DOT.
- Working with various Department bureaus to develop and submit the Department's FAA, FHWA, and FTA DBE Methodologies and Goals.
- Managing the Department's DBE/SBE Supportive Services Program.
- Administering the approved Small Business Element.
- Ensuring that bid notices and requests for proposals are available to DBEs/SBEs in a timely manner.
- Assisting in identifying contracting opportunities for DBEs/SBEs.
- Analyzing the Department's progress toward goal attainment and identifying ways to improve progress.
- Advising the Department's Secretary and Deputy Secretary for Administration/DBE Liaison Officer on DBE matters and achievement.
- Participating with Department Executives, the Bureau of Design and Delivery (BoDD), BPT, Districts, and the Department's Office of Chief Counsel in determining contractor compliance with good faith efforts.
- Working to resolve disputes between prime contractors and DBEs/SBEs.
- Providing DBEs/SBEs with information and assistance in preparing bids and obtaining bonding and insurance.
- Planning and participating in DBE/SBE training seminars, workshops, and networking sessions.
- Providing outreach to DBEs/SBEs and community organizations on how to do business with the Department and to promote contracting opportunities.
- Certifying DBEs in accordance with the criteria set by DOT and acting as a liaison to the PA UCP.
- Assisting in maintaining and updating the statewide directory of certified PA UCP DBEs.
- Certifying DBEs in accordance with the criteria established by the Department.
- Maintaining and updating the statewide directory of certified DBEs.

The Department has a designated legal adviser for DBE matters that provides guidance in all areas covered by Part 26.

Although chief responsibility for the administration of the DBE Program lies within BEO as bulleted above, multiple organizations fulfill a designated role in overall program administration.

The following summarizes the primary areas of responsibility for the organizations involved in

developing, implementing, and enforcing the Department's DBE Program.

### **Deputy Secretary for Administration**

- Serves as DBE Liaison Officer
- Sets PennDOT policy in accordance with federal and state regulations
- Establishes general direction for implementing policy
- Participates as a voting member on both the Good Faith Effort Committee

### **Bureau of Equal Opportunity**

- Monitors the DBE Program
- Assists in assuring effective administration of the PA UCP
- Establishes DBE goal methodologies and triennial goals for federally funded projects (FAA, FHWA, and FTA)
- Adjusts DBE goals as needed or as required by the impacted DOT operating administrations
- Assists potential DBEs and SBEs in understanding certification procedures
- Assists certified DBEs and SBEs in becoming business partner registered, prequalified, and/or consultant qualified
- Oversees DBE/SBE Supportive Services
- Reviews DBE/SBE certification and continuing eligibility applications, including Affidavit of No Change and Notice of Change
- Assists in managing and updating the PA UCP DBE Directory
- Ensures compliance with reporting requirements
- Delivers training on DBE/SBE requirements to stakeholders
- Assists DBEs and SBEs in understanding program requirements and procedures
- Conducts compliance reviews
- Participates in the DBE Interdisciplinary Review Team (IRT) for analysis of Good Faith Effort submissions
- Assures effective administration of the SBE Element
- Performs oversight and monitoring of federal-aid subrecipient compliance with DBE program

### **Office of Chief Counsel**

- Provides legal guidance on all aspects of federal DBE regulations
- Provides a legal adviser for the PA UCP Certification Appeals Committee

- Provides a legal adviser to the DBE Good Faith Effort Review Committee
- Provides legal representation for the PA UCP Oversight Committee

### **Bureau of Design and Delivery**

- Establishes project-specific DBE participation goals
- Monitors and reports on DBE goal attainment for construction/consultant agreements
- Reviews and approves proposed DBE project participation (original and revisions)
- Reviews and approves Good Faith Effort requests for revisions to DBE goals
- Establishes DBE participation special provisions, as appropriate
- Accepts or rejects bids, based in part on proposed DBE involvement
- Chairs the DBE IRT for analysis of Good Faith Effort submissions for highway construction contracts and consultant agreements
- Coordinates Good Faith Effort submissions, including data gathering
- Delivers ECMS training related to DBE data input, monitoring, and reporting
- Assists primes in identifying qualified DBEs
- Participates in prequalifying consultants and contractors, including DBEs
- Monitors prompt payment of DBE subconsultants
- Grants provisional prequalification approval for all firms seeking to expand their areas of service, including DBEs
- Approves proposed sub-subcontractor and joint venture arrangements
- Conducts quality assurance reviews
- Provides ad hoc reports on DBE goals, commitments, and attainments
- Coordinates resolution of project-related problems involving DBE participation
- Delivers training to Districts on DBE involvement
- Imposes sanctions on contractors for failing to comply with DBE requirements
- Performs oversight and monitoring of federal-aid subrecipient compliance with DBE program

### **Bureau of Public Transportation (BPT) & Bureau of Aviation (BOA)**

- Monitors DBE goals for specific projects
- Reports on DBE project goal attainment
- Reviews and approves proposed DBE project participation (original and revisions)
- Reviews and approves Good Faith Effort requests for revisions to DBE goals

- Chairs the DBE Interdisciplinary Review Team (IRT) for analysis of Good Faith Effort submissions for public transportation grants (BPT) and contracts, and for aviation grants (BOA)
- Coordinates Good Faith Effort submissions, including data-gathering
- Monitors prompt payment of DBE subcontractors
- Conducts quality assurance reviews
- Provides ad hoc reports on DBE goals, commitments, and attainments
- Performs oversight and monitoring of federal-aid subrecipient compliance with DBE program

**Bureau of Planning and Research, Bureau of Office Services, & Center for Program Development**

- Monitor DBE goals for specific projects
- With input and cooperation from BEO, conduct relevant training for subrecipients, construction managers, contractors, and bidders; monitor compliance and provide technical assistance to subrecipients and construction managers regarding capital and operating projects; and provide an active role in the development and approval of DBE triennial goals and contract goals
- Ensure subrecipients are properly reporting on DBE project goal attainment
- Coordinate with Bureau of Office Services (BOS) to monitor prompt payment of DBE subcontractors
- Conduct quality assurance reviews
- Provide ad hoc reports on DBE goals, commitments, and attainments
- Perform oversight and monitoring of federal-aid subrecipient compliance with DBE program

**PA Department of Conservation and Natural Resources**

- Reports on DBE utilization
- Monitors prompt payment of DBE subcontractors
- Conducts quality assurance reviews
- Provides ad hoc reports on DBE goals, commitments, and attainments
- Performs oversight and monitoring of federal-aid subrecipient compliance with DBE program

**Engineering Districts**

- Monitor DBE participation on individual projects (District Executives, Assistant District Executives, Project Inspectors, District EEO/DBE Coordinators)
- Verify that DBE firms are performing a commercially useful function (CUF)
- Monitor prompt payment of DBE subcontractors
- Perform oversight and monitoring of federal-aid subrecipient compliance with DBE program

**Section 26.27 DBE Financial Institutions**

The Department adheres to [Management Directive 305.8](#) – Commonwealth Bank Accounts and Special Banking Services, established by the Governor’s Office. This document establishes policy, defines responsibilities for payment of banking services costs, provides uniform procedures for establishing bank accounts and procuring special banking services, and establishes reporting requirements.

The following financial institutions have been identified as being owned and controlled by socially and economically disadvantaged individuals:

United Bank of Philadelphia 30 South 15 <sup>th</sup> Street Philadelphia, PA 19102 215-351-4600	Asian Bank 111 North 9 <sup>th</sup> Street Philadelphia, PA 19107 215-592-1188
Noah Bank 7301 Old York Road Elkins Park, PA 19027 215-424-5100	Franklin Savings Bank 320 East Girard Avenue Philadelphia, PA 19125 215-423-8012

The Department and its DBE Supportive Services Consultant encourage and promote use of this bank by consultants, contractors, and subrecipients.

**Section 26.29 Prompt Payment Mechanisms**

Prompt payment of subcontractors, suppliers, and/or dealers by a prime contractor is required by the Department. Requirements vary by Office and Bureau, but all requirements comply with the 30 calendar days mandated by Part 26, Section 26.29 of the CFR. Subrecipients are also required to have a contract clause requiring prime contractors to pay subcontractors within 30 calendar days of receipt of payment. Each Bureau and DCNR has differing payment terms; however, all are less than or equal to 30 calendar days and are therefore in compliance with Part 26.

The Department and subrecipients do not require retainage in contracts with prime contractors.

The Department will include the following clause (or similar language) in each DOT-assisted prime contract:

The prime contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than 30 days [in compliance with the requirements of the publications and forms listed below] from the receipt of each payment the prime contract receives from the Department. The prime contractor agrees further to return retainage payments to each subcontractor within 30 days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the Department. This clause applies to both DBE and non-DBE subcontracts.

Specific requirements for Prompt Payment are included in the contracting documents utilized by each Bureau and DCNR. Additional information is also available in various PennDOT Publications and Forms:

- Bureau of Design and Delivery, Consultant Agreements - see Publications 93, 442, and 740 (local projects).
- Bureau of Design and Delivery, Highway Construction - see Publications 2 and 408, and the DSP7.
- Bureau of Aviation - see Publication 405 and Form AV-27.
- Bureau of Public Transportation - see Form PT-27.

For subrecipients, Publication 408, Section 110.05 states that within seven calendar days of the receipt of current estimate and final payments from the Department, primes are to pay subcontractors their earned share of the payments, including all retainage, provided the terms of the applicable subcontract or purchase agreement have been reasonably met.

Failure to meet the prompt payment requirements established by the Department could result in a breach of contract since the Prompt Payment requirements are part of the standard DBE assurances document that is included in all consultant and contractor contractual agreements with PennDOT. Per Management Directive 215.9, A contractor may be placed in a Contractor Responsibility Program for several reasons including: Unsatisfactory or deficient Performance or failure to carry out or satisfactorily perform all requirements, including compliance with all plans, specifications, service level agreements, or terms and conditions of a Commonwealth Contract.

## **Section 26.31 DBE Directory**

The PA UCP maintains a shared database that produces the statewide directory of firms eligible to participate as DBEs on DOT-assisted contracts. The PA UCP database is electronic and updates to the directory occur in real time. For each firm, the PA UCP Directory lists the firm name, address, owner, phone number, fax number, e-mail, website, applicable North American Industry Classification System (NAICS) codes, service category, and a description of work the DBE has been certified to perform.

A searchable directory of certified DBEs can be viewed by visiting <https://paucp.dbesystem.com/>. The directory is available for free to all Department organizations, contractors, consultants, construction/consultant associations, minority, women and small business development entities, federal/state agencies, all interested bidders/proposers, and the general public.

On a quarterly basis, a hard copy of the PA UCP DBE Directory is printed and made available for free upon request by contacting the Department or any of the other four certifying participants in the PA UCP (the Southeastern Pennsylvania Transportation Authority (SEPTA) DBE Program Office, the Port Authority of Allegheny County Office of Disadvantaged Business Enterprise & Diverse Business, Philadelphia International Airport's Office of Business Diversity, and Allegheny County Department of Equity and Inclusion). See Sections 26.61-26.73 of this publication for contact information.

### **Section 26.33 Overconcentration**

The Department, working in tandem with its DBE Supportive Services consultant, has not currently identified the existence of overconcentration in the types of work that DBEs perform. A contractor, however, may challenge that there is an area of DOT-assisted work in which there is an overconcentration of DBE firms, and that such concentration creates an undue burden for non-DBE firms in obtaining work in this area. Where such challenges are made, they shall be processed as follows:

The challenge must be submitted in writing to the Pennsylvania Department of Transportation, Director, Bureau of Equal Opportunity, at either of the following addresses:

Pennsylvania Dept. of Transportation Director, Bureau of Equal Opportunity Commonwealth Keystone Building 5 <sup>th</sup> Floor, 400 North Street Harrisburg, PA 17120	or	Pennsylvania Dept. of Transportation Director, Bureau of Equal Opportunity P.O. Box 3251 Harrisburg, PA 17105-3251
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The written challenge must identify the challenging party, summarize the grounds for the challenge, and include all available information relevant to determining whether the challenge is valid. The Department will thoroughly review the information submitted.

Based on this information, the Department will conduct an inquiry. To assist in the inquiry, the Department will use the information available within ECMS maintained by the Department.

ECMS contains project information regarding all subcontracting activity on highway construction projects. Information contained in the PA UCP database or other sources may also be used.

If the Department determines that there is no reason to believe the challenge is valid, the challenging party shall be informed in writing thereby terminating the challenge procedure.

If it is determined that there is reason to believe that the party has a valid claim, the Department will work with the concerned DOT operating administration on a determination of overconcentration and to devise measures to address it. The measures may include the use of incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specified



field in which the Department determined that non-DBEs are unduly burdened. Once approved by DOT, the measures will become part of the DBE Program.

## Section 26.35 Business Development Programs

Two separate business development programs offered by Pennsylvania are discussed below.

### **DBE Business Development Program**

The Department operates a comprehensive DBE Supportive Services Program aimed at enhancing the growth, development, and self-sufficiency of all DBE firms competing for DOT- assisted contracts and subcontracts. That program is described in the Race-Neutral subsection of Section 26.51. The Department also supports a Comprehensive Business Development Program (BDP) that is made available to a limited number of DBE firms that are selected based on criteria including the firm's commitment to the program. Both the DBE Supportive Services Program and the BDP are federally funded.

The BDP assists these firms in developing a comprehensive business plan, which:

- Provides an analysis of the participating DBE's market potential, the competitive environment, and other business analysis capable of estimating the prospects for profitable operation during the term of participation in and after graduation from the program.
- Provides an analysis of the firm's strengths and weaknesses, with particular attention to the means of correcting any financial, managerial, technical, or labor conditions which could impede the participant from receiving contracts for work that historically has not been performed by DBEs.
- Sets specific targets, objectives, and goals for the business development of the participant DBE during their participation in the BDP.
- Provides estimates of contract awards from the DBE Program and from other sources needed to meet the objectives and goals for the period covered by the BDP.
- Includes a transition management plan that prepares the firm for graduation from the program when specified criteria are met.

The BDP and the DBE Supportive Services Program are operated by a single contractor chosen using a competitive procurement process. By awarding the contract for both programs to one vendor, the two similar and interrelated programs can be operated more efficiently and with better outcomes for the participating DBE firms.

As part of this program, PennDOT has created a Mentor Protégé Program to increase diversity and participation in the Disadvantaged Business Enterprise (DBE) Program for contractors and consultants, with a focus on drawing in underserved and underrepresented companies. In addition, the creation and implementation of this program will specifically address the findings of PennDOT's *2018 Disparity Study*. The mentor and protege firms will partner to establish protege firms as experienced vendors for the Commonwealth. Together, they will explore opportunities to provide training and development, share knowledge, and collaboratively review the protege's work product.

Initial qualification will include working through PennDOT's DBE Supportive Services Center for opportunities to meet and connect with mentor firms. They will then formalize alignment onto teams through a Memorandum of Understanding (MOU).

These teams will pursue construction or design projects bid or advertised through PennDOT's normal procurement process. The mentor firms will lead the pursuit of these projects while working with the protege firms through both regular meetings (as defined in the MOU) and informal feedback, training, and review. Each element of a project will offer opportunities for input and discussion.

This will be a much more collaborative process than that of a typical consultant/subconsultant team. Each of these points in the process will offer hands-on, real-time feedback for the protege and further build the team's relationship. Similar work streams would exist for the contracting, performance of work, QA/QC, invoicing, and evaluation phases of a project. The end goal of this process is to build the protege's experience, complete MOU goals, and expand the approved qualifications for the protégé (DBE) firm.

Specific guidance and information are available on <http://www.penndbe.prorankllc.com/>.

### **Department of Community and Economic Development Programs**

The Department refers DBEs/SBEs and potential applicants to the Pennsylvania Department of Community and Economic Development (DCED), which offers various programs aimed at the successful expansion of businesses within Pennsylvania. DCED assists all businesses (both DBE and non-DBE) in writing business plans, obtaining financing, navigating tax laws, pursuing expansion, and an array of other activities. This assistance is best exemplified in the *Small Business Assistance website*<sup>8</sup> and *Entrepreneur's Guide*.

#### **Section 26.37 Monitoring and Enforcement Mechanisms**

The Department utilizes the following monitoring and enforcement mechanisms to ensure compliance with Part 26.

The Department brings to the attention of the DOT any known activities that appear to be inconsistent with Part 26 of this program so that the DOT can take the steps provided in Part 26, Section 26.109 (e.g., referral to the United States Department of Justice for criminal prosecution, referral to the DOT Inspector General and/or the Commonwealth's Office of Inspector General, or action under suspension and debarment or Program Fraud and Civil Penalties rules). Per Management Directive 215.9, A contractor may be placed in a Contractor Responsibility Program for several reasons including: Unsatisfactory or deficient Performance or failure to carry out or satisfactorily perform all requirements, including compliance with all plans, specifications, service level agreements, or terms and conditions of a Commonwealth Contract.

The Department employs a number of standard forms used to collect DBE information for initial project setup and for ongoing monitoring of DBE participation:

- [Form AV-27](#) – DBE Project Compliance Review Checklist for Airports

<sup>8</sup> <https://dced.pa.gov/business-assistance/small-business-assistance/>

- [Form PT-27](#) – DBE Project Compliance Review Checklist for Transit Systems
- [Form EO-354](#) – DBE Commercially Useful Function (CUF) Report
- [Form EO-354AV](#) – DBE Commercially Useful Function Report – Aviation
- [Form EO-354BRFPW](#) – DBE Commercially Useful Function Report (For BRFPW Grants)
- [Form EO-354OS](#) – DBE Commercially Useful Function (CUF) Report for Non-ECMS Projects
- [Form EO-354PT](#) – DBE Commercially Useful Function Report – Public Transportation
- [Form EO-380](#) – DBE Participation for Federal Projects
- [Form EO-380AV](#) – DBE Participation for Federally Funded Airport Projects
- [Form EO-380PT](#) – DBE Participation for Federal Projects (BPT)
- [Form EO-385](#) – DBE Participation for Federally Funded Service Agreements (BPR and BOS)
- [Form EO-401](#) – DBE Awards and Commitments Report
- [Form EO-402](#) – Monthly DBE/SBE Status Report
- [Form EO-402LP](#) – Monthly DBE/SBE Status Report for Local Projects

The Bureau of Equal Opportunity conducts direct monitoring of DBE requirements via a number of methods. The DBE Field Agent conducts onsite compliance reviews of FHWA funded Highway Construction projects. The DBE Field Agent reviews DBE subcontracts, payments, completed CUF reports, and evaluates any DBE firms working on the project during the date of the visit. The DBE Field Agent also reviews monthly progress reports submitted by individual Engineering Districts which provide status on all FHWA funded projects. Based upon the comments included in the report and the progress of individual projects in meeting the goal, the DBE Field Agent conducts follow-up inquiries and provides technical assistance as needed.

Additionally, BEO's Contract Compliance Division evaluates DBE requirements, including CUF, as part of general compliance reviews of construction contractors.

In addition to the forms and the direct monitoring activities by BEO noted above, the Department also relies upon several electronic systems to assist in monitoring and enforcement. Highway construction and consultant agreement contract awards, commitments, and payments are all captured in the ECMS system. EO-354 along with the PSAs (project site activities) is used to monitor performance. When final payments to DBE firms are entered, the system requires Good Faith Effort documentation to be submitted for any shortfall in meeting the DBE goal. This documentation is evaluated in connection with project closeout. Aviation grants awards, commitments, and payments are captured in eGrants. Airport sponsors (or their designee) complete the EO-354AV for all DBE firms performing on the grant. Airport sponsors must provide complete records, including DBE payments and any Good Faith Effort documentation, to the Department in order to receive the final grant reimbursement. Various other offline and online processes are

utilized by other program areas as noted below. Regardless of the program area or system used, the Department signs off that the DBE requirements have been met as part of its larger contract closeout process.

- Bureau of Design and Delivery, Consultant Agreements, utilize ECMS for tracking. See Publications 93 and 740 (local projects) for more information.
- Bureau of Design and Delivery, Highway Construction, utilize ECMS for tracking. See Publications 2 and 408 for more information.
- Bureau of Aviation utilizes eGrants for tracking. See Form AV-27 for more information.
- Bureau of Public Transportation monitors DBE compliance through reviews with subrecipients and construction manager monitoring of construction projects. See Form PT-27 for more information. Bureau of Planning and Research and Bureau of Office Services, utilize the EO-385 in combination with data from its RPMS to complete the EO-401 report.
- Center for Program Development requires a status report on the DBE goal be submitted to the Department quarterly. Planning Partners (Metropolitan Planning Organizations (MPOs), etc.) are required to capture awards, commitments, and payments to DBEs throughout the life of a project and to email this information to [penndotdbegoal@pa.gov](mailto:penndotdbegoal@pa.gov) resource account, copying the Center for Program Development on the email.
- PA Department of Conservation and Natural Resources requires grantees to submit Form EO-402 – Monthly DBE/SBE Status Report during the project.

### **Monitoring is REQUIRED**

The DBE program regulation at 49 CFR § 26.37(b) requires that recipients monitor every contract on which DBE participation is claimed, including race-conscious DBE participation in response to a contract goal and race-neutral DBE participation towards a recipient's overall goal. DBE work can only count toward DBE goals if the DBE is performing a commercially useful function (CUF) – a necessary and useful role - on that contract.

Failure to comply with this requirement can result in corrective action from the federal funding agency and in extreme cases could result in loss of federal funding or at least loss of oversight for such funding.

As with any federal requirement, including but not limited to the National Environmental Policy Act (NEPA), utility clearance, and right-of-way clearance, monitoring and reporting that the appropriate processes are followed is necessary and an expectation of the federal regulation. Monitoring and reporting on DBE participation is no more cumbersome than any other federal requirement and should not be looked at as such. Additional information on monitoring and reporting requirements, from the US Department of Transportation is available here: <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/guidance-recipient-responsibilities-oversight-and>

#### **Section 26.39 Small Business Enterprise Element**

The Department has implemented a Small Business Element of its Disadvantaged Business Enterprise Program in accordance with Part 26, Section 26.39. The element is designed to foster and facilitate participation by Small Business Enterprises (SBE) on DOT-assisted projects and to

overcome barriers or obstacles to their participation. The element incorporates a variety of strategies designed to meet the regulatory objective, which are described briefly below.

- Create an SBE certification to identify firms that meet the definition of a small business concern as contained in Part 26, Section 26.5.
- Collect data and produce reports on the level of participation by SBEs in the Department's DOT-assisted projects.
- Encourage prime contractors and consultants to use SBEs as subcontractors and actively market SBEs to primes to assist the SBEs in establishing business relationships.
- Create an SBE special provision for use in selected municipal bid packages where prequalified SBE subcontractors will be allowed to bid as primes.
- Support the Small Business Enterprise Supportive Services Center (The SBE SS Center) to assist all small businesses in acquiring skills and identifying resources that will contribute to their growth and eventual self-sufficiency.
- Maintain a list of prime contractors certified as SBEs by work class code and provide this list to District personnel for consideration for projects utilizing FHWA Emergency Repair funding.
- Publicize the list of potential prime contractor bidders for Department projects to allow SBEs to contact the bidders to offer quotes on portions of the work that will be subcontracted. BEO also provides ongoing monitoring of SBE involvement by prime contractors.

See Section 26.51 and PennDOT's webpage for SBEs<sup>9</sup> for more information on the SBE Supportive Services Center. The SBE Supportive Services Center is an element of PennDOT's DBE Supportive Services Center<sup>10</sup>.

The BEO reviews all bid documents used by subrecipients to verify that they include relevant references to SBE requirements. In addition, subrecipients are required to report SBE commitments and attainments to BEO on a monthly or quarterly basis, depending on the program area. The methods used are the same as those used for reporting DBE commitments and attainments.

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<sup>9</sup> [https://www.penndot.pa.gov/about-us/EqualEmployment/Pages/Small-Business-Enterprise-\(SBE\).aspx](https://www.penndot.pa.gov/about-us/EqualEmployment/Pages/Small-Business-Enterprise-(SBE).aspx)

<sup>10</sup> <https://www.penndot.pa.gov/about-us/EqualEmployment/Pages/Disadvantaged-Business-Enterprise-Supportive-Services-.aspx>

## SUBPART C – GOALS, GOOD FAITH EFFORTS, AND COUNTING

### Section 26.41 Nationwide Goal

The US DOT established a nationwide goal stating that not less than 10% of authorized funds are to be expended with DBEs. This is an aspirational goal and does not affect or influence the goal setting of individual recipients.

### Section 26.43 Set-Asides or Quotas

The Department and its subrecipients do not use set-asides or quotas in the administration of this DBE Program.

### Section 26.45 Overall Goals

The Department develops its overall DBE involvement goal consistent with Part 26, Section 26.45. The methodology used to develop the overall goal is available to the public electronically through the Bureau of Equal Opportunity's website<sup>11</sup>. Additionally, physical copies of the methodology are available upon request by contacting BEO at 717-787-5891. The Department's methodologies are incorporated in the DBE Program by reference. Subrecipients adopt the Department's methodology and goals consistent with the subrecipient's operating areas.

The Department submits its FAA, FHWA, and FTA methodologies and goals to the appropriate operating administration as required. Submittal is based upon the staggered three-year goal schedule established for federal highway, transit, and aviation funds. The Department implements the overall goal on October 1 of the appropriate fiscal year unless it receives other instructions from the DOT.

The DBE Methodology and Goal Development process used by the Department is described on the referenced BEO website.

### Section 26.47 Goal Attainment

The Department constantly monitors attainment of DBE goals through the use of the various methods described in Section 26.11 – Recordkeeping Requirements and Section 26.37 – Monitoring and Enforcement Mechanisms. If at the end of a fiscal year the Department has not attained the overall goal applicable for that year, the Department shall analyze the reasons for the shortfall and create a corrective action plan in accordance with Part 26, Section 26.47. The analysis and corrective action plan shall be submitted to FHWA and FAA within 90 calendar days of the end of the fiscal year.

### Section 26.49 Transit Vehicle Manufacturers

PennDOT ensures federal funds applied to subrecipient transit vehicle procurements are disbursed to Transit Vehicle Manufacturers (TVMs), which comply with applicable DBE requirements. This is accomplished through timely submission of Transit Vehicle Award Reports to FTA.

<sup>11</sup> <https://www.penndot.pa.gov/about-us/EqualEmployment/Pages/default.aspx>

**Section 26.51 Breakout of Estimated Race-Neutral & Race-Conscious Participation**

The breakout of estimated race-neutral and race-conscious participation is updated in the Department's methodology and goal-setting documents for each required DBE goal submission. The Department monitors the race-neutral and race-conscious goal apportionment and makes adjustments up or down as supported by the most recent data available. The Department reviews monthly reports submitted by each market area defined in its methodology to ensure that appropriate DBE goals are set on contracts and that DBE commitments and attainments are monitored. Additionally, each District provides a detailed monthly report of DBE commitments and attainments on its highway construction contracts. This further assists the Department in identifying potential shortfalls early and also serves as a reminder to track DBE payments closely. Adjustments to the DBE contract goals are made as required based upon attainment within the appropriate market area and the overall goal. The DBE/Title VI Division Chief sends quarterly reports of goal attainment along with recommendations to adjust individual market area goals, if warranted.

**Race-Neutral**

The Department attempts to meet the maximum feasible portion of its overall goal using race-neutral means. Race-neutral credit is given for the dollar amount of a prime contract awarded to a DBE that exceeds the goal amount and is not subcontracted to a non-DBE, a DBE subcontract executed on a project that did not contain a DBE goal, or DBE commitment or payment dollar amounts exceeding the contract goal. Race-neutral means employed by the Department include, but are not limited to, the following programs.

**DBE Supportive Services Center**

One method used by the Department to improve its race-neutral performance is the establishment and operation of the federally funded Disadvantaged Business Enterprise Supportive Services Program. This program is intended to provide training, assistance, and services to DBE firms certified in the DBE Program to facilitate their development into viable self-sufficient organizations capable of competing for and performing on DOT-assisted highway projects on an equal basis with non-DBE firms.

The program is operated by a contractor as the DBE Supportive Services Center (The DBE SS Center). The program's objectives are to:

1. Build relationships and communication networks with available expertise at all government levels in addition to the private, non-profit, and academic sectors; maintain a database of these contacts.
2. Determine critical DBE needs relative to performance on PennDOT's DOT-assisted highway projects within the areas of business, construction, consulting, and technology management.
3. Develop and deploy needs-based training for participating DBE firms.
4. Conduct direct consultative assistance to participating DBE firms concerning PennDOT's DOT-assisted highway projects.

5. Generate support services information through the collection, promotion, and dissemination of business, construction, consultant, and technical materials.
6. Spearhead, coordinate, and attend conferences, meetings, and symposia.
7. Evaluate and continuously improve the key supportive services activities by collecting, analyzing, and utilizing feedback from a variety of sources.

The DBE Supportive Services Center provides the following services, all of which are free of charge.

#### *Continual Needs Assessment and Identification*

The DBE SS Center conducts an annual formal Needs Assessment Survey of DBE firms and conducts ongoing informal needs assessments by means of face-to-face and telephone interviews, e-mails, and self-administered surveys. The objective of the needs assessments is to identify the barriers that DBEs face in competing with non-DBEs for DOT-assisted contracts and subcontracts and determine what services would assist DBEs in overcoming those barriers. The results of both the formal and informal assessments are used to adjust processes and services provided by The DBE SS Center and the objectives of the DBE Supportive Services Program.

#### *Training, Consulting, and Information Management*

The DBE SS Center develops approaches to providing training, consulting, and information management. This includes a training reimbursement program to provide financial assistance to pre-screened DBEs for company-specific training. The DBE SS Center coordinates instructor-led training, computer-based training, and one-on-one consulting services. In addition, The DBE SS Center continues to collect, promote, and disseminate information deemed relevant to the DBE community. The DBE SS Center bases the initial need for ongoing trainings on historical information, results of various needs assessments, and data available through the Department's Bureau of Equal Opportunity. The DBE SS Center continually reevaluates and updates those needs based on feedback received from training evaluations, interaction with and requests from DBE firms, and other relevant sources.

#### *Outreach, Networking, and Communication*

The DBE SS Center uses various methods of outreach to inform and encourage DBEs to use its services. These include:

- The DBE SS Center website<sup>12</sup>
- Newsletter articles
- Brochures and other promotional materials
- Direct mail (both U.S. mail and e-mail)

Networking methods include participating in meetings, preconstruction conferences and symposia (at which DBEs and the prime contracting community are likely to be present), as well as outreach to community, civic, ethnic, business, and construction organizations. In addition to the above

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<sup>12</sup> <http://www.penndbe.prorankllc.com/>



outreach and communication methods, The DBE SS Center responds to individual written and telephone requests for assistance.

#### *Continual Evaluation of Processes, Outcomes, and Effectiveness*

The DBE SS Center uses personal interviews, online interviews, telephone follow-up, and self-administered survey forms as part of its ongoing self-evaluation. The DBE SS Center utilizes a combination of qualitative and quantitative methods to analyze the data, as well as evaluation and measurement of the attainment of specific training objectives. The DBE SS Center, which now includes a webpage for SBE Supportive Services, maintains a website that allows for the collection of formal and informal real-time data through online DBE interaction. Collection of the data assists in determining if changes need to be made to services or activities being delivered in subsequent fiscal years, and if so, what those changes should be.

#### *Contractor Prequalification*

The Department makes use of two types of contractor prequalification but does not require prequalification as a condition for DBE certification, in accordance with Part 26, Section 26.73(g).

#### *Provisional Prequalification*

Provisional Prequalification can enable a prequalified contractor to become prequalified in an additional work classification. Provided both parties agree, the prime contractor provides training and oversight to the subcontractor in the performance of the work classification. Upon completion of provisional subcontract work, the District files a Past Performance Report with the Prequalification Officer which includes a recommendation to either revoke provisional approval, deem it unattainable (Inspector-in-Charge does not think a firm is capable of learning a given task regardless of additional training), continue provisional approval, require further training, or make approval permanent, with no further training required. Provisional prequalification approval is project specific.

#### *Conditional Prequalification*

Conditional Prequalification can enable a prequalified contractor to become prequalified in an additional work classification or new contractor applicants to become prequalified based upon a superintendent's prior work experience as a superintendent for another contractor. Conditional prequalification approval is not project specific.

Provisional and Conditional Prequalification are specialized programs. Requests are evaluated on a case-by-case basis.

#### *Designated Race-Neutral Programs and Contracts*

In addition to the strategies noted above, the Department has deemed certain program areas and/or contracts to be race-neutral and no contract goals are established. In making such a determination, the Department considers a number of factors encouraging subcontracting opportunities, dollar value, project type, location, and the availability of DBEs. Work that is performed intermittently or that deviates from what is generally performed by the Department is also considered.

As an example, the Department utilizes the DCNR Recreational Trails Program as a race-neutral

component of its DBE Program. No DBE goals are established in connection with the Recreational Trails Grants. Instead, language is included with the grants encouraging the utilization of DBEs, SBEs, and other small business concerns. Any DBE or SBE utilization is tracked by grantees and reported to DCNR quarterly. DCNR in turn reports all DBE and SBE attainment to BEO every six months.

The Department's also utilizes Right-of-Way Demolition Contracts as a race-neutral component. These contracts are small, often less than \$10,000.00, and offer no subcontracting opportunities. Individual Engineering Districts are required to notify DBE or SBE demolition contractors located in the subject County and surrounding counties where the work is to be performed.

Within ECMS Districts can search for DBEs and SBEs that have the work class code for Building Demolition and thus are approved to do the work on Department projects.

No other program areas are currently race-neutral, but the Department continues to evaluate potential opportunities based upon the criteria noted above.

### **Race-Conscious**

The Department utilizes race-conscious or contract goals to attain a portion of its overall DBE participation goal. Contract goals are applied in order to meet the overall goal that is not projected to be met through the use of race-neutral means.

The Department does not establish a DBE goal on every federally funded contract as Part 26 does not require that it do so. The Department establishes goals only for those contracts that lend themselves to subcontracting opportunities. Dollar value, project type, location, and the availability of DBEs to perform specific services are considered in setting an appropriate DBE goal on a given project, consistent with the Department's approved DBE goal-setting methodology. The Department shall review subrecipient contracts to determine if a DBE goal is appropriate. Upon determination that a contract DBE goal is appropriate, the Department shall develop the contract goal on behalf of the subrecipient.

The Department expresses its contract goals as a percentage of the total dollar amount of a DOT-assisted contract. The Department does not permit the use of rounding in determining DBE contract goal attainment.

## **Section 26.53 DBE Good Faith Effort Procedures**

For all DOT-assisted projects in any bureau of the Department, the obligation of the apparent low bidder is to make a good faith effort to meet the DBE goal. The low bidder must demonstrate that it has done so either by meeting the DBE contract goal or documenting good faith efforts taken in its effort to meet the goal. See **Appendix B, Good Faith Efforts – Approval Process** for more information.

The Department will ensure that all information is complete, consistent, and adequately demonstrates the low bidder's good faith effort before the contract is awarded.

The Department treats bidders' compliance with good faith effort requirements as a matter of responsiveness that requires serious consideration under Part 26. Each proposal for which a contract goal has been established requires the low bidder to submit the following information within five calendar days after the bid opening, using Form EO-380, Form EO-380PT, Form EO-385, or ECMS input to the appropriate contact as noted in contracting documents or at the pre-proposal/pre-construction conferences.

- Names and contact persons for DBE firms that will participate in the contract.
- A description or list of work items that each DBE will perform. To count toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract.
- Dollar amount of each DBE's participation.
- Written or electronic signature of a commitment to use a DBE subcontractor whose participation is being used to meet a contract goal.
- Written or electronic signature confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment.
- If the contract goal is not met, evidence of good faith efforts that meet the standards set forth in Part 26, Appendix A of the CFR. The documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract.

### **Tips when soliciting DBEs**

1. Send written emailed solicitations/requests to certified DBE firms (document!).
2. Be sure to solicit DBE firms that are actually able to perform required work tasks.
3. Allow DBE firms adequate time to respond.
4. Identified sufficient DBE work to meet the goal; if not, try again!
5. Follow-up with DBEs as needed.
6. Negotiate in good faith. Price alone is not sufficient reason to reject a DBE firm.

If the contract goal is not met, the bidder's good faith efforts are reviewed by the Department and may be approved or disapproved. If disapproved, the bidder may seek administrative reconsideration of the disapproval, which is conducted by persons other than those involved in the initial determination.

If a prime intends to terminate a DBE subcontractor, the prime must request approval from the Department prior to termination. Additionally, the prime must provide the DBE firm notice in writing that it intends to terminate the DBE's contract and state the reason for termination. DBE firms are to be given a minimum of five calendar days from receipt of that notice to respond, agree or disagree with the prime's intention, including reasons for disagreement.

If a DBE contractor is removed from a project or fails to complete its work on a project for any reason, the prime contractor is required to make a good faith effort to find another DBE subcontractor to replace the original DBE and perform an equivalent amount of work. Primes must have a minimum of seven calendar days to provide their good faith effort documentation or identify

substitute DBE firms. At the request of the prime, contracting entities may be afforded additional time if deemed appropriate by the Department. The prime may also submit the information early, before the seven-day deadline. Per Management Directive 215.9, A contractor may be placed in a Contractor Responsibility Program for several reasons including: Unsatisfactory or deficient Performance or failure to carry out or satisfactorily perform all requirements, including compliance with all plans, specifications, service level agreements, or terms and conditions of a Commonwealth Contract.

- Bureau of Design and Delivery, Consultant Agreements – see Publications 93 and 740 (local projects) for more information on good faith effort requirements.
- Bureau of Design and Delivery, Highway Construction – see Publications 2 and 408 for more information.
- Bureau of Aviation – see Publication 405 for more information.
- Bureau of Public Transportation – see Form PT-27.

### Section 26.55 Counting DBE Participation

The Department counts DBE participation toward overall and contract goals as described in Part 26, Section 26.55. The Department monitors its projects to ensure that DBEs are performing a commercially useful function (CUF). The results of the CUF evaluation are reported using Form EO-354 – DBE Commercially Useful Function Report.

- Bureau of Design and Delivery, Consultant Agreements - see Publication 93 for more information on DBE Certification requirements for counting a firm’s work towards DBE goals and for monitoring requirements, including CUF requirements.
- Bureau of Design and Delivery, Highway Construction - see Publications 2 and 408 for more information, along with the DSP7 (**Appendix A**).
- Bureau of Aviation – see Forms AV-27 and EO-354AV for more information.
- Bureau of Public Transportation - see Forms PT-27 and EO-354PT.

The Bureaus of Planning and Research, and Office Services, Center for Program Development and PA DCNR each have their own specific contract attachments that specify requirements for counting DBE work, including CUF analyses, that are based on the DSP7 requirements (**Appendix A**).

### More GFE Guidance

Good faith efforts mean a bidder's (both consultant and contractor) efforts to achieve PennDOT's DBE contract goal as required by 49 CFR Part 26. Such efforts must be, by their scope, intensity, and appropriateness to the objective, reasonably be expected to fulfill the program requirement. Efforts include both race-conscious (i.e., a DBE goal has been established) and race-neutral (i.e., the market "self-utilizes" DBE firms due to their abilities) means.

A bidder must FIRST use good faith efforts to obtain adequate DBE participation in a federally funded project whether or not a goal has been established. When there is a DBE goal established, every effort must be made to ensure sufficient DBE participation to meet the goal.

If for some reason this is not possible, the bidder must document the efforts made and why they were not successful. The following information is required to document DBE participation:

- Names and addresses of participating DBE firms
- Description of work each participating DBE will perform, including dollar amounts
- Confirmation of the DBE firm certification in Pennsylvania
- Written documentation of the bidder's COMMITMENT to use the reported DBEs and written CONFIRMATION from each DBE firm.

When evaluating good faith efforts there is no quantitative process, the evaluation is based on the reviewer's judgement and must be based on facts specific to the procurement. Good faith effort reviews must be well-reasoned, thorough, and well documented. The review must consider the evidence provided by the bidder that they properly solicited qualified DBE firms, including reaching out to PennDOT and the DBE Supportive Services for assistance, and gave them adequate time to consider the solicitation. The bidder's documentation of good faith efforts must demonstrate that they negotiated in good faith and did not dismiss a DBE simply because the bidder could self-perform the work or because another firm (or self-performance) would be less expensive. The bidder must document that they provided assistance, as needed, to the DBE with bonding or other items required on construction contracts.

Additional information and guidance on good faith efforts is available at the following U.S. Department of Transportation links:

- <https://www.transportation.gov/sites/dot.gov/files/docs/mission/civil-rights/civil-rights-learning-center/281956/session-12gfe-crsymposium-2017-final.pdf>
- <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/final-rule-section-26-53>
- <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/appendix-a-to-part-26-guidance-concerning-good-faith-efforts>

## SUBPART D – CERTIFICATION STANDARDS

### Sections 26.61 – 26.73 Certification Standards

As a member of the PA UCP, the Department uses the certification standards of Part 26, Subpart D, to determine the eligibility of firms to participate as DBEs in DOT-assisted contracts.

Additionally, the Department utilizes 49 CFR Part 23, Subpart C, to determine the eligibility of airport concessionaries to participate as Airport Concessionaire DBEs (ACDBE) in DOT- assisted contracts. To be certified as a DBE, a firm must meet all certification eligibility standards. The firm seeking certification has the burden of proving by a preponderance of the evidence that it meets the requirements concerning group membership or individual disadvantage, business size, ownership, and control. The Department will make certification decisions based on all the facts in the record as required by Parts 26 and 23.

For detailed information on applying for certification, the certification process, and certification standards, firms may contact Department at either of the following addresses or they may contact any certifying participant in the PA UCP by visiting [www.paucp.com](http://www.paucp.com). This website and the Department’s main website are both ADA-compliant.

Pennsylvania Dept. of Transportation BEO DBE/Title VI Division Commonwealth Keystone Building 5 <sup>th</sup> Floor, 400 North Street Harrisburg, PA 17120 717-787-5891 <a href="mailto:penndottucpinfo@pa.gov">penndottucpinfo@pa.gov</a>	or	Pennsylvania Dept. of Transportation BEO DBE Certification P.O. Box 3251 Harrisburg, PA, 17105-3251
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The Department follows an established procedure to ensure compliance with the certification standards of Part 26, Subpart D when processing initial certification requests. DBE firms certified to perform certain types of work (under certain NAICS codes) may request to become certified in additional areas of work. ***This section of Publication 404 applies to 49 CFR 26 Sections 26.61 through 26.73 with additional specifics for the following sections.***

### Section 26.65 Business Size Standards

To qualify for certification as a DBE, a firm must be an existing small business, as defined by federal Small Business Administration (SBA) business size standards found in 13 CFR Part 121 and have had average annual gross receipts (as defined by SBA regulations in 13 CFR 121.402) for the firm’s three previous fiscal years less than the amount specified in Part 26, Section 26.65(b) and (c).

Note that even if a firm meets the SBA size requirements, the firm will not be eligible for the program if it exceeds the DBE program size cap of \$26.29 million (average annual gross receipts over three fiscal years); per Part 26, Section 26.65(b).

The US DOT reviews and adjusts the above based on Department of Commerce price deflators for purchases by State and local governments.

**Section 26.67 Social and Economic Disadvantage Standards**

Citizens of the United States and lawfully admitted permanent residents who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA are presumed to be socially and economically disadvantaged individuals. Applicants in one of these groups must submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged. In addition, each firm owner whose ownership and control are relied upon for DBE certification must certify that he or she has a personal net worth that does not exceed \$1.32 million.

An individual's presumption of disadvantage can be rebutted in one of two ways: (1) Having a net worth in excess of \$1.32 million. (2) Demonstrating that the individual has the capacity to accumulate significant wealth. If the presumption is rebutted, that individual's ownership interest cannot be counted toward meeting requirements for DBE certification. If the second method of rebuttal is used, a proceeding is required to present evidence in support of the rebuttal.

Individuals that are not presumed to be disadvantaged and those whose presumed disadvantage has been rebutted may apply for an individual determination of social and economic disadvantage. The individual determination shall include a proceeding where the firm has the burden of proving that the individuals who own and control it are socially and economically disadvantaged. Appendix E of Part 26 of the CFR will be used in making these determinations.

**Section 26.73 Other Standards**

When making certification decisions, the Department may consider whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or the requirements of the DBE program. In all other situations, the eligibility of the firm for certification will be evaluated only in present circumstances.

## SUBPART E – CERTIFICATION PROCEDURES

### Section 26.81 Unified Certification Program

The Department is a member of the PA UCP and abides by the Cooperative Memorandum of Agreement, as amended, having established a Unified DBE Certification Program between and among DOT recipients in the Commonwealth of Pennsylvania. The PA UCP received approval of the agreement from DOT on January 20, 2004. The PA UCP meets all of the requirements of Part 26, Section 26.81.

Certifying participants in the PA UCP are Allegheny County Department of MBE/WBE/DBE, the Philadelphia International Airport's DBE Program Office, the Port Authority of Allegheny County, the Southeastern Pennsylvania Transportation Authority, and PennDOT.

The PA UCP uses its certification website (<https://paucp.dbesystem.com/>) to ensure uniformity of practice in the implementation of the DBE certification process. The Department amends its Procedures Manual as corrective amendments to Parts 26 and 23 are issued that impact DBE certification standards and procedures.

The PA UCP utilizes the DOT's [Uniform Certification Application](#) and is structured so that a DBE applicant can submit its application to any certifying participant. However, upon receipt by a given certifying participant, the application will either be handled internally or forwarded to another certifying participant where a backlog or geographic considerations make it more cost-efficient for another certifying participant to evaluate the application. The certifying participants make all certification decisions on behalf of all DOT recipients in the Commonwealth. Once a DBE applicant has been certified by any certifying participant, all other DOT recipients within the Commonwealth recognize the certification. This comports with the "one-stop shopping" component of Part 26, Section 26.81, and ensures that a prospective DBE applicant will need to apply only once for a DBE certification that will be honored by all recipients. If a certifying participant or other Pennsylvania recipient/signatory is unwilling to abide by a decision made by a PA UCP certifying participant, then the UCP Oversight Committee (OC) will be responsible for establishing remedial procedures to resolve the problem. If the dispute cannot be resolved by the OC, the matter may be referred to a designated executive/official within the certifying participants' organization for additional guidance. Should the OC or the designated official(s)/executive(s) require further guidance or reach an impasse, the OC may bring the matter to the attention of DOT for intervention and possible conciliation.

Out-of-state firms seeking DBE certification in Pennsylvania must first be DBE-certified in their home state. The PA UCP has not formed regional reciprocity with other states at this time. See Section 26.85.

### Section 26.83 Procedures for Certification Decisions

The PA UCP reviewed the eligibility of DBEs that were certified under former Part 23 to ensure that each firm met the standards of Subparts D and E of Part 26.

DBEs that are found to be eligible in accordance with Part 26 are considered certified until they are removed from the program under procedures outlined under Part 26, Section 26.87.



Firms seeking initial certification as a DBE may do so through the <https://paucp.dbesystem.com/> website or by contacting any of the certifying participants directly, as noted on the website.

A DBE is required to submit a Notice of Change Affidavit for circumstances that may affect its ability to meet size, disadvantaged status, ownership, or control criteria of Part 26 or when there are any material changes to the information provided with DBE's application for certification.

A DBE is required to submit an annual Affidavit of No Change affirming that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control criteria of Part 26 or of any material changed in the information provided with DBE's application for certification. Approximately one month prior to the firm's certification anniversary date, but no later than the anniversary date of the firm's certification (per Part 26, Section 26.83(j)), the DBE firm must complete and submit an Affidavit of No Change but no later than the anniversary date of the firm's certification.

A DBE may be required to provide additional information to determine continued eligibility for the program. Additionally, the Department reserves the right to revisit or investigate a firm if there is a reason to suspect that the firm is no longer eligible to participate as a DBE.

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## *DBE Certification & Renewal Requirements*

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*\*Not an all-inclusive list – refer to the [Uniform Certification Application](#) for full details regarding a **NEW DBE application**\**

- Firm contact name, title and email address
- Firm legal name
- Firm primary phone number
- Firm website, street and mailing addresses
- Business description, services, and NAICS Code(s), if known
- Date firm established and legal structure
- Date and how each person became a firm owner
- Employee list, indicating start dates, titles, and status (full, part, seasonal)
- Gross receipts for past three years
- Relationships with other businesses
- Identify majority owner, title, full contact and demographic information
  - Years with the firm and function
  - Investment interest and how acquired
  - Proof of U.S. citizenship
  - Familial relationship to any employees
  - Relationship/interest in other firms
  - Personal net worth
- Identify officers and board of directors
  - Names, titles, dates of appointment, demographics
  - Interest in other firms
- Full inventory (equipment, vehicles, office/storage spaces)
- Management/payroll support firm(s), if any
- Financial/banking information (including loans, asset transfers)
- Licenses/permits held by any owner or employee
- Largest contracts, completed and ongoing

Firms **already registered as a DBE in another state**, must use the Interstate Certification Affidavit for certification in Pennsylvania: <https://www.penndot.pa.gov/about-us/EqualEmployment/Documents/PA%20UCP%20Interstate%20Certification%20Affidavit.pdf>

Firms already registered in Pennsylvania, either with the NEW DBE application or Interstate Certification Affidavit, must submit annually either an **Annual Affidavit of No Change** (<https://www.penndot.pa.gov/about-us/EqualEmployment/Documents/DBE%20No%20Change%20Annual%20Affidavit%20Form.pdf>) or a **PA UCP Notice of Change Affidavit** (<https://www.penndot.pa.gov/about-us/EqualEmployment/Documents/PA%20UCP%20Notice%20of%20Change%20Affidavit.pdf>).

Complete information is contained on PennDOT's UCP Webpage (<https://www.penndot.pa.gov/about-us/EqualEmployment/Pages/UnitedCertificationProgram.aspx>).

**Section 26.85 Interstate Certification**

A firm certified as a DBE in its home state may apply for certification in Pennsylvania. The Department may, at its discretion, accept the home state's certification and certify the firm without further procedure. To obtain certification in this manner, the firm shall provide the Department with a copy of its certification notice from its home state and the Department will confirm the validity of the certification from the home state.

If the Department chooses not to accept the home state's certification, the firm shall provide the information required by Part 26, Section 26.85(c)(1), to the Department, which shall make a determination of certification as required by Part 26, Section 26.85.

**Section 26.86 Denials of Initial Requests for Certification**

In the event of a denial of certification or an ineligibility determination, a firm may reapply for certification six months from the date the denial was issued. Firms are advised of the right to receive an informal administrative hearing/appeal before the PA UCP's Certification Appeals Committee (Committee) or to appeal a decision directly to the DOT.

**Section 26.87 Removal of Eligibility**

In the event of removal of eligibility of a DBE, the procedures outlined in Part 26 are followed. Prior to removing eligibility, the DBE is notified of its right to a hearing with PA UCP DBE Certification Appeals Committee, or to respond to the initial notification in writing. A DBE has 30 days to respond to the initial notification.

If a firm does not engage in the hearing or response process, or it is determined through those processes that a firm is no longer eligible to be a DBE, the firm is provided with a Final Removal Notice. When a DBE's eligibility is removed, the firm is advised of its right to appeal the decision to the DOT; appeals must be submitted within 90 days. The firm may reapply for certification one year from the date removal of eligibility was issued.

To ensure separation of functions in a removal of eligibility proceeding, the Committee confirms that the initial decision-maker has not participated in any way in the earlier removal decision against the firm or the decision to initiate such proceeding.

**Section 26.88 Summary Suspension of Certification**

The Department shall immediately suspend a DBE's certification if an owner whose ownership and control of the firm are necessary to the firm's certification dies or is incarcerated. The PA UCP may immediately suspend a DBE's certification where there is adequate evidence that there has been a material change in circumstances that may affect the firm's DBE eligibility or when the firm fails to notify the Department of a material change in circumstances or fails to file an annual Affidavit of No Change.

The suspension notice will be drafted and promptly communicated to the firm as defined in Part 26, Section 26.88. The suspension takes effect when the DBE receives or is deemed to have received the notice. Following receipt of a notice suspension, a DBE that believes it is no longer eligible for the program may voluntarily withdraw from the program. If the DBE believes that its

eligibility should be reinstated, it must provide to the Department information demonstrating its eligibility. The Department, within 30 calendar days of receiving this information, must either lift the suspension and reinstate the DBE's certification or commence a hearing under Section 26.87.

### **Section 26.89 Certification Appeals to US DOT**

Any firm denied certification or whose eligibility has been removed may appeal to DOT. Such appeals are sent to:

U.S. Department of Transportation Departmental Office of Civil Rights

External Policy & Program Development Division

1200 New Jersey Ave, SE – Room W76-101

Washington, DC 20590

Phone: 202-366-4648 (dial 7-1-1 for telecommunications relay services)

Fax: 202-366-5575

### **Section 26.91 US DOT Certification Appeals Decisions**

Certification appeal decisions affecting the eligibility of DBEs are promptly implemented as required by Part 26 of the CFR.

If DOT determines the Department erroneously certified a firm as a DBE, the firm's DBE status will be removed, effective on the date of receipt of DOT's decision.

If DOT determines the Department erroneously failed to find reasonable cause to remove a firm's eligibility, the Department will expeditiously begin proceedings to determine whether the firm's eligibility should be removed.

If DOT determines that the Department erroneously declined to certify or removed the eligibility of a firm, the Department will certify the firm, effective on the date of receipt of DOT's decision.

If DOT determines that the Department erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, the Department will take the corrective action stipulated by DOT.

If DOT affirms the Department's determination, no further action will be taken.

All participants in the Department's DBE program will cooperate with compliance reviews, investigations, and other actions triggered by DOT.

## SUBPART F - COMPLIANCE AND ENFORCEMENT

### Section 26.101 Compliance Procedures for Recipients

If the Department or any of its subrecipients fails to comply with requirements of Part 26, then the Department or the subrecipient may be subject to formal enforcement action which could result in the suspension or termination of federal funds or refusal to approve projects, grants, or contracts.

### Sections 26.103 & 26.105 Enforcement Actions

Non-compliance complaints: Any person who believes that the Department or a subrecipient has failed to comply with its obligations under this part may file a written complaint with the concerned operating administration's Office of Civil Rights. The complainant must do so no later than 180 calendar days after the date of the alleged violation or the date on which the complainant learned of a continuing course of conduct in violation of this part. In response to the written request, the Office of Civil Rights may extend the time for filing in the interest of justice, specifying in writing the reason for so doing. The Office of Civil Rights will protect the confidentiality of the complainant's identity as provided in Part 26, Section 26.109(b).

Complaints under Part 26 are limited to allegations of violation of the provisions of Part 26.

Anyone wishing to file a complaint with the Federal Aviation Administration (FAA) may address it to:

Office of Civil Rights  
Federal Aviation Administration  
U.S. Department of Transportation  
800 Independence Avenue  
Washington, DC 20591

Anyone wishing to file a complaint with the Federal Highway Administration (FHWA) may address it to:

Office of Civil Rights  
Federal Highway Administration  
Pennsylvania Division Office  
228 Walnut Street  
Harrisburg, PA 17101-1720

Anyone wishing to file a complaint with the Federal Transit Administration (FTA) may address it to:

Office of Civil Rights  
Federal Transit Administration  
U.S. Department of Transportation

1200 New Jersey Avenue, SE  
Washington, DC 20590

If the Department has reason to believe that a subrecipient, contractor, consultant, supplier, or lessee on a DOT-assisted contract is not operating in compliance with the terms, conditions or requirements of the DBE program and the Department's special provisions, the Department will commence an investigation by contacting the appropriate engineering district. Where necessary, the Department will send a contract compliance specialist to the job site for a preliminary assessment and report.

In the event that the report and the supporting evidence suggest that the contractor is not in compliance, the Department will issue a written "Show Cause Notice" to the party or parties. This Notice will contain a list of the specific infractions. The contractor will be required to submit a Corrective Action Plan and/or schedule a compliance conference with the Department to negotiate the Plan within 15 calendar days of receipt of the "Show Cause Notice". The Notice shall also state that failure to make corrections within the prescribed timeframe may result in the sanctions (i.e., withholding of all or part of payments; potential suspension of the contract and disqualification of the vendor from future bidding on the Department's federal-aid projects).

If the contractor fails to respond to the notice and continues to be in non-compliance, the Department, after consultation with its Office of Chief Counsel, will initiate the most appropriate sanctions contained in the Notice and take all necessary and reasonable actions under its authority to ensure that the DBE program requirements are enforced. The Department will send a copy of its written enforcement actions to the impacted operating administration (OA) of the DOT for consideration of additional sanctions (action under suspension and debarment or, if necessary, referral to the Department of Justice or to the DOT's Inspector General).

#### **Section 26.107 Enforcement Actions for Firms**

DOT may initiate suspension or debarment proceedings against any firm that does not meet the DBE eligibility criteria and that attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent or deceitful statements or representations or circumstances indicating a serious lack of business integrity or honesty. Similarly, DOT may initiate suspension or debarment proceedings against any firm that in order to meet DBE contract goals or other DBE program requirements, use or attempts to use another firm that does not meet the DBE eligibility criteria on the basis of false, fraudulent or deceitful statements or representations.

DOT may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action. DOT may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement related to participation of a DBE in any DOT-assisted program or who otherwise violates applicable Federal statutes.

Additionally, if the Department has reason to believe that a contractor, consultant, supplier, or lessee on a DOT-assisted contract is not operating in compliance with the terms, conditions or requirements of the DBE program and the Department's special provisions, the Department will refer the matter to the Office of Chief Counsel to determine the appropriate course of action which

may include an investigation and a referral to the Office of Inspector General for the Commonwealth.

**Section 26.109 Information, Confidentiality, Cooperation**

The Department safeguards from disclosure third-party information, including financial information, consistent with federal, state, and local law. The PA Right to Know Law (RTKL), 65 P.S. Sections 67.101-67.3104 contains an exception for trade secrets. It also prohibits disclosure where such disclosure is barred by state or federal law.

Notwithstanding any contrary provisions of state or local law, the Department will not release personal financial information submitted in response to the personal net worth requirement for DBE certification to a third party (other than DOT) without the written consent of the applicant.

The Department's contracts and agreements with subrecipients contain confidentiality clauses binding the subrecipient to confidentiality requirements.

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### URL Summary List

The following hyperlinks appear in this publication; full URLs are provided below.

Linked Text	URL
49 CFR Part 23, as amended	<a href="http://www.ecfr.gov/cgi-bin/text-idx?SID=ae43b2b2e9cf3b7bf59563b68f74e401&amp;node=pt49.1.23&amp;rgn=d_iv5">http://www.ecfr.gov/cgi-bin/text-idx?SID=ae43b2b2e9cf3b7bf59563b68f74e401&amp;node=pt49.1.23&amp;rgn=d_iv5</a>
49 CFR Part 26, as amended	<a href="http://www.ecfr.gov/cgi-bin/text-idx?SID=df232feeac1a39e6f07b918bfe3e7c19&amp;node=pt49.1.26&amp;rgn=di_v5">http://www.ecfr.gov/cgi-bin/text-idx?SID=df232feeac1a39e6f07b918bfe3e7c19&amp;node=pt49.1.26&amp;rgn=di_v5</a>
62 Pa.C.S. § 2108	<a href="http://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HT_M&amp;ttl=62&amp;div=0&amp;chpt=21">http://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HT_M&amp;ttl=62&amp;div=0&amp;chpt=21</a>
DBE Policy Statement	<a href="https://www.penndot.pa.gov/about-us/EqualEmployment/Documents/DBE%20Policy%20Statement_2020.docx.pdf">https://www.penndot.pa.gov/about-us/EqualEmployment/Documents/DBE%20Policy%20Statement_2020.docx.pdf</a>
PennDOT ECMS	<a href="https://www.ecms.penndot.gov/">https://www.ecms.penndot.gov/</a>
PennDOT eGrants Site	<a href="https://www.penndot.pa.gov/Doing-Business/Aviation/AviationGrants/Pages/default.aspx">https://www.penndot.pa.gov/Doing-Business/Aviation/AviationGrants/Pages/default.aspx</a>
Pennsylvania eMarketplace	<a href="http://www.emarketplace.state.pa.us/">http://www.emarketplace.state.pa.us/</a>
BEO Website (DBE goals and methodologies links)	<a href="https://www.penndot.pa.gov/about-us/EqualEmployment/Pages/default.aspx">https://www.penndot.pa.gov/about-us/EqualEmployment/Pages/default.aspx</a>
PennDOT DBE Supportive Services Center	<a href="https://penndbe.prorankllc.com/">https://penndbe.prorankllc.com/</a>
BPR Research Program Management System (RPMS) database	<a href="https://www.penndot.pa.gov/ProjectAndPrograms/Planning/Research-And-Implementation/Pages/default.aspx">https://www.penndot.pa.gov/ProjectAndPrograms/Planning/Research-And-Implementation/Pages/default.aspx</a>
PennDOT SBE webpage	<a href="https://www.penndot.pa.gov/about-us/EqualEmployment/Pages/Small-Business-Enterprise-(SBE).aspx">https://www.penndot.pa.gov/about-us/EqualEmployment/Pages/Small-Business-Enterprise-(SBE).aspx</a>
DCED Small Business Assistance website	<a href="https://dced.pa.gov/business-assistance/small-business-assistance/">https://dced.pa.gov/business-assistance/small-business-assistance/</a>

Linked Text	URL
DCED “Entrepreneur’s Guide”	<a href="https://dced.pa.gov/download/entrepreneurs-guide/?wpdmdl=56163">https://dced.pa.gov/download/entrepreneurs-guide/?wpdmdl=56163</a>
Form AV-27	<a href="http://www.dot.state.pa.us/public/pubsforms/Forms/AV-27.pdf">http://www.dot.state.pa.us/public/pubsforms/Forms/AV-27.pdf</a>
Form CS-4339R	<a href="https://www.dot.state.pa.us/public/PubsForms/Forms/CS-4339R.pdf">https://www.dot.state.pa.us/public/PubsForms/Forms/CS-4339R.pdf</a>
Form EO-354	<a href="http://www.dot.state.pa.us/public/PubsForms/Forms/EO-354.pdf">http://www.dot.state.pa.us/public/PubsForms/Forms/EO-354.pdf</a>
Form EO-354AV	<a href="http://www.dot.state.pa.us/public/PubsForms/Forms/EO-354AV.pdf">http://www.dot.state.pa.us/public/PubsForms/Forms/EO-354AV.pdf</a>
Form EO-354BRFPW	<a href="http://www.dot.state.pa.us/public/PubsForms/Forms/EO-354BRFPW.pdf">http://www.dot.state.pa.us/public/PubsForms/Forms/EO-354BRFPW.pdf</a>
Form EO-354OS	<a href="http://www.dot.state.pa.us/public/PubsForms/Forms/EO-354OS.pdf">http://www.dot.state.pa.us/public/PubsForms/Forms/EO-354OS.pdf</a>
Form EO-354PT	<a href="http://www.dot.state.pa.us/public/PubsForms/Forms/EO-354PT.pdf">http://www.dot.state.pa.us/public/PubsForms/Forms/EO-354PT.pdf</a>
Form EO-355	<a href="http://www.dot.state.pa.us/public/PubsForms/Forms/EO-355.pdf">http://www.dot.state.pa.us/public/PubsForms/Forms/EO-355.pdf</a>
Form EO-380	<a href="http://www.dot.state.pa.us/public/PubsForms/Forms/EO-380.pdf">http://www.dot.state.pa.us/public/PubsForms/Forms/EO-380.pdf</a>
Form EO-380AV	<a href="http://www.dot.state.pa.us/public/PubsForms/Forms/EO-380AV.pdf">http://www.dot.state.pa.us/public/PubsForms/Forms/EO-380AV.pdf</a>
Form EO-380PT	<a href="http://www.dot.state.pa.us/public/PubsForms/Forms/EO-380PT.pdf">http://www.dot.state.pa.us/public/PubsForms/Forms/EO-380PT.pdf</a>
Form EO-385	<a href="http://www.dot.state.pa.us/public/PubsForms/Forms/EO-385.pdf">http://www.dot.state.pa.us/public/PubsForms/Forms/EO-385.pdf</a>
Form EO-401	<a href="http://www.dot.state.pa.us/public/PubsForms/Forms/EO-401.xls">http://www.dot.state.pa.us/public/PubsForms/Forms/EO-401.xls</a>
Form EO-402	<a href="http://www.dot.state.pa.us/public/PubsForms/Forms/EO-402.pdf">http://www.dot.state.pa.us/public/PubsForms/Forms/EO-402.pdf</a>
Form EO-402LP	<a href="http://www.dot.state.pa.us/public/PubsForms/Forms/EO-402LP.xlsx">http://www.dot.state.pa.us/public/PubsForms/Forms/EO-402LP.xlsx</a>
Form PT-27	<a href="http://www.dot.state.pa.us/public/PubsForms/Forms/PT-27.pdf">http://www.dot.state.pa.us/public/PubsForms/Forms/PT-27.pdf</a>
All publicly accessible PennDOT Forms	<a href="https://www.penndot.pa.gov/ContactUs/layouts/pa.penndot.formsandpubs/formsandpubs.aspx">https://www.penndot.pa.gov/ContactUs/layouts/pa.penndot.formsandpubs/formsandpubs.aspx</a> (Filter by “Document Type = Forms” and “Topic = Equal Opportunity” for BEO forms)

Linked Text	URL
DCNR Recreational Trails Program (RTP) Grant Agreement (including Exhibit A: DBE & SBE Requirements)	<a href="http://elibrary.dcnr.pa.gov/PDFProvider.ashx?action=PDFStream&amp;docID=1750540&amp;chksum=&amp;revision=0&amp;docName=TrailsPRTGrantAdministrationPolicyandAppendices&amp;nativeExt=pdf&amp;PromptToSave=False&amp;Size=4233548&amp;ViewerMode=2&amp;overlay=0">http://elibrary.dcnr.pa.gov/PDFProvider.ashx?action=PDFStream&amp;docID=1750540&amp;chksum=&amp;revision=0&amp;docName=TrailsPRTGrantAdministrationPolicyandAppendices&amp;nativeExt=pdf&amp;PromptToSave=False&amp;Size=4233548&amp;ViewerMode=2&amp;overlay=0</a> (Exhibit A starts on page 19 of 42 of the pdf)
DCNR Grant Terms and Conditions	<a href="http://www.dcnr.state.pa.us/cs/groups/public/document/document/d_001_231.pdf">http://www.dcnr.state.pa.us/cs/groups/public/document/document/d_001_231.pdf</a>
Management Directive 305.8	<a href="https://www.oa.pa.gov/Policies/md/Documents/305_8.pdf">https://www.oa.pa.gov/Policies/md/Documents/305_8.pdf</a>
PA UCP	<a href="http://www.paucp.com/">http://www.paucp.com/</a>
PennDOT Bureau of Equal Opportunity	<a href="http://www.penndot.gov/about-us/EqualEmployment">http://www.penndot.gov/about-us/EqualEmployment</a>
Publication 2	<a href="http://www.dot.state.pa.us/public/pdf/BOCM_MTD_LAB/PUBLICATIONS/POM/POMcover.pdf">http://www.dot.state.pa.us/public/pdf/BOCM_MTD_LAB/PUBLICATIONS/POM/POMcover.pdf</a> <a href="http://www.dot.state.pa.us/public/PubsForms/Publications/PUB%202/PUB%202.pdf">http://www.dot.state.pa.us/public/PubsForms/Publications/PUB%202/PUB%202.pdf</a>
Publication 405	<a href="http://www.dot.state.pa.us/public/PubsForms/Publications/PUB_405.pdf">http://www.dot.state.pa.us/public/PubsForms/Publications/PUB_405.pdf</a>
Publication 408	<a href="https://www.dot.state.pa.us/public/PubsForms/Publications/Pub_408/PUB%20408.pdf">https://www.dot.state.pa.us/public/PubsForms/Publications/Pub_408/PUB%20408.pdf</a>
Publication 442	<a href="http://www.dot.state.pa.us/public/pubsforms/Publications/PUB_442.pdf">http://www.dot.state.pa.us/public/pubsforms/Publications/PUB_442.pdf</a>
Publication 448	<a href="http://www.dot.state.pa.us/public/pubsforms/Publications/Pub%20448/Pub%20448.pdf">http://www.dot.state.pa.us/public/pubsforms/Publications/Pub%20448/Pub%20448.pdf</a>
Publication 740	<a href="http://www.dot.state.pa.us/public/pubsforms/Publications/PUB%20740.pdf">http://www.dot.state.pa.us/public/pubsforms/Publications/PUB%20740.pdf</a>
Publication 93	<a href="http://www.dot.state.pa.us/public/PubsForms/Publications/PUB_93.pdf">http://www.dot.state.pa.us/public/PubsForms/Publications/PUB_93.pdf</a>
US DOT Uniform Certification Application (new DBE)	<a href="http://www.dot.gov/osdbu/disadvantaged-business-enterprise/dbe-uniform-certification-application">http://www.dot.gov/osdbu/disadvantaged-business-enterprise/dbe-uniform-certification-application</a>
US DOT Form 4630, Uniform Report of DBE Awards	<a href="https://omb.report/icr/202112-2105-001/doc/116981900">https://omb.report/icr/202112-2105-001/doc/116981900</a>

## **Appendix A: DBE Requirements (DSP7)**

Designated Special Provisions available in Appendix C of Publication 408  
([http://www.dot.state.pa.us/public/PubsForms/Publications/Pub\\_408/PUB%20408.pdf](http://www.dot.state.pa.us/public/PubsForms/Publications/Pub_408/PUB%20408.pdf) – select latest version)

**\*\*Note:** each Bureau/Agency may have their own slightly modified language in their contracts. Hard copy of the DSP7 provided herein for example language only.

**APPENDIX C  
DESIGNATED SPECIAL PROVISION 7 (DSP7)**

**DISADVANTAGED BUSINESS ENTERPRISE (DBE) REQUIREMENTS  
For Federally-Funded Construction Projects**

NOTE: Requires special provision for participation DBE goal percentage.

**I. DBE GOAL—**

The Department has established, in connection with this contract, a DBE goal as specified in the proposal of the original contract amount for the utilization of firms owned and controlled by socially and economically disadvantaged individuals certified as DBEs. If the DBE goal is zero, make an effort to identify and use DBEs. This DBE goal remains in effect for the life of the project.

Include the following provisions (paragraphs a through d) in every subcontract, so that such provisions will be binding not only upon the prime contractor but also upon each subcontractor, supplier, service provider or consultant.

- (a) **Policy for Federally-Funded Projects.** It is the policy of the U.S. Department of Transportation (DOT) and the Department that DBEs, as defined in 49 CFR Part 26, as amended, (Part 26) and this specification, be given the opportunity to participate in the performance of contracts financed in whole or in part with Federal funds under this contract. Consequently, the DBE requirements of Part 26, as amended, apply to this contract.
- (b) **DBE Obligation.** Take all necessary and reasonable steps to ensure that all DBEs have the opportunity to compete for and perform contracts. Do not discriminate on the basis of race, color, national origin, or sex in the award and performance of PennDOT and DOT-assisted contracts.
- (c) **Failure to Comply with DBE Requirements.** Failure to carry out the requirements as specified constitutes a breach of contract and may result in termination of the contract, being barred from bidding on Department contracts for up to three (3) years, withholding progress payments, assessing sanctions, assessing liquidated damages, or any other remedy that the Department deems appropriate. Failure to comply with DBE requirements may include, but is not limited to, failure to submit DBE Minority Participation and Commitment within the time period specified, failure to exert a reasonable Good Faith Effort to meet the established DBE goal, or failure to realize the approved DBE participation level set forth may result in the bidder being declared ineligible for the contract.
- (d) **Small Business Enterprise (SBE) Participation.** Recruitment and utilization of certified SBEs is in addition to all other equal opportunity requirements of the contract. There is no SBE goal.

**II. DEFINITIONS—**

The following definitions apply for terms used in this specification:

- (a) **Disadvantaged Business Enterprise (DBE).** A for-profit small business concern:
  1. An entity certified by the Pennsylvania Unified Certification Program (PAUCP) as listed on [www.paucp.com](http://www.paucp.com).
  2. That meets the ownership and control requirements of the DBE certification program.
  3. That meets the Personal Net Worth requirements of the DBE certification program.
- (b) **Small Business Enterprise (SBE).** A for-profit small business concern:
  1. An entity certified by the PennDOT as listed on [www.dotsbe.pa.gov](http://www.dotsbe.pa.gov).
  2. That meets the ownership and control requirements of the Small Business Element (SBE) certification

- program.
3. That meets the Personal Net Worth requirements of the SBE certification program.
- (c) **Commercially Useful Function.** A DBE performs a Commercially Useful Function (CUF) when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a CUF, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, installing (where applicable), and paying for the material itself.
  - (d) **Interdisciplinary Review Team (IRT).** A team of three representing both the Bureau of Equal Opportunity and the Bureau of Project Delivery (Contract Management Section) that performs the initial review of the Good Faith Effort documentation and makes the recommendation to the Director.
  - (e) **Committee.** The Good Faith Effort Review Committee.
  - (f) **Days.** Calendar days. In computing any period of time described in this specification, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or state holiday, the period extends to the next day that is not a Saturday, Sunday, or state holiday. Similarly, in circumstances where the PennDOT offices are closed for all or part of the last day, the period extends to the next day on which the PennDOT offices are open.
  - (g) **Director.** Director, Bureau of Equal Opportunity.
  - (h) **DBE Participation.** Minority Participation and Commitment that is accessed by the Department's ECMS website ([www.dot14.state.pa.us/ECMS](http://www.dot14.state.pa.us/ECMS)).
  - (i) **Revised DBE Participation.** Minority Participation and Commitment that is accessed by the Department's ECMS website which includes new DBE firm(s) as well as those not affected by the revision.
  - (j) **Supplier.** A manufacturer, regular dealer, or transaction expeditor/broker.
    1. **Manufacturer.** A DBE/SBE 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.
    2. **Regular Dealer.** A DBE/SBE 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. Whether a DBE/SBE firm meets the criteria for being treated as a regular dealer is a contract-by-contract determination to be made by the Department.
    3. **Transaction Expeditor/Broker.** A DBE/SBE packager, broker, manufacturers' representatives, or other persons who arrange or expedite transactions and who arrange for material drop-shipments.
  - (k) **Service Provider.** A DBE/SBE that performs work that does not have a prequalification requirement on a project.
  - (l) **Shortfall.** The difference between the dollar amount on the approved DBE commitment in ECMS and the amount of payments to the approved DBE entities as listed in ECMS.

**III. COUNTING PARTICIPATION—****COUNTING DBE PARTICIPATION TOWARD THE DBE GOAL**

Utilization of certified DBEs is in addition to all other equal opportunity requirements of the contract.

Count DBE participation toward meeting the DBE goal for federal projects as follows: If a firm is a certified DBE contractor or subcontractor at the time that submission of DBE Minority Participation and Commitment documents are due, the total dollar value of the contract awarded to the certified DBE is counted toward the applicable DBE goal as provided below. Any services to be performed by a DBE are required to be readily identifiable to the project.

**(a) Construction.**

1. **Prime Contractor.** The Department requires that all prime contractors including DBE prime contractors perform at least 50% of the work on a Department project. A DBE prime contractor will receive credit for all work performed with its own forces. The Department strongly encourages DBE prime contractors to make additional outreach efforts to solicit DBEs to perform subcontracting work on the project.
2. **Subcontractor.** When a DBE participates in a contract directly as a subcontractor or as a second-tier or lower-tier subcontractor, count only the value of the work actually performed by the DBE.

Count the entire amount of that portion of a construction contract that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the subcontract, including supplies purchased or equipment leased by the DBE.

When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count.

Count expenditures to a DBE contractor only if the DBE is performing a CUF on that contract.

Count expenditures to a DBE only if the DBE is certified at the time the Subcontractor Request has been approved.

**(b) Materials and Supplies.**

1. **DBE Manufacturer.** If the materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies.
2. **DBE Regular Dealer.** If the materials or supplies are purchased from a DBE regular dealer, count 60% of the cost of the materials or supplies. There is no North American Industry Classification System (NAICS) code for regular dealer.
3. **DBE Transaction Expeditor/Broker.** If the materials or supplies are 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, provided the fees are determined 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.

- (c) **Service Providers.** Count 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 the contract, provided the fee is reasonable and not excessive as compared with fees customarily allowed for similar services.

- (d) Trucking Firms.** Count 100% of trucking costs using the following factors to determine what can be counted:
1. Count if the DBE is 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.
  2. Count if the DBE owns and operates at least one fully licensed, insured, and operational truck used on the contract.
  3. Count the total value of the transportation services the DBE provides on the contract using trucks it owns, insures, and operates using drivers it employs.
  4. The DBE may lease trucks from another DBE firm, including an owner-operator who is a certified DBE. If the DBE leases trucks from another DBE, count the total value of the transportation services the lessee DBE provides on the contract.
  5. The DBE may also lease trucks from a non-DBE firm, including an owner-operator. If the DBE leases trucks from a non-DBE firm and the DBE operates these leased trucks (with its own forces), count the total value of the transportation services the lessee non-DBE provides on the contract. If the DBE leases trucks from a non-DBE owner-operator, count only the fee or commission it paid as a result of the lease arrangement. Do not count the total value of the transportation services provided by the lessee (non-DBE owner-operator), since these services are not provided by a DBE.
  6. For purposes of this provision, a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from being used for work 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.
- (e) Specialty Items.** In cases where specialty items and DBE involvement overlap, follow the requirements specified in Section 108.01(c).

#### COUNTING SBE PARTICIPATION

- (a) Recruitment and utilization of certified SBEs is in addition to all other equal opportunity requirements of the contract.
- (b) There is no SBE goal.
- (c) Count SBE participation the same as DBE participation.

#### IV. ACTIONS REQUIRED BY THE DBE AT THE BIDDING STAGE AND PRIOR TO AWARD FOR PROJECTS WITH A DBE GOAL—

Include the applicable North American Industry Classification System (NAICS) code(s) for each type of work that the DBE firms quotes and intends to perform on the contract.

#### V. ACTIONS REQUIRED BY BIDDERS AT THE BIDDING STAGE AND PRIOR TO AWARD FOR PROJECTS WITH A DBE GOAL—

- (a) **Submission Preparation.** All bidders are obligated to obtain and to provide all applicable NAICS codes for each proposed DBE and type of work that it will perform on the contract.
- (b) **Submission Requirements.** When the DBE goal established by the Department is met or exceeded, the



bidders are required to electronically submit evidence of such commitments, by accessing the Department's ECMS website to complete and submit the DBE Minority Participation and Commitment including DBE acknowledgement by 3:00 P.M. prevailing local time within five (5) calendar days after the bid opening. The DBE Minority Participation and Commitment Detail Screen must include the applicable NAICS code(s) for each proposed DBE and type of work that it will perform on the contract. If the DBE Minority Participation and Commitment Detail Screen is not sufficient to provide all DBE NAICS information, email the remaining DBE NAICS information to [minorityparticipation@pa.gov](mailto:minorityparticipation@pa.gov) or fax the remaining DBE NAICS information to (717) 705-1504 so that it is received by the time specified below for consideration. DBE Minority Participation and Commitment Screen completed in ECMS regarding commitments to certified DBEs will become part of the contract. When the fifth (5<sup>th</sup>) calendar day after the bid opening falls on a day that the PennDOT offices are closed, submit the DBE Minority Participation and Commitment by 3:00 P.M. prevailing local time on the next business day. If assistance with the DBE submission is needed, contact the ECMS Help Desk at 855-783-8330 or at 717-783-8330. ECMS Help Desk assistance is available 24 hours a day, 7 days a week.

When the DBE goal established by the Department is not met (the Department will not round up), demonstrate a Good Faith Effort (GFE) to meet the contract DBE goal. Demonstrate that the efforts made were those that a bidder seeking to meet the DBE goal established by the Department would make, given all relevant circumstances. Email the GFE documentation to [minorityparticipation@pa.gov](mailto:minorityparticipation@pa.gov) or upload or fax to (717) 705-1504 so that it is received by the time specified above for consideration. All submissions must include, as a part of the GFE documentation, copies of each DBE and non-DBE subcontractor quote when a non-DBE subcontractor was selected over a DBE subcontractor for work on the contract due to the apparent low bidders' determination that the DBE's quote was too high or unreasonable. Also, indicate on the DBE Minority Participation and Commitment screen that the Good Faith Effort is being submitted for consideration.

Failure to electronically submit the DBE Minority Participation and Commitment Screen including DBE acknowledgement completed in ECMS or upload or email or fax any applicable GFE documentation for consideration within five (5) calendar days of the bid opening by the 3:00 P.M. deadline will result in the rejection of the bid.

**(c) Good Faith Effort Requirements.** The demonstration of GFEs is accomplished by seeking out DBE participation in the project given all relevant circumstances. The following illustrate the types of efforts that may be taken, but they are not deemed to be exclusive or exhaustive (for more guidance on GFE requirements, refer to 49 CFR Part 26 Appendix C). The Director and/or Committee will consider other factors and types of efforts that may be relevant:

- Efforts made to conduct market research to identify small business contractors and suppliers and solicit through all reasonable and available means (e.g., use of the DBE Directory, attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder should provide written notification, at least 15 calendar days before the bid opening, to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.
- Efforts made to select portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goal will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.
- Efforts made to provide interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.
- Efforts made to negotiate in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers

of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work. A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract DBE goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a bidder to perform the work of a contract with its own work force does not relieve the bidder of the responsibility to make a GFE. Bidders are not, however, required to accept quotes from DBEs if the price difference is too high or unreasonable.

- Bidder's determination of a DBE as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the contract DBE goal. Another practice considered an inadequate GFE is the rejection of a DBE because its quotation for the work was not the lowest received. However, nothing in this paragraph shall be construed to require the bidder or prime contractor to accept unreasonable quotes in order to satisfy the contract DBE goal.
- Efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance.
- Efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
- Efforts to effectively use the services of the Department's DBE Supportive Services Center; services of the Department's SBE Supportive Services Center; services of available minority/women community organizations; minority/women contractors' groups; local, State, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

#### VI. ACTIONS TO BE TAKEN BY THE DEPARTMENT BEFORE AWARD—

- (a) **Approval.** If the apparent low bidder submits the DBE Minority Participation and Commitment by the deadline and meets the contract DBE goal and all other contract requirements, the Department will approve the submission.
- (b) **Conditional Approval.** The Department will issue a conditional approval of the DBE Minority Participation and Commitment to the apparent low bidder if (1) any DBE listed on the DBE Minority Participation and Commitment is not prequalified, if required, at the time the Department desires to award the contract or (2) the distinction between regular dealer and transaction expeditor/broker is unclear.
- (c) **Good Faith Effort Review.** If the apparent low bidder submits the DBE submission by the deadline but fails to meet the contract DBE goal and requests a GFE review, the Department will review the GFE documentation. If, during the review of the Contractor's GFE information, the reviewers have questions, the Contractor may be contacted for clarification. The GFE steps are as follows:
  1. IRT reviews and makes a recommendation to the Director.
  2. The Director either
    - a. Approves recommendation that the GFE was met and the DBE Minority Participation and Commitment will be approved, or
    - b. Recommends that the Committee make a determination.
  3. If forwarded to them, the Committee meets and makes the final determination. If the Committee

determines that the apparent low bidder met the GFE, the DBE Minority Participation and Commitment will be approved. If the Committee determines that the apparent low bidder has failed to make a GFE, the bid will be rejected and the apparent low bidder will be notified of the rejection.

#### VII. ACTION TO BE TAKEN BY THE DEPARTMENT DURING CONSTRUCTION—

To ensure that all obligations awarded to DBEs under this contract are met, the Department will review the Contractor's DBE involvement efforts during the performance of the project whether or not the DBE is listed on the approved DBE Minority Participation and Commitment. The review will include a CUF review and analysis.

**Sanctions.** Upon completion of the work the Department will review the actual DBE participation and make a determination regarding the Contractor's compliance with the applicable requirements. Sanctions may be imposed for noncompliance or unwarranted shortfalls in the approved DBE goal.

#### VIII. ACTIONS REQUIRED BY THE CONTRACTOR DURING CONSTRUCTION—

- (a) **DBE Participation.** Must continue to make GFEs for the life of the project. When DBE Minority Participation and Commitment is approved with a DBE participation less than the contract DBE goal, continue GFE toward meeting the contract DBE goal. Ensure that the Commitment is attained. Proof of attainment is provided by payments to DBEs and documented in ECMS.
- (b) **DBE Subcontractor Approval.** Firms listed on DBE Minority Participation and Commitment are not to commence work until they are approved.

All firms listed on the approved DBE Minority Participation and Commitment, including those business types other than subcontractor (i.e. dealers, truckers, service providers), must be submitted for subcontractor approval after the contract is executed and approved before DBEs actual performance of work. The subcontractor request must be equal to or greater than the committed amount. Submit for subcontractor approval any other DBE whether or not they are listed on the approved DBE Minority Participation and Commitment. When submitting request for subcontractor approval, attach a copy of the DBE subcontract or agreement or:

- A copy of the executed signature page,
  - A copy of the description of the scope of work, and
  - A copy of the unit prices as they appear in the DBE's subcontract or agreement.
- (c) **Conditional Approval Resolution.** Continually monitor conditional approval of DBE subcontractors. Examples of these conditional approvals may include prequalification requirements and distinction between dealer and broker.
  - (d) **Substitution.** Obtain written approval from the Department before substituting an approved DBE subcontractor or making any change to the DBE participation listed on the approved DBE Minority Participation and Commitment. Immediately request substitution authorization from the District in writing. The request must include documentation supporting the substitution and written agreement from the DBE to the change. Include proof that a certified letter giving the DBE five (5) days to respond with acceptance or to notify the Department of non-acceptance. Demonstrate that every effort has been made to allow the DBE to perform. The District will contact the Bureau of Project Delivery, Contract Awards.

A prime contractor may not self-perform any work committed to a DBE without prior written approval from the Department. Any work committed to a DBE that is instead self-performed by a prime contractor without obtaining prior written approval from the Department will result in non-payment for the specified work. The

Department may also seek additional remedies as stated in Part I(c) - Failure to Comply with DBE Requirements.

1. If the DBE agrees to be removed by the Contractor and the Department approves, document the following procedures:
  - Make a GFE in accordance with V.(b) to subcontract the work with another DBE, or subcontract other work items to DBE firms, to make up the DBE shortfall. A prime contractor's inability to find a replacement DBE at the contract price is not, in and of itself, adequate to support a finding that GFEs have been made to replace the original DBE. The fact that the prime contractor has the ability and/or desire to perform the contract work with its own forces does not relieve the prime contractor of the obligation to make GFEs to find a replacement DBE, and it is not a sound basis for rejecting a prospective replacement DBE's reasonable quote.
  - When the substitution results in meeting the DBE goal, complete a revised DBE Minority Participation and Commitment with DBE acknowledgement and/or a revised subcontractor approval request within five (5) days of a revision being opened in ECMS. If the DBE performed on the project, the Revised DBE Minority Participation and Commitment and/or subcontractor approval request should include the total amount paid to the DBE before the DBE substitution.
  - When the substitution does not result in meeting the DBE goal, complete a revised DBE Minority Participation and Commitment with DBE acknowledgement and/or a revised subcontractor approval request within five (5) days of a revision being opened in ECMS and provide additional GFE documentation, including (1) a statement of efforts made to negotiate with DBEs for specific work or supplies, including the names, addresses, telephone numbers, and emails of those DBEs that were contacted; (2) the time and date each DBE was contacted; (3) a description of the information provided to DBEs regarding plans and specifications for portions of the work to be performed or the materials supplied; and (4) an explanation of why an agreement between the prime contractor and DBE was not reached. If the DBE performed on the project, the Revised DBE Minority Participation and Commitment and/or subcontractor approval request should include the total amount paid to the DBE before the DBE substitution.

**Good Faith Effort Review.** The Department will review the GFE documentation for substitution. If, during the review of the Contractor's GFE information, the reviewers have questions, the Contractor may be contacted for clarification. The GFE steps are as follows:

- a. Contract Awards reviews and, if acceptable, approves the GFE and DBE revision or recommends that the IRT made the determination.
- b. The IRT either
  - Approves recommendation that the GFE was met and the Minority Participations substitution will be approved, or
  - Disapproves the GFE resulting in a shortfall requiring the contractor to continue GFEs.
- c. If forwarded to them, the IRT makes a final determination.

Do not perform any of the DBE work included in the substitution request without prior approval from the Department.

If the projected DBE participation on an approved DBE Minority Participation and Commitment meets or exceeds the DBE goal amount for the contract without replacing the DBE, then no contract shortfall exists. A Revised DBE Minority Participation and Commitment and/or subcontractor approval request must be submitted to reflect the decreased dollar amount.

2. If the arrangement to be replaced is not agreeable between the Contractor and the DBE, the following procedures are required:
- Until a determination is made, do not perform the DBE work without prior approval.
  - The IRT will review and make a determination and the District will notify both the Contractor and the DBE.
  - The Contractor or the DBE may request a meeting with the Department by contacting the District Office.
- (e) **SBE Participation.** SBE Firms are not to commence work until they are approved. The SBE, including those business types other than subcontractor (i.e. supplier, trucking, service provider), must be submitted for subcontractor approval after the contract is executed and approved before the SBEs actual performance of work.
- (f) **Additional Work.** When additional work is required for any classification of work which is identified on the DBE Minority Participation and Commitment to be performed by the DBE, at least 50% of this additional work will be performed by the same DBE unless the DBE submits, in writing, that it cannot perform the work due to its own limitations.
- (g) **Progress Payments.** Make payments in accordance with Section 110.05. Enter DBE and SBE progress payments into ECMS monthly. Bring to the attention of the Department, in writing, any situation in which regularly scheduled progress payments are not made to DBE/SBE subcontractors, suppliers, service provider or consultant.
- (h) **Records and Reports.** Keep such project records as are necessary to determine compliance with DBE Requirements. These records can be used as GFE documentation. Design these records to indicate:
- The number of disadvantaged and non-disadvantaged subcontractors, small businesses, regular dealers, manufacturers, consultants, and service providers, and the type of work or services performed on or materials incorporated in this project.
  - The progress and efforts made in seeking out DBE and SBE contractor organizations and individual DBEs and SBEs for work on this project.
  - Documentation of all correspondence, personal contacts, telephone calls, etc., to obtain the services of DBEs and SBEs for this project. Submit reports, as required by the Department. Certify that the amounts were actually paid to the DBE and SBE for work performed on the project and keep cancelled checks on file in the home office to reflect payment for the specific project and for inspection and audit by the Department. Enter the payment information in ECMS “DBE Payments” within 5 business days after the end of the month and include the following:
  - The number of contracts awarded to DBEs and SBEs, noting the type of work and amount of each contract executed with each firm and including the execution date of each contract.
  - The amount paid to each DBE and SBE during the month and the amount paid to date. If no payments are made to a DBE/SBE during the month, enter a zero (\$0.00) payment.
  - Paid invoices or a certification attesting to the actual amount paid to each firm, upon completion of the individual DBE’s and SBEs work. In the event the actual amount paid is less than the award amount, provide a complete explanation of the difference.

Maintain all such records for a period of three (3) years following acceptance of final payment. Make these records available for inspection by the Department and FHWA.

If DBE credit is being claimed for material costs included in a DBE subcontract or agreement, submit purchase orders for the material to the Inspector-in-Charge on a monthly basis.

## **Appendix B: Good Faith Efforts – Approval Process**

**Pennsylvania Department of Transportation Disadvantaged  
Business Enterprise Program**

**Good Faith Efforts Approval Process (General – language may be modified slightly by  
Bureau, Agency, or Subrecipient<sup>13</sup>)**

**THE REGULATORY MANDATE - GOOD FAITH EFFORTS DOCUMENTATION**

In accordance with the federal DBE regulation set forth in 49 Code of Federal Regulations Part 26 (Part 26), the Pennsylvania Department of Transportation (Department) is required to establish procedures addressing good faith efforts in those instances where Disadvantaged Business Enterprise (DBE) contract goals have been imposed. Section 26.53 (a) of Part 26 requires that contracts carrying a DBE goal requirement be awarded to a bidder who fully documents that it meets the DBE contract goal or documents a good faith effort (GFE) to meet the goal even though it did not succeed.

Each case turns on its own facts. However, both Section 26.53 and Appendix A of Part 26 outline factors to be used in a GFE analysis. In addition, institutional guidance issued by the [United States Department of Transportation's \(USDOT\) Office of General Counsel in the form of questions and answers \(Q and A\)](#)<sup>14</sup> also sets forth guiding principles to be used in GFE reviews. Since each of the three sources contain guidelines for reviewing GFE submissions, they are attached to this document and viewed by the Department as part and parcel of the Department's GFE review process document. Should changes originate from USDOT in this area; this document will be amended accordingly.

DBE commitment and GFE documentation is contained within the bid documentation referenced within the respective bid advertisement. This information must be submitted by the bidder by the advertised bid closing date, and the information is reviewed by appropriate Department, Bureau, Agency, or Subrecipient (Planning Partner) personnel.

The pre-award GFE review process is triggered when the prime contractor requests a GFE review and provides GFE documentation within the deadline identified above. The GFE review process is triggered when the prime contractor requests a GFE review for revisions to a DBE commitment. Where pre-award GFE efforts occur, a two-tiered GFE review process is used to address regulatory GFE issues that cannot be resolved by Department, Bureau, Agency, or Subrecipient (Planning Partner) officials tasked with reviewing documentation.

**GOOD FAITH EFFORTS PROCEDURES TIER I:**

***THE INTERDISCIPLINARY REVIEW TEAM RECOMMENDATION AND RULING OF THE DIRECTOR  
OF THE BUREAU OF EQUAL OPPORTUNITY***

Where there is a request for review of a contractor's GFE submission, the Department's Interdisciplinary Review Team (IRT), comprised of personnel from the Department's applicable

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<sup>13</sup> A BPT subrecipient is not involved in a GFE procedure unless that subrecipient is also a direct FTA recipient. In the case where a subrecipient is also a direct FTA recipient, the subrecipient's DBE procedures will apply, not PennDOT's.

<sup>14</sup> [https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/questions-and-answers-dbe-program\\_part26](https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/questions-and-answers-dbe-program_part26)



Bureau (Design & Delivery, Public Transportation, Aviation, Center for Planning and Programming, and/or Planning Partner Staff) and Bureau of Equal Opportunity will review the submitted documentation. The assigned personnel (Chief of the Performance, Compliance, Safety Division in the Bureau of Public Transportation, or other relevant position, or Chief of the Engineering and Planning Division of the Bureau of Aviation or the Deputy Secretary for Highway Administration or the Deputy Secretary for Multimodal Transportation) will act as chairperson. When necessary, other individuals familiar with the project specifications and its DBE Special Provisions may be consulted and may be asked to assist in the review process. The IRT will evaluate a bidder's good faith effort in accordance with the regulatory guidelines set forth in Section 26.53 of Part 26, Appendix A and the official Q and A referred to above. When DBE percentages are calculated, the Department will not round.

Because GFE issues are time-sensitive, the IRT will be required to complete its review of the submitted documentation within seven (7) business days of the contractor's GFE submission. Upon completion, the IRT will forward its findings and recommendations to the Bureau of Equal Opportunity (BEO) Director for approval or disapproval. If approved by the Director, documentation indicating that the GFE has been approved will be forwarded to the appropriate Bureau or Agency.

In the event that the Director disapproves the GFE, the second tier of the Department's GFE review process is triggered. Section 26.53 requires that the Department provide the bidder with an opportunity for administrative reconsideration. Section 26.53 (d) (1) states that the Department's decision on reconsideration must be made by an official who did not take part in the original determination that the bidder failed to meet the goal or failed to make adequate GFE to do so. Consistent with this provision, neither the BEO Director nor any member of the IRT will participate in the second-tier determination, to be known as the GFE Committee.

GOOD FAITH EFFORTS PROCEDURES TIER II:  
*THE GOOD FAITH EFFORT REVIEW COMMITTEE*

**Purpose:** In the event that the IRT and Director disapprove the GFE submitted by a bidder, the bidder will be afforded an opportunity for administrative reconsideration before the Department's GFE Review Committee (Committee). The Committee will meet on an as-needed basis. As noted above, this body is independent of both the IRT and the BEO Director. The Committee will review the low bidder's DBE documentation and GFE to meet the DBE contract goal to determine whether to approve or disapprove the submission.

**Composition:** The Committee will be comprised of three members. The Department's Deputy Secretary for Highway Administration or Multi-Modal Transportation will serve as Chairperson. Various Department Bureau Directors, as appropriate, will serve as the remaining members. Alternates will be available should a need arise. For the Deputy Secretary, any other Deputy may serve as an alternate. Alternates include any Department Bureau Directors. An attorney with the Department's Office of Chief Counsel will serve as legal adviser to the Committee but will not participate as a decision maker. A quorum will consist of three (3) members and may include both standing committee members and alternates.

The Committee meetings are not subject to the Sunshine Law and are not open to the public. Attendance is limited to the impacted contractor, the Committee members, and the legal adviser. The

IRT chairperson also attends to provide supporting information as required.

**Good Faith Effort Review Documentation Package and Scheduling of the Committee Meeting:**

The Chair of the IRT will prepare the background information that generated the appeal and will attend the hearing to clarify material contained in the source documentation provided to Committee members. A GFE review package will be provided to the Committee two (2) business days prior to the meeting. The information will include the IRT information and findings. However, this individual will not be permitted to participate in any deliberations.

**Regulatory Guidance Documents:** Each Committee member will evaluate the GFE submission in accordance with the applicable regulatory guidelines for DBE GFE. These include Appendix A of Part 26 as well as Section 26.53 of Part 26 and the institutional guidance issued by USDOT's Office of General Counsel (in the form of official questions and answers).

**Contractor Notification Prior to the Committee Meeting:** Whenever a committee meeting is intended to be convened, BEO will be responsible for scheduling the meeting and notifying the impacted contractor in writing of the scheduled date for the meeting. The contractor will be advised that the purpose of the meeting is to clarify documentation previously submitted to the Department within the time constraints set forth in the bid documents and DBE Special Provisions. The contractor will not be authorized to submit additional GFE documentation consistent with Part 26 regulatory guidelines. The contractor will be expected to address questions posed by Committee members and will have the opportunity to clarify points resulting from questions asked or from review of its GFE submissions. The contractor will then be excused, and the Committee will deliberate in an executive session. The legal adviser will participate in the executive session to address regulatory questions.

**Contractor Notification Subsequent to the Committee Meeting:** At the conclusion of the executive session and deliberation, the Committee will vote to approve or disapprove the GFE submission. The decision will result from a simple majority vote. The majority must reach a consensus as to the reason for accepting or rejecting the contractor's GFE. The Committee's decision will be outlined in a letter sent to the contractor by first-class mail. The decision letter will be prepared by the legal adviser and will be signed by the Committee's Chairperson. Consistent with Section 26.53, the Committee's decision is not administratively appealable to USDOT. All decisions of the Committee are final and binding.

**Construction Good Faith Effort:** Because of the time-sensitive nature of a GFE review during the construction phase of a given project, the GFE documentation is reviewed, and a determination is made by the Chair of the IRT. When necessary, personnel from the impacted engineering district, other Bureau staff and other individuals familiar with the project specifications and its DBE Special Provisions may be consulted and may be asked to assist in the review process. The IRT Chair will evaluate a bidder's good faith effort to replace the dollar amount of a DBE commitment that creates a shortfall of the DBE goal in accordance with the regulatory guidelines set forth in Section 26.53 of Part 26 as well as Appendix A and the official Q and A referred to above.