



Florida Department of Transportation

CHARLIE CRIST
GOVERNOR

605 Suwannee Street
Tallahassee, FL 32399-0450

STEPHANIE KOPELOUSOS
SECRETARY

August 6, 2010

Monica Gourdine
Program Operations Engineer
Federal Highway Administration
545 John Knox Road, Suite 200
Tallahassee, Florida 32303

Re: Office of Design, Specifications
Section 7
Proposed Specification: SS0072400 Legal Requirements and Responsibilities to the
Public – Disadvantaged Business Enterprise Program

Dear Ms. Gourdine:

We are submitting, for your approval, two copies of the above referenced Supplemental Specification.

This change was proposed by Erica Miller of the State Minority Programs Office. The Federal Highway Administration has mandated that the Department update the current DBE Specification to address prompt payment by contractors to DBEs and to include language on assessing commercially useful function.

Please review and transmit your comments, if any, within two weeks. Comments should be sent via Email to ST986RP or rudy.powell@dot.state.fl.us.

If you have any questions relating to this specification change, please call Rudy Powell, State Specifications Engineer at 414-4280.

Sincerely,

Signature on File

Rudy Powell, Jr., P.E.
State Specifications Engineer

RP/
Attachment

cc: Gregory Jones, Chief Civil Litigation
Florida Transportation Builders' Assoc.
State Construction Engineer

**LEGAL REQUIREMENTS AND RESPONSIBILITIES TO THE PUBLIC -
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM.**

(REV ~~5-12-106-88-5-10-10~~)

ARTICLE 7-24 (Pages 74 – 76) is deleted and the following substituted:

7-24 Disadvantaged Business Enterprise Program.

7-24.1 *Disadvantaged Business Enterprise Affirmative Action Plan* General:

Prior to award of the Contract, have an approved Disadvantaged Business Enterprise (DBE) Affirmative Action Program Plan filed with the Equal Opportunity Office. Update and resubmit the plan every three years. No Contract will be awarded until the Department approves the Plan. The DBE Affirmative Action Program Plan ~~and commitment to carry out the Plan must be~~ is incorporated into and ~~become-made~~ a part of the ~~awarded~~ Contract.

7-24.2 Required Contract and Subcontract DBE Assurance Language: *Per-In accordance with* 49 CFR 26.13 (b), ~~each-the~~ Contract FDOT signs with ~~a-the~~ 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.” ~~(49 Code of Federal Regulations Part 26.13 [2009], as amended)~~

7-24.3 Plan Requirements: Include the following in the DBE Affirmative Action Program Plan:

(a) A policy statement, *signed by an authorized representative (president, chief executive officer, or chairman of the contractor)*, expressing a commitment to use DBEs in all aspects of contracting to the maximum extent feasible, *outlining the various levels of responsibility, and stating the objectives of the program.* ~~The policy making body must issue a policy statement signed by the chairperson, which expresses its commitment to utilize DBEs, outlines the various levels of responsibility, and states the objectives of the program.~~ Circulate the policy statement throughout the Contractor’s organization.

(b) The designation of a Liaison Officer within the Contractor’s organization, as well as support staff, necessary and proper to administer the program, and a description of the authority, responsibility, and duties of the Liaison Officer and support staff. The Liaison Officer and staff are responsible for developing, managing, and implementing the program on a day-to-day basis for carrying out technical assistance activities for DBEs and for disseminating information on available business opportunities so that DBEs are provided an equitable opportunity to participate in Contracts let by the Department.

(c) *Utilization of* ~~Use~~ techniques to facilitate DBE participation in contracting activities which include, but are not limited to:

1. Soliciting price quotations and arranging a time for the review of plans, quantities, specifications, and delivery schedules, and for the preparation and presentation of quotations.

2. Providing assistance to DBEs in overcoming barriers such as the inability to obtain bonding, financing, or technical assistance.

3. Carrying out information and communication programs or workshops on contracting procedures and specific contracting opportunities in a timely manner, with such programs being bilingual where appropriate.

4. Encouraging eligible DBEs to apply for certification with the Department.

5. Contacting Minority Contractor Associations and city and county agencies with programs for disadvantaged individuals for assistance in recruiting and encouraging eligible DBE contractors to apply for certification with the Department.

7-24.4 DBE Records and Reports: Submit the Anticipated DBE Participation Statement at or before the Pre-Construction Conference. Report monthly, through the Equal Opportunity Reporting System on the Department's Website, actual **DBE** payments *(including retainage) made to DBEs for work performed with their own workforce and equipment in the area in which they are certified. and for they perform with their own workforces/ and equipment, retainage, ; and Report payments made to of* all DBE and Minority Business Enterprise (MBE) subcontractors and DBE and MBE construction material and major suppliers. The Equal Opportunity Office will provide instructions on accessing this system. Develop a record keeping system to monitor DBE affirmative action efforts which include the following:

(a) the procedures adopted to comply with these Specifications;

(b) the number of subordinated Contracts on Department projects awarded to DBEs;

(c) the dollar value of the Contracts awarded to DBEs;

(d) the percentage of the dollar value of all subordinated Contracts awarded to DBEs as a percentage of the total Contract amount;

(e) a description of the general categories of Contracts awarded to DBEs;

and

(f) the specific efforts employed to identify and award Contracts to DBEs.

Upon request, provide the records to the Department for review.

~~All~~ **Maintain all** such records ~~are required to be maintained~~ for a period of five years following acceptance of final payment and have them available for inspection by the Department and the Federal Highway Administration.

7-24.5 Counting DBE Participation and Commercially Useful Functions: ~~Per 49 CFR Part 26.55, specifies when DBE credit can only may shall be awarded for work actually performed by a DBEs themselves for the types of work for which they are certified and Contractors must familiarize themselves with its provisions and timely comply with them. DBE credit can only be awarded for work actually performed by DBEs themselves for the types of work for which they are certified. Therefore, on~~ **On the Anticipated DBE Participation Statement, prime contractors shall only include the dollars that a DBE is expected to earn for work they perform with their own workforce and equipment.- Prime contractors shall sSubmit a revised Anticipated DBE**

Participation Statement to reflect significant changes to the initial Anticipated DBE Participation Statement within 14 business days from the date of the change.

When a DBE participates in a contract, the value of the work is determined in accordance with 49 CFR Part 26.55, for example:

(a) The Department will count only the value of the work performed by the DBE toward DBE goals. The entire amount of the contract that is performed by the DBE's own forces (including the cost of supplies, equipment and materials obtained by the DBE for the contract work) will be counted as DBE credit

(b) The Department will count the entire amount of fees or commissions charged by the DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services or for providing bonds or insurance specifically required for the performance of a Department-assisted contract, toward DBE goals, provided that the Department determines the fees to be reasonable and not excessive as compared with fees customarily followed for similar services.

(c) When the DBE subcontracts part of the work of its contract to another firm, the Department will count the value of the subcontracted work only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

(d) When a DBE performs as a participant in a joint venture, the Department will count the portion of the dollar value of the contract equal to the distinct, clearly defined portion of the work the DBE performs with its own forces toward DBE goals.

(e) The ~~Prime~~-Contractors shall ensure that only expenditures to DBEs that perform a commercially useful function in the work of a contract may be counted toward the voluntary DBE goal.

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

(g) To determine whether a DBE is performing a commercially useful function, the Department will evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

(h) A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation.

(i) If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own workforce, or if the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, the DBE has not performed a commercially useful function.

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~~The Department will count the entire amount of fees or commissions charged by the DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services or for providing bonds or insurance specifically required for the performance of a Department-assisted contract, toward DBE goals, provided that the Department determines the fees to be reasonable and not excessive as compared with fees customarily followed for similar services.~~

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7-24.6 Prompt Payments: *Meet the requirements of Section 9-5, Standard Specifications for Road and Bridge Construction (2010), as amended, for payments to all*

~~DBE subcontractors. The Department may withhold progress payments from the contractor if it fails to 'comply with the requirement to provide all necessary information, including actual payments to DBEs' within 60 days after beginning work. (Section 9-5.3.2 [2010], as amended).~~

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(REV 8-5-10)

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7-24.6 Prompt Payments: Meet the requirements of 9-5 for payments to all DBE subcontractors.