

SECTION F: DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

Any questions about the DBE Program provisions of this project, including filling out the Special Prequalification Report, should be directed to Norman Davis, Contract Compliance Officer, City Affirmative Action Department, at 608/266-4082, e-mail ndavis@ci.madison.wi.us.

A copy of the complete City of Madison Disadvantaged Business Enterprise (DBE) Program and/or DBE Directory may be obtained by calling the City Affirmative Action Department at 608/266-4082.

PREQUALIFICATION REQUIREMENTS

1. PURPOSE

It is the policy of the U. S. Department of Transportation/Federal Transit Administration (USDOT/FTA) that disadvantaged business enterprises (DBE) as defined in 49 C.F.R. Part 26 shall have the maximum feasible opportunity to participate in the performance of contracts financed in whole or in part with Federal funds. Consequently, the DBE requirements of 49 C.F.R. Part 26 apply to this contract.

2. DBE OBLIGATION

The Contractor agrees to ensure that DBEs as defined in 49 C.F.R. Part 26 have the maximum feasible opportunity to participate in the performance of contracts and subcontracts financed under this project. In this regard, all bidders shall take all necessary and reasonable steps in accordance with 49 C.F.R. Part 26 to insure that DBEs have the maximum feasible opportunity to compete for and perform contracts. The Contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of USDOT/FTA-assigned contracts.

3. DBE UTILIZATION GOAL

For the current fiscal year, an over-all participation goal of twelve and sixteen hundredths percent (12.16%) has been established on Madison Metro contracting activity. **For this contract, a DBE goal of fifteen percent (15%) has been assigned.**

Each bidder shall meet or show adequate good faith efforts to meet the DBE project goal. DBE firms may participate as subcontractors, suppliers or in joint ventures. **The bidder shall meet or exceed or demonstrate that it could not meet the goal despite its best efforts or the bid will be considered non-responsive.**

4. DBE CERTIFICATION

In order to be considered a DBE firm, the firm must be certified by the City of Madison's Affirmative Action Department or by a state's Department of Transportation.

The City's DBE Program outlines the eligibility criteria and is available from the DBE Liaison Officer. If the DBE firm has not been certified by the City, it must submit a copy of a current DOT certification or a completed "Schedule A" form to the Affirmative Action Department.

5. DEFINITIONS AND CERTIFICATION REQUIREMENTS

For the purposes of this program, a Disadvantaged Business Enterprise (DBE) is a small business concern:

1. which is at least fifty-one (51) percent owned by one or more socially and economically

disadvantaged individuals, or, in the case of any publicly owned business, at least fifty-one (51) percent of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

2. whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

The Contract Compliance Officer has a list of DBE firms who are certified as meeting these definitions.

6. GOOD FAITH EFFORTS/WAIVER OF DBE GOAL

If a bidder finds it impossible to fully meet the DBE goal of a contract, the bid shall include a signed petition on the bidder's letterhead, for grant of relief from the DBE goal requirements, accompanied by documentation demonstrating that all reasonable good faith efforts were made toward fulfilling the goal.

To demonstrate sufficient reasonable efforts to meet the DBE contract goal, a bidder shall document the steps it has taken to obtain DBE participation, including but not limited to the following:

- a. Obtaining information about DBEs in specific subcontracting areas by:
 1. Developing and maintaining the Contractor's own file of certified DBEs;
 2. Consulting lists of certified DBEs, including those of the City Affirmative Action Department, the State of Wisconsin Department of Transportation, and the Wisconsin Supplier Development Council; and
 3. If necessary, assisting an uncertified DBE to obtain certification by the City Affirmative Action Department. The Affirmative Action Department will provide the necessary forms at the bidder's request.
2. Contacting DBEs sufficiently in advance of the bid deadline so that they can prepare a bid and engage in negotiations:
 1. Advertising in general circulation media, trade association publications, and minority-focus media for at least twenty (20) calendar days before bids are due. If twenty (20) days are not available, publication for a shorter reasonable time is acceptable, and
 2. written notification to DBEs that their interest in the contract is solicited.
3. Selecting portions of the work, which could be performed by DBEs in order to increase the likelihood of achieving the DBE project goal.
4. Negotiating directly with DBEs, including DBEs who contact the bidder to volunteer a sub-bid.
5. Outlining efforts to negotiate with DBEs for specific sub-bids including at a minimum the names, addresses, and telephone numbers of DBEs that were contracted; a description of the information provided to DBEs regarding the plans and specifications for portions of the work to be performed; and a statement of why additional agreements with DBEs were not reached:
 1. If the DBE is unavailable, a detailed statement from the bidder of the reasons for that conclusion;
 2. If the bidder considers the DBE to be unqualified, a detailed statement of the reasons for

that conclusion;

3. If the DBE refused to or was unable to offer a price which the bidder could reasonably agree to pay, a detailed statement of the reasons for that decision; and
 4. Any other reasons why agreements with DBEs could not be reached.
6. Efforts made to assist the DBEs contacted that needed assistance in obtaining bonding or insurance required by the bidder or the City.
 - g. Attendance at project pre-bid conferences.

Bidders that fail to meet DBE goals and fail to demonstrate sufficient reasonable efforts shall not be eligible to be awarded the contract.

A bidder will not be considered to have made a good faith effort to meet the DBE project goal if he or she rejects the bid of an otherwise qualified and competent DBE on the basis of price alone, unless it is shown that no reasonable price can be obtained from a DBE. A DBE's bid for the subcontract will be presumed to be unreasonable if the DBE's price exceeds the average price quoted by more than fifteen (15) percent.

7. COUNTING DBE PARTICIPATION

A bidder may count towards his or her attainment of the DBE goal only those expenditures to DBEs that perform a commercially useful function. For purposes of evaluating a bidder's responsiveness to the attainment of the DBE goal, the contract participation by a DBE is based on the percentage of the total base bid proposed by the Contractor. The total base bid price is inclusive of all amendments, modifications and change orders.

Work performed by a DBE firm in a particular transaction can be counted toward the goal only if it involves a commercially useful function. That is, in light of industry practices and other relevant considerations, does the DBE firm have a necessary and useful role in the transaction, of a kind for which there is a market outside the context of the DBE Program, or is the firm's role a superfluous step added in an attempt to obtain credit towards goals? If, in Madison Metro's judgement, the firm does not perform a commercially useful function in the transaction, no credit towards goals may be awarded, and the counting provisions of the regulation never came into play.

It should be noted that the question of whether a firm is performing a commercially useful function is completely separate from the question of whether the firm is an eligible DBE. A firm is eligible if it meets the definitional criteria and ownership and control requirements, as set forth in the City of Madison's DBE Program.

If Madison Metro determines that the firm is performing a commercially useful function, then Madison Metro must then decide what that function is. If the commercially useful function is that of a regular dealer, then Madison Metro may count 60% of the value of the product supplied toward DBE goals.

A regular dealer must be engaged in selling the product in question to the public. This is important in distinguishing a regular dealer, which has a regular trade with a variety of customers, from a firm which performs supplier-like functions on an ad hoc basis or for only one or two contractors with whom it has a special relationship.

As noted above, a supplier of bulk goods may qualify as a regular dealer if it either maintains an inventory or owns or operates distribution equipment. With respect to the distribution equipment; e. g., a fleet of trucks, the term "or operates" is intended to cover a situation in which the supplier leases the equipment on

a regular basis for its entire business. It is not intended to cover a situation in which the firm simply provides drivers for trucks owned or leased by another party; e. g., a prime contractor, or leases such a party's trucks on an ad hoc basis for a specific job.

If the commercially useful function being performed is not that of a regular dealer, but rather that of delivery of products, obtaining bonding or insurance, procurement of personnel, acting as a broker or manufacturer's representative in the procurement of supplies, facilities, or materials, etc., the counting rules of 49 C.F.R. Part 26.55 would apply.

Under paragraph (C), for example, a business that simply transfers title of a product from manufacturer to ultimate purchaser; e. g., a sales representative who re-invoices a steel product from the steel company to Madison Metro, or a firm that puts a product into a container for delivery would not be considered a regular dealer. Madison Metro would not receive credit based on a percentage of the cost of the product for working with such firms.

Subparagraph (C)(3) concerns the use of services that help Madison Metro obtain needed supplies, personnel, materials or equipment to perform a contract a program function. Only the fee received by the service provider could be counted toward goals. For example, use of a minority sales representative or distributor for a steel company, if performing a commercially useful function at all, would entitle Madison Metro receiving the steel to count only the fee paid to the representative or distributor toward the goal. This provision would also govern fees for professional and other services obtained expressly and solely to perform work relating to a specific contract or program function.

Subparagraph (C)(3) concerns transportation or delivery services. If a DBE trucking company picks up a product from a manufacturer or regular dealer and delivers the product to Madison Metro, the commercially useful function it is performing is not that of a supplier, but simply that of a transporter of goods. Unless the trucking company is itself the manufacturer or a regular dealer in the product, credit cannot be given based on a percentage of the cost of the product. Rather, credit would be allowed for the cost of the transportation service.

Subparagraph (C)(3) applies the same principle to bonding and insurance matters. Contractors often are required to obtain bonding and insurance concerning their work in USDOT-assisted contracts. When they obtain a bond or an insurance policy from a DBE agent, the amount allowable toward goals in not any portion of the face value of the policy or bond or the total premium, but rather the fee received by the agent for selling the bond or insurance policy.

The City is aware that the rule's language does not explicitly mention every kind of business that works in USDOT/FTA financial assistance programs. In administering 49 C.F.R., Part 26, the City would, on a case-by-case basis, determine the appropriate regulatory provision to apply in a particular situation.

8. THE SPECIAL PREQUALIFICATION REPORT

The Special Prequalification Report consists of one cover page, one contact report and one letter of intent. Prepare one contact report for each DBE contacted.

For each contract, the bidder should list the information provided to the DBE, the type of work, and the percentage of the bid that will be performed by the DBE, or, if the DBE will not be used, the good faith efforts the bidder made to secure agreement. In reporting good faith efforts, include at least the following for each contract:

- a. A description of the information provided to each DBE regarding the plans and specifications for portions of the work to be performed;

- 2. If the DBE is unavailable, a detailed statement from the bidder for the reasons for that conclusion;
- c. If the bidder considers the DBE to be unqualified, a detailed statement of the reasons for that conclusion;
- 4. If the DBE refused to or was unable to offer a price which the bidder could reasonably agree to pay, a statement of reasons for that decision. Be specific.
- e. Any other reasons why agreements with DBEs could not be reached; and
- f. Other good faith efforts.

9. APPEAL PROCEDURE

A Contractor who is denied prequalification may appeal the City's decision to the Affirmative Action Officer, Madison Municipal Building, Room 130, Madison, WI 53701. All appeals shall be filed, in writing, during normal working hours. At a minimum, the appeal shall include the name and address of the appellant, the telephone and FAX numbers of the appellant, the action which is the subject of the appeal, the reason for the protest, and a statement of the remedy sought. The appeal should be specific.

10. DBE AWARD NOTIFICATION

Whenever a prime Contractor is awarded a contract by Madison Metro, the DBE subcontractor will be notified in writing by the DBE Liaison Officer that a contract has been awarded in which they were identified as a DBE subcontractor. A copy of the Letter of Notification will also be sent to the prime Contractor and the Transit General Manager.

REQUIREMENTS OF SUCCESSFUL BIDDER

11. DBE SUBSTITUTIONS

Arbitrary changes by the Contractor of DBEs identified in his or her bid is strictly prohibited. Further, without prior approval by the DBE Liaison Officer, the Contractor may not terminate a subcontract agreement, reduce the scope of work nor decrease the proposed price to the DBE.

In instances where the Contractor finds it necessary to request substitution of a DBE for reasons such as default on the part of the DBE or poor work performance, the Contractor shall submit, in writing, to the DBE Liaison Officer, the reasons justifying release of prior approved DBEs and receive approval from the City of such change prior to subcontracting with another certified DBE.

The Contractor's notification should include the specific reasons for the proposed substitution. Stated reasons which would be acceptable include any of the following examples:

- a. A previously committed DBE was found not to be able to perform;
- b. A committed DBE was found not to be able to produce acceptable work;
- c. A committed DBE was later discovered not to be bona fide; and
- d. A DBE previously committed to a given price later demands an unreasonable escalation of price.

The Contractor's position in these cases shall be fully explained and supported with adequate documentation. Stated reasons which will not be acceptable include:

1. A replacement firm has been recruited to perform the same work under terms more advantageous to the Contractor;
- b. Issues about performance by the committed DBE were disputed (unless every reasonable effort has already been taken to have the issues resolved or mediated satisfactorily); and
3. A DBE has requested reasonable price escalation which may be justified due to unforeseen circumstances; i. e., change in scope of DBE's work.

The Contractor's notification should include the name, address, and principal official of any proposed substitute DBE and the dollar value and scope of work of the proposed subcontractor. The same DBE affidavits, documents, and Letter of Intent which are required of bidders should be attached.

DBE Liaison Officer will evaluate the submitted documentation and respond within fifteen (15) working days to the request for approval of a substitution. The response may be in the form of requesting more information, or requesting an interview to clarify or mediate the problem. The response may also be in the form of a rejection of the proposed DBE substitution with the reasons therefore included in the City's response. In the case of an expressed emergency need to receive the necessary decision for the sake of job progress, the City will instead respond as soon as practicable.

Actual substitution of a DBE to fulfill contract requirements should not be made prior to City approval. Once notified of City approval, the substitute DBE subcontract shall be executed within five (5) working days, and a copy of the DBE subcontract, with signatures of both parties to the agreement, should be submitted to the DBE Liaison Officer.

The City will not approve extra payment for escalated costs incurred by the Contractor when a substitution of subcontractors becomes necessary in order to comply with DBE contract requirements.

In the case where an enterprise under contract was previously considered to be a DBE but is later found not to be, or whose work is found not to be creditable toward the DBE goals fully as planned, the City will consider the following criteria in evaluating a waiver request:

- a. Whether the Contractor was reasonable in believing the enterprise was a DBE or that eligibility or "counting" standards were not being violated, and
- b. The adequacy of unsuccessful efforts taken to obtain a substitute DBE.

12. CONTRACT MONITORING

To insure DBE compliance on all contracts regardless of dollar amount, the DBE Liaison Officer will contact the Contractor and the DBE subcontractor when the project reaches the 90% mark of completion. The Contractor will receive a request for status of DBE subcontractor payment. The request will identify the names of DBEs proposed by the Contractor, the proposed goods or services the DBE subcontractor was to provide and the proposed subcontracted DBE dollar amount. The Contractor will be requested to supply, within ten (10) working days, proof of payment for each of the DBEs listed in order to verify the year-to-day DBE participation.

The DBE subcontractor will be requested to provide an affidavit for DBE subcontractor participation/payment attesting to the work performed and the amount paid to date to the subcontractor.

13. NON-COMPLIANCE AND LIQUIDATED DAMAGES

The City shall have the discretion to apply suitable sanctions to the Contractor if the Contractor is found to be in non-compliance with the DBE requirements. Failure to comply with the DBE terms of a contract or

failure to use DBEs as stated in the Contractor's bid constitutes a material breach of this contract, and may lead to the suspension or termination of this contract in whole or in part; furthermore, continued eligibility to enter into future contracting arrangements with Madison Metro may be jeopardized as a result of non-compliance. In some cases, monthly progress payments may be withheld until corrective action is taken.

Therefore, in such cases of non-compliance, the City will deduct as liquidated damages cumulative amounts computed as follows: for each one (1) percent (or fraction thereof) of shortfall toward the DBE goal, one (1) percent of the base bid for this contract shall be surrendered by the Contractor to the City in payment as liquidated damages, if such damages are assessed.

When work is completed, in the event that the City has determined that the Contractor was not in compliance in the fulfillment of the required DBE goals, and a grant of relief of the requirements was not obtained, the City will thereby be damaged in the failure to provide the benefit of participation to DBEs to the degree set forth in the contract.

14. OPPORTUNITIES FOR THE USE OF BANKS OWNED & CONTROLLED BY DBES

The City of Madison encourages its prime contractors to use banks owned and controlled by minorities and women in Wisconsin whenever feasible.

THIS INFORMATION MUST BE SUBMITTED, ALONG WITH THE FTA CERTIFICATIONS, IN A SEPARATE SEALED ENVELOPE MARKED "ENVELOPE NO. 2--DBE REPORT/FTA CERTIFICATES."

1. DBE PROGRAM SPECIAL PREQUALIFICATION REPORT/COVER SHEET

Project
Name: _____

Bidder's
Name: _____

Bidder's
Contact Person: _____

Contact Person's
Telephone Number: _____

BIDDER CERTIFICATION

I, _____, hereby declare and affirm that I am a duly authorized representative of _____ and that I have personally reviewed the material and facts set forth in and submitted in this DBE Utilization Plan and, to the best of my knowledge and belief, the information in this Plan is true and correct.

Furthermore, the undersigned shall enter into formal written agreements with all listed DBE firms for work as indicated in this Plan and shall enter into such agreements within five (5) working days after receipt of the contract executed by the City of Madison, Wisconsin.

SIGNATURE _____

NAME _____

TITLE _____

FIRM NAME _____

DATE _____

2. DBE PROGRAM SPECIAL PREQUALIFICATION REPORT/CONTACT REPORT

DBE's

Name: _____

DBE's

Address: _____

DBE's

Contact Person: _____

Contact Person's

Telephone Number: _____

FILL in this Section if you will use this DBE on this Project:

THIS DBE WILL BE A: (Check One)

() Sub-contractor () Supplier () Joint Venture

Type of work this DBE will perform:

List total percentage of commitment to this DBE: _____%

FILL in this section if you will not use this DBE on this project:

To the best of our knowledge and belief, the DBE listed above is unavailable for work on this project for the following reasons:

It is our belief that the DBE listed above is unqualified to work on this project for the following reasons:

The DBE listed above cannot be used for work on this project for other reasons. Such reasons may include unreasonable prices or negotiations which were unsuccessful for other reasons. State specifically and in detail what those reasons were.

Describe the information provided to the DBE listed on the preceding page regarding the plans and specifications for portions of the work to be performed:

Describe any other good faith efforts (use additional paper if necessary):

3. DBE PROGRAM SPECIAL PREQUALIFICATION REPORT/LETTER OF INTENT FROM DBE TO PERFORM AS SUBCONTRACTOR, SUPPLIER AND/OR CONSULTANT

To: _____ and the City of Madison
(Name of Prime Contractor)

From: _____
(Name of DBE Firm)

The undersigned is prepared to provide the following described services or supply the following described goods in connection with the following project/contract.

Project
Name: _____

DBE Firm's
Contact Person: _____

Contact Person's
Telephone Number: _____

THIS DBE FIRM WILL BE A: (Check One)

Sub-contractor Supplier Joint Venture

This firm will perform the following type of work:

List total value of commitment to this firm: \$ _____.

If more space is needed to fully describe the DBE firm's proposed scope of work and/or payment schedule, attach additional sheets.

The undersigned will enter into a formal written agreement with the Prime Contractor, conditioned upon the Prime Contractor's execution of a contract with the City of Madison, Wisconsin, and will do so within five (5) working days of the Prime Contractor's knowledge of said contract award.

The DBE status of the undersigned has been certified by the City of Madison, Wisconsin, or the Wisconsin

Department of Transportation. A copy of said certification is attached to this Letter of Intent.

Notice: If the DBE firm is not certified by the City or the Region V DBE Coordinating Council, the firm must attach copies of other current certifications **and** must complete and submit "Schedule A," the City of Madison DBE Application form, to the Affirmative Action Office within thirty (30) days of contract award.

SIGNATURE _____

NAME _____

TITLE _____

FIRM NAME _____

DATE _____

4. DBE PROGRAM SPECIAL PREQUALIFICATION REPORT CERTIFICATION OF LOWER-TIER PARTICIPANTS (SUBCONTRACTOR) REGARDING DEBARMENT, SUSPENSION, AND OTHER INELIGIBILITY AND VOLUNTARY EXCLUSION

The lower-tier participant (potential subcontractor), _____, certifies, by submission of this proposal or bid, that neither it nor its principles are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency.

(If the lower-tier participant [potential subcontractor] is unable to certify to any of the statements in this certification, such participant shall attach an explanation to this certification.)

THE LOWER-TIER PARTICIPANT (POTENTIAL SUBCONTRACTOR) CERTIFIES OR AFFIRMS THE TRUTHFULNESS AND ACCURACY OF THE CONTENTS OF THE STATEMENTS SUBMITTED ON OR WITH THIS CERTIFICATION AND UNDERSTANDS THAT THE PROVISIONS OF 31 U.S.C. SUBSECTION 3801 ET SEQ. ARE APPLICABLE THERETO.

SIGNATURE _____

NAME _____

TITLE _____

FIRM NAME _____

DATE _____

The undersigned chief legal counsel for the _____ (entity) hereby certifies that the _____ (entity) has authority under State and local law to comply with the subject assurances and that the certification above has been legally made.

SIGNATURE _____

NAME _____

TITLE _____

FIRM NAME _____

DATE _____