



Wisconsin Department of Transportation

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Scott Walker
Governor

Mark Gottlieb, P.E.
Secretary

Division of Transportation
System Development

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To: WisDOT Consultants and WisDOT Contracting Staff

From: Nathan Czech, P.E.
Statewide Consultant Engineer

Subject: New DBE Commitment Procedures

WisDOT is implementing new procedures to document consultant commitments to utilize DBE firms on consultant engineering contracts. These changes are being made to improve tracking of DBE utilization on all contracts and to comply with federal regulations governing the DBE program published at [49 CFR 26](#).

DBE Commitment Forms will be required for all contracts, work orders and amendments with DBE participation submitted to the Department beginning February 1, 2014.

Notice of Interest Form (Contracts with DBE Goals)

When there is a DBE goal assigned to a consultant contract, the Prime Consultant **must** complete the DBE commitment question in the Notice of Interest (NOI) process. The Notice of Interest form includes a question asking the respondent to list the DBE firm(s) they intend to use and describe their roles.

WisDOT considers the prime consultant's response to the DBE questions on the Notice of Interest to be the initial confirmation of the DBE's participation in the contract under 49 CFR 26.53(b)(3). If selected, the prime consultant may not substitute itself or another subconsultant (including another DBE) for work identified in the Notice of Interest unless they have met the criteria for substitution specified in 49 CFR 26.53(f) and received written consent to substitute from WisDOT's DBE Section.

It is the contracting region/bureau's responsibility to monitor the consistency and continuity of DBE commitments through the selection and negotiation process

including comparison and evaluation of DBE commitment through the NOI, consultant interviews and contract negotiations. When appropriate, the consultant should be directed to request consent to terminate/reduce/substitute from the WisDOT DBE Section.

Contract Negotiation Submittal (All Contracts)

Any time there is DBE participation (prime or sub) in a contract or work order, or when the amount of any DBE firm's participation in a contract is changed through a contract amendment, the Prime consultant shall submit a commitment form and attachments. The prime consultant will submit a completed Form [DT1029](#) for each new contract, work order or amendment that includes DBE participation and include a separate DT1029 Attachment A for each DBE subconsultant participating in the contract. For contract amendments impacting DBE contract amounts, Attachment A is required only for DBE subconsultants affected by the amendment.

When there is DBE participation on any federally funded contract, work order, or amendment, with or without an assigned goal, the contracting WisDOT bureau/region will email a copy of the contract/amendment, Form DT1029 including Attachment A forms to dbeconsultantservices@dot.wi.gov concurrent with submittal of documents to the Contract Administration Unit. For contracts funded only with state funds, submittals to the DBE mailbox are not required.

When there is a goal, WisDOT staff should use the following subject line for the email:

ID xxxx-xx-xx DBE Goal Commitment

When there is DBE participation and federal funding but no DBE goal on the contract, use the following subject line for the email:

ID xxxx-xx-xx Commitment No Goal

For all contracts, work orders and amendments affecting DBE participation, the original copy of the DBE commitment form will accompany the original copy of the contract/work order/amendment submitted to CAU.

Contract Approval (Contracts With Goals)

For contracts with assigned goals, the Contract Manager will not sign contracts with assigned goals until receiving approval of the DBE commitment from the DBE Section. Contract pre-award activities including audit and Governor's approval may occur concurrent to DBE Section review of the DBE Commitment forms.

While DBE commitment forms are submitted to the DBE Section for all federally funded contracts, DBE Section approval of commitments is not required for approval of contracts that do not have assigned goals.

DBE Termination /Reduction/Substitution (Contracts with Goals)

WisDOT policy and contract terms require any change in services to be performed by participants under a contract to be approved by WisDOT in the form of a contract amendment.

For contracts with DBE goals, termination (including reduction or substitution) of services committed to be performed by a DBE firm on a contract requires prior written consent from WisDOT's DBE Section prior to submission of any amendment that eliminates or reduces an individual DBE firm's subcontract amount. Request for consent along with a justification meeting the criteria in 49 CFR 26.53(f) should be requested by the prime consultant via an email to dbiconsultantservices@dot.wi.gov. Consultants emailing dbiconsultantservices@dot.wi.gov should copy the Department Representative for the contract. Request for consent to terminate, reduce or substitute a DBE firm's participation on a contract with goals should use the following subject line for the email:

ID xxxx-xx-xx Consent to Terminate/Reduce/Substitute DBE

A copy of the DBE office consent shall be included along with the commitment form when the amendment is submitted to the Department.

Good Faith Waiver

If the prime believes they are not able to meet the assigned DBE goal at the time of negotiation, they are required by 49 CFR 26.53 to submit a request for a Good Faith Waiver documenting all efforts to meet the DBE goal that will be reviewed and evaluated by the DBE office.

A Good Faith Waiver Form [DT1026](#) is required for any original contract with an assigned goal where the DBE goal has not been met. A Good Faith Waiver is also required for amendments when an assigned goal is not met. Good Faith Waivers for amendments are not required if a waiver for not meeting the goal had been approved on the original contract or a previous amendment. When a Good Faith Waiver had been previously approved for a contract, a new Good Faith Waiver is required for the amendment if the DBE participation after the amendment is less than approved under the previous Good Faith Waiver. For contracts with dollar goals, a Good Faith Waiver is required if the dollar amount of DBE participation is less than the amount approved under a previous Good Faith Waiver. For contracts with percentage goals, a Good

Faith Waiver is required if the DBE participation after the amendment is lower than the percentage approved under a previous Good Faith Waiver.

Good Faith Waiver forms should be submitted to the DBE Section via email addressed to dbeconsultantservices@dot.wi.gov. Consultants emailing dbeconsultantservices@dot.wi.gov should copy the Department Representative for the contract. When requesting a Good Faith Waiver, use the following subject line for the email:

ID xxxx-xx-xx Good Faith Waiver

If a Good Faith Waiver is needed along with consent to terminate, reduce or substitute a DBE on a contract, use the following subject line for the email:

ID xxxx-xx-xx Good Faith Waiver/Consent to Terminate

New Consultant DBE Commitment Process
Frequently Asked Questions

1. When does the prime consultant need to complete Form DT1029 “Consultant Commitment to Subcontract To DBE Firm”?

The form is required anytime they submit a new contract or work order with DBE participation as either a prime or sub. They also need to submit the form for any amendment that changes the basis of payment for DBE firms providing services under a contract. The form is required regardless of funding or whether there is an assigned DBE goal on the contract.

2. When will a DBE subconsultant be required to complete Form DT1029 “Consultant Commitment to Subcontract To DBE Firm – Attachment A”?

The form will be completed for any DBE firm working as a subconsultant on any WisDOT contract or work order regardless of funding or whether there is a DBE goal assigned on the contract. The form will also be required for any amendment on which a DBE firm’s basis of payment has been modified.

3. Is consent from the DBE Section to terminate/reduce/substitute required for when there is not DBE goal on a contract?

No. The DBE Section’s consent is only required on contracts if there is a DBE goal assigned on the contract. Standard contract provisions require WisDOT approval to subcontract and incorporate the role of subconsultants in the special provisions and basis of payment. Modifications to the terms of contract terms affecting subconsultants must be approved through a contract amendment even if consent to terminate/reduce/substitute is not required.

4. Is consent to terminate/reduce/substitute required for amendments that reduce the basis of payment amount for a DBE subconsultant when the final costs of services provided by the DBE were lower than initially estimated?

Yes, consent is required any time the basis of payment to a DBE subconsultant is reduced or eliminated on a contract with an assigned DBE goal. Justification for this example would fall under the criteria in 49 CFR 26.53(f)(3)(ix): “ Other documented good cause that you determine compels the termination of the DBE subcontractor. Provided, that good cause does not exist if the prime contractor seeks to terminate a

DBE it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award.”

A Good Faith Waiver will also be required when a reduction in required services cause overall DBE participation on the contract to fall below the assigned goal.

5. When is a contracting Bureau/Region required to submit the Form DT1029 along with a scan of the proposed contract/amendment to dbiconsultantservices@dot.wi.gov?

Submittal to dbiconsultantservices@dot.wi.gov is only required when the contract is federally funded and there is DBE participation.

6. How do I fill out the DT1029 Commitment Form if a DBE firm is performing services that cannot be counted for DBE credit because they are not certified for that type of work?

Show separate lines on the commitment form for the work under NAICS codes that is not creditable. Work that isn't creditable should not be counted in the "Assigned" or "Voluntary" columns of Form DT1029.

Work that isn't DBE creditable should be shown in the contract basis of payment under a separate not-to-exceed line. If a DBE firm is performing work that is creditable along with work that isn't creditable, there will be multiple not-to-exceed lines for that firm in the contract basis of payment.

49 CFR 26.53

Governing Good Faith Waivers and DBE Termination

§26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?

(a) When you have established a DBE contract goal, you must award the contract only to a bidder/offeror who makes good faith efforts to meet it. You must determine that a bidder/offeror has made good faith efforts if the bidder/offeror does either of the following things:

(1) Documents that it has obtained enough DBE participation to meet the goal; or

(2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the bidder/offeror does document adequate good faith efforts, you must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal. See Appendix A of this part for guidance in determining the adequacy of a bidder/offeror's good faith efforts.

(b) In your solicitations for DOT-assisted contracts for which a contract goal has been established, you must require the following:

(1) Award of the contract will be conditioned on meeting the requirements of this section;

(2) All bidders/offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:

(i) The names and addresses of DBE firms that will participate in the contract;

(ii) A description of the work that each DBE will perform;

(iii) The dollar amount of the participation of each DBE firm participating;

(iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;

(v) Written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and

(vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part); and

(3) At your discretion, the bidder/offeror must present the information required by paragraph (b)(2) of this section—

(i) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or

(ii) At any time before you commit yourself to the performance of the contract by the bidder/offeror, as a matter of responsibility.

(c) You must make sure all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before committing yourself to the performance of the contract by the bidder/offeror.

(d) If you determine that the apparent successful bidder/offeror has failed to meet the requirements of paragraph (a) of this section, you must, before awarding the contract, provide the bidder/offeror an opportunity for administrative reconsideration.

(1) As part of this reconsideration, the bidder/offeror must have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so.

(2) Your decision on reconsideration must be made by an official who did not take part in the original determination that the bidder/offeror failed to meet the goal or make adequate good faith efforts to do so.

(3) The bidder/offeror must have the opportunity to meet in person with your reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so.

(4) You must send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.

(5) The result of the reconsideration process is not administratively appealable to the Department of Transportation.

(e) In a "design-build" or "turnkey" contracting situation, in which the recipient lets a master contract to a contractor, who in turn lets subsequent subcontracts for the work of the project, a recipient may establish a goal for the project. The master contractor then establishes contract goals, as appropriate, for the subcontracts it lets. Recipients must maintain oversight of the master contractor's activities to ensure that they are conducted consistent with the requirements of this part.

(f)(1) You must require that a prime contractor not terminate a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) without your prior written consent. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.

(2) You may provide such written consent only if you agree, for reasons stated in your concurrence document, that the prime contractor has good cause to terminate the DBE firm.

(3) For purposes of this paragraph, good cause includes the following circumstances:

(i) The listed DBE subcontractor fails or refuses to execute a written contract;

(ii) The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor;

(iii) The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements.

(iv) The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;

(v) The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant 2 CFR Parts 180, 215 and 1,200 or applicable state law;

(vi) You have determined that the listed DBE subcontractor is not a responsible contractor;

(vii) The listed DBE subcontractor voluntarily withdraws from the project and provides to you written notice of its withdrawal;

(viii) The listed DBE is ineligible to receive DBE credit for the type of work required;

(ix) A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract;

(x) Other documented good cause that you determine compels the termination of the DBE subcontractor. Provided, that good cause does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award.

(4) Before transmitting to you its request to terminate and/or substitute a DBE subcontractor, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to you, of its intent to request to terminate and/or substitute, and the reason for the request.

(5) The prime contractor must give the DBE five days to respond to the prime contractor's notice and advise you and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why you should not approve the prime contractor's action. If required in a particular case as a matter of public necessity (e.g., safety), you may provide a response period shorter than five days.

(6) In addition to post-award terminations, the provisions of this section apply to preaward deletions of or substitutions for DBE firms put forward by offerors in negotiated procurements.

(g) When a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, you must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal you established for the procurement.

(h) You must include in each prime contract a provision for appropriate administrative remedies that you will invoke if the prime contractor fails to comply with the requirements of this section.

(i) You must apply the requirements of this section to DBE bidders/offerors for prime contracts. In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, you count the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5098, Jan. 28, 2011]