

REQUIRED CONTRACT PROVISION
FEDERAL AID CONTRACTS
UTILIZATION OF DISADVANTAGED BUSINESSES

I. INTRODUCTION.

The specific requirements for the utilization of Disadvantaged Business Enterprises, hereinafter referred to as DBEs, are set forth in this Required Contract Provision and are imposed pursuant to 49 CFR Part 26, hereinafter referred to as the regulations. This provision meets or exceeds the regulatory requirements. The regulations always take precedence over normal industry practice.

A. ASSURANCE. The Contractor, subrecipient, or subcontractor shall not discriminate on the basis of race, color, national origin, religion, age, disability, income status, veteran status or gender in the performance of the Contract. The Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of USDOT 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 Kansas Department of Transportation deems appropriate.

B. DEFINITIONS. For the purpose of this Required Contract Provision, the following words and phrases shall have the meanings as stated herein:

(1) Disadvantaged Business Enterprise (DBE) means a small business concern which is independently owned and controlled by one or more socially and economically disadvantaged individuals and which KDOT has certified as a DBE in accordance with 49 CFR Part 26.

(2) Small business concern means a small business as defined by Section 3 of the Small Business Act and relevant regulations except that a small business concern shall not include any firms or affiliated firms owned and controlled by the same socially and economically disadvantaged individual or individuals whose value has average, annual gross receipts in excess of \$ 22,410,000 over the previous three fiscal years.

(3) Owned and controlled means a business:

- (a) Which is at least 51 percent unconditionally owned by one or more socially and economically disadvantaged individuals, and
- (b) Whose management and daily business operations are controlled by one or more such individuals.

(4) Socially disadvantaged individual means a person who is a citizen or lawful permanent resident of the United States, has suffered social disadvantage in education, employment, or business, and who is a(an):

- (a) Black American (a person having origins in any of the black racial groups of Africa);
- (b) Hispanic American (includes a person of Mexican, Puerto Rican, Cuban, Central or South American, or any Spanish or Portuguese culture or origin, regardless of race);
- (c) Native American (includes a person who is American Indian, Eskimo, Aleut or Native Hawaiian);
- (d) Asian-Pacific American (includes a person whose origin is from the original people of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands);
- (e) Subcontinent Asian American (includes a person whose origin is India, Pakistan, Bangladesh, Bhutan, Nepal, Sri Lanka, or the Maldives Islands);
- (f) Member of a group, or any other individual of any race or sex, found to be both economically and socially disadvantaged; or
- (g) Women.

(5) Economically disadvantaged means an individual who has a personal net worth of less than \$1,320,000 excluding the value of the individual's ownership share of the DBE firm and primary personal residence. The individual has had diminished access to capital and credit compared to non-disadvantaged persons.

(6) Commercially useful function means the qualifying DBE owner performs, manages and supervises its work and manages and supervises the work of subcontractors, suppliers, manufacturers, truckers, brokers and other persons with whom the DBE contracts.

(7) Race and gender neutral measure means one that is used to assist any small business.

II. DBE CONTRACT GOALS.

A. KDOT strongly encourages all contractors to utilize DBE firms as subcontractors, suppliers, manufacturers, truckers, and brokers whenever possible and feasible. Greater voluntary participation will result in lower and fewer DBE contract goals. KDOT will set DBE contract goals only to meet the portion of its annual goal that is not met by race and gender neutral means and voluntary participation.

B. Only Eligible DBEs satisfy DBE contract goals. An Eligible DBE is one which KDOT has certified meets the legal requirements for social and economic disadvantage, ownership, and control with respect to the specific types of work which the DBE will be performing (Eligible DBE or KDOT Certified DBE). KDOT Certified DBEs, by name and the NAISC code(s) applicable to the work for which the DBE is certified, are listed in the KDOT DBE directory that is located on the internet at: <http://www.ksdot.org/divadmin/civilrights/>. KDOT also prints a paper directory quarterly, and Contractors may ask the KDOT Office of Civil Rights for a copy of the printed directory. However, as it is only published quarterly, Contractors should be aware that the printed directory may list DBE's who were decertified after the directory was printed, and these DBE's would not be considered eligible DBE's in a letting that followed decertification or when examining good faith efforts. Also, the printed directory will not list DBE's who have been certified after the directory was printed, but KDOT will consider these DBE's in a letting and when examining good faith efforts. Thus, the electronic directory controls as it is the most current information KDOT has available. Any bid proposal listing a firm that is not a KDOT certified DBE with respect to ownership/control at the time of bidding will be considered non-responsive unless the bidder has still met the DBE goal after KDOT has removed the ineligible DBE firm(s) from the bidder's DBE Goal Sheet. Any bid proposal listing a firm that is not a KDOT certified DBE with respect to the work type(s) (NAISC Code(s)) the firm will be performing on the project will be considered non-responsive unless the bidder has still met the DBE goal after KDOT has removed the ineligible work from the bidder's DBE Goal Sheet.

C. Contractors shall, as a minimum, seek DBE firms working in the same geographic area in which they seek subcontractors for a given solicitation.

D. Contractors are required to make good faith efforts to replace a DBE firm that is unable to perform successfully with another DBE firm. Any substitution of DBE firms from the time the Contractor has submitted a bid to KDOT through Project completion shall be approved by KDOT Office of Civil Rights. Substitutions will only be allowed for good cause. (See Section III.G).

E. When projects are State or Contractor tied, the assigned DBE Contract Goals shall be met for each project that contains a DBE contract goal. To compute DBE participation on tied projects the following method will be used:

(1) If the dollar amount actually subcontracted to DBEs on each contract is equal to or greater than the minimum dollar amounts assigned to each contract, the DBE goals shall have been met.

(2) If a State of Kansas funded project is tied to a federal aid funded project, the DBE contract goal can only be met by the amounts subcontracted to DBE firms on the Federal Aid Project.

III. MEETING DBE CONTRACT GOAL CRITERIA.

The award of the Contract will be conditioned upon satisfaction of the requirements herein established. The apparent low bidder must either meet or exceed the DBE goals for the contract or satisfy KDOT that good faith efforts were made to meet the goals prior to the bid letting.

A. REQUIRED DBE PARTICIPATION INFORMATION. All bidders are required to use the electronic bidding system file [EBSX file] created by KDOT for the Project to complete the DBE participation information described below .

- (1) Use the DBE folder in the EBSX file of the Project to select the names of KDOT Certified DBE firms that will participate in the Contract and accurately complete all the required fields for each certified DBE firm;
- (2) For each selected KDOT Certified DBE firm, identify the function the firm will serve on the project (subcontractor, manufacturer, supplier, broker), insert the NAISC code(s) applicable to the work the firm will be performing on the Project, and choose the bid item(s) that the firm will perform;
- (3) The actual dollar amount anticipated to be paid to each named KDOT Certified DBE firm; including DBE suppliers. Note: For DBE suppliers, the electronic bidding system will compute and apply towards the DBE goal the proper credit of 60% of the actual dollar amount anticipated to be paid ;
- (4) The actual dollar amount (not to exceed 10 percent of DBE subcontract) to be paid ahead of work as DBE mobilization to each named KDOT Certified DBE firm receiving DBE mobilization.
- (5) For federal aid contracts with a zero DBE goal, list all KDOT Certified DBE firms to be utilized, if any.

B. GOOD FAITH DETERMINATION. It is the bidder's responsibility to meet the DBE contract goal with KDOT Certified DBEs or to provide information to enable KDOT to determine that, prior to bidding, the bidder made good faith efforts to meet such goal. Note: the bidder cannot establish good faith efforts and KDOT will not consider good faith efforts when the failure to meet the DBE goal arises from the use of non-KDOT Certified DBEs. (See Section II.B).

- (1) Good Faith Information Submittal. If the low bidder's required DBE information indicates that the DBE contract goal will be met with KDOT Certified DBEs, the contract will proceed toward award and the low bidder need not submit any further DBE information. If the low bidder's required DBE information indicates that the actual dollar amount of the eligible work anticipated to be paid to KDOT Certified DBEs is insufficient to meet the DBE contract goal, the Contractor shall submit good faith documentation within two working days of the bid opening. Example: if bids are read publicly on Wednesday at 1:30 p.m., the good faith documentation must be at KDOT Office of Civil Rights before 5 p.m. on Friday.
- (2) KDOT Review. KDOT will review all information submitted to determine if the low bidder has met the DBE contract goal and, if not, whether the low bidder made sufficient good faith efforts to meet such contract goal. The determination of good faith efforts is made on a case-by-case basis and depends on the particular circumstances of the procurement. The issue KDOT will consider is whether the bidder took those steps, a reasonable bidder would have taken to actively and aggressively obtain KDOT Certified DBE participation sufficient to meet the goal. A KDOT determination that the low bidder's information failed to show sufficient good faith efforts shall cause rejection of the bid. If the low bid is rejected, the above procedure will be applied to the next lowest bidder, and other bidders if necessary, until a bidder is found that meets the DBE contract goals or establishes that good faith efforts were made to meet the goal. KDOT reserves the right to reject all bids and re-advertise the Contract.
- (3) Establishing Good Faith Efforts. To demonstrate good faith efforts to meet the DBE contract goal, submit to KDOT documentation on the factors listed as (a) through (g). KDOT has assigned a percentage to each factor that shows the relative importance of each factor to KDOT and to the other factors. These percentages are a guide only; the circumstances of a particular procurement may justify different percentages or consideration of factors not mentioned. In evaluating the reasonableness of the low bidder's

efforts, KDOT may consider whether other bidders met the goal or failed to meet the goal. In evaluating the reasonableness of the low bidder's efforts, KDOT will consider all documentation submitted; yet, documentation created during the bidding process is more credible than documentation created after the letting.

(a) The bidder negotiated in good faith with interested KDOT Certified DBEs. It is the bidder's responsibility to consider the available pool of KDOT Certified DBEs when determining subcontract or supply needs. It is the bidder's responsibility to furnish DBEs with information about plans or specifications to facilitate the bid. Include names of DBEs considered, information given to the DBE, if any, and an explanation of why agreements could not be reached for DBEs to perform the work. (25%)

(b) The bidder selected portions of work for which KDOT has capable, KDOT Certified DBE's to perform. This may include breaking out work items or subcontracting items the prime Contractor normally performs. (20%)

(c) The bidder used good business judgment in rejecting a KDOT Certified DBE quote, considering both price and capabilities. If a DBE quote represents a reasonable price for performing the work, the bidder should use that quote even though the DBE quote is higher than a non-DBE quote. However, bidders do not have to use excessive or unreasonable quotes. Before determining that a DBE quote is excessive, the bidder should inquire as to the reason for the disparity between the DBE and non-DBE quotes. The bidder should also evaluate what impact, if any, using a higher DBE price would have on the bidder's overall project bid. A higher DBE price may not be excessive or unreasonable if the price differential is a very small part of the project bid. (20%)

(d) The bidder solicited capable, KDOT Certified DBEs through pre-bid meetings, advertising, telephone, mail, facsimile, e-mail, or a combination of the foregoing. The solicitation must have occurred within sufficient time to allow a DBE to respond. Follow up all initial contacts, whether the contact was solicited or unsolicited. If a DBE expresses an interest in the contract or a desire to quote and fails to submit a quote, follow up that contact, whether the contact was solicited or unsolicited. Receiving substantial unsolicited quotes may not be considered actively and aggressively pursuing DBE participation. (10%)

(e) The bidder assisted interested KDOT Certified DBEs in obtaining equipment, supplies, or materials for the project being bid. (10%)

(f) The combinations of KDOT Certified DBEs the bidder considered in trying to meet the goal. It is acceptable to use a portion of several DBE bids. (10%)

(g) The bidder assisted interested KDOT Certified DBEs in obtaining bonding, credit, or insurance on the project being bid. (5%)

(4) Staff of KDOT's Office of Civil Rights and the Chief of Construction and Materials will review the documentation submitted and either accept or reject the good faith effort submittal.

(5) At the bidder's request, KDOT's Director of Operations will hold an informal hearing to discuss the bidder's good faith effort submittal. The bidder may have legal counsel present, at the bidder's expense. After the appeal hearing, the Director of Operations will issue the Agency's final administrative decision on whether the bidder made a good faith effort. The decision will be in writing and will explain the basis for the Agency's decision. This will be final agency action and a final order under the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601 *et. seq.* Any petition for judicial review shall be served on the Secretary of Transportation, Kansas Department of Transportation, 700 S.W. Harrison St., Topeka, KS 66603-3754.

C. COUNTING DBE PARTICIPATION TOWARD DBE CONTRACT GOALS.

DBE participation shall be counted toward meeting the DBE contract goals pursuant to this contract as follows:

(1) A Contractor may count toward its DBE contract goals the total dollar value of a contract paid to an Eligible DBE, including an approved DBE protégé.

NOTE: At the time the bid is submitted on the DBE goal sheet, list the actual amount intended to be paid to the DBE. On Form 259, submitted after award, list the same amount as in the contract line item. If this amount differs from the DBE subcontract amount, list the latter amount on the bottom of the form with an explanation.

(2) A DBE, bidding as a prime contractor, may count toward its DBE contract goals the total dollar value of the work actually performed by the Eligible DBE prime contractor, including the cost of supplies and materials the DBE obtains.

Example: A DBE contractor bids as a prime contractor. The contract specifies a \$10,000.00 DBE goal. The DBE prime contractor performs \$50,000 of the work with its own forces. The DBE prime contractor has met the \$10,000 goal.

(3) A Contractor may count toward its DBE goals a portion of the total dollar value of a subcontract with an Eligible DBE joint venture equal in proportion to the percentage of ownership and control of the DBE partner in the joint venture.

Example: A contract specifies a \$5,000.00 DBE contract goal. Prime contractor bids \$100,000.00 subcontracting with a joint venture DBE/non-DBE contractor for \$20,000.00 of the work. The percentage of ownership and control of the DBE/non-DBE joint venture is 25% DBE and 75% non-DBE. The prime contractor may count \$5,000.00 ($\$20,000.00 \times .25$; i.e. total dollar value times the percentage of DBE ownership) toward the DBE contract goal, thus fulfilling the DBE requirements of the contract.

(4) If a non-DBE contractor and an Eligible DBE contractor form a joint venture and bid as a prime contractor, the joint venture contractor shall fully meet the DBE contract goals specified in the project special provision. The joint venture contractor may count toward its DBE contract goals the total dollar value of the work actually performed by the DBE participant in the joint venture.

Example: A non-DBE contractor forms a joint venture with a DBE contractor and the joint venture bids the project as a prime contractor. The DBE contract goal is \$10,000.00. The DBE participant in the joint venture performs \$50,000 of the work with its own forces. The joint venture has met the \$10,000 goal.

Example: A non-DBE contractor forms a joint venture with a DBE contractor and the joint venture bids the project as a prime contractor. The DBE contract goal is \$100,000.00. The DBE participant in the joint venture performs \$80,000 of the work with its own forces. The joint venture must obtain the remaining \$20,000 in goal through use of another certified DBE firm, or show good faith efforts if the joint venture fails to meet the \$100,000 goal.

(5) A Contractor may count toward its DBE goal 60 percent of its expenditures for materials and supplies obtained from an Eligible DBE regular dealer, and 100 percent of its expenditures for materials and supplies obtained from an Eligible DBE manufacturer. A letter must be submitted to KDOT, detailing the amount, but the amount does not count as a subcontracted percentage.

(a) A manufacturer is a firm that operates a facility that produces goods from raw material on the premises.

(b) A regular dealer is a firm that owns, operates, or maintains a store, or warehouse where materials are stocked and regularly sold to the public. A regular dealer of bulk items (sand, gravel, etc.) need not stock the product if it owns or long-term leases distribution equipment. The supply of structural steel, steel assemblies and petroleum products do not count toward any KDOT DBE goal. A dealer must be responsible for material quality control and must deliver with its own or long term leased equipment to count toward the DBE goal.

(6) A Contractor may count toward its DBE goals the following expenditures to Eligible DBE firms that are not manufacturers or regular dealers:

(a) The commission charged for providing a bona fide service in the procurement of essential personnel, facilities, equipment, materials or supplies required for the performance of the contract, provided the commission is reasonable and customary.

(b) The commissions charged for bonds or insurance provided by a DBE broker for the specific performance of the contract, provided the fee is reasonable and customary. A letter must be submitted detailing the amount but does not count as a subcontracted percentage.

(7) A Contractor may count toward its DBE goals the amount paid to an Eligible DBE trucker for transportation services (labor and equipment used in delivering material to a Project).

(a) A DBE trucker who picks up a product at point A and delivers the product to the Contractor at point B provides a transportation service. The full amount paid for this transportation service (including the DBE trucker's overhead and profit) counts toward the DBE goal if the conditions in this subsection IIC(7) are met.

(b) Some DBE truckers are also a regular dealer (supplier) of a bulk item(s). In this case, 60% of the amount paid for the material delivered will count toward the DBE goal in addition to the amount paid for the transportation service. The DBE trucker is responsible for the quality of the material.

(c) For amounts paid to DBE truckers to be credited toward the DBE contract goal, the Contractor shall submit a letter to KDOT requesting DBE subcontract credit for delivering the materials or credit for both delivering and supplying the materials. Make this request before the DBE trucker begins delivering the material and include in the request the DBE trucking company's name, the applicable line items, the contact amount and the percent of the original contract being subcontracted to the DBE trucking company.

(d) For 100% of amounts paid to DBE truckers for transportation services to be credited toward the DBE contract goal, the DBE trucking company shall meet the following requirements and conditions:

1. Own and operate at least one fully licensed, insured, and operational truck on the project. Use owned or a combination of owned and leased trucks in accordance with this subsection
 - Trucks owned by the DBE trucking company operated by drivers the DBE trucking company employs
 - Trucks leased from another certified DBE firm operated by drivers the DBE trucking company employs.
 - Trucks leased from a non- DBE firm operated by drivers the DBE trucking company employs. (see Special Rule 5 (e))
2. Exercise control over all owned and leased trucks.
 - Control means the DBE trucking company is responsible for scheduling the use of the leased truck and for approving the owner's use of the leased truck for other purposes.
 - The DBE trucking company shall manage the leased truck(s) in a manner that gives the DBE trucking company absolute priority over the use of that truck for the project for which DBE credit is being counted.
3. Haul material to a dedicated project stockpile (unless KDOT approves hauling material to a commercial plant in accordance with the procedure provided below).
4. Furnish the KDOT field office the opportunity and information needed to monitor the DBE trucking. The KDOT field office will make a consistent effort to monitor the trucking as time and resources allow; however, trucking activity that is not monitored shall not count toward DBE goal. The information the Contractor and DBE trucking company are required to provide to enable the KDOT field office to monitor the DBE trucking include the following:
 - On or before the preconstruction conference meeting, submit to the KDOT field office all subcontract or lease agreements with trucking/equipment companies. Such agreements shall include a list of trucks to be leased by VIN and the agreed upon amount and method of payment.
 - On or before the preconstruction conference meeting, submit to the KDOT field office a list of trucks and truck drivers to be utilized for the duration of the project. For each truck, include the VIN, tag number, or other vehicle identification that enables the KDOT field office to verify which vehicles may be counted toward the DBE goal. Update the list and associated information throughout project construction as changes occur and provide updated lists to the KDOT field office.

- Monthly, submit to the KDOT field office a spread sheet or list which contains all trucks that hauled on the project the previous month and the dates and tons hauled which the Contractor claims count toward DBE goal.
- Weekly, submit to the KDOT field office certified payrolls from the DBE trucking company.
 - The prime contractor may submit the certified payrolls to the KDOT field office separately or with all other payrolls for the Project.
 - Instruct the DBE trucker to list Davis Bacon wages separately from non-Davis Bacon wages if the DBE trucker is being paid both wage types on a project (i.e. the trucking company is performing both on-site and off-site work).
- Ensure the name and identification number of the DBE trucking company is displayed on both owned and leased vehicles.

5. Special Rules for delivering materials to commercial batch plants. As a general rule, for DBE trucking to count toward the DBE goal, the DBE has to deliver the material to a dedicated stockpile on the project. However, before the bid letting, the Contractor may submit a written request to the KDOT field office, asking that KDOT allow DBE goal credit for delivering material to a dedicated stockpile location at a commercial plant.

- In its request, the Contractor shall identify how the material will be separated from other aggregate at the commercial plant and how the material will be identified as material for the project being constructed.
- In evaluating the request, the KDOT field office shall determine if KDOT has sufficient resources to monitor the trucking to the commercial plant. If the KDOT field office determines that time and resources allow that office to monitor this trucking, the KDOT field office will notify the Office of Civil Rights. The Office of Civil Rights will issue to the Contractor a letter of concurrence, approving DBE goal credit for the DBE trucking to the dedicated stockpile at the commercial plant.

(e) Special Rule for Trucks leased from non-DBE firms. Obtain written permission from the KDOT Office of Civil Rights before using trucks leased from a non-DBE firm to count toward DBE goal. If approved, trucks leased from non-DBE firms may be counted toward goal along with trucks owned or leased from DBE firms if the total value of transportation services (equipment and labor costs) provided by the non-DBE owned trucks is equal to or less than the value of the transportation services provided by DBE-owned or leased trucks on the contract. However, if the value of the transportation services provided by the non-DBE owned trucks exceeds the value of the services provided by the DBE-owned or leased trucks, the DBE goal credit will be the value of the transportation services provided by the DBE-owned or leased trucks plus the value of the transportation services provided by the non-DBE owned trucks but only up to the limit of the value of the DBE-owned trucks. ~~plus the fee or commission allowed on the difference between the value of the transportation services provided by the non-DBE owned trucks and the value of the transportation services provided by the DBE owned or leased trucks.~~

(f) DBE Brokers. A DBE that has no DBE trucks or DBE employees is not considered to have full control over the trucking services provided for the project and thus will only be considered a broker. A broker arranges or expedites transactions only. Once considered a broker, 100% of the broker fee or commission received by the DBE may be counted toward the DBE goal; however, no trucking labor or materials costs may be counted toward the DBE goal.

D. COMMERCIALY USEFUL FUNCTION.

The prime contractor is responsible for ensuring that Eligible DBE firms under subcontract to meet a DBE goal perform a commercially useful function (CUF). Failure to fulfill this obligation is a breach of contract and KDOT may invoke the sanctions listed in Section IV (Sanctions). The three criteria for a CUF are:

(1) The DBE firm shall manage the work through personal direct supervision by the DBE owner or a skilled, knowledgeable, full-time superintendent. Management includes scheduling work, ordering equipment and materials, hiring and firing employees, and submitting all required forms and reports. The DBE is not in compliance with this provision if the DBE subcontracts out part or all of the work to another entity.

(2) The DBE shall own all equipment, long term lease all equipment, or own some equipment and long term lease the remaining equipment except for specialized equipment as noted below.

(a) If the DBE leases equipment, the DBE shall have a written lease that gives the DBE full control of the equipment during the lease period. The DBE shall use its own workers to operate leased equipment.

(b) A DBE may enter into long term leases with companies operating as prime contractors. The DBE is not in compliance with this provision if the DBE leases equipment from the prime contractor on the project for that project only.

(c) Exception for specialized equipment: The DBE may lease short term specialized equipment such as a crane from another contractor or third party if this equipment is necessary for the DBE to perform its work and the equipment is of such a nature that it is not economically feasible or practical for the DBE to lease the equipment long term. The Contractor shall bill the DBE for this equipment and the DBE shall pay the contractor for the equipment. The DBE is not in compliance with this provision if the Contractor deducts from the DBE's pay estimate specialized equipment costs rather than submitting an invoice to and receiving payment from the DBE.

(3) The DBE shall negotiate the cost of, arrange delivery of, and pay for materials, supplies, labor, and equipment. Invoices shall be billed to the DBE and paid by the DBE.

(4) KDOT will not count towards goal or give DBE contract goal credit for the following:

(a) Monies the prime contractor pays directly for supplies, materials, labor or equipment on the DBE's behalf except for two-party checks approved under Section III.F below.

(b) Costs deducted from a DBE's pay estimate for supplies, materials, labor or equipment the prime contractor or its affiliate provided.

(c) Costs incurred for equipment the DBE leases from the Contractor on the project if the DBE is using the equipment for that project only and the equipment is not part of a long term lease agreement.

(d) Costs associated with a portion of a bid item that the Agency is unable to measure clearly.

(e) Costs incurred for work subcontracted outside normal industry practices, just to meet a goal.

(5) KDOT's determination that a DBE is not performing or did not perform a CUF is not appealable to the US Department of Transportation. KDOT's determination will be final agency action and a final order under the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601 *et. seq.* Any petition for judicial review shall be served on the Secretary of Transportation, Kansas Department of Transportation, 700 S.W. Harrison St., Topeka, KS 66603-3754.

E. BUSINESS INTEGRITY

Any person or entity will be found to be out of compliance with this required contract provision if any investigation reveals a commission or omission of any act of such serious or compelling nature that the act indicates a serious lack of business integrity or honesty. Such commission or omissions include, but are not limited to:

(1) Violating any applicable law, regulation, or obligation relating to the performance of obligations incurred pursuant to an agreement with a recipient under a KDOT financial assistance program or,

(2) Making, or procuring to be made, any false statement or using deceit to influence in any way any action of KDOT.

F. TWO PARTY CHECKS.

To comply with the current regulation, KDOT is implementing the following two-party check procedures. The prime contractor is responsible for following the procedure and for ensuring that Eligible DBE firms follow the procedure.

- (1) The DBE owner shall make the request for a two-party check to the KDOT Office of Civil Rights and shall explain the benefit to the DBE firm. On a case-by-case basis, it may be necessary for the prime contractor to initiate the issuance of two party checks.
- (2) The prime contractor shall send the check to the DBE owner who will endorse and forward the check to the supplier. This should be done within the 10-day prompt pay timeframe.
- (3) The amount of the check should not exceed the amount of material paid by KDOT on the latest estimate. *For example, if the estimate was taken on 7/23, pay the material bill through 7/23 not through 7/31.*
- (4) Two party checks shall be issued only long enough to establish credit for the DBE firm.
- (5) KDOT will not count towards goal or give DBE contract goal credit for two party checks that have not been pre-approved by KDOT.

G. TERMINATION AND SUBSTITUTION OF DBEs.

Contractors may substitute a KDOT Certified DBE firm listed on the Contractor's DBE goal sheet without Sanctions under Section IV if either the DBE voluntarily withdraws from the project or the Contractor has good cause to terminate the DBE, if the Contractor has complied with the procedures for requesting termination and substitution, if KDOT has consented in writing to the termination and substitution, and if the Contractor has either met the terminated DBE's remaining goal commitment with KDOT-approved substitute DBEs or made documented, good faith effort to meet the terminated DBE's remaining goal commitment.

- (1) If the DBE wants to withdraw from the project, the Contractor shall provide KDOT Office of Civil Rights a letter requesting termination as well as a letter from the original DBE in which the DBE states the reason for the DBE's withdrawal or inability to perform. The Contractor shall notify KDOT Office of Civil Rights if the DBE fails to provide this letter to the Contractor. KDOT will review the documentation and determine if additional information or an informal hearing is needed for KDOT to determine whether to consent to termination. KDOT will inquire whether the DBEs reason for withdrawal is attributable to bad faith, discriminatory action, or other fault of the Contractor.
- (2) If the Contractor wants to terminate the DBE firm for good cause (and reason other than a DBE's voluntary withdrawal), the Contractor shall give written notice to the DBE firm of its intent to request that KDOT consent to the Contractor terminating the DBE firm. The Contractor shall identify the reasons for the requested termination and copy KDOT Office of Civil Rights on the letter to the DBE firm. Unless the Contractor requests and KDOT determines that a shorter response time is needed for public safety, the letter shall notify the DBE firm that it has five business days to respond in writing to the Contractor's notice and provide reasons, if any, why the DBE objects to the proposed termination and why KDOT should withhold its consent to the termination. If the Contractor desires to proceed with termination after receiving the DBE firm's response, the Contractor shall provide KDOT Office of Civil Rights written notice requesting that KDOT allow the Contractor to terminate the DBE and identifying the reasons for the requested termination. KDOT will then review the documentation and determine if additional information or an informal hearing is needed for KDOT to determine whether to consent to the termination.
- (3) Contractors are required to obtain written consent from KDOT Office of Civil Rights before terminating and before substituting a KDOT Certified DBE firm listed on the Contractor's DBE goal sheet (listed DBE firm) with another KDOT Certified DBE firm, a non-DBE firm, or the Contractor's own forces or an affiliate of the Contractor.

(4) KDOT will only approve termination of DBEs for good cause. Good cause includes the following circumstances, though the existence of any circumstance does not excuse termination before written notice to and written consent by KDOT:

- (a) The listed DBE firm fails or refuses to execute a written contract;
- (b) The listed DBE firm fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards through no fault of the Contractor.
- (c) The listed DBE firm fails or refuses to meet the Contractor's reasonable, nondiscriminatory bond requirements.
- (d) The listed DBE firm becomes bankrupt, insolvent, or exhibits credit unworthiness;
- (e) The listed DBE firm is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to state law, federal law, or both;
- (f) The listed DBE firm is non-responsible based upon KDOT's determination that the DBE lacks the skills, abilities, or integrity to perform the work for the reasons stated in Standard Specification Subsection 102.18c;
- (g) The listed DBE firm voluntarily withdraws from the project and provides the Contractor written notice of its withdrawal and the reason(s) for withdrawal;
- (h) The listed DBE is ineligible to receive DBE credit for the type of work required;
- (i) The listed DBE firm is unable to complete its work on the contract because of the death or disability of the DBE owner;
- (j) Other documented good cause that the Contractor determines and KDOT agrees compels the termination of the DBE firm.

Note: In evaluating good cause, KDOT will consider whether the Contractor acted in good faith and in a non-discriminatory manner in its dealing with the DBE firm and whether the Contractor is seeking termination so that the Contractor can self-perform the work for which the DBE firm was engaged or so that the Contractor can substitute another DBE or non-DBE firm after contract award.

(5) If KDOT provides written consent to termination of a listed DBE firm, the Contractor shall make good faith effort to substitute the terminated DBE firm with another KDOT Certified DBE firm. The Contractor shall obtain KDOT's written consent to the substitute DBE firms the Contractor proposes for meeting the remaining goal commitment of the terminated DBE. KDOT will not consider substitution with a non-DBE firm, the Contractor's own forces or an affiliate of the Contractor unless and until the Contractor demonstrates that it used good faith efforts to substitute the terminated DBE with another DBE. The Contractor may solicit substitute DBEs that perform the same work as the original DBE or different work than the original DBE. The Contractor shall obtain DBE substitution participation that at least equals the monetary value of the work needed to satisfy the goal commitment for the terminated DBE after that commitment has been reduced by the value of the work performed by the terminated DBE, if any (Substitution DBE goal). If the Contractor fails to meet or exceed the terminated DBE's remaining goal commitment with KDOT-approved substitute DBEs, KDOT will determine whether the Contractor made good faith effort to meet the terminated DBE's remaining goal commitment. The issue KDOT will consider is whether the Contractor took those steps a reasonable Contractor would have taken to actively and aggressively obtain substitute DBE participation sufficient to meet the monetary value of the work needed or remaining to satisfy the goal commitment for the terminated DBE. To demonstrate good faith effort, the Contractor shall provide documentation to KDOT on the factors listed in Section III.B(3)(a) through (g) within 7 days of KDOT's request.

(6) Staff of KDOT's Office of Civil Rights and the Chief of Construction and Materials will review the documentation submitted and either accept or reject the good faith effort submittal.

(7) If the Contractor's good faith effort is rejected, the Contractor may request an informal hearing with KDOT's Director of Operations. The Contractor may have legal counsel present, at the Contractor's expense. After the appeal hearing, the Director of Operations will issue the Agency's final administrative decision on whether the Contractor made a good faith effort. The decision will be in writing and will explain the basis for the Agency's decision. This will be final agency action and a final order under the

Kansas Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601 *et. seq.* Any petition for judicial review shall be served on the Secretary of Transportation, Kansas Department of Transportation, 700 S.W. Harrison St., Topeka, KS 66603-3754.

(8) If the Contractor's good faith effort is accepted either on initial review or in the Agency's final determination, no sanctions will be imposed for the Contractor's inability to satisfy the remaining goal commitment for the terminated DBE.

(9) KDOT will not count towards goal credit costs incurred for work subcontracted to unapproved, substitute DBEs.

(10) Only work performed by the listed DBE or a substitute approved by KDOT is eligible for payment. Thus, in addition to lack of goal credit, KDOT will not pay for work (labor, materials, equipment) performed by a DBE firm, non-DBE firm, the Contractor, or a Contractor affiliate that has not been approved by KDOT as a substitute for the terminated DBE firm.

(11) The procedures in this subsection III.G apply to termination and substitution of approved substitute DBE firms as well as listed DBE firms.

IV. SANCTIONS.

If KDOT finds any contractor, sub-contractor, DBE, joint venture, or mentor/protégé to be out of compliance with this required contract provision, KDOT may impose one or more of the following sanctions:

(1) Withhold payment of progress payments until the contractor or DBE contractor complies with the payment requirements of this Special Provision.

(2) Remove the non-complying DBE from the DBE directory until the DBE shows the company is meeting the requirements necessary to perform a CUF, including payment of all bills.

(3) Deny goal credit as previously stated for failure to replace a non-performing DBE with another DBE (unless good faith effort was made), failure to meet the requirements necessary to perform a CUF, or failure to follow two party check procedures.

(4) Assess and deduct as liquidated damages the monetary difference between the DBE goal amount and the amount actually paid to the DBEs for which KDOT has allowed DBE goal credit.

(5) Reject the bidder's bid if the bidder failed to meet the DBE goal and failed to show good faith effort to meet the goal.

(6) Refer the matter to the Office of the Attorney General, the US Department of Justice, or both for follow-up action.

(7) Enforce all other remedies KDOT has under other contract provisions such as contract termination, contractor suspension, contractor debarment, and sanctions for failing to pay promptly.

(8) Deduct from contract funds the value of work performed by any firm for which KDOT did not consent to substitution.

V. USE OF MINORITY OWNED FINANCIAL INSTITUTIONS (49 CFR 26.27).

KDOT encourages prime contractors to use the services of institutions owned and controlled by socially and economically disadvantaged persons. All eligible institutions are certified by KDOT and are listed on the internet at <http://www.ksdot.org/divadmin/civilrights/>.

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