

**DISADVANTAGED BUSINESS
ENTERPRISE REQUIREMENTS
ON FEDERALLY FUNDED
TRANSPORTATION
PROJECTS**

**County Counsels' Association
of California
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Disadvantaged Business Enterprise (“DBE”) Requirements

49 C.F.R. Part 26

- For recipients of certain Highway, Airport or Transit project funding from the U.S. Department of Transportation.
- Condition of receipt of Federal funds - 49 C.F.R. § 26.21.
- Small businesses owned by Women and Ethnic Minorities - 49 C.F.R. § 26.5.
- “[T]he primary purpose of the CSBE and DBE programs is to help small minority-owned businesses develop and grow, creating new jobs and helping to overcome the effects of past discrimination in the construction industry. . . .” (Emphasis added)

United States v. Maxwell (11th Cir. 2009) 579 F.3d 1282,1306.

- Allowed by an Exception to Proposition 209, Const. Art. I, § 31(e).

DBE Program Requirements

- DBE goals, based on historical under-utilization studies - 49 C.F.R. § 26.45.

G. LaNoue, "Setting Goals in the Federal Disadvantaged Business Enterprise Programs" (2006-2007) 17 Geo. Mason U. C.R. L.J. 423.

CalTrans DBE goals upheld:

Associated Gen. Contrs. of Am. v. Cal. DOT (9th Cir. 2013) 713 F.3d 1187,1190.

- DBE subcontractors or suppliers must be listed in bids. 49 C.F.R. § 26.53(b).
 - purpose is to avoid "bid shopping" - 57 Fed.Reg. 58288, 58294.(Section by Section analysis of proposed 49 C.F.R. § 23.35); 64 Fed.Reg. 5096, 5115; 75 Fed.Reg. 25812, 25821; 79 Fed.Reg. 59566, 59584-59585.
 - similar to P.C.C. § 4104.
- Award must be conditioned on meeting goals, or showing "good faith efforts" and outreach to meet goals - 49. C.F.R. § 26.53(a).
- Prompt Payment to DBE Requirements - 49 C.F.R. § 26.29.
- Funding Recipients must Monitor Compliance - 49. C.F.R. § 26.37.
- Sample DBE Program -

<https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/49-cfr-part-26-sample-disadvantaged-business>

Who Is A DBE?

- Disadvantaged business enterprise or DBE means a for-profit small business concern—
 - (1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such 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.

49 C.F.R § 26.5.

- DBE Certification Process - Statewide
 - PCC § 2050 et seq..
 - 49 C.F.R. §§ 26.61 et seq, 26.81 et seq.

Grounds for Rejection of Bids, or Bid Protests

- **§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 or 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. To count toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;

(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; and

(v) Written confirmation from each listed DBE firm that it is participating in the contract in the kind and amount of work provided in the prime contractor's commitment.

(vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part). The documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract; and

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

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

(B) No later than 7 days after bid opening as a matter of responsibility. The 7 days shall be reduced to 5 days beginning January 1, 2017.(d)

49 C.F.R. § 26.53(a) & (b).

Section 26.53(b)(2) is similar to PCC § 4104.

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.

49 C.F.R. § 26.53(d).

- Lack of “responsiveness” or “responsibility” are grounds for a bid protest of, or rejection of, a bidder’s bid. *See, MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal. App. 4th 359, 364, 370 (bid non-responsive for failure to show compliance with MBE/WBE requirements); *Great West Contractors, Inc. v. Irvine Unified School Dist.* (2010) 187 Cal. App. 4th 1425, 1452-1453.
- *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2010) 23 Cal.4th 305, 308-309 (bid had been found non-responsive for failure to meet DBE requirements); *Dunnet Bay Constr. Co. v. Hannig* (C.D. Ill.Feb. 11, 2014) 2014 U.S. Dist. LEXIS 17679 (bid non-responsive per 49 C.F.R. § 26.53(a) due to DBE non-compliance); *GE v. County of Cook* (N.D. Ill. Apr. 4, 2001) 2001 U.S. Dist. LEXIS 4993, 56-58 (bid non-responsive due to M/WBE non-compliance).

Monitoring of DBE Use

- Utilization Reports and counting of DBE participation - 49 C.F.R. § 26.55.
- Compare to Listing of DBE subs/supplier in Bid - 49 C.F.R. §§ 26.37, 26.11(d).
- Respond to / investigate complaints.
- [F]ailure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate, which may include, but is not limited to:
 - (1) Withholding monthly progress payments;
 - (2) Assessing sanctions;
 - (3) Liquidated damages; and/or
 - (4) Disqualifying the contractor from future bidding as non-responsible.

49 C.F.R § 26.13(b).

Frequent Areas of Fraud, Evasion

- Sham DBEs.
- Contractor takeovers of DBEs.
- Materials dealers vs. brokers.
- WBEs.
- Material brokers masquerading as “regular dealers”.
- Improper use of material brokers disguised as “regular dealers”.

“Commercially Useful Function” Requirement of 49 C.F.R. § 26.55(c)

- Originally designed for material suppliers and brokers.
- Protection against evasion of regulations.
- (1) 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. To determine whether a DBE is performing a commercially useful function, you must 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.
- (2) 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. In determining whether a DBE is such an extra participant, you must examine similar transactions, particularly those in which DBEs do not participate.
- (3) If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or 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, you must presume that it is not performing a commercially useful function.
- (4) When a DBE is presumed not to be performing a commercially useful function as provided in paragraph (c)(3) of this section, the DBE may present evidence to rebut this presumption. You may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.

(5) Your decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to DOT.

49 C.F.R. § 26.55(c).

- Small Business Enterprise (“SBE”), Disabled Veteran Business Enterprise (“DVBE”), and Local Business Enterprise (“LBE”) and other similar “*Spending Power*” social programs on the Federal, State and Local level also have similar “*Commercially Useful Function*” subcontracting requirements to avoid fraud, evasion and abuse by government contractors. See e.g., 49 C.F.R. § 23.55(a); 40 C.F.R. § 33.503(f); Mil. & Vet. Code §§ 999, 999.9(h); Gov. Code § 14837(d)(4); 2 Code Calif. Regs. §§ 1896.4, 1896.71; San Francisco, California, Administrative Code §§ 12D.5 & 14A.4.

“ Regular Dealers”, Suppliers or Brokers of Materials

- Only 60% DBE Credit - 49 C.F.R. § 26.55(e)(2).
- Must not be brokers - 4 elements.
- U.S.D.O.T. General Counsel Interpretations -

<https://www.transportation.gov/sites/dot.gov/files/docs/Official%20Questions%20and%20Answers%204-15-16.pdf>

- (e) Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

(1)(i) If the materials or supplies are obtained from a DBE manufacturer, count 100 percent of the cost of the materials or supplies toward DBE goals.

(ii) For purposes of this paragraph (e)(1), a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

(2)(i) If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals.

(ii) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

(A) To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.

(B) A person may be a regular dealer in such bulk items as petroleum products,

steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph (e)(2)(ii) if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

(C) Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph (e)(2).

(3) With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided you determine the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals, however.

(4) You must determine the amount of credit awarded to a firm for the provisions of materials and supplies (e.g., whether a firm is acting as a regular dealer or a transaction expediter) on a contract-by-contract basis.

Substitution of Listed DBEs Only for “Good Cause”

- 49 C.F.R. § 26.53(f).
- Based on P.C.C. § 4107(a) - 75 Fed.Reg. 25812, 25821.

“(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.

(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;

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

- (vi) The listed DBE subcontractor voluntarily withdraws from the project and provides to you written notice of its withdrawal;
- (vii) The listed DBE is ineligible to receive DBE credit for the type of work required;
- (viii) A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract;
- (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.

. . . .

(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. . . ."

"(g) When a DBE subcontractor is terminated, . . . , you must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. . . ." (Emphasis added).

49 C.F.R. § 26.53(f) - (g).

- Problems of listing DBEs in bid but not using them, or "bid shopping".

- Due Process Hearings on matters of “responsibility”?
- “a. The Nature of Responsibility”

“The definition of responsibility is fairly easy, because it is now statutory, set forth in section 1103 of the Public Contract Code. We now quote in full: “ ‘Responsible bidder,’ as used in this part, means a bidder who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract. [¶] The Legislature finds and declares that this section is declaratory of existing law.”

“Readers of Public Contract Code section 1103 will note that it is focused on the bidder, not the bid. The statute speaks in terms of personal qualities that have been “demonstrated” by the bidder. And the legislative emphasis on responsibility going to the personal quality of the bidder is all the more significant when one recognizes the history of the case law on responsible bidding.”

Great West Contractors, Inc. v. Irvine Unified School Dist. (4th Dist. 2010)187 Cal. App. 4th 1425, 1450-1451.

“[The] bidder was entitled to at least a “due process hearing” on the purported nonresponsibility. (D.H. Williams, *supra*, 146 Cal.App.4th at p. 772.)

“In the process, the D.H. Williams court employed five factors in determining that the rejection of the bid before it was, in “legal effect,” for nonresponsibility rather than nonresponsiveness.

Before we list those factors, let us hasten to add one threshold matter: literal compliance with the bid request. In D.H. Williams, the losing lowest bidder complied with the literal language of the bid request. (See D.H. Williams, *supra*, 146 Cal.App.4th at pp. 764, 769–770 [making the point that the bid package “[did] not require” listing of only licensed subcontractors].) We thus recognize, as one can derive from the ordinary nonresponsive bidding cases (Taylor Bus, Pacific Bell, Domar Electric II, and M & B) that literal noncompliance with a bid request does indeed make a bid nonresponsive.

That said, the following D.H. Williams factors are for situations where, as in D.H. Williams, there is literal compliance, but the public entity still claims the bid was nonresponsive. Here they are:

(1) The complexity of the problem and the ensuing need for subtle administrative judgment. (See D.H. Williams, *supra*, 146 Cal.App.4th at p. 766; see also *id.* at p. 764, quoting Taylor Bus, *supra*, 195 Cal.App.3d at pp. 1341–1342 [contrasting responsibility determination as a complex process with responsiveness determination as practically a ministerial one involving no exercise of agency discretion].)

(2) The need for “ ‘information received outside the bidding process.’ ” (D.H. Williams, *supra*, 146 Cal.App.4th at p. 764, *italics added*, quoting Taylor Bus, *supra*, 195 Cal.App.3d at pp. 1341–1342.)

(3) Whether the problem is the sort that is susceptible to categorical hard and fast lines, or whether it is better handled on a “case-by-case” basis. (See D.H. Williams, *supra*, 146 Cal.App.4th at p. 767 [noting that problem of erroneous listing of unlicensed subcontractor required case-by-case determination].)

(4) The potential for “ ‘adverse impact on the professional or business reputation of the bidder. (D.H. Williams, *supra*, 146 Cal.App.4th at p. 764, [1457] *italics added*, quoting Taylor Bus, *supra*, 195 Cal.App.3d at pp. 1341–1342; see also D.H. Williams, *supra*, 146 Cal.App.4th at p. 766 [noting a determination that a contract intentionally listed an unlicensed subcontractor was a “serious matter”].)

(5) The potential that “innocent bidders” are subject to “arbitrary or erroneous disqualification from public works contracting.” (D.H. Williams, *supra*, 146 Cal.App.4th at p. 766, *italics added*; *id.* at p. 767.) [This factor was also restated as whether any “purpose of the Public Contract Code would be served” by the disqualification of the bid.]

Great West Contractors, Inc. v. Irvine Unified School Dist. (4th Dist. 2010) 187 Cal. App. 4th 1425, 1455-1457; *Advanced Real Estate Services, Inc. v. Superior Court* (4th Dist. 2011) 196 Cal.App. 4th 338, 351-352.

- A “property interest”, rather than just a “liberty interest”, may be present in a substitution of a listed DBE, because the listing of a DBE in a bid may give it a legal right to perform that work.

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“Since the purpose of the statute is to protect both the public and subcontractors from the evils of the proscribed unfair bid peddling and bid shopping (Gov. Code, §§ 4100, 4101), we hold that it confers the right on the listed subcontractor to perform the subcontract unless statutory grounds for a valid substitution exist.”

Southern California Acoustics Co. v. C. V. Holder, Inc. (1969) 71 Cal. 2d 719, 727.

Possible Civil and Criminal False Claims Acts Violations

- “Pursuant to federal regulations and the BART contract, Defendant was required to certify that it had complied with the DOT's Disadvantaged Business Enterprise ("DBE") program relating to the participation of DBEs on the project. (Id.). . . As part of the program, Defendant was required to submit monthly DBE utilization reports to BART, including in each report the amounts awarded to DBEs as well as the amounts actually paid during each month. (Id. at 6). The numbers in these reports, submitted with Defendant's invoices, were required to be accurate under the BART contract and were forwarded to the DOT to allow the DOT to evaluate nationwide DBE participation. (Id.).” (Emphasis added)

United States ex rel. Laymon v. Bombardier Transp (W.D. Pa. 2009) 656 F.Supp. 2d 540, 542.

“Bombardier's right to payment was conditioned upon its submission of accurate monthly DBE reports regardless of the percentage of the goal attained. . . Had BART and DOT been aware that Bombardier's reports were false, BART could have withheld payment and/or terminated the contract, while DOT could have imposed penalties including banning BART from participation in federal contracts. (Docket No. 53 at P 110).” (Emphasis added)

Laymon v. Bombardier Transp. (Holdings) USA, Inc., 2009 U.S. Dist. LEXIS 24403, 33 (W.D. Pa. Mar. 23, 2009).

- *Donovan v. Dragados, S.A.*, 2013 U.S. Dist. LEXIS 92661, 29-30 (D.N.J. June 28, 2013);
- *Ab-Tech Constr. v. United States* (Fed. Cl. Ct.1994) 31 Fed. Cl. 429, 434, *aff'd. Ab-Tech Const. v. United States* (Fed. Cir. 1995) 1995 U.S. App. LEXIS 25757 (MBE program);
- *Southern Cal. Rapid Transit Dist. v. Superior Court* (1994) 30 Cal. App. 4th 713, 724;

- *United States v. Maxwell* (11th Cir. 2009) 579 F.3d 1282, 1288 - 1294, 1298-1303, 1306;
- *United States v. Brothers Constr. Co.* (4th Cir. 2000) 219 F.3d 300, 308-309, 317 -318 .

Debarment from Public Contracting

- 49 C.F.R. §§ 26.107, 26.13(b)(4).
- Due Process Requirement, as a “liberty interest” in being able to bid on future contracts is implicated -

“ [A] person's 'right to ... follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' ... concept[] of the Fifth Amendment." *Greene v. McElroy*, 360 U.S. 474, 492, 3 L. Ed. 2d 1377, 79 S. Ct. 1400 (1959); see also *Kartseva v. Dep't of State*, 308 U.S. App. D.C. 397, 37 F.3d 1524, 1529 (D.C. Cir. 1994) (acknowledging a "constitutionally protected 'right to follow a chosen trade or profession' " (quoting *Cafeteria & Restaurant Workers Local 473 v. McElroy*, 367 U.S. 886, 895-96, 6 L. Ed. 2d 1230, 81 S. Ct. 1743 (1961))). Because this "liberty concept" protects corporations as well as individuals, formally debarring a corporation from government contract bidding constitutes a deprivation of liberty that triggers the procedural guarantees of the Due Process Clause. *Old Dominion Dairy Prods., Inc. v. Sec'y of Defense*, 203 U.S. App. D.C. 371, 631 F.2d 953, 961-62 (D.C. Cir. 1980)” (Emphasis added)

Trifax Corp. v. District of Columbia (D.C. Cir. 2003) 314 F.3d 641, 643.