

## ATTACHMENT H – SUBCONTRACTING

### INSTRUCTIONS

#### DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROVISIONS FOR PROFESSIONAL SERVICES CONTRACTS WITH FEDERAL FUNDING

[Insert the following Attachment H – Subcontracting, and Attachment H – Exhibits, into the contract template. Add the legacy contract and PeopleSoft contract number in top right header, modify page numbering as applicable, and delete this page of instructions.]

This Attachment is applicable to federally funded contracts with or **without** an assigned DBE goal.

A copy of the Attachment H - Subcontracting and a copy of each Attachment H Exhibit (as indicated in the Exhibits file) shall be included and made part of the contract.]

## ATTACHMENT H – SUBCONTRACTING

### DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROVISIONS FOR PROFESSIONAL SERVICES CONTRACTS WITH FEDERAL FUNDING

#### A. PURPOSE

The purpose of this Attachment is to carry out the U.S. Department of Transportation's (DOT) policy of ensuring nondiscrimination in the award and administration of DOT-assisted contracts.

#### B. DEFINITIONS

**Commercially Useful Function (CUF):** A CUF occurs when a DBE has the responsibility for the execution of the work and carrying out such responsibilities by performing, managing, and supervising the work. See citation [49 CFR 26.55 \(c\)](#) for additional CUF requirements.

**DBE Goal:** The DBE goal is the advertised contract DBE participation goal for services to be provided on the contract.

**Disadvantaged Business Enterprise (DBE):** A DBE is a for-profit small business certified through the [Texas Unified Certification Program \(TUCP\)](#) in accordance with [Title 49 Code of Federal Regulations \(CFR\) Part 26](#), that is at least 51% owned by one or more socially and economically disadvantaged individuals, or in the case of a publicly owned business, in which is at least 51% of the stock is owned by one or more socially and economically disadvantaged individuals, and whose management and daily business operations are controlled by one or more of the individuals who own it.

**Good Faith Effort (GFE):** All necessary and reasonable steps to achieve the DBE goal which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation. For additional information, see [49 CFR, Part 26, Appendix A](#).

**North American Industry Classification (NAICS):** NAICS are work codes used to identify types of services that the provider or subprovider has been approved to perform. For a complete list of PEPS precertified work categories, see [DBE NAICS Codes for Standard Work Categories](#).

**Professional Services Contract Administration Management System (PS-CAMS):** The electronic reporting system used for PEPS professional services contracts.

**PS-CAMS Online Reporting System:** The Online Reporting System used by providers for submitting monthly electronic reporting for subprovider services under a PEPS professional services contract. See [Manage Active Contracts with PS-CAMS](#) for additional information on the Online Reporting System.

**Race-Conscious (RC) DBE Participation:** Participation by a DBE that performs services to meet the DBE goal. A DBE must be certified in the NAICS code associated with the services and must be shown to be performing a CUF to be counted toward the RC goal.

**Race-Neutral (RN) DBE Participation:** Participation by a DBE that performs services more than the DBE goal, or that performs services where the DBE is not certified in the NAICS code associated with the services. A DBE must be shown to be performing a CUF to be counted toward the RN goal.

**Texas Unified Certification Program (TUCP) Directory:** An online directory listing all DBEs currently certified by the [Texas Unified Certification Program](#) (TUCP). The directory identifies DBEs whose participation on a contract may be counted toward achievement of the assigned DBE goal.

### C. TXDOT POLICY

The Texas Department of Transportation (TxDOT) has established a Disadvantaged Business Enterprise (DBE) program in accordance with the regulations of U.S. Department of Transportation (DOT), [Title 49 Code of Federal Regulations \(CFR\) Part 26](#).

It is TxDOT's policy to ensure that DBEs have an equal opportunity to receive and participate in DOT-assisted contracts.

For additional information, see the [TxDOT DBE Program Policy Statement](#) and [TxDOT DBE Program Website](#).

### D. PROVIDER REQUIREMENTS

The provider shall:

1. offer DBEs, as defined in [49 CFR Part 26, Subpart A](#) and the [TxDOT's DBE program](#), the opportunity to compete fairly for contracts and subcontracts financed in whole or in part with Federal funds,
2. include the following assurance in the contract between the provider and each subprovider: The provider, sub recipient or subprovider shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. See citation [49 CFR 26.13 \(b\)](#),
3. adhere to the prompt payment requirements for all subproviders, including DBEs, as outlined in section [49 CFR Part 26.29](#) and the [Texas Administrative Code \(TAC\) Rule 9.208](#),
4. carry out applicable requirements of [49 CFR Part 26](#) in the award and administration of DOT-assisted contracts,
5. report subprovider payment information using the Online Reporting System. The report must be submitted monthly, even if there is no invoice being submitted or subcontracting to report,
6. comply with all requirements, processes and procedures outlined in this contract, Attachment H, and the Attachment H Exhibits, in support of TxDOT's DBE program,
7. make a Good Faith Effort (GFE) to meet the DBE goal for this contract, and
8. cooperate fully and promptly with compliance audits, reviews, investigations, and other requests for information.

A provider's failure to comply with these requirements, may constitute a material breach of this contract. In such a case, the State reserves the right to:

- a. terminate the contract,
- b. deduct the amount of the DBE goal not accomplished by DBEs from the money due or to become due to the provider, and/or

c. other remedy or remedies as the State deems appropriate.

#### **E. FALSIFICATIONS AND MISREPRESENTATION**

If the State determines that a provider or subprovider was a knowing and willing participant in any intended or actual subcontracting arrangement contrived to artificially inflate DBE participation or any other business arrangement determined by the State to be unallowable, or if the provider engages in repeated violations, falsification, or misrepresentation, the State may:

1. refuse to count any fraudulent or misrepresented DBE participation,
2. withhold progress payments to the provider commensurate with the violation,
3. reduce the provider's prequalification status,
4. refer the matter to the Office of Inspector General of the US Department of Transportation for investigation, and/or
5. seek any other available contractual remedy.

#### **F. DBE CERTIFICATION**

Firms interested in becoming certified as a DBE may apply online through TxDOT's [Diversity Management System](#) (DMS) or by submitting the paper DBE Application and Personal Net Worth Statement located on [Texas Unified Certification Program](#) (TUCP) webpage.

Once certified, the firm can be used to meet the DBE goal established for a federally-assisted contract. A DBE must be:

1. certified in the work category and the NAICS code, for the services that they are to perform under the contract (between TxDOT and the prime provider), at the time the contract is executed, and
2. certified at the time the subcontract (between the prime provider and subprovider) is executed.

#### **G. DBE DECERTIFICATION**

A DBE may become decertified by any of the following:

1. no longer meeting the eligibility standards of [49 CFR Part 26, Subpart D](#), to be certified as a DBE,
2. graduating from the DBE program,
3. merging with or being acquired by a non-DBE,
4. terminating from the program for good cause outlined under [Appendix C to Part 26](#), or
5. voluntarily withdrawing from the DBE program.

If a DBE becomes decertified, they will continue to be counted towards the DBE goal throughout the life of the contract for services they perform in the work category and the NAICS code for which they were originally certified.

## H. DBE PARTICIPATION (GOAL CREDIT)

The DBE may be counted towards the DBE goal only if the DBE is performing a commercially useful function (CUF). Additional requirements for counting participation by a DBE towards the DBE goal are covered in section [49 CFR 26.55](#). In summary the following may be counted towards the DBE goal:

1. the value of the work actually performed by the DBE's own forces.
2. the value of subcontracted work performed if the subprovider itself is a DBE.
3. expenditures for materials or supplies if they are obtained from a DBE manufacturer.

## I. COMMERCIALLY USEFUL FUNCTION (CUF)

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.

The DBE must perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force.

The DBE must not subcontract 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.

Additional requirements for determining if a DBE is performing a commercially useful function are covered in citation [49 CFR 26.55 \(c\)](#) and [TAC Rule 9.232](#). PEPS will perform a CUF review for each DBE to ensure compliance.

## J. DBE TERMINATION

The [DBE Termination Request Form 4010](#) is required when a provider seeks to terminate a DBE, in whole or in part, that is being used for DBE goal credit on a federally-assisted project. The provider must notify the DBE in writing of the intent to terminate and the reason(s) for such termination. The notice must give the DBE five (5) calendar days to respond to the notice.

If the DBE termination is approved, the provider will have (seven) 7 days to submit the [DBE Substitution Request Form 4011](#) or provide evidence of their Good Faith Effort (GFE). PEPS will process a supplemental agreement to update Attachment E, Exhibit H-1, and Exhibit H-2 where applicable.

It is important to note that if a DBE becomes decertified after contract execution, their work will continue to be counted towards the DBE goal. Neither a DBE Termination nor a DBE Substitution Request Form is needed.

## K. DBE SUBSTITUTION

The [DBE Substitution Request Form 4011](#) is required when a provider seeks to substitute an approved DBE with another DBE to be utilized for DBE goal credit. The proposed DBE does not have to perform the same

scope of work as the previously approved DBE but must be certified in the appropriate NAICS code to perform the proposed work.

If the DBE substitution is approved, PEPS will process a supplemental agreement to update Attachment E, Exhibit H-1, and Exhibit H-2 where applicable.

It is important to note that if the provider or another DBE does the work of the DBE being substituted before the substitution is approved, they are not entitled to payment for the work.

#### **L. GOOD FAITH EFFORT (GFE)**

The provider is required to make adequate good faith efforts (GFE) to meet the DBE goal for the contract. If the DBE goal will not be met, the provider must submit documentation to PEPS showing that the provider made a GFE to meet the DBE goal. The provider should refer to [49 CFR, Part 26, Appendix A](#) for types of activities that can demonstrate a GFE. This documentation should be provided to PEPS as soon as possible to allow enough time for review.

PEPS will respond to the provider that the GFE has been approved or denied within seven (7) working days of receipt of the request when possible. Some requests may take longer depending on the amount of GFE documentation and the need to follow up with the DBE(s) listed.

## ATTACHMENT H – EXHIBITS

The following Exhibits are required for federally funded contracts:

### A. EXHIBIT H-1 SUBPROVIDER COMMITMENT PLAN

Provider completes form when the contract is being developed, and the form is inserted into the contract template and becomes part of the executed contract.

### B. EXHIBIT H-2 DBE SUBPROVIDER COMMITMENT AGREEMENT

1. **Specific Deliverable Contracts without Work Authorizations (WAs):** Completed when a contract is developed and then becomes part of the executed contract. If no DBE subproviders are used, complete the H-2 per the instructions, insert N/A (not applicable) in the Subprovider Firm Name field, and include the H-2 as part of the executed contract.
2. **Specific Deliverable Contracts with WAs and Indefinite Deliverable Contracts:** Completed when a Work Authorization (WA) is developed and then becomes part of the executed WA. If no DBE subproviders are used, complete the H-2 per the instructions, insert N/A (not applicable) in the Subprovider Firm Name field, and include the H-2 as part of the executed WA.
3. **Supplemental WAs:** When a supplement to the WA updates the WA amount, and this results in the dollar amount change for a DBE, an updated H-2 is included as part of the executed SWA. If the result is no dollar amount change for any DBEs, complete the H-2 per the instructions, insert N/A (not applicable) in the Subprovider Firm Name field, and include the H-2 as part of the executed SWA.

### C. EXHIBIT H-2 (SECOND TIER):

This is a continuation of Exhibit H-2 when there is a Second Tier subprovider to a DBE subprovider. The entire Exhibit H-2 must be completed when using Exhibit H-2 (Second Tier).

1. **Specific Deliverable Contracts without Work Authorizations (WAs):** PEPS SC completes form when the contract is developed and then becomes part of the executed contract, if applicable.
2. **Specific Deliverable with WAs and Indefinite Deliverable Contracts:** PEPS SC completes form when a WA is developed and then becomes part of the executed WA, if applicable. If there are no 2nd Tier DBE subproviders, this Exhibit will not be included and will not be part of the WA.

### D. EXHIBIT H-3 SUBPROVIDER MONTHLY PROGRESS ASSESSMENT REPORT:

Provider enters data, including subprovider payment information, using the State's [PS-CAMS Online Reporting System](#). The electronic report must be submitted monthly, even if there is no invoice being submitted or subcontracting to report, in which case \$0.00 is entered for the subprovider payment amount. A sample copy of the Exhibit H-3 that will be generated electronically is attached for reference.

### E. EXHIBIT H-4 SUBPROVIDER FINAL REPORT:

Generated from TxDOT's electronic reporting system. This report shows the accumulative total of all data entered into the [Online Reporting System](#) for the contract. This report shall be verified to ensure that all monthly reports have been submitted electronically under the contract. This report shall also be used for a

final assessment of DBE activities for the contract. A sample copy of the electronically generated form is attached for reference.

[INSERT EXHIBITS STARTING HERE. DELETE THIS INSTRUCTION PAGE.]

EXAMPLE