Prime Contractors' DBE Guide

Texas Department of Transportation

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From: Michael D. Bryant, Director, Civil Rights Division

Manual: *Prime Contractors' DBE Guide*

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Purpose

The *Prime Contractors' DBE Guide* provides guidance for the prime contractor on the federal and state requirements of the Disadvantaged Business Enterprise (DBE) Program. This Guide contains the processes and procedures to be used by the prime contractor to successfully accomplish all phases of DBE compliance from project initiation to project close-out. The procedures include prime contractor responsibilities and best practices with respect to both federal and state requirements.

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Archives

This is a new manual and no past notices are available.

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Chapter 1 — Introduction

Contents:

Section 1 — Purpose of the Guide

Section 2 — Overview of the DBE Program

Section 3 — Acronyms, Terms and Definitions

Section 1 — Purpose of the Guide

The Prime Contractors' DBE Guide provides guidance for the prime contractor on the federal and state requirements of the Disadvantaged Business Enterprise (DBE) Program. This Guide contains the processes and procedures to be used by the prime contractor to successfully accomplish all phases of DBE compliance from project initiation to project close-out. The procedures include prime contractor responsibilities and best practices with respect to both federal requirements and state requirements.

This Guide is not meant to supersede any federal, state, or contract specific requirements. If a conflict of instructions should arise, always refer to the published regulations or the DBE Special Provision for guidance.

Section 2 — Overview of the DBE Program

The DBE Program is a legislatively mandated United States Department of Transportation (USDOT) program that applies to federal-aid highway dollars expended on federally-assisted contracts issued by USDOT recipients such as the Texas Department of Transportation (TxDOT).

The program is administered by the USDOT's three modal administrations: Federal Highway Administration (FHWA), Federal Transit Administration (FTA) and Federal Aviation Administration (FAA). Implementation of the DBE Program is guided by USDOT regulations found at 49 Code of Federal Regulations (CFR), Part 26.

TxDOT has established a DBE Program in accordance with regulations of the USDOT.

TxDOT's primary DBE Program objectives are:

- To ensure nondiscrimination in the award and administration of USDOT-assisted contracts in TxDOT's highway, transit, and airport financial assistance programs.
- To create a level playing field on which DBEs can compete fairly for USDOT-assisted contracts.
- To ensure that TxDOT's DBE Program is narrowly tailored in accordance with applicable law.
- To ensure that only firms that fully meet 49 CFR, Part 26 eligibility standards are permitted to participate as DBEs.
- To help remove barriers to the participation of DBEs in USDOT-assisted contracts.
- To promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients.
- To assist the development of firms so they can compete successfully in the marketplace outside of the DBE Program.
- To provide appropriate flexibility to recipients of federal financial assistance in establishing and providing opportunities for DBEs.

Section 3 — Acronyms, Terms and Definitions

Acronyms

Acronyms

Acronym	Description
AE	Area Engineer
AFA	Advanced Funding Agreement
AO	Area Engineer Office
CFR	Code of Federal Regulations
CIV	Civil Rights Division
CSJ	Control Section Job
CUF	Commercially Useful Function
DBE	Disadvantaged Business Enterprise
DDC	District DBE Coordinator
DE	District Engineer
DMS	Diversity Management System
DOC	Director of Construction
FAA	Federal Aviation Administration
FHWA	Federal Highway Administration
FTA	Federal Transit Administration
GFE	Good Faith Effort
LG	Local Government
LGP	Local Government Projects Office
MOU	Memorandum of Understanding
NAICS	North American Industry Classification System
TAC	Texas Administrative Code
TUCP	Texas Unified Certification Program
TxDOT	Texas Department of Transportation
USDOT	United States Department of Transportation

Terms and Definitions

Commercially Useful Function (CUF) - A DBE performs a CUF when it is responsible for execution of a distinct element of work of a contract or subcontract and carries out its responsibilities by actually performing, managing, and supervising the work involved.

Disadvantaged Business Enterprise (DBE) - A for-profit, small business concern where socially and economically disadvantaged individuals own at least a fifty-one percent interest and also control management and daily business operations.

Diversity Management System (DMS) - A web-based software program used to collect, verify and manage payment information for prime contractors and subcontractors working on federal-aid projects.

Federally-Assisted Contract - Any contract between TxDOT and a contractor which is paid for, in-whole or in-part, with USDOT financial assistance.

Goal Credit - The value of DBE participation on a project that qualifies towards the DBE goal.

Good Faith Effort - A contractor's efforts to achieve a DBE goal by its scope, intensity, and appropriateness to the objective can reasonably be expected to fulfill the program requirement.

Guide - Prime Contractors' DBE Guide.

Joint Venture – A joint venture is an association of a DBE firm and one or more other firms to carry out single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills, and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose shares in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

Local Government - A project in which at least one phase of project development is managed by a local government agency for which it is being reimbursed with federal or state funding or a locally-funded project managed by a local government on the state highway system.

NAICS - The North American Industry Classification System is the primary industry classification system which best describes the primary business of a firm. The NAICS is used by federal statistical agencies for the purpose of collecting, analyzing, and publishing statistical data related to the US economy. (http://www.census.gov/eos/www/naics/)

Race-Conscious - Measures taken to meet DBE Program objectives that focus specifically on assisting only DBEs.

Race-Neutral - Measures taken to meet DBE Program objectives that are tailored to assist all small businesses including DBEs and do not single out a specific minority group.

Shortfall - A contractor's failure to meet a project assigned DBE goal.

Sub recipient - Any entity, public or private, to which USDOT financial assistance is extended through a recipient, through programs of the FHWA, FAA, or FTA.

Special Provision - Additions or revisions to standard specifications or special specifications of the contract.

Texas Unified Certification Program (TUCP) - A certification program for the federal DBE Programs in Texas.

Utilization Plan - The Utilization Plan identifies which DBEs the prime contractor intends to use to satisfy the project DBE Goal.

Chapter 2 — Resources

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Section 2 — Training

Section 1 — Resources

Overview of the DBE Program – Videos

Below are web resources from the USDOT and FHWA on the DBE Program:

- DBE Program:

  https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise

- DBE Program Overview

  http://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?id=73

TxDOT DBE Guides

TxDOT has two guides for DBE program administration.

- DBE Contractors' Guide
- Prime Contractors' DBE Guide

These guides and accompanying training materials are available on TxDOT's website. TxDOT's Civil Rights Division can provide guidance and training.

Diversity Management System

The Diversity Management System (DMS) is a web-based software program used to collect, verify, and manage payment information for prime contractors and subcontractors working on federal-aid projects.

Below is a list of vendor resources that can be found in DMS: (https://txdot.txdotcms.com/)

- Vendor Guide
- Vendor Training Manual
- Utilization Plans (Found on page titled Utilization Plans)
- Video Tutorials

Section 2 — Training

TxDOT DBE Guides

TxDOT can provide guidance and training for the following guides:

- DBE Contractors' Guide
- Prime Contractors' DBE Guide

These guides and accompanying training materials are available on TxDOT's website.

Diversity Management System

B2Gnow provides DMS training to contractors. Below is a list of training courses:

- Online Certification Application – Vendor Training
- Vendor Registration & Questionnaire – Vendor Training
- Introduction to the System – Vendor Training
- Contract Compliance Reporting – Vendor Training

Chapter 3 — DBE Program Authorities

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Section 1 — Regulations and Provisions

Section 1 — Regulations and Provisions

The following is a list of the DBE contract regulations and provisions that contractors must comply with:

- USDOT DBE regulations 49 CFR, Part 26
- Special Provision 000-007 – (Disadvantaged Business Enterprise in Federal-Aid Contracts) for projects let prior to February 2017
- Special Provision 000-394 - (Disadvantaged Business Enterprise in Federal-Aid Contracts) for projects let after February 2017
- Special Provision 009-009 Measurement and Payment - (Payment Provisions for Subcontractors)

Chapter 4 — DBE Program Responsibilities

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Section 3 — TxDOT Districts

Section 4 — Prime Contractor

Section 1 — Overview

Condition of Federal Funding

TxDOT receives federal financial assistance from USDOT through programs of the FHWA, FAA, and FTA. As such, TxDOT becomes a recipient of federal funds and is responsible for administering its DBE Program and is legally accountable for expenditures of USDOT financial assistance in accordance with federal requirements.

As a condition of receiving this assistance, TxDOT has signed an assurance that it will comply with 49 CFR, Part 26 in the establishment and administration of a DBE Program.

Prime contractors, subcontractors, suppliers, manufacturers, and consultants all become sub recipients of USDOT federal funds when they enter into federally assisted contracts, subcontracts, and agreements with TxDOT.

As sub recipients of federal funds, TxDOT requires sub recipients comply with the requirements of 49 CFR, Part 26, TxDOT DBE Program, and DBE contract provisions.

As sub recipients of federal funds, and as a condition of contract award, prime contractors, subcontractors, suppliers, manufacturers, and consultants must affirm that they will carry out DBE obligations, and will work with TxDOT and the federal government in their review of its activities under the contract.

Section 2 — Civil Rights Division

Overview

TxDOT's DBE Program is established under TxDOT's Civil Rights Division (CIV). CIV is responsible for implementing all aspects of the DBE Program and ensuring that TxDOT complies with all provisions of 49 CFR, Part 26. CIV accomplishes this responsibility through a tiered approach of contract oversight, program administration, and verification of contractor compliance at division and District levels.

CIV Staff

CIV's director and staff are responsible for:

- Implementation and oversight of TxDOT's DBE Program.
- Recommending and establishing policy and procedure in administration of the DBE Program.
- Coordination of DBE Program requirements with the Districts, FHWA, and all sub recipients.
- Setting overall DBE state participation goal.
- Setting specific DBE project or contract goals.
- Oversight and administration of the DMS contractor payment software and DBE utilization program.
- Annual reporting requirements to FHWA.
- Providing training on DBE Program requirements, processes, and procedures.
- Providing support and guidance to Districts, divisions and sub recipients.
- Conducting annual DBE Program compliance audits on Districts, local governments, and other entities that are recipients of federal funds.
- Oversight and administration of the Texas Unified Certification Program (TUCP).

CIV Organizational Chart

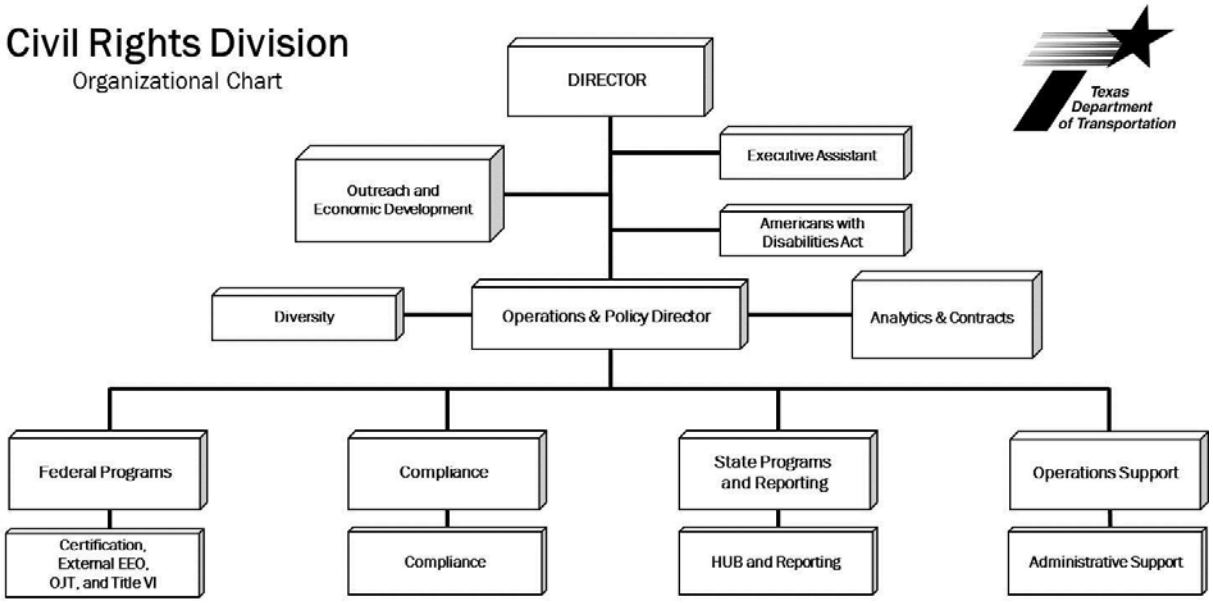


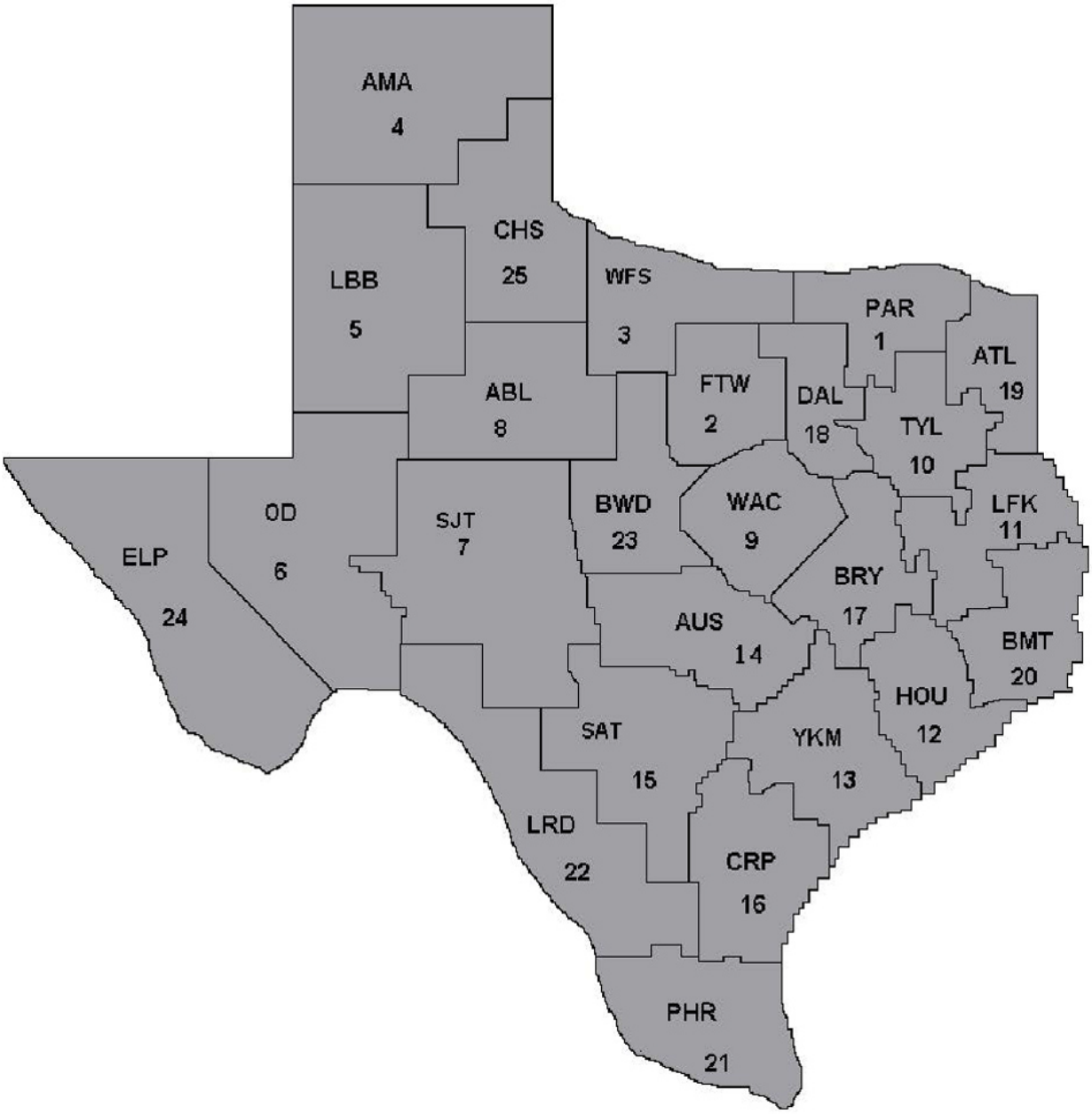
Figure 4-1. Civil Rights Division Organization Chart

CIV Contact Information

For assistance please contact the Civil Rights Division at 512-416-4700

Section 3 — TxDOT Districts

The Districts oversee the construction of state highways. The oversight responsibility includes monitoring contractor compliance with the DBE Program requirements. District offices are the initial and primary contact for prime contractors and subcontractors and provide oversight for construction division projects. Area offices (under the District office) support the District office during different stages of the project. The oversight responsibility includes monitoring contractor compliance with the DBE Program requirements.



District Engineer Responsibilities

The District Engineer (DE) oversees the planning, designing, building, operation, and maintenance of the state transportation system for the District. The DE will assign the District DBE Coordinator (DDC) or other staff to monitor contract compliance with the DBE special provision. In addition, the DE will address DBE Program violations and initiate sanctions or penalties when applicable.

District Staff Responsibilities

District staff DBE Program responsibilities include:

- Know and understand federal-aid contract DBE provisions included in the contract.
- Ensure all federal-aid project contracts in DMS are reviewed and locked-in in DMS prior to start of work.
- Ensure all DBE subcontractors in DMS are transferred from the utilization plan to the contract compliance module prior to start of work.
- Discuss DBE provision requirements at the pre-construction conference.
- Review and approve termination and substitution requests.
- Verify DBE payments in DMS.
- Review joint check requests.
- Perform Commercially Useful Function reviews.
- Verify final DBE participation dollar amounts in DMS or determine adequate good faith efforts.
- Maintain records in accordance with FHWA records retention requirements.
- Coordinate with the DDC or Director of Construction (DOC) if a contractor does not perform a monthly audit of payments to DBE subcontractors, does not request appropriate substitution or does not send adequate good faith efforts during the project.
- Escalate the issue to the District Engineer for administrative actions and determine the best course of action when a DBE commitment cannot be met.
- Seek direction and guidance from CIV staff on DBE Program compliance issues.

District DBE Coordinator (DDC) Contact List

The DDC contact list should be used to contact your DDC should you have any questions regarding compliance with the DBE Program.

Section 4 — Prime Contractor

Prime Contractor Staff

Having adequate staff that fully comprehends the DBE Program requirements is the most effective way to ensure compliance with all provisions of 49 CFR, Part 26.

Prime Contractor Responsibilities

- Sponsor or participate in outreach events with small, disadvantaged, minority or women-owned businesses.
- Vet subcontractors to identify if they are certified and capable DBE firms.
- Document good faith efforts to meet the DBE contract goal.
- Set up subcontracts in DMS in accordance with contract provision.
- Use DMS to report monthly payments to DBE subcontractors and suppliers.
- Ensure DBE subcontractors perform a commercially useful function on the project.
- Monitor change orders and impacts to DBE contract goal.
- Make prompt payment to DBE and non-DBE subcontractors as required by the TxDOT Prompt Payment Provision.
- Submit termination requests that comply with DBE Program requirements.
- Submit substitution requests that comply with DBE Program requirements.
- Submit DBE joint check approval request.
- Maintain records of DBE activities to comply with DBE Program requirements.
- Communicate with TxDOT personnel to seek guidance regarding DBE compliance.

Chapter 5 — The Texas Unified Certification Program (TUCP)

Contents:

Section 1 — Background on the TUCP

Section 1 — Background on the TUCP

49 CFR, Part 26.81(b)(2) states: "The UCP shall provide 'one-stop shopping' to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state."

In support of this requirement, the State of Texas established a TUCP Committee that certifies DBEs for participation in USDOT federal contracting projects across the State of Texas.

TUCP Certifying Agency Requirements

Six certifying agencies make all certification decisions in accordance with 49 CFR, Part 23, Part 26, and the TUCP Memorandum of Agreement. Agencies must keep complete files on applicants and provide information as required and annually require its DBE firms to submit an affidavit of no change form, due on their certification anniversary date.

A business' DBE certification received from any of the TUCP agencies is valid and can be relied upon by any Texas entity that receives USDOT funds.

The following agencies are members of the TUCP:

- City of Austin, Small Business Development
- City of Houston, Office of Business Opportunity
- Corpus Christi Regional Transportation Authority
- North Central Texas Certification Agency
- South Central Texas Certification Agency
- Texas Department of Transportation

TUCP Directory

The firms listed in the TUCP directory meet the DBE certification requirements to perform the specific work codes granted. All requests for additional work codes must be approved prior to the execution of any contract the DBE firm wishes to perform work on as a DBE. The TUCP DBE directory should be relied on as primary source for soliciting DBEs.

The TUCP directory of all certified DBE firms in Texas is available online. The TUCP directory includes a list of certified DBE firms; including the name, address, telephone, and NAICS codes.

Chapter 6 — Commercially Useful Function

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Section 2 — Counting DBE Participation

Section 3 — Evaluating a CUF

Section 4 — CUF and Certification

Section 5 — DBE Fraud Indicators

Section 1 — Overview

A DBE firm performs a commercially useful function (CUF) when it is responsible for execution of the contract and is carrying out its responsibilities by performing, managing, and supervising the work involved. The regulations provide that with regard to materials and supplies, the DBE must be responsible for negotiating price, determining quality, quantity, ordering the material, installing (where applicable), and paying for the material itself.

In summary, the DBE should:

- Possess the required experience.
- Be financially independent.
- Employ its own laborers.
- Own or rent its own equipment.
- Handle its own payroll, invoicing, and negotiations.

To count toward the DBE goal, a DBE firm's work must serve a CUF. This means that the DBE firm has a necessary and useful role in the project. For example, the DBE firm supplies the material and performs, manages and supervises the work.

Prime contractors are responsible for determining that the subcontractors they are using to claim DBE credit meet this requirement. It is incumbent on prime contractors who work on projects with DBE participation requirements to hire independent, certified DBE firms to perform a CUF. Prime contractors should adopt a DBE compliance program to closely monitor its DBE subcontractor relationships.

A DBE firm's appearance on TUCP does not confirm that it is ready or capable of performing a CUF on a project. The prime contractor should ask potential DBE firms these questions to confirm that the DBE is ready and able to perform a CUF.

- How long has your company been in business?
- Will the DBE manage and supervise the work with its own managers and superintendents?
- Will the DBE perform the work with its own forces?
- Will the DBE be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, installing (where applicable) and paying for the material itself?
- What work, if any, does the DBE intend to subcontract and is that amount consistent with industry practice?

The regulations make clear that a DBE firm does not perform a CUF 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. If the DBE firm serves only to provide the appearance of DBE participation, the work cannot count toward the DBE goal. CUF violations may indicate possible fraud and abuse of public funds.

"FHWA Tips on Evaluating a Commercially Useful Function" is an excellent resource for evaluating a CUF.

Section 2 — Counting DBE Participation

Counting Overview

Once TxDOT determines that work on a project qualifies as a CUF, it then calculates the amount it can count toward its DBE goal. Only the value of the work performed by the DBE firm counts toward the goal. Depending on the nature of the work, different guidance applies.

The following is guidance for counting participation when a DBE firm is:

- DBE Subcontractor
- Manufacturer
- Regular Dealer
- Packager, Broker, Manufacturer's Representative
- Trucking Firm
- Joint Venture

DBE Subcontractor

When a DBE firm is a subcontractor it must perform at least thirty percent (30%) of its contract using its own employees, equipment, materials, and resources. When this condition is met, all DBE work performed counts toward the DBE goal. A DBE subcontractor typically furnishes and installs the work item. One hundred percent (100%) of the prime contractor's payment to the DBE firm will count toward the contract goal. This includes payment for labor and materials.

When a DBE subcontracts to another DBE firm, the value of the subcontracted work may be counted toward the DBE goal. However, work subcontracted to non-DBE firms does not count toward the goal.

Manufacturer

A prime contractor purchases materials or supplies from a DBE manufacturer. A DBE manufacturer produces, on its premises, materials or equipment used for a project. A DBE manufacturer can also take product and alter it to meet contract specifications. TxDOT counts one hundred percent (100%) of the value of manufactured materials and equipment toward the DBE goal.

Regular Dealer

A prime contractor purchases material or supplies from a DBE regular dealer. There are two ways a DBE firm can perform as a regular dealer.

- A DBE firm may have a store or warehouse out of which it sells or leases products to the public.
- For bulk items such as petroleum, steel, cement, gravel, stone, or asphalt, a DBE firm must own and operate distribution equipment for the product it is supplying. Any supplementing of regular dealer's own distribution equipment shall be by a long-term lease agreement and not on an ad-hoc or contract-by-contract basis. The DBE must lease the equipment itself, as well as run the equipment with its own workforce.

If a DBE firm is acting as a regular dealer, sixty percent (60%) of the value of items sold to the project counts toward the DBE goal. TxDOT determines the amount of credit on a contract-by-contract basis.

For example, a dealer will provide pipes for $100,000. Because the DBE firm regularly sells this product as a part of its business, TxDOT counts $60,000 toward the DBE participation goal, or sixty percent (60%) of the value of the items provided.

Packager, Broker, Manufacturer's Representatives

A prime contractor purchases material or supplies from a DBE firm, which is neither a manufacturer nor a regular dealer. TxDOT will count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies. Goal credit will be granted if the fees or commissions are reasonable.

Differences between a Manufacturer, Regular Dealer, and Broker

The following example shows the difference under the requirements of the DBE Program between a manufacturer, a regular dealer, and a broker. The example is the furnishing of crushed aggregate meeting a state DOTs specification for such items as aggregate base course.

- Manufacturer (100%) - A DBE as its principal business and under its name produces on its premises crushed aggregate and meets state standard specifications would be considered a manufacturer and the cost of the crushed aggregate produced can be credited 100% towards meeting the goal.
- Regular Dealer (60%) - A DBE is considered a regular dealer of crushed aggregate if the material is purchased in its name, and it engages as its principal business the purchase and sale of crushed aggregate to the general public, or owns and operates the necessary distribution equipment (since aggregate is considered a bulk item) to deliver the crushed aggregate. Under

these circumstances, the DBE can be considered a regular dealer and 60% of the cost of the crushed aggregate purchased is credited towards the goal.

- Packager, Broker, or Manufacturer's Representative - (100% Fees or Commissions) - If the DBE firm does not meet all or any of the functions presented in defining a manufacturer or regular dealer in crushed aggregate but arranges or expedites transactions consistent with industry practice in the delivery of such materials, then the services in the amounts of fees or commissions charged in the procurement and/or delivery of such materials can be credited towards the goal.

Trucking Firm

There are several ways to count DBE credit for the services of DBE trucking firms. The DBE must have at least one truck and driver of its own, but it can lease the trucks of others, both DBEs and non-DBEs, including owner operators.

The following are ways to count DBE credit for the services of DBE trucking firms:

- For work done with its own trucks and drivers, and for work with DBE lessees, the primary DBE trucking firm receives 100% credit for all transportation services provided.
- If a non-DBE trucking firm hires second tier DBE trucking firms and DBE truck owner-operators, then 100% credit will be counted. Credit will not count for the amount of any fees that are deducted from the DBE trucking firm's payment, such as, fuel costs, other fees, etc.
- If the primary DBE trucking firm leases trucks from non-DBE firms, but uses its own employees as the drivers, then 100% credit will be counted. No credit will be allowed for 1099 employees. The primary DBE trucking firm must own and operate at least one truck used on the project.
- For work done with non-DBE lessees, the primary DBE trucking firm gets credit only for the fees or commissions it receives for arranging the transportation services.
- A primary DBE trucking firm may lease non-DBE trucks on a 1 for 1 basis for credit of the value of transportation services provided. If the hauling services performed by non-DBE trucks exceed the hauling services provided by the primary DBE trucking firm, the credit is limited to the fees and commissions only.

Primary DBE firm X has one (1) truck and leases one (1) truck from DBE firm Y. Primary DBE firm also leases three (3) trucks from non-DBE firm Z.

Primary DBE firm X hauling services	$3,000
DBE Firm Y hauling services	$3,000
Total DBE hauling services	**$6,000**
Non-DBE firm Z hauling services (20% commission charged)	
Truck 1	$3,000
Truck 2	$4,000
Truck 3	$4,000
Total non-DBE hauling services	**$11,000**
(The value of hauls by non-DBE trucks exceeds the value of hauls by DBE owned trucks.)	
Credit allowed for DBE Trucks	$6,000
Credit allowed for non-DBE Trucks 1 and 2	$6,000
(1 for 1 not to exceed value of the DBE hauls)	
Commision for Truck 3	$800
(Derived by multiplying value of haul at $4,000 times the 20% commission)	
Total Hauling credit to count towards goal	**$12,800**

Figure 6-1. Trucking Example

Joint Venture

A joint venture is defined as an association of a DBE firm and one or more other firms to carry out single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills, and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose shares in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

When a DBE firm performs as a participant in a joint venture, TxDOT will count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward the DBE goal.

TxDOT will assess each joint venture agreement proposed to meet all or a portion of a DBE participation goal by using the following criteria:

- Does the relationship, or any aspect of such, between the DBE and non-DBE conflict with the ownership and control requirements specified in contract provisions?
- Is the DBE an independent business concern separate and apart from the non-DBE partner in the proposed agreement?
- Is the DBE's share in the ownership, control, management responsibilities, risks, and profits of the joint venture commensurate with the DBE's ownership in a joint venture?
- Does the agreement clearly define the work to be performed by the DBE?
- Is the work to be performed by the DBE in conformance with the contractual and statutory provisions governing the DBE's performance of a Commercially Useful Function?

Section 3 — Evaluating a CUF

To ensure each DBE firm is performing a CUF, TxDOT must monitor contract activity and certify in writing that DBE firms are performing a CUF. To determine whether a DBE firm is performing a CUF, five elements must be considered: management, workforce, equipment, materials, and performance.

A CUF review is required for all DBE firms on all federally-funded projects, including projects with no DBE goal. This also includes DBE truckers, suppliers and other vendors where a subcontract is not required.

TxDOT field personnel conduct CUF reviews and inspect jobsites to verify that the DBE firm is performing and managing the work. The reviewer's activities include making observations and interviewing DBE personnel.

Field staff review project-related documents such as:

- Executed subcontracts
- Certified payrolls
- Invoices
- Purchase Orders
- Delivery tickets and equipment title of ownership or lease agreements

These documents identify and support who is paying and supervising employees, ordering and paying for materials, and whose equipment is used on the project.

To qualify for goal credit, DBEs must perform a CUF.

If a DBE firm is presumed not to be performing a CUF, TxDOT will notify the DBE firm and offer the opportunity to provide rebuttal information. If the presumption prevails, no work performed by the DBE will count as eligible participation. The denial of goal credit may occur before or after a CUF determination has been made by TxDOT.

If the denial of goal credit results in a goal shortfall, the prime contractor will be required to obtain a substitute DBE to meet the contract goal or provide an adequate good faith effort when applicable. CUF determinations are not subject to administrative appeal to USDOT.

Section 4 — CUF and Certification

Certification and CUF are separate and distinct issues.

Certification decisions address the nature of a firm's ownership and structure while CUF primarily concerns the role a firm has played in a transaction.

A DBE firm's repeated failure to perform a CUF may raise questions regarding the firm's control, as it relates to independence, and perhaps ownership. If there is evidence of a pattern of failing to perform a CUF that raises serious issues with the firm’s ability to control the work and its independence from the non-DBE firm, TxDOT must address this matter and may commence or initiate a proceeding under 49 CFR, Part 26.87 to determine the continued eligibility of the DBE firm.

If a DBE firm is a mere pass-through or middle man between two performing parties, the contractor seeking participation credits may be exposing itself to serious criminal and civil liability. In cases of deliberate attempts to circumvent the intent of the DBE Program, or fraud, these actions may lead to criminal prosecution of both the prime contractor and the DBE.

Section 5 — DBE Fraud Indicators

DBE Fraud Indicators

TxDOT will report any false, fraudulent, or dishonest conduct in connection with the DBE program to the USDOT Office of the Inspector General (OIG) for appropriate action. The OIG looks at ten key indicators, or "red flags," in determining whether to investigate a contractor for DBE fraud. These red flags include:

- DBE firm's owner lacking background, expertise or equipment to perform subcontract work
- Employees shuttling back and forth between prime contractor and DBE-owned business payrolls
- Business names on equipment and vehicles covered with paint or magnetic signs
- Orders and payment for necessary supplies made by individuals not employed by DBE- owned business
- Prime contractor facilitated purchase of DBE-owned business
- DBE owner never present at job site
- Prime contractor always uses the same DBE
- Financial agreements between prime and DBE contractors
- Joint bank accounts (prime/DBE)
- Absence of written contracts

Under 49 CFR, Part 26.107, businesses working in the DBE program who engage in the conduct may be subject to suspension or debarment, enforcement actions under 49 CFR Part 31, Program Fraud and Civil Remedies, or criminal prosecution. USDOT OIG makes investigating and prosecuting DBE fraud a priority. The OIG, working with U.S. Attorney's offices has helped to create successful criminal prosecution for fraudulent conduct in the DBE program. Anyone who becomes aware of fraud, waste, or abuse in these programs should inform the OIG as well as TxDOT staff.

Reporting Fraud

TxDOT has established a hotline for employees, contractors, and others to report suspected fraud or abuse. The TxDOT Watch reporting system allows individuals to anonymously report suspected unethical and illegal activities within the agency in one of two ways:

- Report incidents by visiting TxDOT Watch
- Call toll-free (877) 769-8936

Chapter 7 — Contract Letting

Contents:

Section 1 — Overview

Section 1 — Overview

Prior to letting a construction project, a DBE project goal will be set by TxDOT. For projects with a specified percentage DBE goal, prime contractors make a commitment to meet the goal by signing the proposal and submitting a bid.

Pre-Estimate Actions

It is recommended the prime contractor take the following pre-estimate actions prior to beginning an estimate for a specific project:

- Review the contract documents for the DBE goal on the project.
- Review the TUCP directory for the list of certified DBEs.

Develop a DBE Utilization Plan

A DBE UP will help the prime contractor achieve the DBE contract goal, or will help in documenting adequate good faith efforts to meet the contract goal. This plan should address the following:

- Review of the project's Special Provision for DBE contract goal.
- Determine items which may be subcontracted and quantify based on estimated dollar amounts.
- When practical, divide large (scope or quantity) items into potential smaller subcontracting opportunities and quantify.
- Look for second tier subcontracting opportunities and quantify.
- Quantify potential material supply contracting opportunities. Determine the allowable DBE participation for material supply.
  - 100% for materials or supplies purchased from a DBE manufacturer.
  - 60% for materials or supplies purchased from a DBE regular dealer.
  - 100% for fees or commissions purchased from a DBE packager, broker or manufacturers' representative.
- Determine the likely total DBE participation from all of the above items and compare to TxDOT's DBE contract goal.

Chapter 8 — Good Faith Efforts

Contents:

Section 1 — Overview

Section 2 — Submitting a Utilization Plan in DMS

Section 3 — UP Submitted Prior to Confirmation by all DBE Subcontractors

Section 1 — Overview

Utilization Plan

Prime contractors are required to submit DBE Utilization Plans (UP) through DMS no later than five calendar days following the official notification that they are the apparent low bidder. If the fifth day falls on a weekend or state or federal holiday, the deadline moves to the next business day.

Prime contractors complete and submit utilization plans online via DMS.

TxDOT creates the UP record in DMS by project CSJ and assigns it to a prime contractor. Once TxDOT releases the UP, the prime contractor's main contact in DMS will receive an e-mail notification.

The prime contractor can then enter all subcontractors or suppliers. The subcontractors and suppliers must confirm their participation. The prime contractor will sign the UP and submit it.

Submitted plans are reviewed by TxDOT CIV staff. CIV staff will either: a) return the plan, b) conditionally approve the plan, c) approve the plan, or d) deny the plan. For returned and conditionally approved plans, the system will automatically send notices to the prime contractor to update and resubmit the plan.

Instructions for submitting a UP in DMS are included in Section 2. In addition, B2Gnow has published a user manual titled Utilization Plans that shows prime contractors how to complete and submit utilization plans. The manual can be located in DMS.

A DBE prime contractor is not required to submit a UP. DBE prime contractors must report subcontractor activity for all subcontractors to include DBEs and non-DBEs in DMS after contract execution. Refer to Chapter 9 titled DMS Subcontractors for more information on adding subcontractors to DMS.

Good Faith Efforts

Prime contractors must make Good Faith Efforts (GFE) to meet the DBE contract goal, either by meeting the goal or by documenting GFE to meet the goal. Prime contractors should make sincere and aggressive efforts to meet the DBE goal. Attempting to obtain a contract on the basis of documented GFE should be a contractor's last resort.

Contractors should document steps it has taken to satisfy GFE requirements and meet the contract DBE goal. Prime contractors should understand the list of the types of GFE found in 49 CFR, Part 26, Appendix A.

TxDOT will not penalize prime contractors if they fail to meet contract DBE goals as long as they follow GFE guidelines in 49 CFR, Part 26, Appendix A and submit their GFE to CIV for review and approval.

If the goal cannot be met in whole or in part, prime contractor will attach Contractors Certification of Good Faith Efforts Form 2603 and supporting documentation in DMS.

Administrative Reconsideration

If TxDOT determines that the apparent successful bidder has failed to meet the requirements of 49 CFR Part 26.53(a), TxDOT, before awarding the contract, will provide the bidder an opportunity for administrative reconsideration. As part of this reconsideration, the bidder will 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.

TxDOT's decision on reconsideration will be made by an official who did not take part in the original determination that the bidder failed to meet the goal or make adequate good faith efforts to do so.

The bidder will have the opportunity to meet in person with TxDOT's reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so.

TxDOT will send the bidder 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. The result of the reconsideration process is not administratively appealable to the DOT.

Section 2 — Submitting a Utilization Plan in DMS

The following steps describe how to submit a Utilization Plan in DMS:

Step 1: TxDOT CIV - Releases UP to Prime Contractor

CIV will release the UP with the basic contract information, including contract total and DBE goal, to the apparent low bidder. The prime contractor will be notified by the following e-mail:

From: Texas Department of Transportation
Date: 03/04/2016 9:30:32 AM
Subject: TxDOT: New Utilization Plan to be submitted Turn Lanes, Rehab Shoulders and Overlay

A Texas Department of Transportation Utilization Plan is pending submission by your firm.

The following Utilization Plan has been assigned by the organization for you to complete and submit by 03/09/2016.

Organization: Texas Department of Transportation
Proposal: Turn Lanes, Rehab Shoulders and Overlay
Proposal Number: 0009-11-999
Utilization Plan Reference: Letting 02/2016
- Phase: Original
- Version: 0
Compliance Officer: Dan Williams
Date Released: March 4, 2016
DUE DATE: March 9, 2016

To view this Utilization Plan, visit https://txdot.txdotcms.com/161803398] and login.

Texas Department of Transportation
Civil Rights Division
125 East 11th Street
Austin, Texas 78701
(512) 416-4700
https://txdot.txdotcms.com

Step 2: Prime Contractor - Add Subcontractor(s) to the UP

Please refer to the B2Gnow manual, titled Utilization Plans and follow the steps for completing and submitting a utilization plan.

When there is a waiver request, the prime contractor must attach the Contractors Certification of Good Faith Effort Form 2603 and supporting documentation.

The prime contractor is responsible for entering all subcontractors and suppliers who contribute to the DBE goal credit, including second and third tier subcontractors.

When adding a DBE subcontractor commitment to the UP, provide a detailed description of work that this subcontractor will be completing. Use the comments section if more space is required.

Select the NAICS code applicable to the kind of work the DBE will be performing in the contract.

The TUCP database is managed by DMS, so all certified DBEs will already have a vendor record. However, in the event a non DBE subcontractor does not have a vendor record in DMS, the prime contractor will create a vendor record in DMS.

Step 3: DBE Subcontractor - Confirm Participation

This step is required by TxDOT as an enhancement to the standard function of the DMS system, therefore it is not covered in the B2Gnow Utilization Plans user manual, or in the standard training webinars.

Once the prime contractor has saved each commitment, the DBE subcontractor will receive the following e-mail notice from DMS.

From: Texas Department of Transportation
Date: 03/06/2016 8:46:31 AM
Subject: Subcontractor to Confirm (Turn Lanes, Rehab Shoulders and Overlay) Participation

Dear TxDOT Test Sub Vendor 5,

TxDOT Test Prime 8 has assigned TxDOT Test Sub Vendor 5 as a SUBCONTRACTOR on the following Utilization Plan. To assist TxDOT Test Prime 8 in completing the utilization plan, please respond to this notice confirming participation ASAP. Click the link below to log into the system and review the request.

Organization: Texas Department of Transportation
Proposal: Turn Lanes, Rehab Shoulders and Overlay
Proposal Number: 0009-11-999
Utilization Plan Reference: Letting 02/2016
- Phase: Original

To view this Utilization Plan, visit https://txdot.txdotcms.com/161803398 and login.
To view all Utilization Plans, visit https://txdot.txdotcms.com/314159256 and login.

Texas Department of Transportation
Civil Rights Division
125 East 11th Street
Austin, Texas 78701
(512) 416-4700
https://txdot.txdotcms.com

The links in this e-mail will prompt the DBE subcontractor to log in to DMS and navigate to the page shown below, **Utilization Plans: Confirm Participation**. On this screen the DBE subcontractor is required to confirm the commitment.

Utilization Plans: Confirm Participation Help & Tools

Return **Texas Department of Transportation** requires that you confirm the proposed utilization as detailed by **TxDOT Test Sub Vendor 3**. Fill in the form and click **Save**.

* required entry

Vendor Information	
Vendor Name	**TxDOT Test Sub Vendor 3**
Vendor Contact Person	**TxDOTSub Test3**
Phone	**650-555-5555**
Email	**txdottestsub3@b2gnowuser.com**
Address	**1234 Main St.** **Somewhere, TX 78701**

Proposed Utilization	
Subcontractor Tier	**Tier 1 Subcontractor to TxDOT Test Prime Vendor 8**
Proposed Amount	**$75,000**
Type of Participation	**Supplier - Regular Dealer at 60.0% Participation** - An established, regular business that engages, as its principal business, in the purchase, sale, or lease of the products being supplied.
Work Description	**Supply Road Signage 644-6001**
Work Codes	**NAICS 423510** **Metal Service Centers and Other Metal Merchant Wholesalers** (More)
Estimated Start Date	**10/3/2016**
Estimated End Date	**11/18/2016**
Attached File(s)	View Attachments

Please confirm participation and details listed in the commitment form. Click "View Attachments" above to download and verify commitment form signed by the Prime Contractor.

Assignment Confirmation	
Confirmation *	◉ **YES, the proposed utilization is confirmed.** ○ **NO, the proposed utilization cannot be confirmed for the reason(s) detailed below.**
Attached File(s)	Attach File Click "Attach File" above to add additional documents.
Comments	These comments are visible to the organization and prime contractor.

For your eSignature, type your full, legal name as your signature, your position/title, organization, and today's date.

eSignature	
Your Full Name *	**Test Sub Contact**
Your Position/Title *	President
Your Organization *	TxDOT Test Sub Vendor 3
Today's Date *	11/15/2016 (mm/dd/yyyy)
Confirmation	☑ Send me a confirmation of my response.

☑ By electronically signing this utilization plan, I hereby attest that the information contained herein and attached in electronic format is accurate and correctly represents my firm.

Save Cancel

The prime contractor can monitor the status of this confirmation process as illustrated below. If the DBE subcontractor has not confirmed the commitment, the prime contractor has the option to send a reminder.

Subcontractors

Subcontractor Name	Sub Tier	Cert	Inc in Goal	Type	$ Commit	$ Self Perf	$ For Credit	Confirmed	Actions
1 TxDOT Test Sub Vendor 2	1	✓	✓ DBE	Truck/Haul 100%	$67,500 3.00%	$67,500 3.00%	$67,500 3.00%	✓	View
1 TxDOT Test Sub Vendor 3	1	✓	✓ DBE	Reg. Dealer 60%	$75,000 3.33%	$75,000 3.33%	$45,000 2.00%	Pending Send Reminder	View
1 TxDOT Test Sub Vendor 5	1	✓	✓ DBE	Sub 100%	$157,500 7.00%	$155,925 6.93%	$155,925 6.93%	Pending Send Reminder	View
2 TxDOT Test Sub Vendor 1	2	✓	✓ DBE	Sub 100%	$1,575 0.07%	$1,575 0.07%	$1,575 0.07%	Pending Send Reminder	View

Figure 8-1. Prime contractor view - Confirm Participation – Pending

Subcontractors

Subcontractor Name	Sub Tier	Cert	Inc in Goal	Type	$ Commit	$ Self Perf	$ For Credit	Confirmed	Actions
1 TxDOT Test Sub Vendor 2	1	✓	✓ DBE	Truck/Haul 100%	$67,500 3.00%	$67,500 3.00%	$67,500 3.00%	✓	View
1 TxDOT Test Sub Vendor 3	1	✓	✓ DBE	Reg. Dealer 60%	$75,000 3.33%	$75,000 3.33%	$45,000 2.00%	✓	View
1 TxDOT Test Sub Vendor 5	1	✓	✓ DBE	Sub 100%	$157,500 7.00%	$155,925 6.93%	$155,925 6.93%	✓	View
2 TxDOT Test Sub Vendor 1	2	✓	✓ DBE	Sub 100%	$1,575 0.07%	$1,575 0.07%	$1,575 0.07%	✓	View

Figure 8-2. Prime contractor view - Confirm Participation – Confirmed

Step 4: TxDOT CIV Compliance - Review the UP

CIV will review the UP prior to contract execution to ensure DBE requirements are satisfied in accordance with the DBE Special Provision. If the UP includes a GFE, there will be an additional review process concerning the GFE documentation.

Below is a list that a CIV specialist will review for each commitment, depending on the participation type:

- Prime contractor met the contract goal
- DBEs are certified for the type of work they are performing per NAICS codes
- Dollar amount listed for the work the DBE is to perform corresponds to appropriate goal credit
- Information related to material suppliers
- DBE subcontractor confirmation
- Prime contractor's GFE, if applicable

The prime contractor may be contacted during this review process, and asked to submit further information to support its commitments.

Once CIV has reviewed and approved each commitment, CIV will approve the UP and notify the Construction Division.

Section 3 — UP Submitted Prior to Confirmation by all DBE Subcontractors

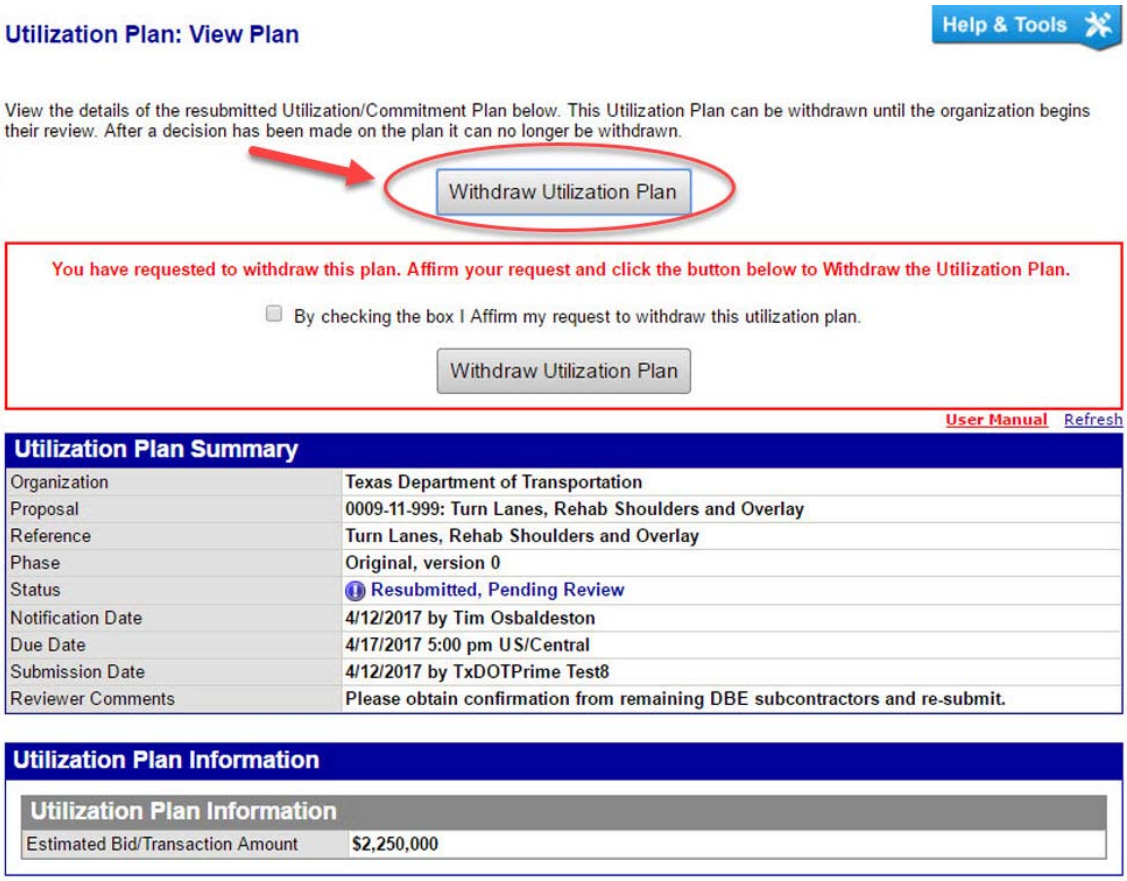
If all DBE subcontractors are not confirmed before the five day deadline expires, the prime contractor can submit the UP for conditional approval and still be in compliance with federal regulations.

CIV will conditionally approve the plan and send it back to the prime contractor to continue obtaining the required DBE subcontractor approvals prior to contract execution.

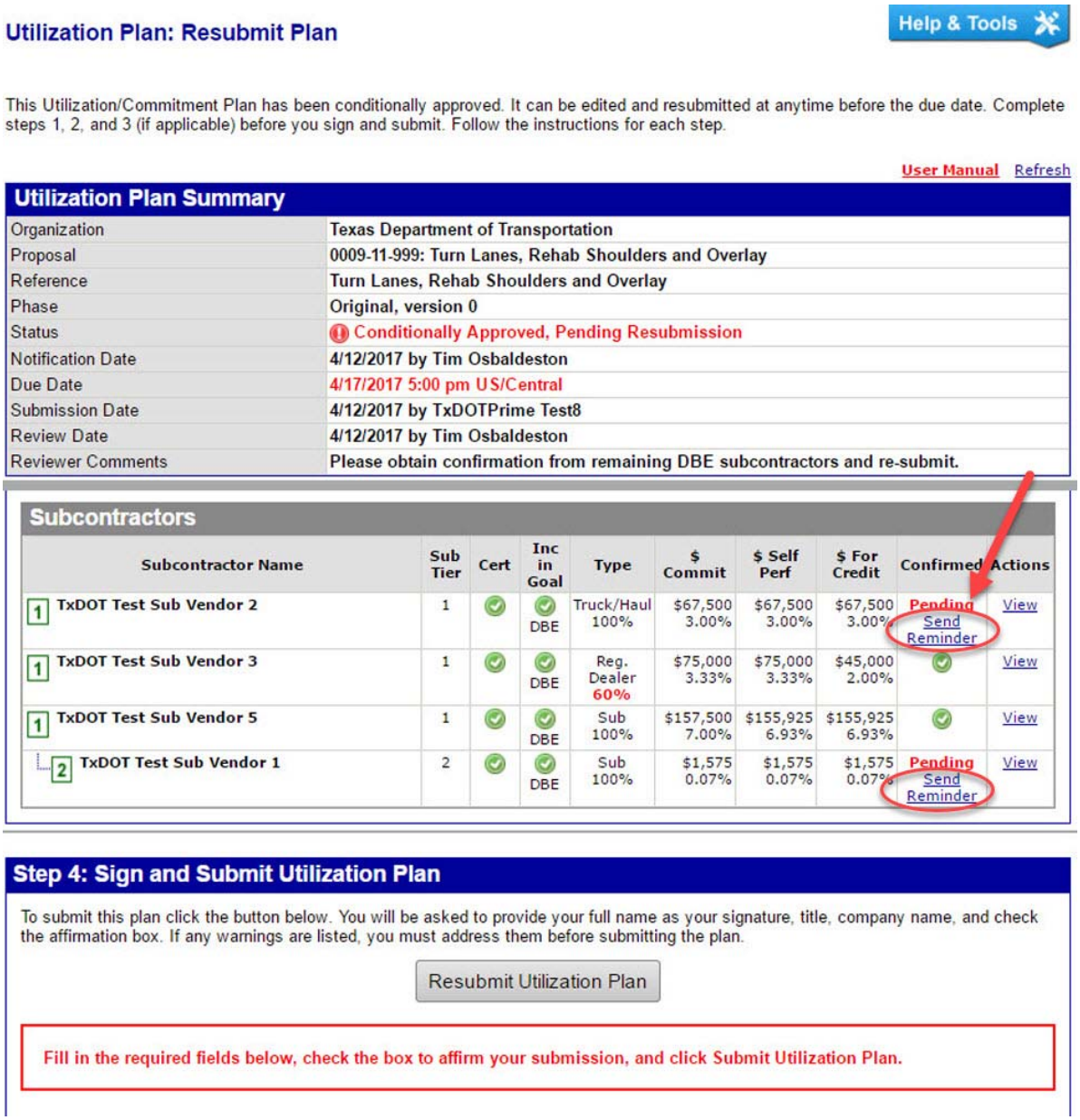
In the event that the prime contractor has submitted the UP with unconfirmed DBE commitments the following conditions will exist, while CIV has the UP record:

- The DBE subcontractor will not be able to confirm their participation.
- The prime contractor will not be able to access or make any changes to the UP.
- The prime contractor may withdraw their UP to make necessary changes.

The image below shows the **Utilization Plan: View Plan** page, note there is an option for the prime to **Withdraw Utilization Plan**.



Once CIV has conditionally approved and released the plan back to the prime contractor, the remaining DBE subcontractor commitments should be confirmed as soon as possible. Navigate to the UP and locate any pending subcontractor commitments. The prime contractor may click on **Send Reminder** to prompt a system generated email for the DBE.



Utilization Plan: Resubmit Plan

Help & Tools

This Utilization/Commitment Plan has been conditionally approved. It can be edited and resubmitted at anytime before the due date. Complete steps 1, 2, and 3 (if applicable) before you sign and submit. Follow the instructions for each step.

User Manual Refresh

Utilization Plan Summary

Organization	Texas Department of Transportation
Proposal	0009-11-999: Turn Lanes, Rehab Shoulders and Overlay
Reference	Turn Lanes, Rehab Shoulders and Overlay
Phase	Original, version 0
Status	Conditionally Approved, Pending Resubmission
Notification Date	4/12/2017 by Tim Osbaldeston
Due Date	4/17/2017 5:00 pm US/Central
Submission Date	4/12/2017 by TxDOTPrime Test8
Review Date	4/12/2017 by Tim Osbaldeston
Reviewer Comments	Please obtain confirmation from remaining DBE subcontractors and re-submit.

Subcontractors

Subcontractor Name	Sub Tier	Cert	Inc in Goal	Type	$ Commit	$ Self Perf	$ For Credit	Confirmed	Actions
1 TxDOT Test Sub Vendor 2	1	✓	✓ DBE	Truck/Haul 100%	$67,500 3.00%	$67,500 3.00%	$67,500 3.00%	Pending Send Reminder	View
1 TxDOT Test Sub Vendor 3	1	✓	✓ DBE	Reg. Dealer 60%	$75,000 3.33%	$75,000 3.33%	$45,000 2.00%	✓	View
1 TxDOT Test Sub Vendor 5	1	✓	✓ DBE	Sub 100%	$157,500 7.00%	$155,925 6.93%	$155,925 6.93%	✓	View
2 TxDOT Test Sub Vendor 1	2	✓	✓ DBE	Sub 100%	$1,575 0.07%	$1,575 0.07%	$1,575 0.07%	Pending Send Reminder	View

Step 4: Sign and Submit Utilization Plan

To submit this plan click the button below. You will be asked to provide your full name as your signature, title, company name, and check the affirmation box. If any warnings are listed, you must address them before submitting the plan.

Resubmit Utilization Plan

Fill in the required fields below, check the box to affirm your submission, and click Submit Utilization Plan.

If the prime contractor withdraws the UP, or the UP is returned by CIV, it is possible to edit the unconfirmed commitments. Click on **View**.

Subcontractors

Subcontractor Name	Sub Tier	Cert	Inc in Goal	Type	$ Commit	$ Self Perf	$ For Credit	Confirmed	Actions
1 TxDOT Test Sub Vendor 2	1	✓	✓ DBE	Truck/Haul 100%	$67,500 3.00%	$67,500 3.00%	$67,500 3.00%	Pending Send Reminder	View
1 TxDOT Test Sub Vendor 3	1	✓	✓ DBE	Reg. Dealer 60%	$75,000 3.33%	$75,000 3.33%	$45,000 2.00%	✓	View
1 TxDOT Test Sub Vendor 5	1	✓	✓ DBE	Sub 100%	$157,500 7.00%	$155,925 6.93%	$155,925 6.93%	✓	View
2 TxDOT Test Sub Vendor 1	2	✓	✓ DBE	Sub 100%	$1,575 0.07%	$1,575 0.07%	$1,575 0.07%	Pending Send Reminder	View

Then, click **Edit** to make changes.

Utilization Plan: View Subcontractor

Help & Tools

Return This vendor is assigned to the Utilization Plan with the following subcontract parameters. Click **Return** to return to the plan.

Confirmation Status	
Status	**Pending Confirmation** Available actions: Send Reminder - to send firm a reminder to confirm this assignment. Edit - to make changes and resubmit. The confirmation process will restart. Cancel - to remove the record from the utilization plan; the assigned firm will be notified of the action.
Last Notification	4/12/2017

Vendor Information	
Vendor Name	TxDOT Test Sub Vendor 2
Vendor Contact Person	TxDOTSub Test1
Phone	
Fax	
Email	txdottestsub2@b2gnowuser.com
Address	1234 Main St. Somewhere, TX 78701

Applicable Vendor Certifications

Type	Organization
DBE	Texas Department of Transportation

Subcontractor Details	
Vendor Type	Subcontractor
Subcontractor Tier	Tier 1 Subcontractor to TxDOT Test Prime Vendor 8
Proposed Amount & Percent	Amount: $67,500 Percent: 3.000%
Type of Participation	Trucking & Hauling at 100.0% Participation - Utilization of trucks owned by firm or trucks leased from other credited firms.
Count Towards Goal	Yes - assigned to DBE goal
Work Description	Hauling of planed materials 354-6045
Work Codes	NAICS 484110 General freight trucking, local (More) NAICS 484110 Motor freight carrier, general, local (More) NAICS 484110 Trucking, general freight, local (More)
Estimated Start Date	9/15/2016
Estimated End Date	9/30/2016

Once all DBE subcontractors have confirmed their commitment, the prime contractor will need to **Resubmit Utilization Plan** to CIV for approval.

Utilization Plan: Resubmit Plan

Help & Tools

This Utilization/Commitment Plan has been conditionally approved. It can be edited and resubmitted at anytime before the due date. Complete steps 1, 2, and 3 (if applicable) before you sign and submit. Follow the instructions for each step.

User Manual Refresh

Utilization Plan Summary

Organization	Texas Department of Transportation
Proposal	0009-11-999: Turn Lanes, Rehab Shoulders and Overlay
Reference	Turn Lanes, Rehab Shoulders and Overlay
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Review Date	4/12/2017 by TxDOTPrime Test8

Subcontractors

Subcontractor Name	Sub Tier	Cert	Inc in Goal	Type	$ Commit	$ Self Perf	$ For Credit	Confirmed	Actions
1 TxDOT Test Sub Vendor 2	1	✓	✓ DBE	Truck/Haul 100%	$67,500 3.00%	$67,500 3.00%	$67,500 3.00%	✓	View
1 TxDOT Test Sub Vendor 3	1	✓	✓ DBE	Reg. Dealer 60%	$75,000 3.33%	$75,000 3.33%	$45,000 2.00%	✓	View
1 TxDOT Test Sub Vendor 5	1	✓	✓ DBE	Sub 100%	$157,500 7.00%	$155,925 6.93%	$155,925 6.93%	✓	View
2 TxDOT Test Sub Vendor 1	2	✓	✓ DBE	Sub 100%	$1,575 0.07%	$1,575 0.07%	$1,575 0.07%	✓	View

Step 4: Sign and Submit Utilization Plan

To submit this plan click the button below. You will be asked to provide your full name as your signature, title, company name, and check the affirmation box. If any warnings are listed, you must address them before submitting the plan.

Resubmit Utilization Plan

Chapter 9 — DMS Subcontractors

Contents:

Section 1 — Overview

Section 2 — Steps to Add a DBE Firm in DMS

Section 1 — Overview

During the course of a project, a prime contractor may want to add additional DBE subcontractors. This includes DBE subcontractors that were not part of the utilization plan. The prime contractor can add subcontractors in DMS after a contract record has been created by the district staff.

Prior to any DBE subcontractor working on a federal-aid project, the prime contractor must request approval by adding the subcontractor in DMS. This includes race-neutral participation on projects with or without DBE goals.

Requests must include the subcontracting firm name and contact information, a description of the work to be performed, bid items, and the total dollar amount of the subcontract.

Any work done by a race-neutral DBE, regardless of NAICS codes should be counted as race-neutral participation provided they are performing a CUF.

DMS Contract Set Up and Use Procedures

The following sections summarize general DMS contract set up responsibilities and procedures performed by the district staff.

TxDOT Responsibility

- Each TxDOT District is responsible for its assigned federal-aid projects in DMS.
- This responsibility will generally be delegated to the DDC.
- The contract record will be set up after contract award and prior to start of work.
- The District will notify the prime contractor in DMS when the contract record has been created.

Prime Contractor Responsibility

- At time of District notification, the prime contractor is responsible for setting up DBE race-neutral participation in DMS.
- The prime contractor will need to notify all its DBE and non-DBE tiered firms of subcontract set up, monthly reporting, and payment approval responsibilities that they must perform in DMS.
- DBE prime contractors must report subcontractor activity for all subcontractors to include DBEs and non-DBEs.

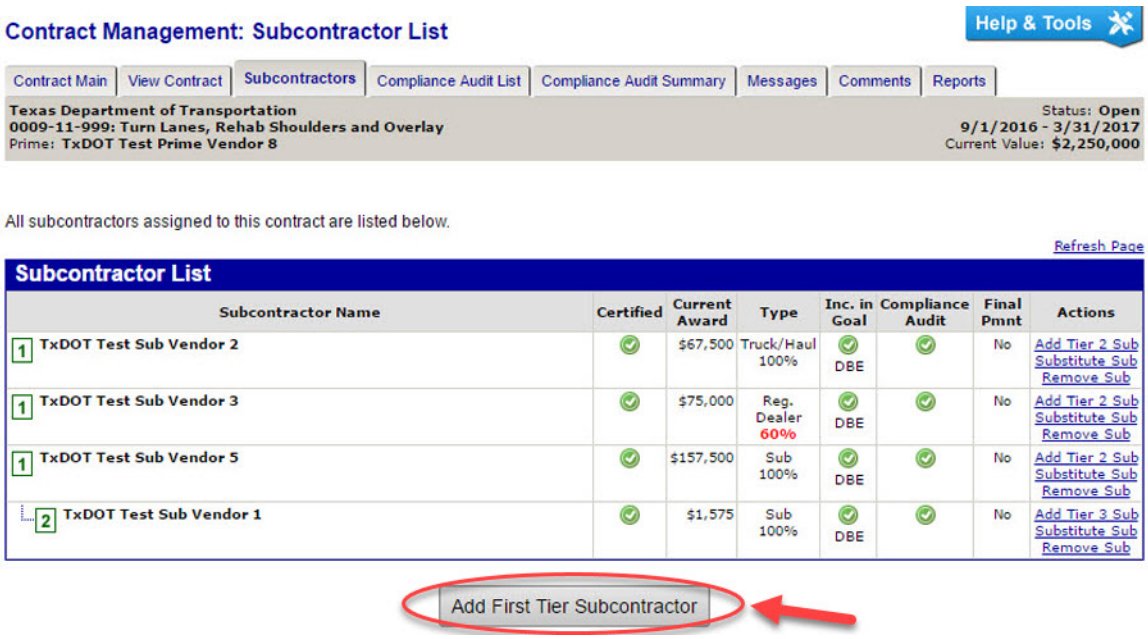
Section 2 — Steps to Add a DBE Firm in DMS

Step 1: Log in to DMS.

Step 2: Navigate to Page: Contract Management: Subcontractor List

Step 3: Click Add First Tier Subcontractor.
(Add Tier 2 Sub can be found in the Subcontractor List under the Actions column.)

(See the B2Gnow Utilization Plans manual for additional information on adding subcontractors.)



Step 4: Fill out required fields on the Contracts Management: Add Subcontractor page.

Selecting the goal (DBE, HUB), and credit type (race-conscious, race-neutral) will also be required.

Step 5: Click Review

Step 6: Review for accuracy and click Submit

DMS will automatically notify TxDOT of the prime contractor's request to add a subcontractor. Any changes to DMS may not be visible until the request is approved.

Chapter 10 — Race-Neutral Participation

Contents:

Section 1 — Overview

Section 2 — Adding a Race-Neutral DBE Subcontractor in DMS

Section 1 — Overview

The Federal DBE Program requires state transportation agencies to meet the maximum feasible portion of their overall DBE goals using race-neutral measures. Race-neutral measures are initiatives that encourage the participation of all businesses, or all small businesses, and are not specifically limited to DBEs.

As part of doing so, agencies must project the portion of their overall DBE goals that they expect to meet through race-neutral and race-conscious programs.

- TxDOT uses a combination of race-neutral and race-conscious measures to meet its overall DBE goals. TxDOT projects that some percent of its overall DBE goal would be met through neutral means and that the remainder would be met through race-conscious means.
- TxDOT uses DMS to track race-conscious and race-neutral participation on federal-aid projects.
- Prime contractors must report race-neutral participation, in DMS, on federal-aid contracts on which the assigned goal is 0% or on projects with goals greater than 0%.
- Any work done by a race-neutral DBE regardless of NAICS codes may be counted provided they are performing a CUF.
- Termination and substitution policy and procedures do not apply to race-neutral participation.
- CUF reviews must be performed on all race-neutral participation on projects with and without goals.

Section 2 — Adding a Race-Neutral DBE Subcontractor in DMS

Overview

It is the responsibility of the prime contractor to add all race-neutral DBE subcontractors to their contract.

The District will inform the prime contractor to add their RN DBEs once the contract has been "Locked In" and the race-conscious DBEs from the UP have been transferred to the contract.

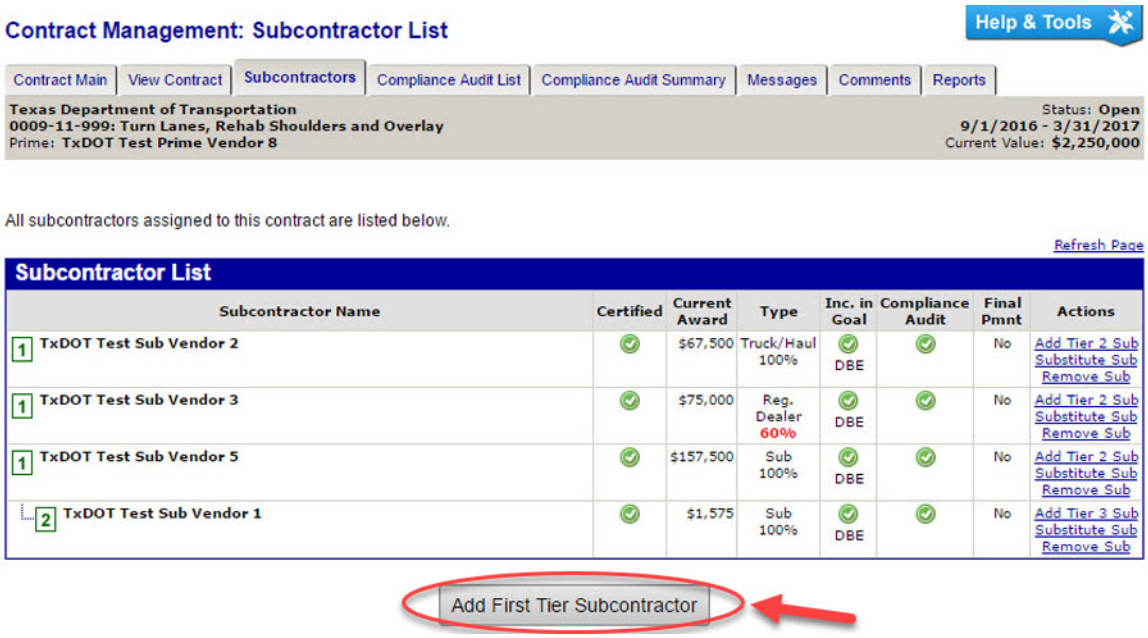
Process

Step 1: Log in to DMS.

Step 2: Navigate to Page: Contract Management: Subcontractor List

Step 3: Click Add First Tier Subcontractor
(Add Tier 2 Sub can be found in the Subcontractor List under the Actions column.)

(See the B2Gnow Utilization Plans manual for additional information on adding subcontractors.)



Step 4: Fill out required fields on the Contracts Management: Add Subcontractor page.

Selecting the goal (DBE, HUB), and credit type (race-conscious, race-neutral) will also be required.

Step 5: Click Review

Step 6: Review for accuracy and click Submit

DMS will automatically notify TxDOT of the prime contractor's request to add a subcontractor. Any changes to DMS may not be visible until the request is approved.

Chapter 11 — Contract Award and Subcontract Execution

Contents:

Section 1 — Subcontracts

Section 2 — DBE Trucking Utilization

Section 1 — Subcontracts

In accordance with TxDOT Standard Specifications, the prime contractor must submit a copy of the executed subcontract agreement or purchase order for all DBE subcontracts including all tiered DBE subcontracts on federal-aid projects.

Subcontract Agreement

The prime contractor must incorporate the following TxDOT provisions in all subcontract agreements or material purchase agreements:

- Disadvantaged Business Enterprise in Federal-Aid Contracts (000-394)
- Special Provision Measurement and Payment (009-009)
- Contract Assurance (49 CFR, Part 26.13)

The prime contractor should review these provisions with the DBE.

It is considered a best practice to include language into the subcontract regarding the ability of a DBE to perform a CUF. Advise the DBE that it is expected to manage, supervise, and perform its work, with its own organization and resources. A DBE's failure to perform a CUF is considered by TxDOT as a valid cause for termination. For more information regarding the CUF requirements, please refer to Chapter 6 of this Guide and 49 CFR, Part 26.55.

Multiple Tier Subcontracts

The prime contractor is ultimately responsible for the actions of its subcontractors and any second tiered DBE subcontractors. The prime contractor should, therefore, ensure that any subcontract between a first tier subcontractor and a DBE subcontractor contains language that the DBE goals are to be met and that the DBE performs a CUF. Additionally, the prime contractor should be certain that the first tier subcontractors understand the process of terminating a DBE subcontractor.

Submitted Contracts

The District will check the following is present in all DBE subcontracts:

- DBE certification is valid at the time of subcontract execution
- Signature of prime contractor and DBE subcontractor
- The dollar amount of DBE subcontract is equal or greater than the commitment and the scope of work does not differ from the commitment

Section 2 — DBE Trucking Utilization

Prime contractors will provide to the District a completed DBE Trucking Utilization Form 2660. The form will be submitted to the District after the contract has been executed and will not be submitted with the UP.

In order to complete the form, the prime contractor will request, from the DBE trucking firm, the following:

- The number of hours or quantities to be hauled.
- The number of fully operational trucks owned by the DBE.
- The number of leased trucks to be used on the project, with copies of the lease agreements.
- The information required for the DBE truck unit listing on Form 2660.

The District will review and approve the form. This review and approval process must be conducted prior to the prime contractor beginning any hauling services being performed for DBE credit.

Chapter 12 — Pre-Construction Conference

Contents:

Section 1 — Overview

Section 1 — Overview

District staff will discuss the DBE requirements of the contract at the pre-construction conference to ensure that the prime contractor is aware of its DBE obligations and is informed of the administrative and reporting procedures that will be utilized by TxDOT.

The district staff will discuss, at a minimum, the following:

- The assigned DBE goal for the project
- The DBE subcontractors that will be participating in the project
- The prime contractor requirement to make a good faith effort to meet the assigned goal
- District responsibility to monitor and ensure a commercially useful function (CUF) is performed
- The prime contractor complies with prompt payment requirements
- The DMS reporting process to include:
  - Reporting payments within 15 days after the end of a calendar month.
  - Adding subcontractors to include race-neutral DBEs.
- The Termination/Substitution process
- The approval process and use of joint checks

Chapter 13 — Payments

Contents:

Section 1 — Payments

Section 2 — Payment Reporting in DMS

Section 1 — Payments

Prompt Payment

49 CFR, Part 26.29 requires DBE and non-DBE subcontractors to be paid promptly. TxDOT interprets prompt payment to mean the prime contractor will pay each subcontractor for satisfactory performance of its contract no later than ten days from receipt of each payment the prime contractor receives from TxDOT. The prime contractor will pay any retainage on a subcontractor's work within ten days after satisfactory completion of all the subcontractor's work.

The prompt payment clause is referenced in TxDOT's Special Provision 009-009 Measurement and Payment. The prime contractor should include in its subcontracts the same prompt payment provision.

Satisfactory completion is accomplished when:

- The subcontractor has fulfilled the contract requirements of both TxDOT and the subcontract for the subcontracted work, including the submittal of all information required by the contract and TxDOT.
- TxDOT has inspected and approved the subcontractor's work, and paid by TxDOT.

TxDOT may pursue actions against the prime contractor for failure to execute prompt payment requirements. The penalties imposed by TxDOT may include, but are not limited to: withholding all or a portion of an estimate, suspending work, withholding project acceptance, placing prime contractor in default for breach of contract, or other actions deemed appropriate.

Final Reimbursement to Prime Contractor

TxDOT cannot make the final reimbursement to the prime contractor until it approves the completion of the project construction and has received and reviewed all necessary documentation, including the DBE Program requirements.

Section 2 — Payment Reporting in DMS

Understanding the Audit Process

After a contract record has been created in DMS and TxDOT begins making payments to the prime contractor, the contract is ready for auditing. Auditing is generated on a monthly basis.

The following image represents the audit process:

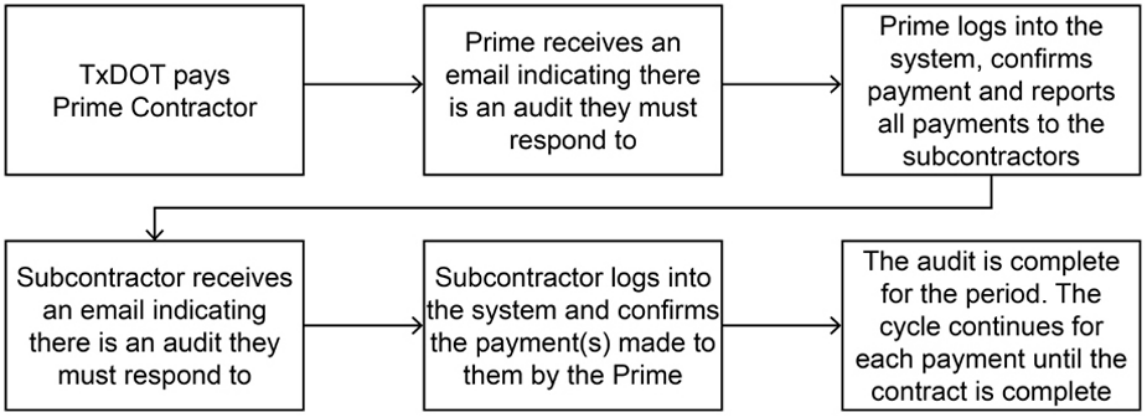


Figure 13-1. Audit process for a contract record in DMS.

A prime contractor working on federal-aid projects is responsible for the reporting of all payments to its DBE subcontractors in DMS. DBE subcontractors are responsible for verification and confirmation of payment data received from the prime contractor in DMS. The prime contractor will include payment entries to non-DBE subcontractors whenever there is a DBE associated with a second or multi-tiered subcontract. A DBE prime contractor is responsible for reporting payments to all subcontractors in DMS.

The prime contractor will report payments, after work begins, to meet the DBE goal and for DBE race-neutral participation on projects with and without DBE goals. These reports will be due within fifteen days after the end of a calendar month. These reports will be required until all DBE subcontracting or material supply activity is completed.

See the reporting timeline example below:

Reporting Timeline

Date	Action
March 10th	TxDOT pays prime contractor.
March 20th	Prime contractor pays DBE subcontractor.
April 5th	DMS alters prime contractor to report March subcontractor payments.
April 15th	Prime contractor completes entering payments.

Reporting Timeline

Date	Action
April 22nd	DBE subcontractor confirms payment received.
April 23rd – 30th	District staff completes reporting audit.

How to Report Payments

By the fifth of each month, DMS will notify the prime contractor by a system generated e-mail to report payments to subcontractors.

Step 1: Click the link provided in the e-mail below:

From: Texas Department of Transportation
Date: 11/4/2016 11:28:31 AM
Subject: TxDOT: Prime Contractor Compliance Monitoring Report

Texas Department of Transportation October 2016 Prime Contractor Contract Compliance Monitoring Report

Contract: Turn Lanes, Rehab Shoulders and Overlay
Prime Contractor: TxDOT Test Prime Vendor 8
Contract Number: 0009-11-999
Audit Time Period: October 2016
Contract Compliance Officer: Daniel Williams

Dear Contact Person,

The Civil Rights Division monitors participation on all Texas Department of Transportation contracts with goals. To assist our office in the monitoring process, please login to your account in the Diversity Management Software and provide the requested subcontractor payment information for October 2016.

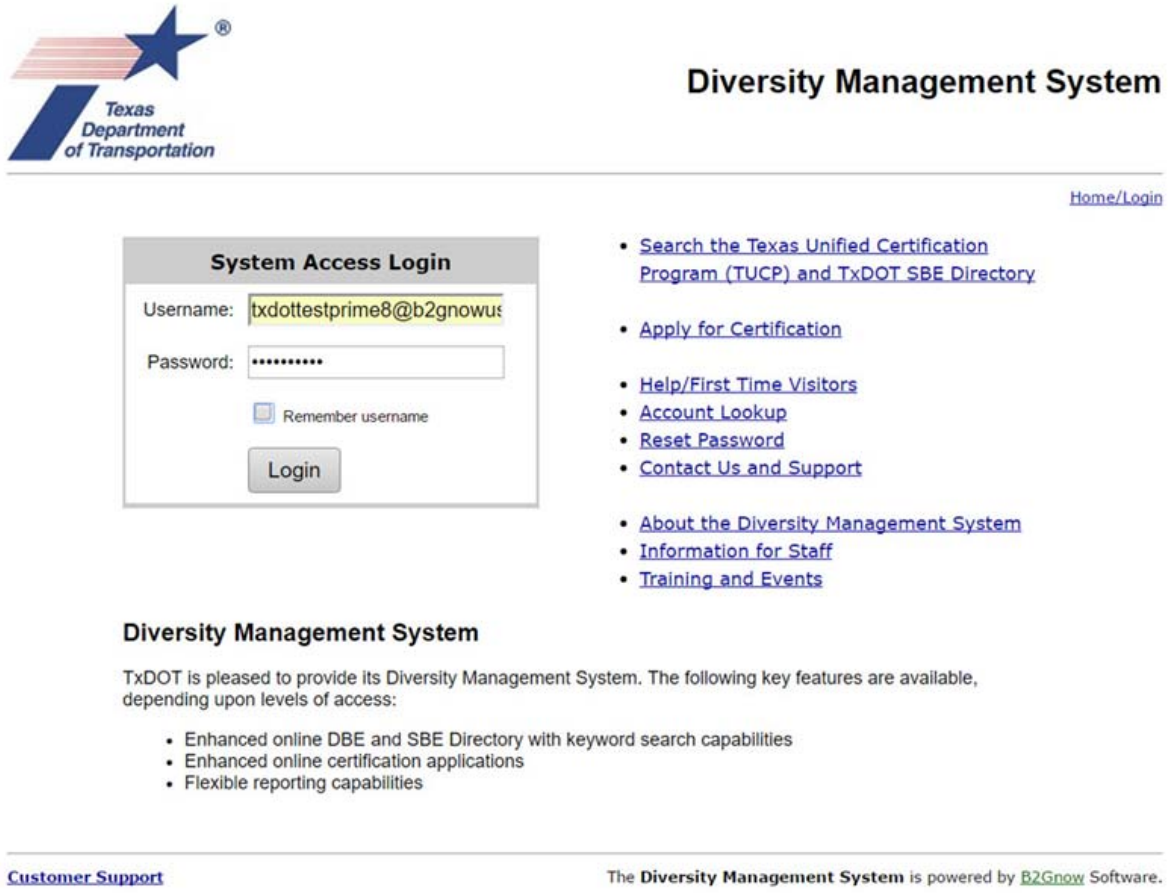
If you have received this notice, then you are currently listed as a PRIME contractor on an active Texas Department of Transportation contract. You are required to respond to this notice with the payment information requested.

To view the audit notice and respond, visit: https://txdot.txdotcms.com/?GO=397
To view all audit notices, visit: https://txdot.txdotcms.com/?GO=753

PLEASE REFER TO THE BOTTOM OF THIS NOTICE FOR ADDITIONAL HELP

Texas Department of Transportation
Civil Rights Division
125 East 11th Street
Austin, Texas 78701
(512) 416-4700
https://txdot.txdotcms.com

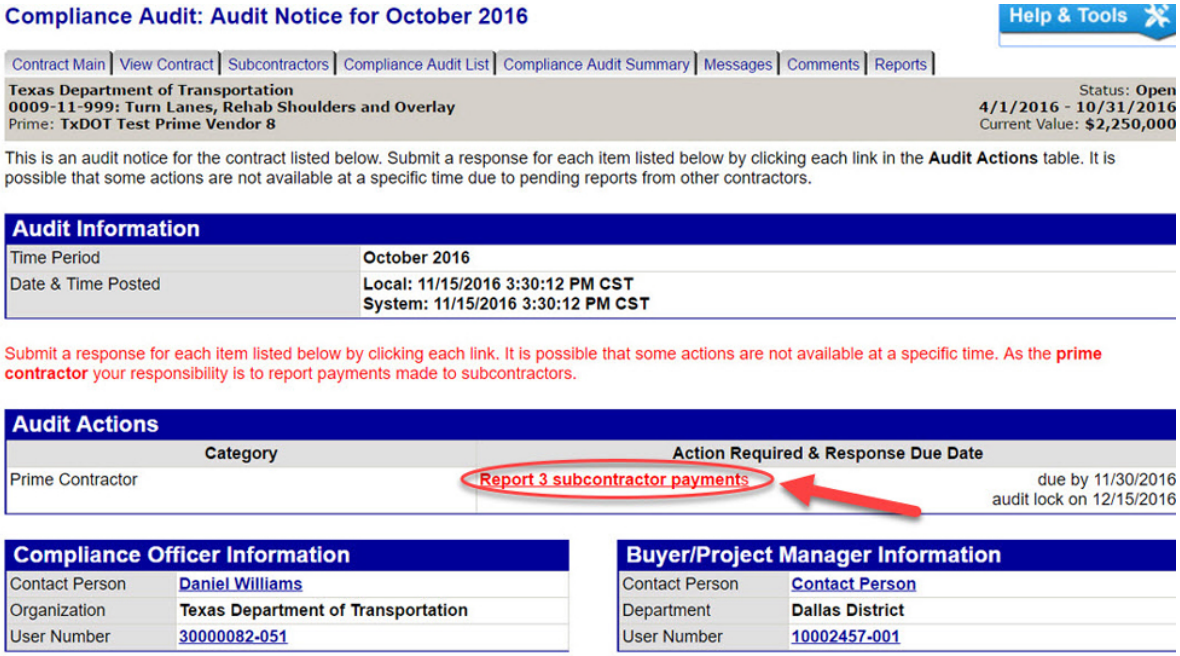
Step 2: Log in to DMS



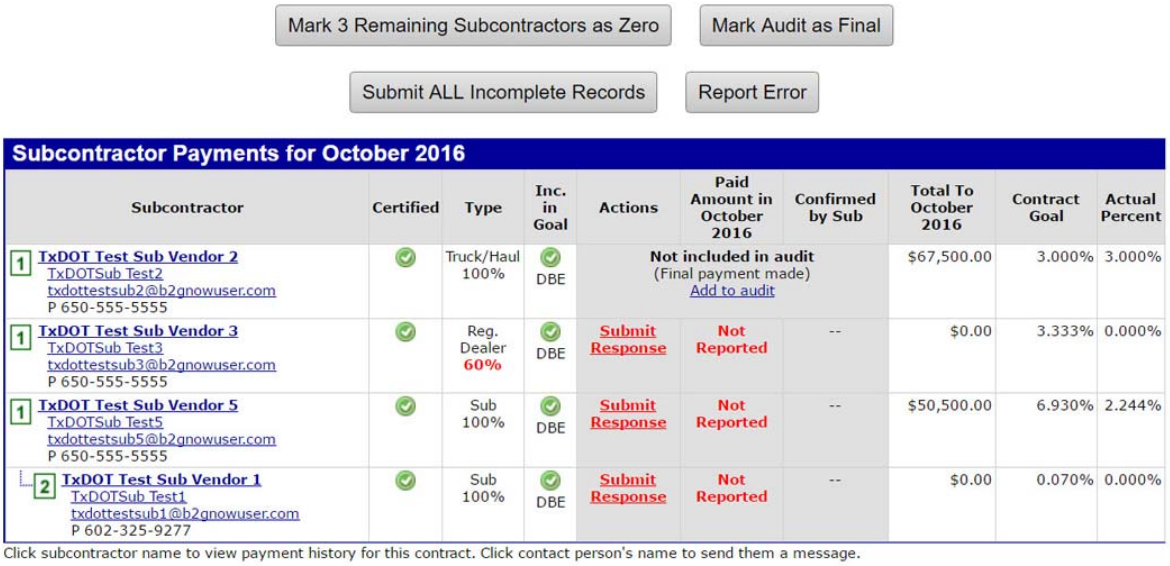
Note: If the e-mail link is not available, use the following instructions to navigate to the incomplete audit.

1. Log in to DMS.
2. Click **View** in the left margin.
3. Click **My Contract Audits**.
4. Click on **Incomplete** to report payments and continue to Step 3 below.

Step 3: Click Report Subcontractor Payment



Step 4: Select a subcontractor to report payment to and click Submit Response or the prime contractor can complete bulk payment reporting, by clicking Submit all Incomplete Records.



Step 5: Enter payment amount, payment date and payment promptness.

Step 6: Enter the invoice and check numbers in the Payment Detail field.

Step 7: Attach any document by clicking **Attach File**.

Step 8: Click **Review**.

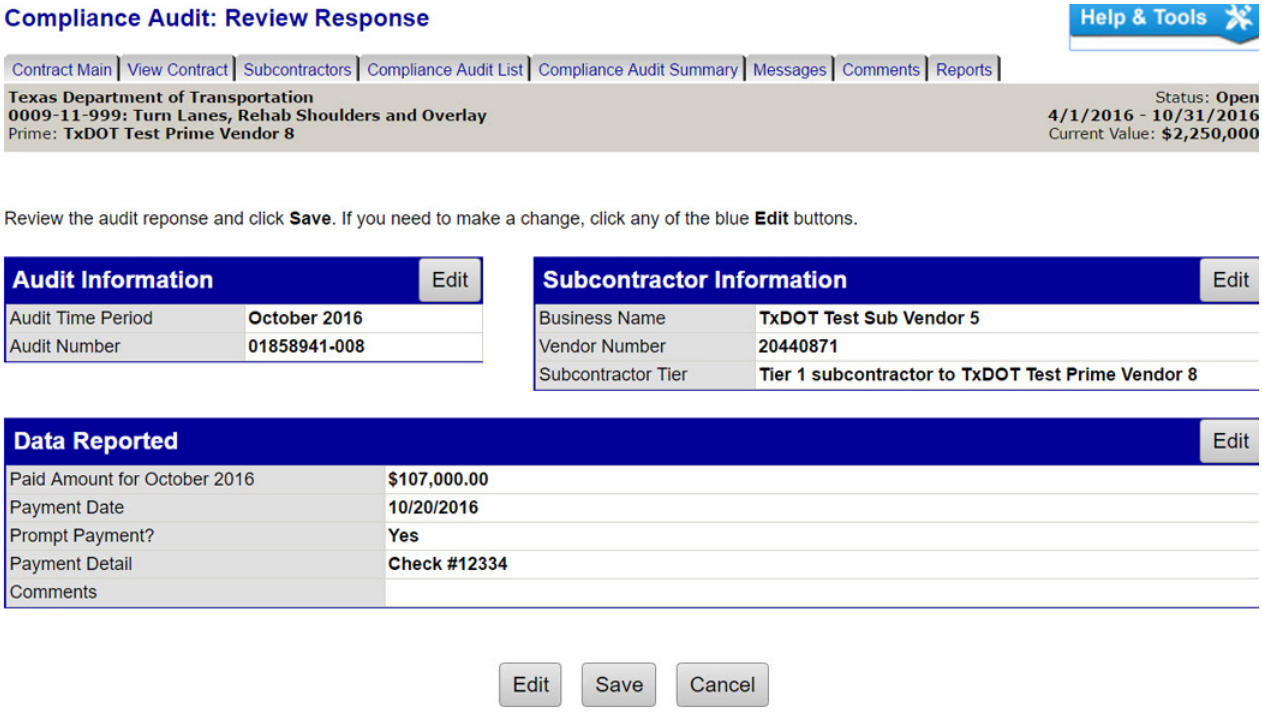
Audit Information

Enter the audit amount for the designated time period. You can attached files or add comments, if necessary.

Amount PAID for October 2016 *	$ 107000 >> Do NOT enter invoice amount. >> Enter full amount paid; do not deduct payments by this subcontractor to its own subcontractors
Payment Date *	10/20/2016 >> Enter payment date if you made a payment for October 2016. >> If multiple payments were made, enter the date of the **first** payment.
Prompt Payment? *	>> Select a choice below if you made a payment for October 2016. (•) Yes - the subcontractor was paid within 10 days of payment from TxDOT Test Prime Vendor 8. ( ) No - the subcontractor was not paid within 10 days of payment from TxDOT Test Prime Vendor 8. ( ) N/A - we cannot determine if the subcontractor was paid promptly.
Payment Detail	Enter details of PAID check numbers (or ACH references) and amounts for October 2016. This information is optional but will speed up the confirmation process. Payment details are displayed to TxDOT Test Sub Vendor 5. Check #12334
Supporting Documents	Attach File Attached documents are not visible to TxDOT Test Sub Vendor 5.
Comments	(Optional) These comments are visible ONLY to your compliance officer. They are not visible to TxDOT Test Sub Vendor 5.

Spell Check Review Cancel

Step 9: Review content and click **Save.**



Step 10: Complete steps 4-9 for each subcontractor.

Subcontractor Verification of Payments

DMS will notify a subcontractor by system generated e-mail when payment is recorded by the prime contractor. Once notified, the subcontractor will have seven days to log in to DMS and agree or disagree with payment reported by the prime contractor.

Step 1: Click the link provided in the e-mail below:

From: Texas Department of Transportation
Date: 11/14/2016 11:58:52 AM
Subject: TxDOT: Subcontractor Contract Compliance Monitoring Report

Texas Department of Transportation October 2016 Subcontractor Contract Compliance Monitoring Report

Contract: Turn Lanes, Rehab Shoulders and Overlay
Prime Contractor: TxDOT Test Prime Vendor 8
Contract Number: 0009-11-999
Audit Time Period: October 2016
Contract Compliance Officer: Daniel Williams
Reference: TxDOT Test Sub Vendor 5

Dear TxDOT Test Sub Vendor 5,

The Civil Rights Division monitors participation on all Texas Department of Transportation contracts with goals. To assist our office in the monitoring process, please use the link below to provide the requested subcontractor payment information for October 2016.

If you have received this notice, then you are currently listed as a SUBCONTRACTOR on an active Texas Department of Transportation contract. You are required to respond to this notice with the payment information requested.

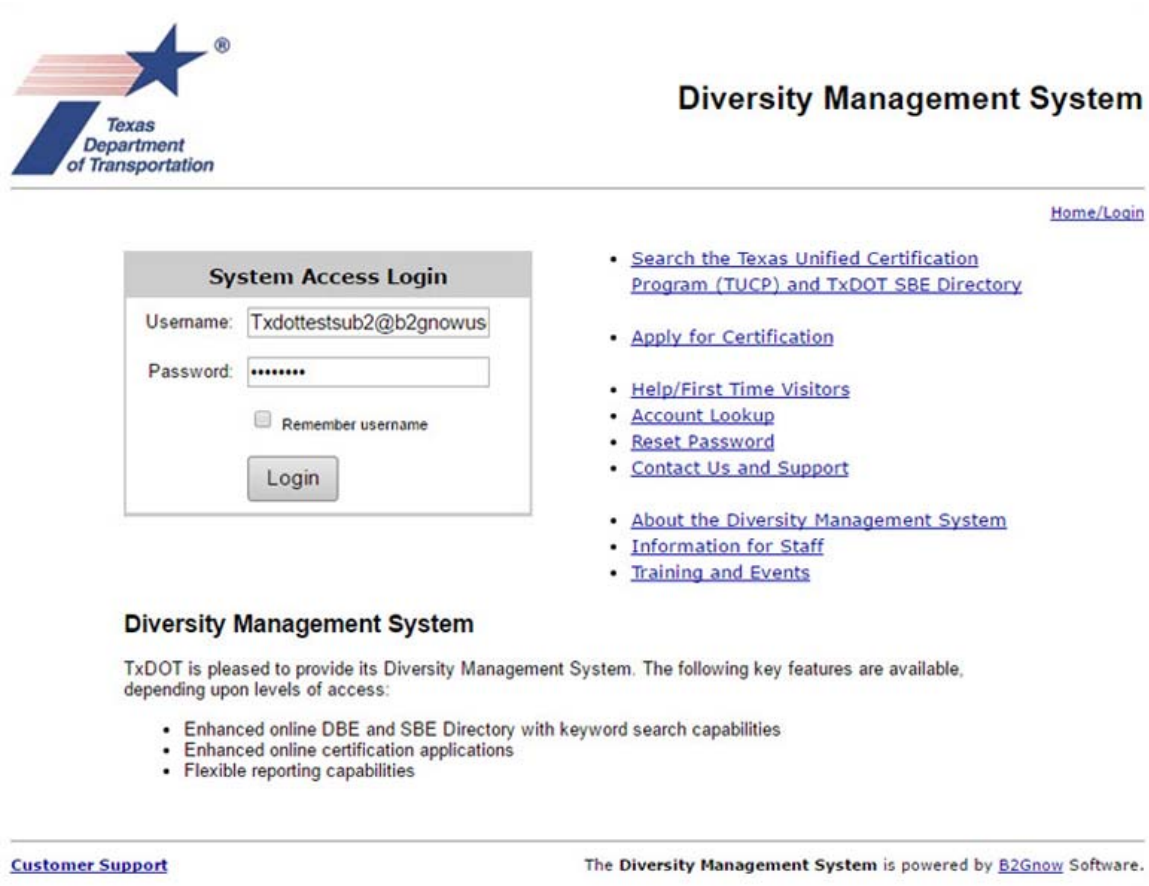
To respond, visit: https://txdot.txdotcms.com/ca.asp?Code=[lblAuditCode]&PIN=[lblAuditPIN]

Audit Code: GDDAFYNN
Audit PIN: YG7B4F3W

To view all audits on this contract, visit: https://txdot.txdotcms.com/?GO=753

Texas Department of Transportation
Civil Rights Division
125 East 11th Street
Austin, Texas 78701
(512) 416-4700
https://txdot.txdotcms.com

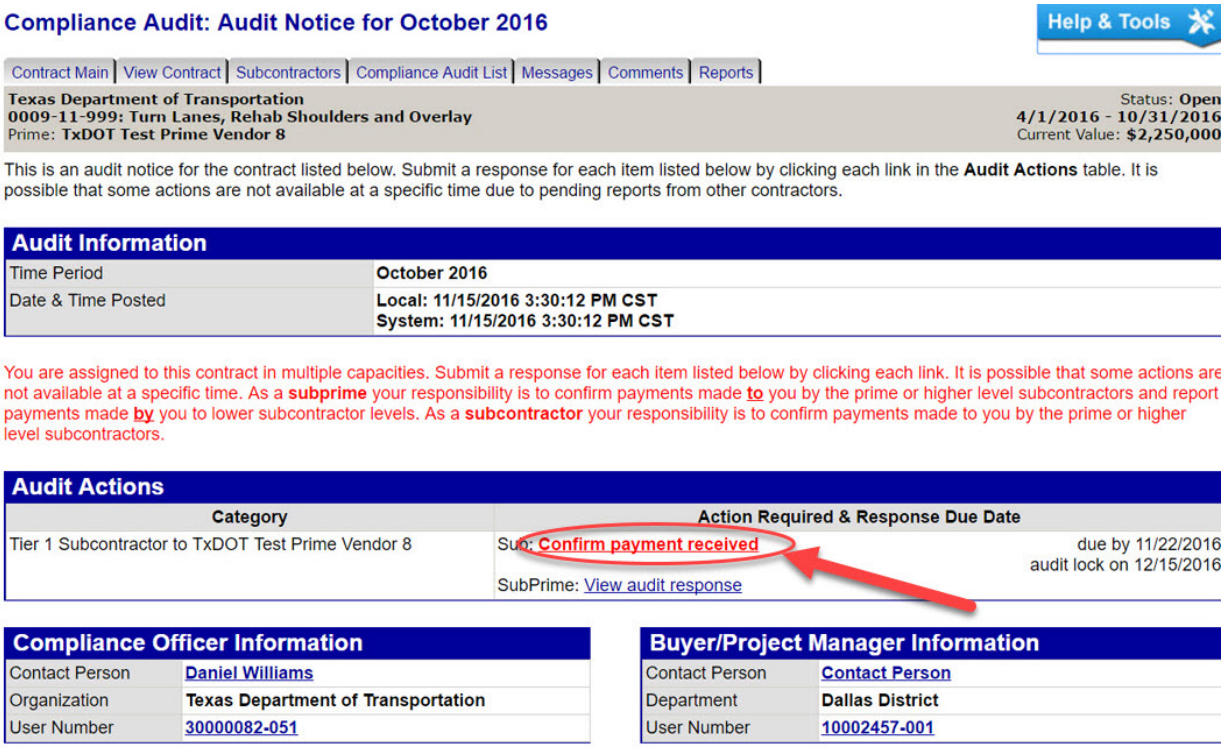
Step 2: After clicking the link, the subcontractor will be directed to the DMS log in interface to sign in. After log in, DMS will navigate directly to the incomplete audit listed in the e-mail.



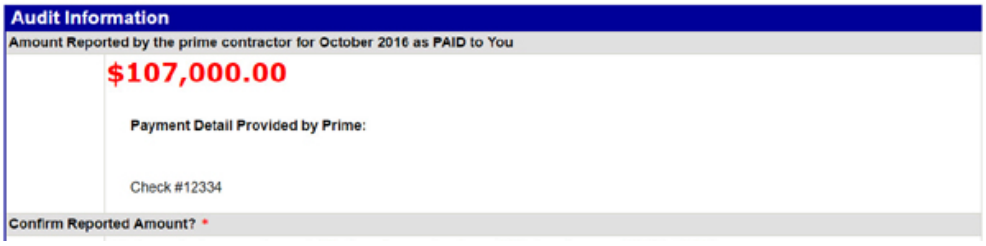
Note: If the e-mail link is not available, use the following instructions to navigate to the incomplete audit.

1. Log in to DMS.
2. Click View in the left margin.
3. Click My Contract Audits.
4. Click on Incomplete to report payments and continue to Step 3 below.

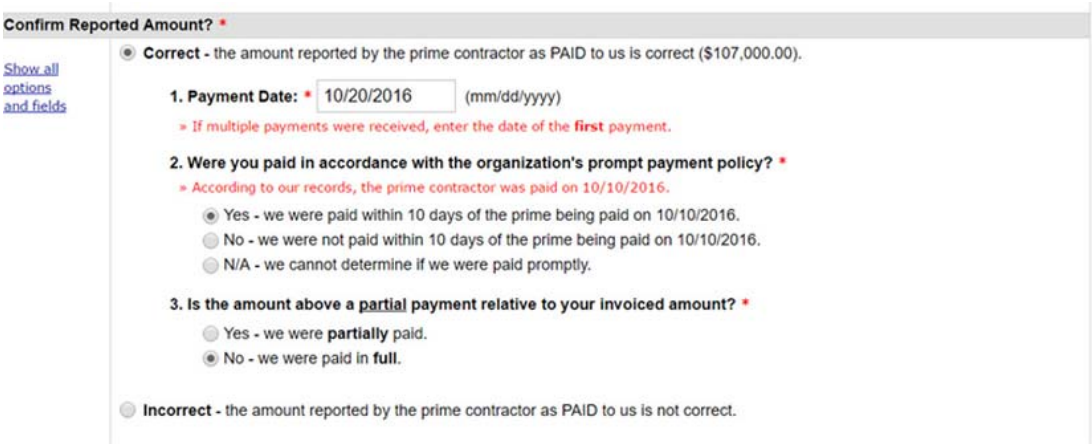
Step 3: Click Confirm payment received



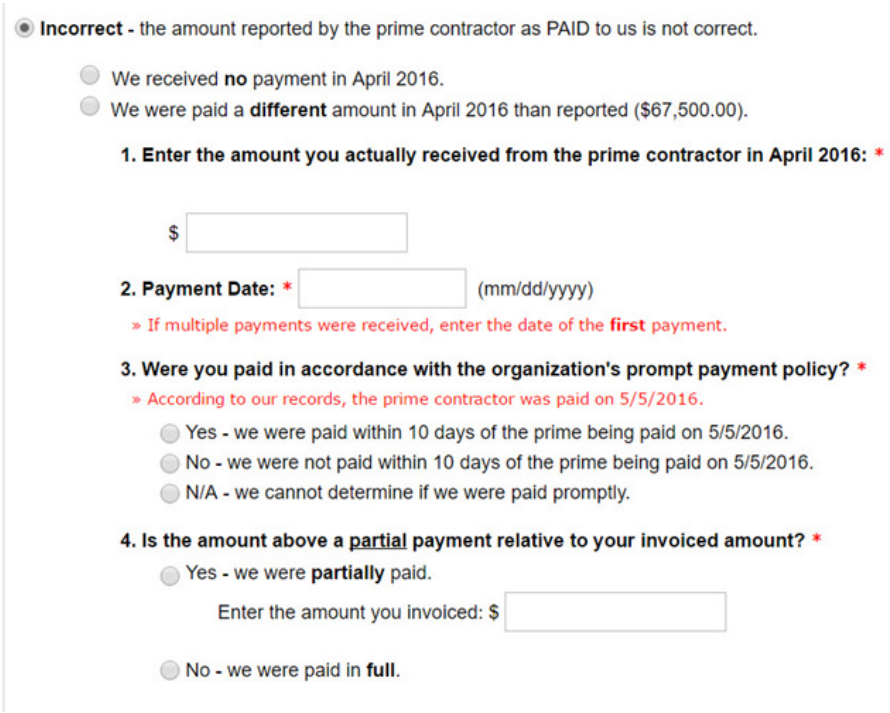
Step 4: Verify the payment amount and details provided by the prime contractor.



If the subcontractor selects Correct for the payment, then they are asked to enter the payment date and if they were paid within ten days.



If the subcontractor selects **Incorrect** for the payment total, DMS will prompt the subcontractor to enter the amount it was paid. The subcontractor is then asked to enter the payment date and if it was paid within ten days. See the following subsection, **Payment Discrepancy** for additional actions.



Step 5: Identify if payment is final or not. By selecting **Yes** the subcontractor will be removed from future audits.

Step 6: Identify if the prime contractor is withholding retainage and the amount retained.

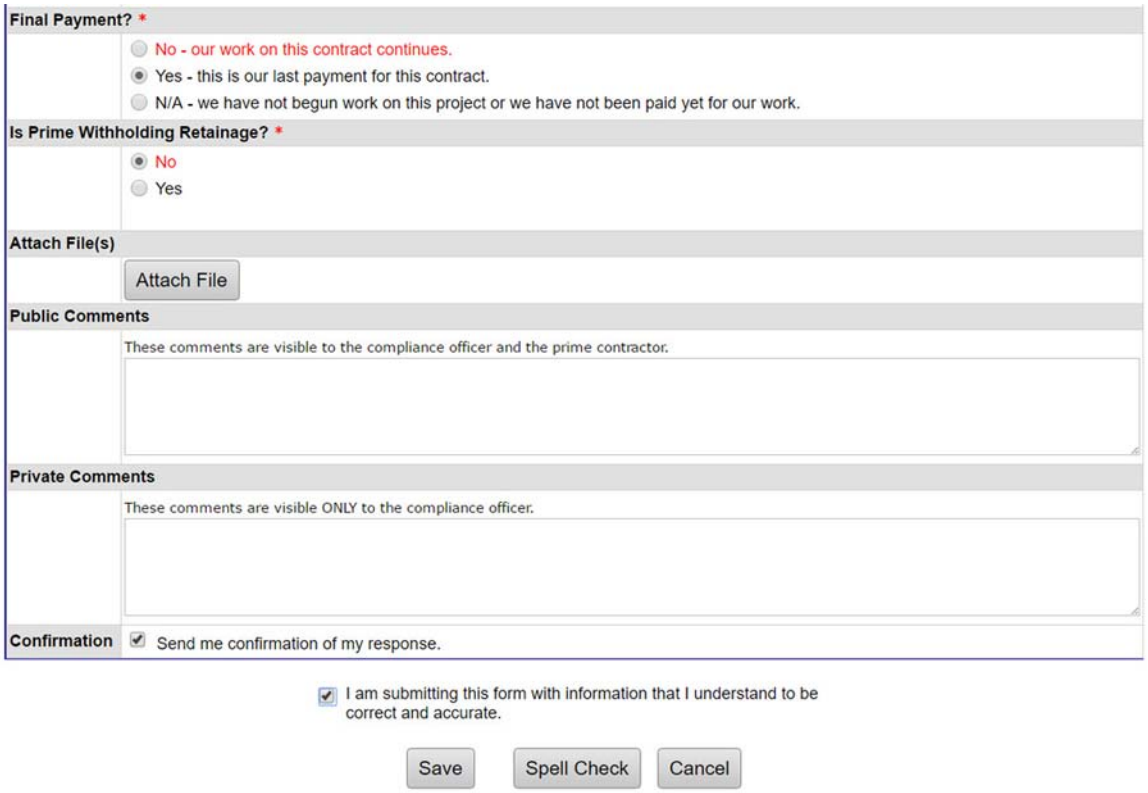
Step 7: Attach file(s) as necessary.

Step 8: There are two comment boxes that can be used to communicate the issue with payment.

- The first box, **Public Comments**, is visible to the prime contractor and TxDOT compliance staff.
- The second box, **Private Comments,** is visible only to the TxDOT compliance staff.

Step 9: Check the confirmation statement: I am submitting this form with information that I understand to be correct and accurate.

Step 10: Click Save.



Payment Discrepancy

If a prime contractor and subcontractor disagree on an amount paid, the system creates a discrepancy. The system sends an e-mail message to the contractors to notify them of the issue and request they resolve the discrepancy. If they are unable to resolve the discrepancy, the district staff may be required to take action.

When a subcontractor selects **Incorrect** in Step 4 above, a discrepancy is created and the following process is required:

- The monthly payment record will be sent back to the prime contractor by DMS to review the payment difference and comments that the subcontractor has made.

- The prime contractor may correct an error and re-submit to the subcontractor for review again.
- The subcontractor and the prime contractor should work together to resolve any payment discrepancies. After two attempts to resolve the discrepancy, DMS will turn over the audit record to the district staff.

Chapter 14 — Joint Checks

Contents:

Section 1 — Joint Check Process

Section 1 — Joint Check Process

A joint check is a two-party check between a DBE subcontractor and a prime contractor to submit to a materials supplier of the DBE. The prime contractor issues a check as payer to the DBE subcontractor and the materials supplier jointly to guarantee payment to the supplier for the materials or supplies used by the DBE subcontractor.

Any joint check arrangement must be pre-approved by TxDOT before the arrangement or transaction takes place. The prime contractor should submit the Joint Check Approval Form 2178 to the District.

Prime contractors need to attach:

- Form 2178
- Correspondence showing the rejection of a line of credit from the material supplier to the DBE subcontractor
- A joint check agreement

The use of joint checks for payment of materials or supplies is acceptable when the following conditions are met:

- The prime contractor issuing the check acts solely as guarantor.
- The DBE subcontractor must release the check to the supplier.
- The DBE subcontractor (not the prime contractor) negotiates the quantities, price and delivery of materials.
- The DBE subcontractor is responsible for both furnishing and installing the materials or supplies.
- The prime contractor cannot require the subcontractor to use a specific supplier or the prime contractor's negotiated price.
- The arrangement is short-term with the purpose being the DBE subcontractor's establishment or increase of a credit line with the material supplier.
- The DBE subcontractor and the prime contractor must keep records of paid invoices and canceled checks as TxDOT will regularly be requesting them to ensure compliance.

Chapter 15 — Assistance to DBE Firms

Contents:

Section 1 — Overview

Section 1 — Overview

According to 49 CFR, Part 26, Appendix A, it is appropriate for prime contractors to provide assistance to DBEs in a variety of areas, such as bonding, credit, insurance, equipment, materials, and supplies.

In providing such assistance, a prime contractor should be careful not to provide so much assistance to a particular DBE in so many areas that TxDOT would conclude that the DBE is not viable without the relationship to the prime contractor. This assistance should be transparent and arms-length. As part of its contract performance oversight functions, TxDOT will continue to scrutinize the independence of DBEs as they work on projects.

Prime contractors with questions about the appropriateness of their assistance relationships with DBEs should consult TxDOT staff.

Chapter 16 — Change Orders

Contents:

Section 1 — Overview

Section 1 — Overview

Circumstances may arise during construction requiring changes to the scope of the work contained in the contract; these are referred to as change orders. The prime contractor should closely monitor change orders to verify if adjusted items or work will impact DBE subcontracted items. The DBE goal applies to the final value of a contract to include all change orders.

Increases of Scope of Work

If TxDOT issues a change order which increases or adds new work items, the prime contractor must ensure that it has obtained sufficient DBE participation to meet the contract goal on the final contract value or has made good faith efforts to do so.

If the prime contractor determines that additional DBE participation cannot be obtained, the prime contractor shall request a waiver of the participation after submitting documentation of good faith efforts to meet the DBE goal.

Reduction of Scope of Work

If a change order eliminates work designated in a DBE commitment, the prime contractor must follow the termination procedures and must make a good faith effort to meet the DBE goal on the final contract value.

Chapter 17 — Termination and Substitution Requests

Contents:

Section 1 — Termination and Substitution of a DBE

Section 2 — Steps to Substitute a DBE Firm in DMS

Section 1 — Termination and Substitution of a DBE

Overview

The prime contractor shall not terminate for convenience, in whole or part, a DBE subcontractor listed on the UP without the written concurrence of TxDOT. 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. Unless consent is provided, the prime contractor will not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE subcontractor.

Good cause for termination of the DBE includes, but is not limited to, the following circumstances:

- The listed DBE subcontractor fails or refuses to execute a written contract.
- 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.
- The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable, non-discriminatory bond requirements.
- The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness.
- The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to 2 CFR, Parts 180 and 1200 or applicable state law.
- The prime contractor has determined that the listed DBE subcontractor is not a responsible contractor.
- The listed DBE subcontractor voluntarily withdraws from the project and provides written notice of its withdrawal.
- The listed DBE firm is ineligible to receive DBE credit for the type of work required.
- A DBE firm owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract.
- Other documented good cause that the prime contractor determines may compel the termination of the DBE subcontractor.

Good cause does not exist if the prime contractor seeks to terminate a DBE subcontractor it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE subcontractor was engaged or so that the prime contractor can substitute another DBE or non–DBE subcontractor after contract award.

Commitment Reduction

A prime contractor cannot reduce the amount of work committed to a DBE at contract award without good cause. A reduction is considered a partial termination of the DBE's contract with the prime contractor.

Termination Procedures

Step 1: The prime contractor shall submit a request and justification for DBE termination to TxDOT.

- The prime contractor shall first give notice in writing to the DBE firm of its intent to terminate and the reason for the termination.
- The prime contractor will copy TxDOT on the Notice of Intent to Terminate correspondence.
- The DBE has five calendar days to respond to the prime contractor's notice and will advise the prime contractor and TxDOT of the reasons, if any, why it objects to the proposed termination of its subcontract and why TxDOT should not approve the prime contractor's request for termination.

Step 2: TxDOT will review the termination request and related information and if necessary seek additional information to formulate its response.

Step 3: TxDOT will provide written consent to the termination request within seven days only if TxDOT agrees, for reasons stated in its concurrence document, that the prime contractor has good cause to terminate the DBE firm. TxDOT may provide a shorter response time if required in a particular case as a matter of public necessity.

Step 4: If TxDOT does not approve the request, the prime contractor shall continue to use the committed DBE in accordance with the contract.

If Termination Does Not Result in DBE Shortfall

If termination of a DBE firm does not result in a DBE contract goal shortfall, the prime contractor is not required to find a substitute DBE firm.

If Termination Results in a DBE Shortfall

When a termination of a DBE firm results in a shortfall, the prime contractor must make good faith efforts to find, as a substitute for the original DBE, another DBE to perform, at least to the extent needed to meet the established contract goal. The prime contractor will document its good faith efforts to find and secure a substitute DBE within seven days, which may be extended for an

additional seven days if necessary at the request of the contractor. The prime contractor will request, in writing, approval from TxDOT to utilize the substitute DBE.

TxDOT will respond in writing to the prime contractor's request to use the substitute DBE and may seek additional information as necessary to formulate its response.

If the substitution request is approved, the prime contractor will process the DBE substitution in DMS.

The substitute DBE cannot work on the contract until its work eligibility has been confirmed and required subcontracts, supply, trucking commitments, or other services have been approved by TxDOT.

Process When a Contractor Fails to Secure a Substitute DBE

If a substitute DBE firm is not found that can perform at least the same amount of work as the terminated DBE, the prime contractor shall submit good faith effort documenting the steps taken.

Such documentation shall include, but not be limited to, the following:

- Copies of written notification soliciting DBEs.
- Efforts to negotiate with DBEs to include at a minimum:
  - The names, addresses, and telephone numbers of DBEs who were contacted.
  - A description of the information provided to DBEs regarding the plans and specifications for portions of the work to be performed.
- A list of reasons why DBE firm quotes were not accepted.

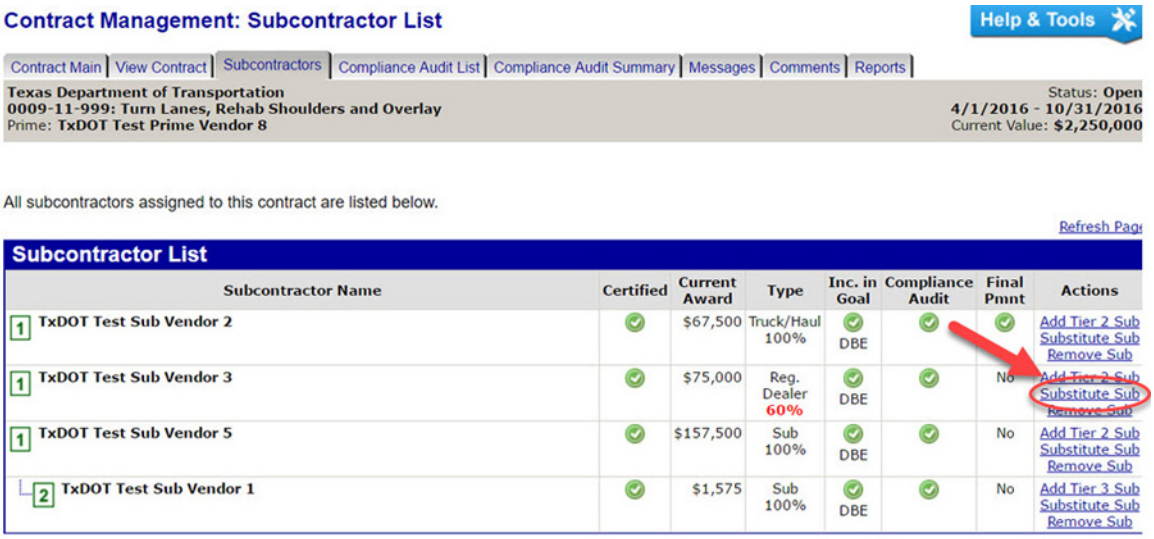
TxDOT will provide the prime contractor with a written response either accepting or rejecting the prime contractor's good faith efforts. If the prime contractor's good faith efforts are rejected, TxDOT shall assess whether administrative remedies are appropriate.

Section 2 — Steps to Substitute a DBE Firm in DMS

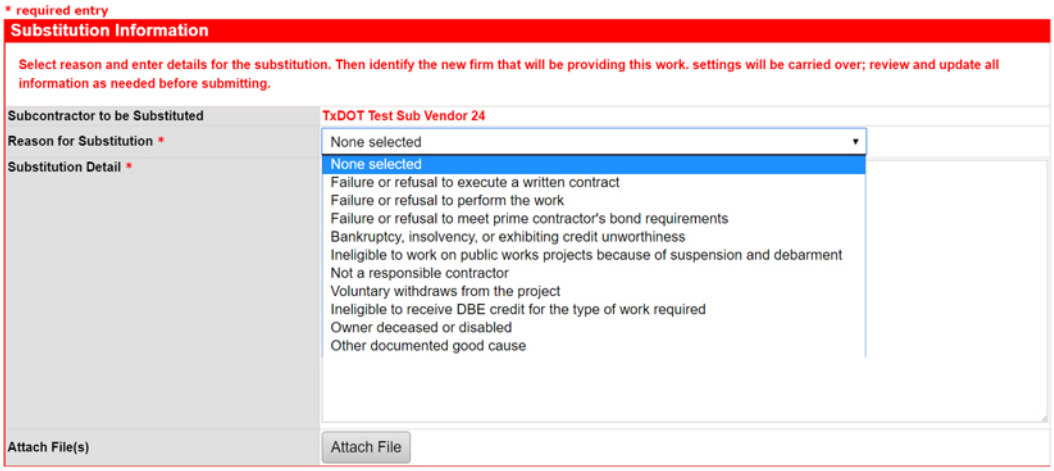
Step 1: Log in to DMS.

Step 2: Navigate to Page: **Contract Management: Subcontractor List**

Step 3: Click: **Substitute Sub**



Step 4: Complete required fields for substitution of the DBE to be removed from further tracking in DMS.



Step 5: Complete required fields to Add Substitute Subcontractor. (See Chapter 9, Section 2, titled Steps to Add a DBE Firm in DMS for information on adding subcontractors.)

The **Count Towards Certified Goal** field below has drop down options. Select **DBE** and **Race Conscious**.

Vendor Information

Vendor *	Get Vendor from vendor database
Vendor Compliance Contact *	None selected
Vendor Address *	None selected

Applicable Vendor Certifications

Assign a vendor and click to refresh certification list.

Subcontract Information

Subcontractor Tier *	[Tier 2] Subcontractor to TxDOT Test Prime Vendor 8 [Prime Contractor]
Current Prime Contract Amount	$2,250,000.00
Subcontract Percent/Amount *	By Amount: $ By Percent: % Enter the full amount/percent of the subcontract or the percent relative to the total contract value ($2,250,000). Do not deduct amount/percent of subcontracts awarded by this subcontractor.
Include in Compliance Audits? *	Yes - subcontractor is active and should be included in the periodic compliance audits of the contract. No - subcontractor is inactive.
Count Towards Certified Goal *	Yes - Payments to this subcontractor count towards the None selected Goal (Credit Type: Not Selected) No
Type of Participation *	Subcontractor/Subconsultant Supplier - Manufacturer Supplier - Regular Dealer Supplier - Packager, Broker, Distrib., Wholesaler, Manuf. Rep. Joint Venture Fees & Commission Broker Trucking & Hauling Trucking & Hauling Brokerage According to policy, goal participation will be counted at **60%**
Work Description *	Supply Road Signage 644-6001
Work Codes	*Currently assigned work codes:* NAICS 423510 Metal Service Centers and Other Metal Merchant Wholesalers (Remove) Add Work Codes Click here to see if there are any available work codes assigned to recognized certifications for the assigned vendor.
Subcontract Award/Commit Date *	(mm/dd/yyyy)
***Estimated* Work Start Date** *	(mm/dd/yyyy)
***Estimated* Work End Date**	(mm/dd/yyyy)
Add vendor to existing audits for this contract? *	Yes - add this subcontractor to all audits going back to the period of November 2016 No. Subcontractor's first audit will be the next one. Payments Already Made: $ 0
Reference Identifier	Use this field to uniquely identify this subcontractor if the firm is listed on the contract two or more times. This identifier will be displayed on the vendor list for quick identification of each instance of a firm's participation on the contract.
Attach File(s)	Attach File

Step 6: Click **Review**.

Step 7: Review Substitution request for accuracy and Click **Submit**.

DMS will automatically notify TxDOT of the prime contractor's request to substitute a subcontractor.

Chapter 18 — Monitoring DBE Activity

Contents:

Section 1 — Monitoring DBE Goal Attainment

Section 1 — Monitoring DBE Goal Attainment

It is the prime contractor's responsibility to monitor its progress towards meeting the goal. Progress towards meeting the established DBE goal should be monitored on a monthly basis during the course of the project.

DMS includes information to monitor DBE goal attainment to include:

- DBE commitment amounts
- Payments to DBE subcontractors
- Modifications to the original contract amount by change order

The prime contractor should contact TxDOT should a concern arise that it will not meet the contract DBE goal and seek options available to meet the goal.

TxDOT will also be monitoring the DBE project goal. If a prime contractor is not meeting the project's DBE goal, TxDOT will send a "Not Meeting the Goal Letter" in DMS. The letter will notify the prime contractor to review its DBE goal attainment progress, and provide a corrective action plan to meet the goal or provide good faith efforts.

Viewing the Audit Summary in DMS

On the **Contract Audit: Audit Summary for Total Contract** page, the prime contractor can view the total payments TxDOT paid to the prime contractor and the reported payments the prime contractor paid to its subcontractors. Compare the **For Credit Progress** bar graph to the **Contract Progress** bar graph.

Audit Summary - Total Contract

	Current Award	Award Percent	Payments	Payments Percent	Difference (Payments - Award)
Prime Contract	$2,250,000.00		$1,725,000.00		
For Credit (4 subs)	$270,000.00	12.000%	$118,000.00	6.841%	5.159% below goal
For Credit to DBE Goal	$270,000.00	12.000%	$118,000.00	6.841%	5.159% below goal
For Credit to HUB Goal	$0.00	0.000%	$0.00	0.000%	Goal matched
Contract Progress	77%				
For Credit Progress	44%				

Amounts listed in the summary table above are payments retained by each subcontractor after payment of successive lower tier subcontractors. Award values may not match due to differences between overall contract goal and subcontractor assignments.

Report Error

Prime Contractor - Total Contract

Prime Contractor		Cert	Inc in Goal	Contracted % Paid %	Paid TO Prime Prime's Share
TxDOT Test Prime Vendor 8 Prime Contact txdottestprime8a@b2gnowuser.com P 650-555-5555, F 650-555-5555	Payments Email	No	No	86.67% 93.16%	$1,725,000 $1,607,000

* Amounts listed below are payments retained by each subcontractor after payment of successive lower tier subcontractors.

Subcontractor Payments for

Subcontractor		Cert	Type	Inc in Goal	*Contracted % *Paid %	*Contracted $ *Paid $	For Credit $
1 **TxDOT Test Sub Vendor 2** TxDOTSub Test2 txdottestsub2@b2gnowuser.com P 650-555-5555	Payments Email	✓	Truck/Haul 100%	✓ DBE	3.00% 3.91%	$67,500 $67,500	$67,500
1 **TxDOT Test Sub Vendor 3** TxDOTSub Test3 txdottestsub3@b2gnowuser.com P 650-555-5555	Payments Email	✓	Reg. Dealer 60%	✓ DBE	3.33% 0.00%	$75,000 $0	$0
1 **TxDOT Test Sub Vendor 5** TxDOTSub Test5 txdottestsub5@b2gnowuser.com P 650-555-5555	Payments Email	✓	Sub 100%	✓ DBE	6.93% 2.93%	$155,925 $50,500	$50,500
2 **TxDOT Test Sub Vendor 1** TxDOTSub Test1 txdottestsub1@b2gnowuser.com P 602-325-9277	Payments Email	✓	Sub 100%	✓ DBE	0.07% 0.00%	$1,575 $0	$0

The **For Credit $** column shows the dollar amount of DBE participation the prime contractor has achieved. Use this amount to monitor attainment progress in comparison to the DBE Utilization Plan submitted.

Chapter 19 — Enforcement

Contents:

Section 1 — Enforcement

Section 1 — Enforcement

If the District determines the prime contractor has failed to meet the established DBE goal, has not demonstrated good faith efforts, or failed to correct DBE Program deficiencies, TxDOT will initiate administrative action against the prime contractor in accordance with applicable regulations. Administrative actions may include the following:

- Withholding all or a percentage of monthly partial payments
- Liquidated damages
- Initiation of appropriate suspension or debarment or decertification proceedings
- Termination of the contract
- Referral of any unlawful actions to the appropriate enforcement agencies
- Other actions as appropriate

The District will notify the prime contractor in writing of the determination. The notice will include the reasons for the determination and specify the administrative action.

Chapter 20 — Project Close Out

Contents:

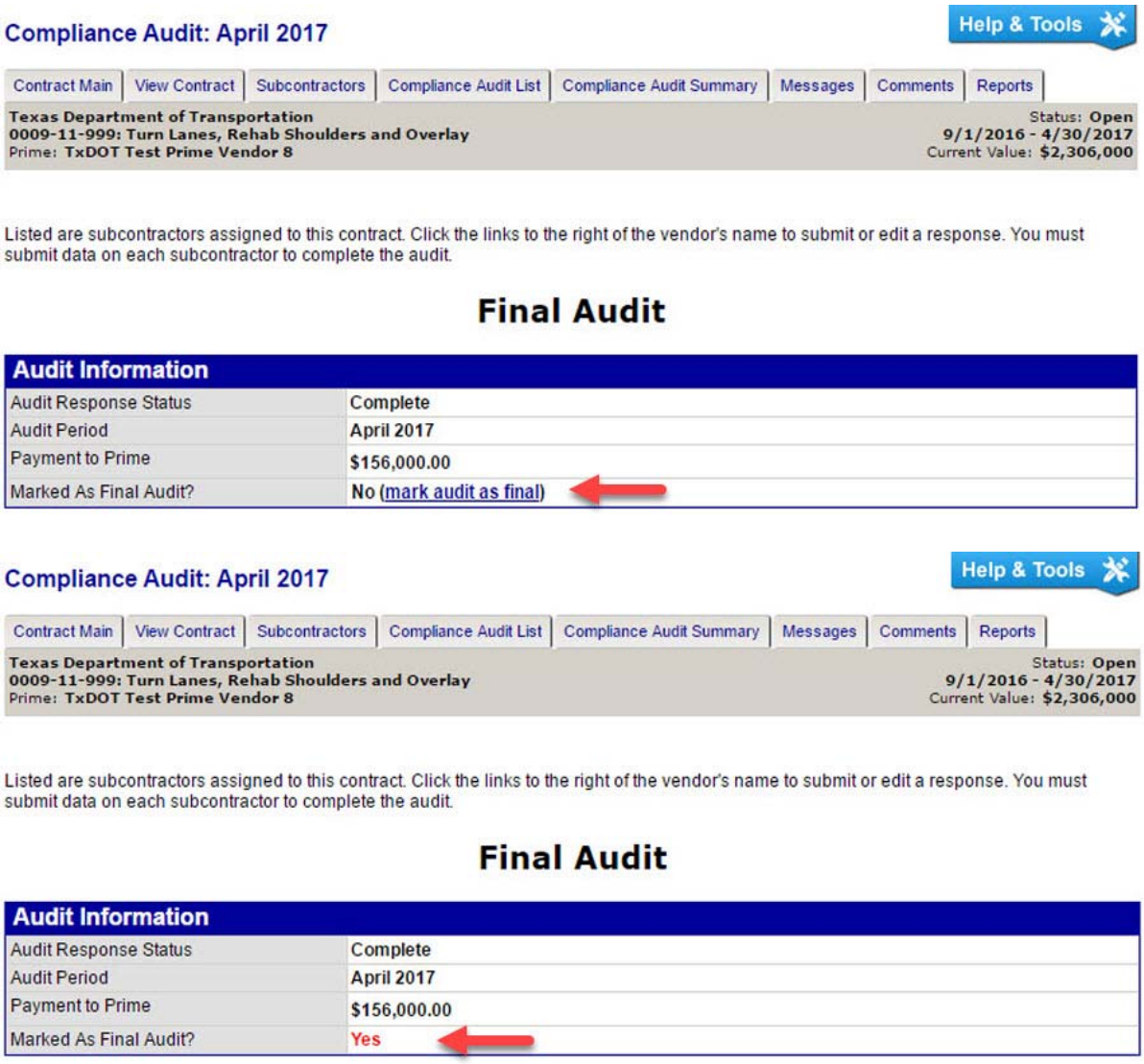
Section 1 — Prime Contractor Actions

Section 2 — Records Retention

Section 1 — Prime Contractor Actions

When a project is complete, prime contractors should perform the following actions

In the most recent monthly contract audit indicate **Yes** to the question, **Marked as Final Audit**.



In the **Compliance Audit List** tab in DMS to ensure that all audit information has been submitted for the project:

- Ensure that there are no incomplete audits for the project.
- Ensure that all subcontractors have confirmed all payments.

Audit Period	Status	Paid to Prime	Audit Reference	Date Posted	Actions
April 2017	Completed	$156,000.00		5/2/2017	View Audit
March 2017	Completed	$425,000.00		5/2/2017	View Audit
February 2017	Completed	$675,000.00		5/1/2017	View Audit
January 2017	Completed	$215,000.00		5/1/2017	View Audit
December 2016	Completed	$190,000.00		5/1/2017	View Audit
November 2016	Completed	$168,000.00		5/1/2017	View Audit
October 2016	Completed	$154,000.00		5/1/2017	View Audit
September 2016	Completed	$323,000.00		5/1/2017	View Audit

After confirming that there are no incomplete audits for the project and that all subcontractors have confirmed payments, the prime contractor will assess goal attainment by selecting the final monthly compliance audit. DMS allows the contractor to assess its goal attainment in terms of subcontracting dollars and participation percentage.

If the prime contractor has met the DBE project goal and each individual DBE race-conscious commitment, no further action from the prime contractor is required.

If a project falls short of the contract DBE goal, the prime contractor should submit a letter to TxDOT explaining the shortfall to TxDOT. Prime contractors should include documentation of any good faith efforts to justify the shortfall. TxDOT will review this documentation and make a determination.

There should be no surprises at the end of the project.

Compliance Audit: April 2017

Help & Tools

Contract Main | View Contract | Subcontractors | Compliance Audit List | Compliance Audit Summary | Messages | Comments | Reports

Texas Department of Transportation
0009-11-999: Turn Lanes, Rehab Shoulders and Overlay
Prime: **TxDOT Test Prime Vendor 8**

Status: **Open**
9/1/2016 - 4/30/2017
Current Value: **$2,306,000**

Listed are subcontractors assigned to this contract. Click the links to the right of the vendor's name to submit or edit a response. You must submit data on each subcontractor to complete the audit.

Final Audit

Audit Information	
Audit Response Status	Complete
Audit Period	April 2017
Payment to Prime	$156,000.00
Marked As Final Audit?	Yes

Audit Summary - Total Contract Through TODAY (5/2/2017)

	Award	Award Percent	Payments	Payments Percent	Difference (Payments - Award)
Prime Contract	$2,306,000.00		$2,306,000.00		
For Credit	$276,720.00	12.000%	$276,720.00	12.000%	Goal matched
For Credit to DBE Goal	$276,720.00	12.000%	$276,720.00	12.000%	Goal matched
For Credit to HUB Goal	$0.00	0.000%	$0.00	0.000%	Goal matched
Contract Progress	100%				
For Credit Progress	100%				

Award values may not match due to differences between overall contract goal and subcontractor assignments.

Logged on as:
TxDOTPrime Test8
TxDOT Test Prime Vendor 8

Section 2 — Records Retention

Records retention is the final step in the project closeout process. The project records the prime contractor has collected must be retained. Supporting documentation for the project must be securely filed and available upon request for audits or reviews by TxDOT, FHWA, or other government officials. Federal regulation requires the retention of all federal-aid project records for a minimum of three years after final payment.

According to the Texas State Retention Schedule (5.1.001 and Government Code, 441.1855) records for all contracts must be kept for seven years after close if executed, renewed or amended on or after September 1, 2015. For contracts executed, renewed, or amended on or before August 31, 2015, records must be retained for four years after close.

Chapter 21 — Local Government Projects

Contents:

Section 1 — Overview

Section 1 — Overview

The term local government (LG) includes municipalities, counties, county and regional toll authorities, metropolitan planning organizations (MPOs), regional mobility authorities (RMA) and some private entities. FHWA refers to this program as local public agency (LPA).

A LG is required to manage and monitor federal-aid projects to ensure that prime contractor and their subcontractors comply with DBE Program provisions.

Prior to letting a construction project a DBE goal will be set by TxDOT. Prior to contract execution, the LG will ensure the prime contractor's DBE commitments meet the goal and if not, reviews and evaluates the prime contractor's good faith efforts.

During construction, the LG is responsible for managing and monitoring the project to ensure DBE Program compliance. This includes conducting CUF reviews and ensuring the prime contractor does not terminate or substitute the DBE without its written approval. And finally, in the post award phase, payments made to DBE subcontractors should equal the DBE goal commitment.

TxDOT is responsible for ensuring such projects are completed in conformance with the DBE requirements in 49 CFR, Part 26.

Chapter 22 — Design-Build Projects

Contents:

Section 1 — Overview

Section 1 — Overview

Design-build (DB) is a construction project contract that combines engineering design services, construction services, and sometimes maintenance services into a single contract. The design-builder is usually the general construction contractor, but in some cases it is the engineering design firm.

Federal regulations recognize the difficulties associated with achievement of project goals before the design has been completed and permits use of an alternative DBE compliance approach for design-build projects. Each proposer for a TxDOT design-build contract will be required to submit a DBE Performance Plan as part of a responsive proposal.

Following award of a design-build contract, and during both the design and construction portions of the project, the DB contractor will be required to submit documentation, in the form of commitments and monthly progress reports to show that the DB contractor is meeting the contract goal. If the goal is not being met, the DB contractor must submit satisfactory good faith efforts.

Appendix A — References

Contents:

Section 1 — Website

Section 2 — Reference Documents

Section 1 — Website

This section has a list of helpful resources from USDOT, FHWA, or TxDOT. Bookmark these useful websites.

- USDOT - DBE Program Overview: https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/dbe-program-overview
- USDOT - Departmental Office of Civil Rights (Official Questions and Answers regarding 49 CFR, Part 26): https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/official-questions-and-answers-qas-disadvantaged
- FHWA - DBE Code of Federal Regulations: http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26_main_02.tpl
- FHWA - DBE Program: http://www.fhwa.dot.gov/civilrights/programs/dbess.cfm
- TxDOT - DBE Program: http://www.txdot.gov/inside-txdot/division/civil-rights/dbe.html
- TxDOT - DBE Forms: http://www.txdot.gov/inside-txdot/forms-publications/doing-business/dbe-forms.html

Section 2 — Reference Documents

Chapter-Section Index of Forms and Documents

The forms and documents referenced in this Guide can be found by clicking the links below: (Internet Explorer required as web browser)

- 6-1FHWA Tips on Evaluating a CUF
- 8-2 TxDOT DBE Contractors Certification of Good Faith Efforts Form 2603
- 11-2DBE Trucking Utilization Form 2660
- 14-1DBE Joint Check Approval Form 2178

Appendix B — FHWA Q&A

Section 1 — Federal Highway Administration Q & A for the DBE Program

Bidders List

Question: Does your DBE Program create and maintain a bidders list of all firms who bid and quote and captures the age and average gross receipts of the firms? (49 CFR 26.11(c))

Answer: You must create and maintain a bidders list that includes the following: Firm name; firm's address; firm's status as a DBE or non-DBE; Age of the firm; and annual gross receipts of the firm. The USDOT has given the flexibility to the State Department of Transportation to determine the most effective means in capturing this information. Most often the identity of bidders and quoters is captured through the handling of bidding documents and/or contract administration procedures. The other information, age and gross receipts may be captured through surveys and questionnaires at a later time from the firms once identified.

Assurance Statement

Question: Do all prime and subcontracts have required DBE program assurance statements incorporated? (49 CFR 26.13(b))

Answer: Each contract a State Transportation Agency (STA) signs with a contractor and sub-recipient must have physically incorporated in it the standardized assurance statement prescribed under 26.13(b) which states that: 1) these parties will not discriminate based on race, color, national origin, or sex in the performance of any DOT-assisted contract; 2) The contractor shall carry out the requirements of 49 CFR 26 in the award and administration of DOT-assisted contracts; and 3) Failure by the contractor to carry out these requirements is a material breach of contract, which may result in contract termination or other remedy as deemed appropriate by the recipient.

Local Agencies

Question: Does the STA's DBE program apply to all sub-recipients? (49 CFR 26.21(a)(1))

Answer: The FHWA's approval of STA's program applies to all of STA's DOT-assisted programs including those federal funds transferred to other state and local agencies (i.e., MPOs, City and County governments) and are expended on federally assisted contracts.

Design-Build Projects

Question: If a goal has been established in a design-build project, does the recipient maintain oversight of the project goal and other requirements? (49 CFR 26.53(e))

Answer: Recipients must maintain oversight of the developer's activities to ensure they are conducted consistent with the requirements of this part. This monitoring is especially important in the case of a design-build project because the developer can only provide a plan of action (DBE performance plan) it intends to take throughout the project since the exact contracting opportunities and timing of any subsequent awards is unknown at the start of a design-build.

Contract Goals

Question: Does the STA establish contract goals based upon factors such as type of work, location, DBE and availability that cumulatively results in meeting only the portion of the overall goal that cannot be met through race-neutral means? (49 CFR 26.51(e)(2))

Answer: Contract goals can be based upon factors such as type of work, location, and DBE availability. The goal should essentially represent the percent of the dollar amount of contracting opportunities for DBEs that exist on that contract. Goals must be set so they will cumulatively result in meeting that portion of the overall goal not being met through race-neutral means.

Race–Neutral Participation

Question: Does the STA count as race-neutral contracts won by DBE primes, DBE subcontracts when there is no contract goal, and primes that do not consider DBE status? (49 CFR 26.51(a))

Answer: Contracts won by DBE primes, DBE subcontracts when there is no contract goal, and DBE subcontracts where a prime did not consider the DBE status in awarding the subcontract are all methods of race-neutral DBE participation. The measurement of when a prime did not consider the firm's DBE status in its selection, is to count all work going to a DBE above the contract goal figure as race-neutral.

Question: Does a DBE have to be certified with the proper NAICS code if it will be used by the prime contractor as race-neutral DBE participation?

Answer: DBEs must be certified in the work categories in which the Prime wants to count that participation towards the contract goal (race-conscious). However, any work done by a non-committed (race-neutral) DBE regardless of NAICS codes should be counted as race-neutral participation provided they are performing a CUF. Prime contractors may be allowing a DBE to expand its capabilities on projects, the work is legitimate and the DBE could then build its resume to expand its NAICS codes in the future.

Commitments

Question: Are all bidders required to submit DBE information, i.e., name, description of work, and dollar amount before award of the contract? (49 CFR 26.53(b)(2) and (c))

Answer: Dependent on whether STA makes the receipt of the information as a matter of responsiveness or responsibility, you can receive information from all bidders or just the apparent low bidder. The receipt of this information in the form of a commitment, when in the presence of a contract goal, is a condition upon which the award of the contract is given by the STA. (As a matter of responsibility, TxDOT receives information from the apparent low bidder.)

Question: Does the STA require as a condition of award, the submission DBE information including the name, description of work, dollar amount, written documentation of commitment, and written confirmation from the DBE that it is participating in the contract (49 CFR 26.53(b)(2)(c))

Answer: The STA must make sure all DBE information is complete and adequately document the bidder's good faith efforts as a condition of awarding the contract.

Question: A prime submitted a subcontractor request document. The District found that three (3) of the items on the subcontract agreement were less then what was originally committed. This reduced amount is $43,503.51. Even with this reduction, the prime contractor is still far over the DBE goal. Can TxDOT accept the prime contractor's reduced subcontract amount in this situation?

Answer: Regulations prohibit the reduction of a submitted DBE commitment without the request and written approval of the STA. The District should investigate the matter and contact the DBE to discuss why the subcontract is less than the commitment (and if they were aware). Depending on the findings, TxDOT should take appropriate action. At the very least, if the DBE knew and was ok with the reduction in commitment, TxDOT should request the Prime contractor to submit something in writing showing the reduced commitment with reasoning for TxDOT approval. This will cover both the Prime and TxDOT.

Good Faith Efforts – Prior to Contract Execution

Question: Does the evidence of good faith efforts provided by the bidder document those efforts to meet the goal, even though such efforts did not succeed in obtaining enough DBE participation to do so? (49 CFR 26.53(a)(2))

Answer: The STA must not deny award of the contract on the basis that the bidder simply failed to meet the goal if the bidder documents adequate good faith efforts. The adequate good faith efforts are those the bidder undertook prior to submitting its bid on the contract.

Administrative Consideration

Question: Does the STA provide an opportunity for administrative consideration when it determines the apparent successful bidder failed to meet good faith efforts? (49 CFR 26.53(d))

Answer: The STA should have an administrative reconsideration process that affords a bidder the opportunity to seek a further ruling on the adequacy of its good faith efforts.

Question: Are reconsideration decisions made by an official who did not take part in the original good faith effort determinations? (49 CFR 26.53(d)(2))

Answer: An official who did not take part in the initial determinations by the STA of inadequate good faith efforts by the bidder must make reconsideration decisions.

Determining Credit When a DBE Firm is Ineligible – Prior to Subcontract Execution

Question: When the prime contractor executes a subcontract prior to your notification that the DBE firm is ineligible, do you count the subcontract amount toward the prime contractor's goal? (49 CFR 26.87(j)(2))

Answer: If a prime contractor has executed a subcontract with a DBE firm before you have notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and my continue to receive credit toward its DBE goal for the firm's work.

Goal Credit – Materials and Supplies

Question: Does the STA count towards the contract goal the value of materials and supplies used on the contract work only if the DBE is responsible for paying for the material and supply? (Factor – joint checks) (49 CFR 26.55(c)(1))

Answer: The DBE must be responsible, with respect to materials and supplies used on the contract, for paying for the material. The use of joint checks has been allowed in the DBE program under certain conditions and/or circumstances. Even under this situation all payments need to be made by the DBE.

Reporting DBE Participation on Contracts With and Without Goals

Question: Does the STA in its running tally capture DBE participation on all contracts with or without contract goals? (49 CFR 26.51(g))

Answer: The STA must report DBE participation in all contracts with and without contract goals awarded during the fiscal year in order to effectively adjust due to both race-neutral and race-conscious achievements to use of contract goals only as necessary to just meet the annual goal. One important consideration in being prepared to make such adjustments is to know the dollar amount that needs to be achieved based on the overall goal before the contract year begins for comparison purposes against the actual RC/RN achievements for making the key decision of when and how much to make any adjustment.

Commercially Useful Function

Question: Does the STA count toward contract goals the value of work only if the DBE performs a Commercially Useful Function (CUF) when a DBE is responsible for a distinct element of the contract work and it carries out its responsibilities by actually performing, managing and supervising the work involved? (49 CFR 26.55(c)(1))

Answer: You count the total contract value of the work the DBE performs itself. The STA needs to have sufficient resources and procedures that effectively determine whether a DBE performs a CUF. In addition to this monitoring responsibility, the STA needs to have appropriate supporting documentation for counting this work as performed by a DBE.

Question: Does the STA count toward contract goals the value of work performed by the DBE's own forces and does not count the DBE's cost of equipment leased from the prime contractor and/or material purchased from the prime contractor? (49 CFR 26.55(a)(1))

Answer: DBE subcontractor's purchases of supplies and equipment and leases from the prime contractor cannot be counted.

Question: Does the STA DBE program require the DBE to perform at least 30% of its work and does not allow DBEs to serve as an extra participant in the contract? (49 CFR 26.55(c)(2)(3))

Answer: A DBE is not performing a CUF when it is not performing the work itself and if the DBE under this rule subs out more than 70% of the work. There are additional instances when a DBE could be considered as serving as an extra participant in the contract or project such as being a pass through in the payment of materials and supplies.

Question: When a STA presumes a DBE is not performing a CUF, do they allow the DBE to present evident to rebut this presumption? (49 CFR 26.55(c)(4))

Answer: The DBE may present evidence to rebut the presumption of not performing a CUF when a STA has initially determined that a DBE is not performing a CUF. The STA must have a CUF reconsideration process established as part of its normal contract administration procedures.

When a DBE Subcontracts its Work to a Non-DBE

Question: When a DBE subcontracts part of its work to a non-DBE, does the STA have a mechanism to deduct that amount from the overall contract goal? (49 CFR 26.55(a)(3))

Answer: Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals. The STA's normal subcontracting approval procedure is an effective way to monitor such possible situations.

Joint Venture

Question: In a joint venture does the STA count only the defined portion of work a DBE performs with its own forces? (49 CFR 26.55(b))

Answer: Count the dollar value of the contract equal to the defined portion of the work that the DBE performs with its own forces toward the DBE goals.

Termination / Substitution

Question: Does the STA have a procedure that requires STA approval of the substitution and/or replacement of DBEs for good cause when replacing DBE subcontractors for any reason? (49 CFR 26.53(f)(1)&(2))

Answer: The STA must give written consent prior to a prime contractor terminating a DBE subcontractor (or an approved substitute DBE firm) when that DBE is either unable or unwilling to perform the work. There are procedures in some States that require the DBE to actually signoff on its termination. There are DBE program rules that effectively prohibit termination for convenience and then performing the work by the prime itself or use an affiliate.

Question: Does the STA require prime contractors to make good faith efforts when replacing DBE subcontractors for any reason? (49 CFR 26.53(f)(1)&(2)).

Answer: The STA must require the prime contractors to make good faith efforts to find another DBE subcontractor to substitute for the original DBE when the DBE is either unable or unwilling to perform.

Counting Credit for Manufacturers, Regular Dealers, Packagers and Brokers

Question: Does the STA DBE program allow for appropriate counting for manufacturers, regular dealers and packagers and brokers? (49 CFR 26.55(e)(1)&(2)(ii)(c))

Answer:

If materials and supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies.

If materials or supplies are purchased from a DBE regular dealer, count 60% of the cost of materials or supplies. To be a regular dealer, the firm must be an established, regular dealer that engages as its principal business and under its own name, in the purchase and sale or lease of the products in question.

Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers. Often times the definition of what constitutes a manufacturer from a regular dealer and a regular dealer from a broker becomes a matter of circumstances of the particular situation and to be determined on a case-by-case basis.

For example, if the material is crushed aggregate, then in order to be a manufacturer the firm needs to have the prerequisite equipment to crush and screen the aggregate for sell pursuant to the STA's gradation requirements. If no such process is being performed by the DBE, but has the necessary distribution equipment to pick up and drop off as a normal course of business the firm is considered to be a regular dealer.

Trucking – Counting Credit

Question: Does the STA DBE program allow DBE truckers to count leased trucks from DBEs and non-DBE truckers toward the goal appropriately? (49 CFR 26.55(4)(5))

Answer:

The DBE that leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.

If the STA adopted the revised trucking counting rule in the June 16, 2003 DBE Program Final Rule, the DBE who leases trucks from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks on the contract.

Additional participation by non-DBE lessees receives credit only for the fee or commission it receives as a result of the lease agreement.

NOTE: The appropriate Department Operating Administration must approve this approach.

Goal Credit – Final Compliance (Payment to DBEs)

Question: Does the STA have a process to ensure a contractor's final compliance with DBE obligations based on payments to the DBEs? (49 CFR 26.55(h))

Answer: Until the amount being counted has been paid to the DBE, do not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract.

Joint Checks

Question: Does the STA count towards the contract goal the value of materials and supplies used on the contract work only if the DBE is responsible for paying for the material and supply? (Factor – joint checks) (49 CFR 26.55(c)(1))

Answer: The DBE must be responsible, with respect to materials and supplies used on the contract, for paying for the material. The use of joint checks has been allowed in the DBE program under certain conditions and/or circumstances. Even under this situation all payments need to be made by the DBE.

Prompt Payment / Retainage

Question: Does your DBE program provide appropriate means to enforce prompt payment and return of retainage? (49 CFR 26.29(a)(1))

Answer: The STA must have the necessary mechanisms to monitor and enforce the prime contractor's prompt and full payment of retainage. Again, with the flexibility USDOT built into the program, it was the STA to determine its approach towards meeting this and other requirements of the program. The USDOT did not present one prescribed way of meeting it, so there may be various methods employed by a recipient to meet this requirement. The most common enforcement practice is for the prime contractor to provide a payment certification that would certify that all payments have been made and would normally be submitted with a progress estimate for payment. The enforcement of this method is through non-payment of the progress payment, until proper evidence that all previous payments due are paid.

Monitoring - Payments and CUF Reviews

Question: Does the STA conduct compliance reviews, audits and/or assessments of all program participants, (e.g., contractors, and other state and local governments/agencies? (49 CFR 26.37(a))

Answer: The STA must ensure that all program participants are in compliance with 49 CFR Part 26. TxDOT must have appropriate mechanisms for monitoring and enforcement set forth in its DBE program.

Question: Does the STA have a monitoring and enforcement mechanism that ensures work committed to DBE is actually performed? (49 CFR 26.37(b))

Answer: The STA must ensure DBEs do the work committed to them. To ensure this is happening, the STA must in its normal contract administration take the necessary steps to compare actual subcontract awards to commitments and payments to awards.

Unified Certification Program

Question: Does your UCP have a process to determine specific types of work a potential DBE has the ability to control and possess the equipment and key personnel to perform the work? (49 CFR 26.71(m)(n) & 26.83(c)(4))

Answer:

The UCP must have a provision that allows the STA or certifying agency to consider whether the firm owns equipment necessary to perform its work. However, the STA or certifying agency must recognize that leasing equipment is a normal industry practice and should not use this practice to determine that a DBE owner does not control his or her company. The STA or certifying agency must make sure that the leasing of equipment

does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.

You must grant certification only for specific types of work in which the socially and economically disadvantaged owner has been able to demonstrate his or her ability to control the firm. This specific type of work needs to be clearly defined in forms consistent with the type of work such firm will be competing to perform. Such designation as "general contractor" does not fit this definition.

Administrative Remedies

Question: Does the STA contract provisions include administrative remedies that will be invoked if prime contractors fail to comply with good faith efforts? (49 CFR 26.15(b))

Answer: If prime contractors fail to comply with good faith efforts, the STA contract provisions must include appropriate administrative remedies that will be invoked. The most common administrative remedy is to withhold payment to the prime equal to the short fall that occurred since the prime failed to comply with the good faith efforts provision. It is not intended that the STA exercise this oversight activity at the very end of the contract, but should be monitoring the actual participation of DBE firms throughout the contract so any necessary adjustments can be made by the prime in a timely fashion towards meeting the goal.