



CONSTRUCTION ADVISORY

UTCA AND INDUSTRY PARTNERS SUCCESSFULLY SECURE MAJOR CHANGES TO THE NEW JERSEY DEPARTMENT OF TRANSPORTATION'S PROPOSED CHANGES TO ITS DBE PROGRAM

UTCA, along with the ACC and the NJAPA recently met with New Jersey Department of Transportation (NJDOT) officials to discuss the Department's proposed changes to its Disadvantaged Business Enterprise (DBE) program. The industry had major concerns with several of the Department's proposed changes, and both through written comments and an in person meeting, industry members and advocates pushed for and successfully secured major changes to the Department's proposed procedures and contract changes.

The Department had intended to require several new forms at the time of bid including:

- Form CR-261- List of All DBE and Non-DBE firms providing a bid or quote for the contract
- Form CR-266- Schedule of DBE/ESBE/SBE Participation
- Form CR-273-Confirmation of DBE/ESBE/SBE Firm (for each firm on CR-266)
- Good Faith Effort would also have been required at time of bid

If applicable, also to be required at time of bid:

- Form CR-274- DBE/ESBE/SBE Trucking Verification Form
- Form CR-272- DBE/ESBE/ Regular Dealer/Supplier Verification

The Department was also seeking to require bidders to include the prices submitted by ALL DBE and NON-DBE firms.

UTCA, along with its industry partners, convinced the Department that there would be detrimental effects to both the industry and the Department's ability to award contracts and successfully deliver projects under the proposed changes. Other than the Form CR-266, which will still be required at the time of bid, the industry was successful in securing the following changes from the NJDOT to their proposed changes:

- The Form CR-261 will now only be required on an annual basis.
- Forms CR-272,273, and 274 will now be required 5 days after the bid as will the firm's Good Faith Effort
- The Form CR-266 will still be required at the time of bid and bidders will not be able to change the firms listed on the Form A until after the contract award.

Several other changes and new procedures are also addressed in a memo from the NJDOT's Division of Civil Right and Affirmative Action which can be found below. All changes being instituted will soon be implemented in the form of a Pilot Program. The parameters of the Pilot Program are still being finalized by the Department. UTCA staff will keep the industry updated as soon as we have additional information.

For more information please contact Anthony Attanasio, UTCA Executive Director at 732-292-4300 or anthony@utcanj.org

Regulation(s)	Current Procedures	Procedures Beginning 10/1/16
<p>Form CR-261 List of All DBE and Non-DBE Firms Providing a Bid or Quote for the Contract</p> <p>49 CFR Part 26.11(c)</p>	<p>NJDOT does not currently obtain this information from bidders.</p>	<p>At the end of the 2017 Federal Fiscal Year (9/30/17), and annually thereafter, NJDOT will require all bidders who bid in that fiscal year, to submit a CR-261. The CR-261 lists all DBE and non-DBE firms who provided a bid or quote to the bidder for work on the project(s) for which bidders submitted a bid. All bidders, regardless of whether or not their bid was successful, must submit a CR-261. The information which must be provided is: firm's name, address, phone #, email address, status as a DBE or non-DBE, relevant North American Industry Classification System (NAICS) code, and type of work for which quote was solicited/received (Electrical, Paving, etc. and contract items, or parts thereof, to be performed).</p>
<p>Form CR-266 Schedule of DBE/ESBE/SBE Participation</p> <p>49 CFR Part 26.53(b)(2) & 26.55</p>	<p>CR-266 is currently submitted by the apparent low bidder no later than seven days after bid opening as matter of responsibility. Changes to the CR-266 are accepted before contract award.</p>	<p>All bidders are required to submit the CR-266 at time of bid, as a matter of responsiveness, for any project that has a DBE/ESBE/SBE goal. Changes will not be accepted before contract award.</p>
<p>Form(s) CR-273 Confirmation of DBE/ESBE/SBE Firm</p> <p>49 CFR Part 26.53(b)(2)(v)</p>	<p>NJDOT Civil Rights currently calls to verify the participation of DBE/ESBE/SBE firms listed on the CR-266, including trucker/haulers and regular dealer/suppliers.</p>	<p>Bidders, as a matter of responsibility, have up to 5 days after Bid Opening to provide the following forms for each DBE/ESBE/SBE firm listed on the CR-266:</p> <ul style="list-style-type: none"> • CR-273 for each DBE/ESBE/SBE firm • CR-274 for each trucking/hauling firm • CR-272 for each regular dealer/supplier firm
<p>Form CR-274 DBE/ESBE/SBE Trucking Verification</p> <p>49 CFR Part 26.55(d)</p>		
<p>Form CR-272 DBE/ESBE Regular Dealer/Supplier Verification</p> <p>49 CFR Part 26.55(e)</p>		<p>Information provided on the forms is to confirm/verify the information provided on the CR-266, therefore, it must match the information on the CR-266.</p> <p>Any firm listed on the CR-266 will not be counted toward the DBE/ESBE/SBE goal commitment unless the CR-273, and CR-274/CR-272, if applicable, are submitted within 5 days after Bid Opening. Good faith effort documentation must be submitted if the goal has not been met.</p> <p>Also, during the construction phase of a contract, the CR-273, and CR-274/CR-272, if applicable, must be submitted with any revised CR-266.</p>

<p>Evidence of Good Faith Effort</p> <p>CFR Part 26.53 & Appendix A to Part 26</p>	<p>Good faith effort documentation is currently submitted with the CR-266 by the apparent low bidder no later than seven days after bid opening as matter of responsibility if the goal commitment has not been met.</p>	<p>If the project has a DBE/ESBE/SBE goal, all bidders will have up to 5 days after Bid Opening to submit good faith effort documentation if they fail to demonstrate verified attainment of the DBE/ESBE/SBE goal. NJDOT will use the standards in the Federal Regulations to determine the adequacy of good faith efforts.</p>
<p>Administrative Reconsideration</p> <p>49 CFR Part 26.53(d)</p>	<p>Rejected apparent low bidders currently appeal decisions by filing a Bid Protest.</p>	<p>If NJDOT deems that the apparent lowest responsive bidder failed to meet the Contract goal AND failed to demonstrate adequate good faith effort to do so by the end of the 5th day after Bid Opening, and the bid is rejected, the Bidder may request Administrative Reconsideration (AR). (A bidder failing to submit the CR-266 at time of bid does not have the right to request Administrative Reconsideration.) To receive AR, the Bidder must make a written request within 1 State business day of being notified by NJDOT that the bid was rejected. The request must indicate whether the rejected bidder wants AR in-person or via a written review. Regardless of the type of AR requested, within 2 State business days of filing a request for AR, a rejected bidder must submit written documentation or argument proving that the Bidder met the Contract goal, or submitted adequate good faith effort documentation to do so. (This is not an opportunity to submit new information on 1) ways to attain the goal commitment or, 2) new good faith effort documentation.)</p>
<p>Notification Requirements Before DBE Subcontracts are Changed/Terminated</p> <p>49 CFR Part 26.53(f)</p>	<p>Contractors must submit, and obtain approval for, revisions to the CR-266 from NJDOT Civil Rights prior to the revision(s) being enacted.</p>	<p>In advance of proposed change(s) to the CR-266, contractors must notify in writing, affected DBE/ESBE/SBE firms, the RE, and NJDOT Civil Rights, indicating the reason(s) for termination/change. Affected DBE/ESBE/SBE firms will have 5 State business days to respond to NJDOT Civil Rights, the RE, and the Contractor in writing of the reasons why they object to their services being terminated/changed. NJDOT Civil Rights must review the arguments, and approve or deny such changes BEFORE they are made. Changes made without prior approval by NJDOT Civil Rights will not be counted toward DBE/ESBE/SBE goal attainment.</p>
<p>Modification of the DBE/ESBE/SBE Goal Commitment</p> <p><i>Official Questions and Answers (Q&A's) DBE</i></p>	<p>No changes are currently made to the established DBE/ESBE/SBE goal, but NJDOT</p>	<p>During the project construction phase, if there are significant changes to the project, NJDOT Civil Rights will determine if the changes necessitate a change to the</p>

<p><i>Program Regulation (49 CFR 26), Transportation.gov U.S. Department of Transportation (last visited May. 23, 2016)</i></p>	<p>Civil Rights takes into consideration good faith effort documentation if changes to the project during the construction phase precludes a contractor from attaining the goal.</p>	<p>DBE/ESBE/SBE goal commitment percentage. If so, NJDOT Civil Rights will notify the RE and Contractor of the change in the goal commitment percentage and will require the Contractor to submit a revised CR-266, and CR-273s, CR-272s/CR-274s (if applicable), AND any good faith effort documentation needed to meet the revised goal commitment.</p>
<p>Commercially Useful Function Monitoring 49 CFR Part 26.55(c)</p>	<p>Commercially Useful Function (CUF) reviews are currently performed informally and not consistently.</p>	<p>For all DBE/ESBE/SBE firms listed on the CR-266, the RE must conduct a CUF review via the CR-275. The Contractor will not receive credit toward attaining the DBE/ESBE/SBE goal for firms that do not pass the CUF review. The CUF review monitors whether the DBE/ESBE/SBE firms are independently managing, supervising, and performing their own work.</p>
<p>Prompt Payment of Subcontractors and Suppliers 49 CFR Part 26.29 & NJSA 52:32-41</p>	<p>NJDOT currently withholds progress payments if the Contractor is delinquent in paying subcontractors or suppliers for work completed satisfactorily according to submitted DL-72s. Civil Rights does not currently verify that a Contractor has made all requisite subcontract payments.</p>	<p>If the Contractor fails to pay a subcontractor or supplier within 30 days after the subcontractor or supplier satisfactorily completes the specified work, the Department may withhold progress payments from the Contractor, until the Contractor pays the subcontractor or supplier any and all delinquent amounts due, or the contract is terminated, or the matter is resolved under N.J.S.A. 52:32-40 and N.J.S.A. 52:32-41. If the Department receives an allegation from a subcontractor or supplier that the Contractor has not paid the subcontractor or supplier the amount due from a previous progress payment, the Contractor must submit to the RE within 10 days of a request made by the RE, evidence that payment has been made, such as copies of cancelled checks or proof of electronic fund transfers.</p> <p>NJDOT is also required to verify prompt payment by prime contractors to subcontractors and suppliers. At a future date, NJDOT will be evaluating electronic systems for monitoring all payments to subcontractors and suppliers by prime contractors, and may implement such a system.</p>
<p>Potential Payment Reduction for Not Attaining Goal or Providing Adequate Good Faith Effort Documentation 49 CFR Part 26.13(b) & 26.53(h)</p>	<p>NJDOT has the right to withhold payment/not process an estimate, or may suspend the Work, wholly or in part.</p>	<p>If the Contractor fails to meet the contract DBE/ESBE/SBE goal, without demonstrating adequate good faith effort to do so, the Department may make a payment reduction from progress payments, retainage, or the final payment as follows:</p> <p>DBE/ESBE/SBE Goal Payment Reduction = (CG - AG) x CP</p> <p>CG = Contract DBE/ESBE/SBE Goal percentage, or approved DBE/ESBE/SBE commitment, or if modified by the</p>

Department, the Modified DBE/ESBE/SBE Contract Goal percentage

AG = Attained DBE/ESBE/SBE goal percentage = (total dollar amount paid to DBE/ESBE/SBE suppliers and DBE/ESBE/SBE subcontractors divided by CP) plus the percent value attributed to the Contractor's Good Faith Effort approved by the Department.

CP = Total Adjusted Contract Price less the payment adjustments for FINAL LAYOUT, PERFORMANCE BOND AND PAYMENT BOND, and DBE Goal Payment Reduction.