DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM

DBE Contractor Responsibilities
Participant Introduction

- Participant name
- Company and role within the company
- What they desire to get out of the course
Housekeeping

- Medical Emergencies
- In case of:
  - Fire alarm
  - Tornado
  - Bomb threat
- Location
  - Safety exits
  - Gathering location
  - Restrooms
  - Food/vending
  - Smoking areas
- Be respectful
- Two 15-minute breaks
Maximizing this Training

- Be open to the information and ideas provided.
- Ask questions to clarify information.
- Pay attention to the examples used to explain the ideas.
- Take notes.
- Flag or highlight key points in the materials.
Training Topics

1. DBE Contractors’ Guide
2. DBE Program Overview and Objectives
3. DBE Program Authorities
4. DBE Program Responsibilities
5. Texas Unified Certification Program
6. Counting DBE Participation
7. Commercially Useful Function
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Training Topics

15. Joint Checks
16. Assistance to DBE Firms
17. Change Orders
18. Termination and Substitution Requests
19. Monitoring DBE Activity
20. Project Close Out
21. Enforcement
Training Topics

- Local Government Projects
- Design-Build Projects
- Resources
- Training
Purpose of the Guide

- Provides guidance for federal and state requirements of the Disadvantaged Business Enterprise (DBE) program.
- Contain processes and procedures used by the DBE to accomplish all phases of DBE compliance for a project.
- Includes DBE contractor responsibilities and best practices to comply with federal and state requirements.
DBE PROGRAM
OVERVIEW AND
OBJECTIVES
DBE Program Overview

- Legislatively mandated by the United States Department of Transportation (USDOT).

- Applies to federal-aid highway dollars expended on federally-assisted contracts issued by USDOT to recipients such as TxDOT.

- Administered by USDOT three modal administrations:
  - Federal Highway Administration (FHWA)
  - Federal Transit Administration (FTA)
  - Federal Aviation Administration (FAA)

TxDOT’s DBE Program Objectives

- Ensure nondiscrimination in the award and administration of USDOT-assisted contracts.
- Create a level playing field where DBEs can compete for contracts.
- Ensure that TxDOT’s DBE Program is tailored in accordance with applicable law.
- Ensure only eligible firms participate.
- Remove barriers for DBEs to participate in USDOT-assisted contracts.
- Promote the use of DBEs in all types of federally-assisted contracts.
- Develop DBEs to compete outside the DBE Program.
- Provide recipient flexibility in establishing and providing opportunities for DBEs.
DBE Program Authorities

- Regulations and provisions prime contractors must comply with:
  - USDOT DBE Regulations (49 CFR, Part 26)
  - DBE Special Provision Disadvantaged Business Enterprise in Federal-Aid Contracts (000-394)
  - Special Provision Measurement and Payment (009-009)
DBE PROGRAM RESPONSIBILITIES
DBE Program Responsibilities

TxDOT receives federal financial assistance from USDOT through FHWA, FAA, and FTA programs.

- TxDOT is:
  - Recipient of federal funds.
  - Responsible for administering its DBE Program.
  - Legally accountable for expenditures of USDOT financial assistance.

- TxDOT assures it will comply with 49 CFR, Part 26 within its DBE Program Plan.

- Breach could result in loss of federal funds.
Condition of Award

- Sub recipients include:
  - Prime contractors
  - Subcontractors
  - Suppliers
  - Manufacturers
  - Consultants

- All sub recipients must comply with 49 CFR, Part 26 requirements, and contract provisions.
Civil Rights Division Responsibilities

- TxDOT’s Civil Rights Division (CIV) administers the DBE program.
- CIV responsibilities include:
  - Develop TxDOT’s DBE Program Plan.
  - Set DBE state participation goal.
  - Set specific contract goals.
  - Complete annual reporting requirements to FHWA.
  - Provide contract oversight and program administration.
  - Monitor performance of program participants (primes, subcontractors, sub recipients).
  - Verify project level monitoring at division, district, and local levels.
  - Ensure districts, divisions and local agencies take compliance and enforcement actions as described in 49 CFR, 29.13(b).
Civil Rights Division Responsibilities

– Collect, analyze data, and submit reports to FHWA.
– Provide training on DBE Program requirements.
– Provide support and guidance to districts, divisions, and sub recipients.
– Conduct annual DBE Program compliance reviews on districts, divisions, local governments, and other entities.
– Provide oversight and administration of the Texas Unified Certification Program (TUCP).
Civil Rights Division Responsibilities

[Diagram of Civil Rights Division organizational chart]

- Executive Assistant
- Directors
  - Americans With Disabilities Act
  - Operations and Policy Director
  - Operations Analysis
- Federal Programs
- Compliance
- Statewide Outreach and Reporting
- Operations Support
- Certification Diversity
- External EEO
- OJ
- Title VI
- Compliance
- HUB Reports Outreach
- Contract Management
  - Special Projects
  - Administrative Support
District Responsibilities

- Oversee the construction of state highways.
- Initial and primary contact for prime contractors and subcontractors.
- Provide oversight for construction division projects.
- Area offices (under district offices) support district offices during different stages of the project.
- Monitor performance of prime contractors, subcontractors, and sub recipients.
District Responsibilities

- Discuss DBE provision requirements at the pre-construction conference.

- Monitor requests to substitute DBE subcontractors and suppliers during the life of the contract. Provide responses to requests within five business days of receipt.

- Verify DBE payments can be counted towards DBE goal.

- Review joint check requests.

- Perform a Commercially Useful Function (CUF) review.

- Verify final DBE participation dollar amounts or determine adequate good faith efforts.

- Take compliance and enforcement actions when a contractor does not fulfill its DBE obligations.

- Maintain records in accordance with FHWA records retention requirements.
DBE Contractor

DBE Contractor Best Practices:

- Market your firm’s capabilities and aggressively seek education on TxDOT contracting process.
- Take maximum advantage of training opportunities offered by TxDOT’s DBE/SS Program.
- Participate in project outreach programs.
- Thoroughly review plans and specifications prior to submitting a quote using http://www.dot.state.tx.us/business/ntc.htm website.
- Promptly respond to prime contractor solicitations.
DBE Contractor Best Practices (cont’d):

- Maintain a log of all quotes and file of all prime contractor solicitations.
- Review bid tabs and contact prime contractor as appropriate.
- If a prime contractor rejects a bid, consider negotiating to do a smaller portion of work quoted.
- Before signing a DBE commitment, talk to the prime contractor and review the contract documents to determine if there are special requirements that will impact your work.
- Do not agree to a commitment if you do not have the expertise, ability, or financial and equipment resources to complete the job.
- A DBE commitment is not a contract; it is a commitment to work.
TEXAS DEPARTMENT OF TRANSPORTATION

TEXAS UNIFIED CERTIFICATION PROGRAM
TUCP Directory

- Lists firms that meet the DBE certification requirements to perform specific work codes granted.

- Is available online at: https://txdot.txdotcms.com/FrontEnd/VendorsearchPublic.asp.

- Provides primary source for DBE firm solicitation and commitment.

- Requests for additional work codes must be approved prior to the execution of any contract the DBE wishes to perform.
Texas Unified Certification Program

- Six certifying agencies make all certification decisions.
  - City of Austin, Office of Business Opportunity
  - City of Houston, Small Business Development
  - Corpus Christi Regional Transportation Authority
  - North Central Texas Certification Agency
  - South Central Texas Certification Agency
  - Texas Department of Transportation

- Agencies require DBE firms to annually submit affidavit of no change form.

- A business’ DBE certification from any TUCP agency is valid for any Texas entity that receives USDOT funds.
COUNTING DBE PARTICIPATION
Counting DBE Participation

Counting Overview

- TxDOT determines if work on a project qualifies as a CUF:
  - TxDOT then calculates the amount it counts toward its DBE goal.
  - Only the value of the work performed by the DBE firm counts towards the goal.

- Counting participation for goal credit depends on the work type:
  - Subcontractors – 100%
  - Manufacturers – 100%
  - Regular Dealers (i.e. suppliers) – 60%
  - Trucking Firms/Haulers – Varies
  - Brokers, Distributors, Manufacturer’s Representatives – Reasonable fees and commissions
  - Joint Ventures – Varies
DBE Subcontractor

- Performs specific work items with own forces pursuant to a contract agreement with prime contractor.
- Must perform at least 30% of the work.
- Furnish and install.
- Count 100% of prime contractor’s payment to DBE toward contract goal (labor and materials)
Counting DBE Participation

Trucking Firm/Hauling

- DBEs must own & operate at least 1 truck (licensed, insured, operational on the contract).

- Must control (manage & supervise) oversee the entire portion of the work it is committed to perform and use at least one of its own trucks.

- Limited DBE credit for non-DBE trucks, but it cannot exceed the value of transportation services provided by DBE trucks.
  - Example: DBE firm has 3 trucks, it can use up to 3 non-DBE trucks (credit received for 6 trucks).
  - DBE credit can be given if DBE leases non-DBE trucks but uses DBE employees/drivers.
Counting DBE Participation

Manufacturer

- Prime purchases materials from a DBE manufacturer
- DBE operates a factory that produces materials on the premises to meet contract specifications
- Or, takes product and alters it to meet contract specs
- Count 100%
Counting DBE Participation

DBE Regular Dealer

- Prime contracts with a regular dealer to supply and deliver products
- Regular dealer owns, operates a store or warehouse that contains products it sells to public
- Regular dealer in bulk items as petroleum product, steel, cement, gravel, stone or asphalt without owning, operating or maintaining a place of business.
- For bulk items must own and operate distribution equipment
- 60% Credit - if the DBE is performing as a regular dealer and determined on a contract-by-contract basis.
Broker, Distributor, Manufacturer’s Representative

- Prime hires a DBE to facilitate the procurement of materials and supplies.
- Count reasonable fees and commissions
Counting DBE Participation

Joint Venture

- An association of a DBE firm and one or more other firms to carry out single, for-profit business enterprise.

- 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.
Commercially Useful Function

• A DBE performs a CUF when it is responsible for execution of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved.

• The DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality, quantity, ordering the material and installing (where applicable) and paying for the material itself.
Commerciaally Useful Function

- DBE should:
  - Possess required equipment.
  - Be financially independent.
  - Employ its own laborers.
  - Own or rent its own equipment.
  - Handle its own payroll, invoicing, and negotiations.
Prime contractor should ask a DBE the following questions:

- How long has company been in business?
- Will the DBE manage work using its own managers?
- Will the DBE perform the work with its own workforce?
- What work, if any, does the DBE intend to subcontract and is that amount consistent with industry practice?
District staff perform CUF reviews to ensure DBE is actually performing, managing, and supervising the work.

Field staff review project related documents:

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

Complete the DBE Program CUF review questionnaire.
CUF Review

- If a DBE is presumed not to be providing a CUF:
  - DBE allowed to provide rebuttal information.
  - If presumption prevails, no work performed is counted towards DBE goal.
  - If denial of goal credit results in a goal short fall, the prime contractor is required to provide DBE substitute or adequate good faith effort.
  - CUF determinations are not subject to administrative appeal to USDOT.

- A prime contractor may be exposed to criminal and civil liability if:
  - DBE firm is a mere pass-through or middle man between two performing parties.
  - Deliberate attempts are made to circumvent the intent of the DBE program.
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. Some fraud indicators are:

- DBE owner lacks background, expertise, or equipment to perform work.
- Employees are shuffling between prime contractor and DBE firm payrolls.
- Business names on equipment covered with paint or magnetic signs.
- Orders and payment made by individuals or not employed by the DBE firm.
- DBE owner never present at job site.
- Prime contractor always uses same DBE firm.
- Financial agreements between prime and DBE contractors.
- Joint bank account with prime and DBE.
- Absence of written contracts.
Reporting Fraud

- TxDOT hotline established for employees, contractors, and others to report suspected fraud or abuse:
  - Report incidents by visiting www.txdotwatch.com
  - Call toll-free (877) 769-8936
DIVERSITY MANAGEMENT SYSTEM (DMS)
On February 2017, TxDOT implemented the contract compliance module of the Diversity Management System.

DMS is used for DBE commitments, contract management, and prompt payment.

All contractors on federal-aid contracts are required to use DMS in order to do work with TxDOT. All primes and DBE subcontractors must have an account in DMS.
Contract Letting

- TxDOT determines the DBE project goal prior to letting a construction project.
- Prime contractors make a commitment to meet the goal by signing the proposal and submitting a bid.
- Bidders are required to submit a DBE Utilization Plan or GFE documentation no later than 5 days after bid opening.
- Prior planning will help to ensure the prime contractor is prepared to attain the DBE goal if awarded the contract.
GOOD FAITH EFFORTS
Good Faith Efforts (GFE)

The prime contractor:

- Must make a good faith effort to meet the DBE contract goal by:
  - Meeting the goal.
  - Documenting GFE to meet the goal.

- If a prime contractor does not meet the DBE goal, it must provide TxDOT with documentation to show that it used GFE to do so.

- Should document steps taken to satisfy GFE requirements and meet DBE goal.

- Should understand the types of GFE found in 49 CFR, Part 26, Appendix A.

- Attempting to obtain a contract on the basis of documented GFE should be a contractor’s last resort.

TxDOT will not penalize contractors if they fail to meet contract DBE goals as long as they follow the GFE guidelines in Appendix A.
**Good Faith Efforts (GFE)**

**TdDOT will evaluate Prime Contractor’s Good Faith Efforts:**

- TdDOT will consider the quality, quantity, and intensity of the different kinds of efforts the prime contractor made.
- TdDOT will evaluate the overall effort of the prime contractor’s documented good faith efforts (holistic).
Good Faith Efforts (GFE)

Evaluation of GFE - Factors

- Did prime contractor make enough work items available to meet the goal?
- Did prime contractor solicit available DBEs for work items?
- Did prime contractor follow up with specific DBEs?
- Did the prime contractor give the DBE adequate time to respond?

TxDOT will evaluate pursuant to 49 CFR, Part 26, Appendix A.
Good Faith Efforts

Administrative Reconsideration

- If bidder good faith efforts are deemed inadequate, TxDOT will provide the bidder an opportunity for administrative reconsideration.
  - The bidder will have the opportunity to provide written documentation or argument.
- The bidder will have the opportunity to meet in person with TxDOT’s reconsideration official.
- Reconsideration official cannot take part in the original determination.
- TxDOT will send the bidder a written decision on reconsideration.
- Not administratively appealable to USDOT.
Good Faith Efforts

Utilization Plan (UP)

- TxDOT creates a UP record in DMS and assigns it to the apparent low bidder.
- Prime contractor’s main contact in DMS is notified when the UP record has been released.
- Prime contractor is required to submit the UP through DMS within five calendar days of notification that they are the apparent low bidder, unless the fifth day is a weekend or holiday, in which case the deadline moves to the next business day.
- CIV will either:
  - Return the plan.
  - Conditionally approve the plan.
  - Approve the plan.
  - Deny the plan.
## Submitting a UP in DMS

### Overview

The following steps are used to submit a UP in DMS:

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<th>Step</th>
<th>Party</th>
<th>Action</th>
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</thead>
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<td>1</td>
<td>TxDOT CIV</td>
<td>Releases UP to prime contractor</td>
</tr>
<tr>
<td>2</td>
<td>Prime Contractor</td>
<td>Adds subcontractor(s) to the UP</td>
</tr>
<tr>
<td>3</td>
<td>DBE Subcontractor</td>
<td>Confirms participation</td>
</tr>
<tr>
<td>4</td>
<td>Prime Contractor</td>
<td>Attaches GFE form and documentation (if it does not meet the DBE contract goal)</td>
</tr>
<tr>
<td>5</td>
<td>Prime Contractor</td>
<td>Signs and submits completed UP</td>
</tr>
<tr>
<td>6</td>
<td>TxDOT CIV</td>
<td>Reviews and approves the UP</td>
</tr>
</tbody>
</table>
Confirm Participation Using DMS

Step 1: Notification via Email to DBE Subcontractor

- 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  
```
Step 2: Log in to DMS

- Click on the link provided in the email and log in to DMS.

- If no email link is available, go to Step 3; otherwise, go to Step 4.
Confirm Participation Using DMS

Step 3: Navigate to Utilization Plans: Confirm Participation

Log in to DMS and find the Utilization Plans, Pending Confirmation as Subcontractor icon.

1: Click Pending Confirmation as Subcontractor.

2: Click Confirm.
3: Click **Confirm proposed utilization**.
Step 4: Confirm Participation
The DBE firm is required to confirm the commitment is correct and to e-sign.
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.

If the prime contractor submitted the UP with unconfirmed DBE commitments, the following conditions 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.
If Prime Submits UP Prior to Confirmation by all DBE Subs

- Once CIV has conditionally approved and released the UP back to the prime contractor, the remaining DBE subcontractor commitments should confirm.
- For assistance during this process, the DBE subcontractor should contact the prime contractor for information on the status of the UP and guidance on when to confirm participation.
DMS
SUBCONTRACTORS
DMS Subcontractors

- During the course of a project, a prime contractor may want to add additional DBE subcontractors. This includes race-neutral participation on projects with or without DBE goals.

- The prime contractor must request approval by adding the subcontractor in DMS.

- 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.
RACE-NEUTRAL PARTICIPATION
Federal DBE Program requires TxDOT to meet the maximum feasible portion of the overall DBE goal by using race-neutral measures.

TxDOT uses a combination of race-neutral and race-conscious measures to meet its overall DBE goals.

- Voluntary DBE participation will count as race-neutral participation.
- Prime contractors must report race-neutral participation on federal-aid contracts with and without a DBE goal.
- The prime contractor will report race-neutral participation in accordance with the DBE monthly report requirements in the contract.
- TxDOT uses DMS to track race-conscious and race-neutral participation on federal-aid funded projects.
CONTRACT AWARD
AND SUBCONTRACT EXECUTION
Subcontracts

The prime contractor must submit a copy of the executed subcontract agreements or purchase orders for all DBE subcontracts, including all tiered DBE subcontractors.

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)
  - Measurement and Payment (009-009)
  - Contract Assurance (49 CFR, Part 26.13)
Submission

- 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
DBE Best Practices

- Ensure your firm has copies of subcontract agreements.
- Ensure the above noted provisions are included in subcontract agreement
- Follow up with the prime contractor if there are issues with the subcontract agreement.
DBE Trucking Utilization Form

- Prime contractors that plan to use DBE trucking for goal credit will submit DBE Program Trucking Agreement Form 2660.
- Form 2660 must be completed prior to the prime contractor beginning any hauling services for DBE credit.
- The district will verify ownership by the DBE owner using TxDMV-MVINET.

![Disadvantaged Business Enterprise (DBE) Trucking Utilization Form](image)
PRE-CONSTRUCTION CONFERENCE
District staff discusses the DBE requirements of the contract to ensure that the prime contractor is aware of its DBE obligations and is informed of the administrative and reporting procedures.

Topics covered:

- DBE goal for the project
- Participating DBE subcontractors
- Requirement to make a GFE to meet the assigned goal
- Prompt payment requirement
- DMS reporting process
  - Reporting payments within 15 days of the end of the calendar month
  - Adding subcontractors to include race-neutral DBEs
- Termination/substitution process
- Use of joint checks
PAYMENTS
Prompt Payment

- Special Provision 009-009 entitled Measurement and Payment requires prime contractors to pay all subcontractors, material suppliers, and truckers within 10 days from when a prime contractor receives a payment from TxDOT.

- Prime contractors must also pay any retainage on subcontractor’s work within 10 days after satisfactory completion.

- Satisfactory completion is accomplished when:
  - The subcontractor fulfills the contract requirements of TxDOT and subcontracted work, including submittal of all information required by the contract and TxDOT.
  - TxDOT has inspected and approved the subcontractor’s work.
The prompt payment clause from TxDOT’s Measurement and Payment Special Provision 009-009 should be included in a prime contractor’s subcontracts.

TxDOT may pursue actions against the prime contractor for failure to execute prompt payment requirements.
Payment Reporting in DMS

Understanding the Audit Process

- TxDOT maintains a running tally of DBE attainments (commitments and payments).
- Payments are tracked in DMS.
- A contract is ready for auditing once TxDOT begins making payments to the prime contractor.
- Auditing is generated on a monthly basis using the following audit process:

  1. TxDOT pays Prime Contractor
  2. Prime receives an email indicating there is an audit they must respond to
  3. Prime logs into the system, confirms payment and reports all payments to the subcontractors
  4. Subcontractor receives an email indicating there is an audit they must respond to
  5. Subcontractor logs into the system and confirms the payment(s) made to them by the Prime
  6. The audit is complete for the period. The cycle continues for each payment until the contract is complete
Understanding the Audit Process

- A prime contractor will report payments after work begins:
  - To meet the DBE goal.
  - For DBE race-neutral participation on projects with and without DBE goals.
- Reports are required until all DBE subcontracting activity is completed.
- Reports are due within 15 days after the end of the month using the following sample timeline:

<table>
<thead>
<tr>
<th>Date</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>March 10th</td>
<td>TxDOT pays prime contractor.</td>
</tr>
<tr>
<td>March 20th</td>
<td>Prime contractor pays DBE subcontractor.</td>
</tr>
<tr>
<td>April 5th</td>
<td>DMS alerts prime contractor to report March subcontractor payments.</td>
</tr>
<tr>
<td>April 15th</td>
<td>Prime contractor completes entering payments.</td>
</tr>
<tr>
<td>April 22nd</td>
<td>DBE subcontractor confirms payment received.</td>
</tr>
<tr>
<td>April 23rd – 30th</td>
<td>District staff completes reporting audit.</td>
</tr>
</tbody>
</table>
Payment Reporting in DMS

Subcontractor Verification of Payments

DMS will notify a subcontractor when a payment is recorded by the prime contractor. The subcontractor has seven days to log in to DMS and agree or disagree with the payment reported by the prime contractor.

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

```
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]
```
Payment Reporting in DMS

Step 2: Log in to DMS.

Note: If the e-mail link is not available, use the following steps 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 on the next slide.
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, it then enters the payment date, and confirms if it was paid within ten days of the prime being paid.
Payment Reporting in DMS

If the subcontractor selects **Incorrect** for the payment amount, 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 of the prime contractor being paid.

![Image of DMS payment reporting form]

- **Incorrect** - the amount reported by the prime contractor as PAID to us is not correct.
  - We received no payment in April 2016.
  - We were paid a different amount in April 2016 than reported ($67,500.00).

1. Enter the amount you actually received from the prime contractor in April 2016: *

   

2. Payment Date: * (mm/dd/yyyy)
   
   - If multiple payments were received, enter the date of the first payment.

3. Were you paid in accordance with the organization's prompt payment policy? *
   
   - Yes - we were paid within 10 days of the prime being paid on 5/5/2016.
   - No - we were not paid within 10 days of the prime being paid on 5/5/2016.
   - N/A - we cannot determine if we were paid promptly.

4. Is the amount above a partial payment relative to your invoiced amount? *
   
   - Yes - we were partially paid.
     Enter the amount you invoiced: $
   
   - No - we were paid in full.
Step 5: Identify if payment is final or not.

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

Step 7: Attach necessary files by clicking Attach File.

Step 8: Provide any public or private comments.

Step 9: Check the confirmation statement.

Step 10: Click Save.
Payment Discrepancy

- When a subcontractor indicates the amount paid is incorrect, a discrepancy is created.

- The following process is required to resolve the discrepancy:
  - The monthly payment report is sent to the prime contractor to review the payment differences and comments provided by the subcontractor.
  - The prime contractor may correct any error and re-submit to the subcontractor for review again.
  - The prime and sub contractors should work together to resolve any payment discrepancies.

- After two attempts to resolve the discrepancy, DMS will turn the audit record over to TxDOT to assist with resolution.
Subcontractor and Material Supplier Complaints

- Complaints must be in writing. The complaint should identify specifics regarding the nonpayment, payment discrepancy, timeliness (10 days) and any attempts to resolve the payment issue with the prime contractor.
JOINT CHECKS
Joint Checks

- A joint check is a two-party check between a DBE subcontractor and a prime contractor to a materials supplier of the DBE.

- The prime contractor issues a check as payer to a DBE subcontractor and the materials supplier jointly to guarantee payment to the supplier.

- All joint check arrangements must be pre-approved by TxDOT before the arrangement or transaction takes place.

- The prime contractor must submit to the TxDOT district:
  - Form 2178
  - Correspondence showing the rejections of a line of credit from the material supplier to the DBE subcontractor
  - A joint check agreement
Using a joint check for payment of materials or supplies is acceptable when the following conditions are met:

- The prime contractor issuing the check acts solely as a guarantor.
- The DBE subcontractor must release the check to the supplier.
- The DBE subcontractor negotiates the quantity, price, and delivery of the 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 to establish or increase the line of credit between the DBE subcontractor and the supplier.
ASSISTANCE TO DBE FIRMS
Assistance to DBE Firms

- In accordance with 49 CFR, Part 26, Appendix A, it is appropriate for a prime contractor to provide assistance to DBEs in various areas such as:
  - Bonding
  - Credit
  - Insurance
  - Equipment
  - Materials, and
  - Supplies

- Prime contractor should be careful not to provide so much assistance to a DBE that TxDOT would conclude that the DBE is not viable without the relationship to the prime contractor.
CHANGE ORDERS
Change Orders

Circumstances may arise during construction requiring changes to the scope of the work contained in the contract.

Increases to Scope of Work

- If the scope of work increases, 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.

Reduction to 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.
TERMINATION AND SUBSTITUTION REQUESTS
Termination and Substitution Requests

Policy

- The prime contractor cannot terminate a committed DBE (in whole or part) without the written approval by TxDOT.
- Written consent only for good cause.
- Some examples of good cause include:
  - DBE fails or refuses to execute contract.
  - DBE becomes bankrupt.
  - The prime contractor has determined the DBE is not a responsible contractor.

Commitment Reduction

- A prime contractor cannot reduce the amount of work committed to a DBE at contract award without good cause.
Termination Process

The following steps must be followed to terminate a DBE:

**Step 1:** The prime contractor must give the DBE notice and give the DBE five days to respond. The prime contractor must copy TxDOT on the notice.

**Step 2:** The prime contractor shall submit a request and provide justification for the DBE termination to TxDOT.

**Step 3:** TxDOT will review the termination request and related information and if necessary seek additional information to formulate its response.

**Step 4:** TxDOT will provide written consent to the termination request only if TxDOT agrees there is good cause.

**Step 5:** If TxDOT does not approve the request, the prime contractor shall continue to use the committed DBE.
Termination and Substitution Requests

No 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.

DBE Shortfall

- If 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.

- 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.

- The substitute DBE cannot work on the contract until its work eligibility has been confirmed by TxDOT.
Termination and Substitution Requests

Failure 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.

- 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.
MONITORING DBE ACTIVITY
Monitoring DBE Activity

Monitoring DBE Goal Attainment

- The prime contractor is responsible for monitoring its progress towards meeting the goal. This should be done on a monthly basis.

- DMS includes the following information to monitor DBE goal attainment:
  - DBE commitment amounts
  - Payments to DBE subcontractors
  - Modifications to the original contract amount by change order

- The prime contractor must 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.
Monitoring DBE Activity

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 Through TODAY (11/15/2016)](image)
Monitoring DBE Activity

- 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.
Enforcement

- Failure by the prime contractor to carry out their requirements is a material breach of the contract.

- May result in termination of the contract or other remedies as TxDOT deems appropriate, which may include:
  - Withholding all or a percentage of monthly partial payments;
  - Assessing sanctions;
  - Liquidated damages;
  - Disqualifying the contractor from future bidding as non-responsible.

- 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, the district will initiate administrative actions against the prime contractor.
PROJECT CLOSE OUT
Records Retention

DBE contractor must:

- Retain records for a minimum of three years after final payment.
- Keep records securely filed and available for audit review.
LOCAL GOVERNMENT PROJECTS
Local Government Projects

- Local government (LG) refers to:
  - Municipalities
  - Counties
  - County and regional toll authorities
  - Metropolitan planning organizations (MPOs)
  - Regional mobility authorities (RMAs)
  - Some private entities

- The LG is responsible for managing and monitoring the project to ensure the prime contractor and their subcontractors comply with the DBE Program provisions.
DESIGN-BUILD PROJECTS
Design-Build Projects

- Design-build (DB) is a construction project contract that combines engineering design services, construction services, and sometimes maintenance services into a single contract.

- Usually awarded to a general construction contractor, but in some cases, an engineering design firm.

- Each developer submits DBE Performance Plan prior to award that includes outreach efforts and categories of work for DBE subcontracting opportunities.

- During the design and construction portions of the project, the DB contractor is required to submit commitments and monthly progress reports to show the contractor is meeting the contract goal.
DBE Program Resource Websites

- USDOT - DBE Program Overview - https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/dbe-program-overview
DMS Resources

- Resources found in DMS: (https://txdot.txdotcms.com/)
  - Vendor Guide
  - Vendor Training Manual
  - Utilization Plans
  - Video Tutorials
Diversity Management System

- Training provided by B2Gnow.
- Courses include:
  - Vendor registration and questionnaire
  - An introduction to the system
  - Utilization plan and contract compliance reporting