

June 20, 2024

DBE OPEN-ENDED PERFORMANCE PLAN (OEPP)  
FOR LOR-90-10.76, PID107714; PROJECT (24)3003

A. DBE OPEN-ENDED PERFORMANCE PLAN - GENERAL

The Project will utilize a DBE Open-Ended Performance Plan (OEPP).

The OEPP will demonstrate the Contractor's plan for bringing on DBEs throughout the life of the project to meet the DBE goal. The OEPP shall include the Contractor's plan for ongoing DBE soliciting, DBE outreach, and DBE contracting efforts after contract execution. The OEPP shall demonstrate reasonable approaches and methodologies to meet all project DBE goals.

The Bidder will not submit anticipated DBE Firms at time of bid.

A DRAFT OEPP shall be submitted as part of the Intermediate Technical Proposal per the submission requirements in the Instructions to Offerors for Request for Proposals (RFP) Section 3. Review comments will be provided for the Shortlisted Offeror to submit a revised OEPP with the Final Technical Proposal and Price Proposal in accordance with the ITO. The Department shall review the apparent successful Bidder's OEPP submittal(s). The Department's approval of an OEPP is required prior to contract execution.

The DBE goal shall be found in the Project's Proposal. The DBE goal of a project is stated as a percentage of the contract. In the event the contract amount increases or decreases, the actual dollar amount of the DBE goal for the project may increase or decrease accordingly.

The successful Bidder shall provide progress updates, as required per this note, for the duration of the Project. The Department will monitor goal attainment throughout the life of the project.

B. DBE OPEN-ENDED PERFORMANCE PLAN - TECHNICAL REQUIREMENTS

The OEPP shall describe and demonstrate the following:

1) OEPP Part 1: DBE Utilization Commitment

Provide a dated commitment letter on the Bidder's letterhead, signed by an officer of the Company, stating the following:

“(date)  
LOR-90-10.76, PID107714; PROJECT (24)3003  
OEPP and DBE Commitment Certification

(*your company*) hereby commits to making all Good Faith Efforts, including those efforts outlined in this DBE Open-Ended Performance Plan (OEPP), to meet the Project's identified DBE Goals.

(*your company*) hereby commits to negotiating and contracting in Good Faith with each DBE to allow economically disadvantaged individuals a fair opportunity to compete for Work on the Project.

This OEPP is being provided in Good Faith and demonstrates (*your company*) and the DBT's Project management's intent to cooperate fully in meeting our requirements of the applicable DBE regulations and the requirements within the DBE OPEN-ENDED PERFORMANCE PLAN (OEPP) specifications for the Project."

2) OEPP Part 2: DBE Utilization Manager

Identify the DBE Utilization Manager. The DBE Utilization Manager is responsible for DBE outreach, monitoring DBE utilization, DBE utilization reporting, DBE compliance, and updating the OEPP. The OEPP shall include the DBE Utilization Manager's resume. The DBE Utilization Manager shall be employed by the Contractor and empowered to represent the Contractor in DBE contractual issues. The DBE Utilization Manager is a Key Personnel and shall report to the Contractor Project Manager.

Minimum Requirements:

- a. Five (5) years minimum of demonstrated experience with a background and understanding of DBE, Commercially Useful Function (CUF), Federal Contract Compliance requirements, and EEO requirements.
- b. Experience with the management of federally funded projects, preferably transportation with preferably DBE outreach, DBE recruitment, and DBE development.
- c. Experience with establishing DBE relationships and/or currently have established relationships with the regional DBE community.

3) OEPP Part 3: DBE Goal Attainment Reporting

Provide the Contractor's management methodology for implementing, managing, and reporting on DBE goal attainment.

Minimum Requirements:

- a. Identification of supporting personnel and their roles assisting the DBE Utilization Manager in overseeing the OEPP. This shall include direct Project Personnel responsible for Project DBE oversight, key Company Officers engaged in identifying opportunities for DBE subcontracting, performing outreach for DBE subcontracting opportunities, and key personnel of the Designer engaged in DBE Outreach (if applicable for DBE goal attainment).
- b. Descriptions of internal company processes, software, or other tools utilized to track DBE utilization on the Project, and a description of how that information will be combined and organized for reporting.
- c. Template of an intended OEPP Monthly Report to the Department (see section D.1).

4) OEPP Part 4: Good Faith Efforts

Describe and provide the Contractor's methodology for documenting DBE goal Good Faith Efforts (GFEs) throughout the life of the project.

Minimum Requirements:

- a. Description of documentation processes of all written solicitations to DBE firms, even if unsuccessful.

- b. Description of documentation processes for all phone logs of solicitation communications with DBE firms.
- c. Description of documentation processes of all written quotes received from DBE firms and communication with each DBE firm regarding the outcome of their submitted quote.
- d. Description of documentation processes and reasons when a non-DBE firm was selected over a DBE firm for solicited work on the contract.
- e. Description of documentation processes when DBE committed work is non-performed by the Department.

5) OEPP Part 5: Non-Discrimination, Affirmative Action, and EEO

Provide the Contractor's plan for ensuring compliance with the non-discrimination provisions and the affirmative action and equal employment opportunity provisions.

Minimum Requirements:

- a. Copies of the Contractor's and Lead Designer's non-discrimination policies, and affirmative action and/or equal opportunities policies.
- b. The intended internal investigation processes to be followed if a complaint is issued, a notification from a governing body is received, or if any a complaint or violation is identified.
- c. The intended reporting mechanisms to the Department's Office of Business & Economic Opportunity and Office of Civil Rights Compliance of any complaint or violation.

6) OEPP Part 6: DBE Prompt Payment

Provide the Contractor's plan for ensuring DBE prompt payment.

Minimum Requirements:

- a. Methods to identify DBE Work on Monthly Invoices.
- b. Methods to monitor Payments from the Department which should be made to DBEs.
- c. Methods to ensure time tracking of the Department payments vs payments made to DBEs.

7) OEPP Part 7: DBE Contracting Notification

Provide the Contractor's plan for providing the Department with 24-hour notice to DBEs performing Project related Work.

Minimum Requirements

- a. Project-level notification processes for notice of construction work.
- b. Lead Designer notification processes of DBE design work, including physical location of the firm performing the design work.

8) OEPP Part 8: Commercial Useful Function

Provide the Contractor's plan for ensuring Commercially Useful Function (CUF) for all DBE work performed.

Minimum Requirements

- a. Methods to ensure DBEs are managing and supervising their own work.
- b. Methods to ensure DBEs are purchasing their own material.
- c. Methods to ensure DBEs are employing their own labor and owning/renting their own equipment.

9) OEPP Part 9: DBE Work Package Notification

Provide the Contractor's plan for ensuring DBEs are sufficiently informed in advance on DBE contracting requirements and methods to determine equitable selection.

Minimum Requirements

- a. Methods to identify potential work packages and the intended timing of packages identification.
- b. Intended communication methods with known DBEs to solicit pricing. Methods shall be in a manner which is easily and equitably accessible for DBEs.
- c. Intended communication and outreach methods for potential DBEs. Methods shall be in a manner which is easily and equitably accessible for DBEs.
- d. Description of the criteria used in the selection of DBE subcontractors.

10) OEPP Part 10: DBE Planned Utilization Forecast

Provide the Contractor's intended forecast of DBE utilization for the duration of the Project.

Minimum Requirements:

- a. Anticipated overall value of Work to be performed corresponding to Month and Year and the subsequent cumulative value. Note: This should be a reasonable Project cost curve forecast, but the Project cost curve forecast will not be used by any party except for the purposes within this note.
- b. Anticipated DBE subcontracting payments corresponding to Month and Year and the subsequent cumulative value of DBE payments.
- c. A linear graph of the cumulative value information provided in (a) and (b). Format the graph so that the Y-axis corresponds to Value and the X-axis corresponds to Time. Add appropriate labels to clearly demonstrate the intent of the graph.  
Note: The graph is to clearly depict the Project cost curve and the DBE subcontracting payments demonstrating payment trends.
- d. Anticipated work types to be performed by DBE subcontracts and estimated work type value corresponding to Month and Year.
- e. DBE subcontract value yet to be determined.

Note: At initial submission, the cumulative value of (b) will be equivalent to (e).

After Contract execution, the OEPP can only be revised with concurrence by the Department's Office of Business & Economic Opportunity.

If the Bidder is also a certified DBE firm, the requirement to complete an OEPP as set forth remains. In this instance, however, the certified DBE Bidder would not need to submit a DBE Affirmation

Form (section E) for the work it is planning to self-perform to meet the goal. the Department will consider the submission of the bid as the certified DBE Bidder's written confirmation that it is participating in the contract. However, a DBE Affirmation Form must be submitted for all other DBE firms that are being utilized toward the DBE goal.

If the Bidder is a Joint Venture, the Joint Venture will only be considered a certified DBE firm if the Joint Venture itself has been certified. The Joint Venture may, however, utilize a certified DBE firm that is also a partner in the Joint Venture to meet the DBE goal. The certified DBE Firm/Joint Venture Partner, however, does not need to submit a DBE Affirmation Form for any work that the certified DBE Firm/Joint Venture Partner is going to perform to meet the goal. the Department will consider submission of the Joint Venture's bid as the certified DBE Firm/Joint Venture Partner's confirmation that it is participating in the contract.

C. DBE OPEN-ENDED PERFORMANCE PLAN - DBE AFFIRMATIONS & TERMINATIONS

The awarded Bidder shall provide regularly occurring updates concerning the status of DBE Contracts, status of DBE contracted work expansion, reductions, and & terminations.

Post award affirmations, termination, and contract reduction requirements include:

1) DBE Affirmations

After award of the design-build contract, the Contractor shall submit all executed DBE subcontracts to the Department for review within seven (7) calendar days from the date of a signed DBE subcontract. The Contractor shall ensure that all subcontracts or agreements with DBEs require that the subcontract and all lower tier subcontractors be performed in accordance with this Proposal Note.

The Contractor shall ensure the DBE firms affirm their participation in the Project within seven (7) calendar days from the date of a signed DBE subcontract using the DBE Affirmation Form below. The Contractor shall submit a separate DBE Affirmation Form for each DBE firm utilized for the DBE goal. The DBE Affirmation Form is written confirmation from each DBE firm that it is participating in the contract.

The Contractor shall utilize the DBE Affirmation Form located at:

<https://www.transportation.ohio.gov/programs/business-economic-opportunity/dbe/dbe-resources/pn-013-affirmation>

The dollar amount on the DBE Affirmation Form must match the amount within the subcontract. If the dollar amount does not match, the Apparent Low Bidder/Awarded Contractor shall utilize the Request for Consent to Terminate/Reduce a DBE Commitment process located at:

<https://www.transportation.ohio.gov/programs/business-economic-opportunity/dbe/dbe-resources/pn-013-termination>

The affirmed value shall be included in the OEPP Monthly Report (see Section D.1.a.i).

2) DBE Reductions/Underruns/Terminations/Good Cause

The Awarded Contractor must not terminate a DBE or any portion of its agreed-upon activities as listed on DBE Affirmation Forms (including subcontracting, services, trucking, and material supply) without the Department's prior written consent, unless the Department causes the termination or reduction. A termination includes any reduction or underrun in DBE activities not caused by a material change to the prime contract by the Department. This requirement applies to instances that include, but are not limited to, when the Awarded Contractor seeks to perform activities indicated on approved DBE Affirmation Forms with its own forces or those of an affiliate, a non-DBE firm, or another DBE firm.

No less frequently than biweekly, the Awarded Contractor must review its DBE Affirmation Forms for any potential reductions or underruns. All potential reductions or underruns must be disclosed along with their causes (i.e., triggering events or actions). When the Department agrees that a potential reduction's primary triggering event or action is a material change to the prime contract by the Department, the Awarded Contractor must update the DBE Affirmation Forms accordingly and send the revised forms to the Department and the affected DBE firms. The Awarded Contractor will not need to replace this DBE participation.

When the Department agrees that it is responsible for a potential reduction's primary triggering event or action, and this event or action was something other than a material change to the prime contract, the Awarded Contractor may terminate the DBE without the Department's prior written consent. In this case, the Awarded Contractor must report the termination and then update the DBE Affirmation Forms accordingly and send the revised forms to the Department and the affected DBE firms.

In all other cases, the Awarded Contractor must utilize the specific DBEs to perform the work and supply the materials as described on DBE Affirmation Forms unless the Awarded Contractor obtains the Department's written consent. Consent requests must be submitted utilizing the Request to Terminate/Reduce DBE Form located at:

<https://www.transportation.ohio.gov/programs/business-economic-opportunity/dbe/dbe-resources/pn-013-termination>

Absent the Department's consent, the Awarded Contractor is not entitled to any payment for work or material unless it is performed or supplied as indicated on approved DBE Affirmation Forms.

Consent requests must be submitted utilizing the Request to Terminate/Reduce DBE Form located at:

<https://www.transportation.ohio.gov/programs/business-economic-opportunity/dbe/dbe-resources/pn-013-termination>

Part 1 of the Request to Terminate/Reduce DBE Form constitutes the Awarded Contractor's notice in writing to the DBE firm of the Awarded Contractor's intent to request to terminate and the reason for the proposed request. Upon completion of Part 1, the DBE has five days to respond by completing Part 2, advising the Department and the Awarded Contractor of the reasons, if any, why it objects to the proposed termination and why the Department should not approve the Prime Contractor's request. If required in a particular case as a matter of public necessity (e.g., safety), the Department may provide a response period shorter than five days. Part 3 of the form constitutes the Awarded Contractor's official request.



The Department will only provide written consent to terminate a DBE if the Department agrees, for reasons stated in its concurrence document, that the Awarded Contractor has good cause to terminate the DBE firm or any portion of its agreed-upon activities as listed on DBE Affirmation Forms (including subcontracting, services, trucking, and material supply).

Good cause to terminate a DBE includes the following circumstances:

- a. The DBE firm fails or refuses to perform the activities listed on its DBE Affirmation Form in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE firm to perform the activities results from the bad faith or discriminatory action of the Awarded Contractor;
- b. The DBE firm fails or refuses to meet the Awarded Contractor's reasonable, nondiscriminatory bond requirements;
- c. The DBE firm becomes bankrupt, insolvent, or exhibits credit unworthiness;
- d. The DBE firm is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to 2 CFR parts 180, 215, and 1200 or applicable state law;
- e. The Department has determined that the DBE firm is not a responsible contractor;
- f. The DBE firm voluntarily withdraws from the project and provides to the Department written notice of its withdrawal;
- g. The DBE firm is ineligible to receive DBE credit for the type of activity required;
- h. A DBE owner dies or becomes disabled with the result that the DBE firm is unable to complete its activity on the contract; and
- i. Other documented good cause that the Department determines compels the termination of the DBE firm.

Provided, that good cause does not exist if the Awarded Contractor seeks to terminate a DBE or any portion of its activity so that the Awarded Contractor can self-perform the activity or so that the Awarded Contractor can substitute another DBE or non-DBE participant.

#### D. DBE OPEN-ENDED PERFORMANCE PLAN - REQUIRED REPORTING

The awarded contractor shall be required to monitor and report the ongoing status of DBE Outreach, DBE contracting, and DBE performance. The awarded contractor shall perform the following ongoing documentation.

##### 1) OEPP Monthly Updates

The awarded contractor shall submit an OEPP Monthly Report by the 10<sup>th</sup> day of the subsequent month.

The OEPP Monthly Report shall contain the following:

##### a) OEPP Monthly Report – Part 1: Actions Summary

Provide a reporting period summary of actions taken or items of interest including but not limited to the following.

- i. Cumulative number, value, listing of DBE contractors, and work type of DBE contracts executed towards participation. Note: DBE contracts must have a DBE

- Affirmation Form signed by the DBE, submitted to the Department, and approved by the Department during the reporting period.
- ii. Number and type of subcontracting work packages identified during the reporting period.
  - iii. Number of DBE quotes, including DBE firm name and date solicited and subsequently received during the reporting period.
  - iv. Number of and subsequent value of Request to Terminate/Reduce DBE Forms submitted, and number and value approved by the Department during the reporting period. Include DBE firm name.
  - v. Violations or notification of any non-discrimination provisions, affirmative action, or equal employment opportunity provisions during the reporting period.
  - vi. Any documented known CUF violations during the reporting period.
  - vii. Proposed revisions to OEPP Parts 2-9 for the Department's approval. Note: It is the responsibility of the Awarded Contractor to advise the Department of any proposed changes to the OEPP.

b) OEPP Monthly Report – Part 2: Individual DBE Contract Summary

For each subcontracted DBE:

- i. Total value of the subcontract (original and current);
- ii. Total value of the subcontract less potential reductions or underruns, if any, with a clear description of the potential reductions or underruns and their causes, noting any pending and/or approved termination consent requests;
- iii. If current subcontract value is less than original, a clear description of the reason for the difference, noting any pending and/or approved termination consent requests, terminations where consent is not needed, and reductions/underruns caused by material changes to the prime contract by the Department;
- iv. Total invoiced by the DBE for the reporting period;
- v. Total payments paid to the DBE in the reporting period; and
- vi. For subcontracts with a difference in invoice vs paid, a clear description of the reason for the difference.

c) OEPP Monthly Report – Part 3: DBE Planned Utilization Update

Provide an update of the initial *TECHNICAL REQUIREMENTS: Part 10 – DBE Planned Utilization Forecast* for the remainder of the Project. Update all information required for a. through e.

Update all graphs and information for the reporting period (and prior) with the actual payment received from the Department and DBE payments made by the Contractor.

Update the DBE Planned Utilization Forecast for the remainder of the Project and fully describe any substantive revisions.

At the request of the Department's Office of Business & Economic Opportunity and after transmittal of the OEPP Monthly Report to the Department, the DBE Utilization Manager will be required to meet with a representative from the Department's Office of Business & Economic Opportunity to discuss the Report.



The Department may withhold partial or full Estimates if the Contractor fails to submit an acceptable OEPP Monthly Report as determined by the Department.

2) Ongoing Good Faith Efforts (GFEs)

The Contractor shall demonstrate that it is making adequate Good Faith Efforts to meet the goal if, in the Department's judgement, the OEPP Monthly Report demonstrates a potential of not trending towards successfully meeting the DBE contract goal.

The Contractor shall produce the following documentation, or any portion thereof, within 2 Working Days upon written request by the Department.

- a. All written quotes received from certified DBE firms;
- b. All written (including email) communications between the Contractor and DBE firms;
- c. All written pre-bid and post-award solicitations to DBE firms, even if unsuccessful;
- d. Copies of each non-DBE quote(s) when a non-DBE was selected over a DBE for work on the contract;
- e. Phone logs of communications with DBE firms;
- f. All Outreach events and community events attended including dates.

For Reference, the Department has provided Good Faith Efforts Guidelines Good Faith Efforts (GFE) for Contractors located at:

<https://www.transportation.ohio.gov/programs/business-economic-opportunity/dbe/dbe-resources/gfe-contractors>

The Department will review the GFE documentation and issue a written determination on whether adequate GFE's have been demonstrated. If the Department determines that the Contractor has failed to demonstrate adequate GFE's to meet the goal, the Contractor will have an opportunity for administrative reconsideration.

As part of this reconsideration, the Contractor may provide written documentation or argument concerning the issue of whether it met the goal or made adequate Good Faith Efforts to do so. Such written documentation or argument must be provided to the Department, attention to the Deputy Director of the Division of Chief Legal Counsel, 1980 West Broad Street, MS 1500, Columbus, Ohio 43223, within two (2) business days of the Department's written determination that GFE's were not adequately demonstrated.

The Contractor may also include in their written documentation a request for an in-person meeting to discuss the issue of whether it met the goal or made adequate Good Faith Efforts to do so.

The Department will send the Contractor a written decision on reconsideration explaining the basis for finding that the Contractor 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 United States Department of Transportation.

**E. DBE OPEN-ENDED PERFORMANCE PLAN - END OF PROJECT GOOD FAITH EFFORTS (GFE) DOCUMENTATION**

If the DBE contract goal established by the Department was not met, the Contractor shall demonstrate through documentation that it has made adequate Good Faith Efforts to meet the goal, even though it failed in obtaining enough DBE participation to do so.

The Contractor shall complete the GFE Contractor Template and produce the following documentation, within seven calendar days upon written request by the Department.

1. All written quotes received from certified DBE firms pre-bid;
2. All written (including email) communications between the Contractor and DBE firms;
3. All written solicitations to DBE firms, even if unsuccessful;
4. Copies of each non-DBE quote(s) when a non-DBE was selected over a DBE for work on the contract;
5. Phone logs of communications with DBE firms;
6. All Outreach events and community events attended including dates.

The Department's GFE Contractor Template and GFE Guidelines for Contractors are located at:

<https://www.transportation.ohio.gov/programs/business-economic-opportunity/dbe/dbe-resources/gfe-contractors>

The Department will review the GFE documentation and issue a written determination on whether adequate GFE's have been demonstrated. If the Department determines that the Contractor has failed to demonstrate adequate GFE's to meet the goal, the Contractor will have an opportunity for administrative reconsideration.

As part of this reconsideration, the Contractor may provide written documentation or argument concerning the issue of whether it met the goal or made adequate Good Faith Efforts to do so. Such written documentation or argument must be provided to the Department, attention to the Deputy Director of the Division of Chief Legal Counsel, 1980 West Broad Street, MS 1500, Columbus, Ohio 43223, within two (2) business days of the Department's written determination that GFE's were not adequately demonstrated.

The Contractor may also include in their written documentation a request for an in-person meeting to discuss the issue of whether it met the goal or made adequate Good Faith Efforts to do so.

The Department will send the Contractor a written decision on reconsideration explaining the basis for finding that the Contractor 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 United States Department of Transportation.

**F. DBE OPEN-ENDED PERFORMANCE PLAN - SANCTIONS AND ADMINISTRATIVE REMEDIES**

Failure by the Contractor to carry out the requirements of this Proposal Note, including (but not limited to)

1. the submission of adequate Good Faith Efforts to meet the goal for a project,
2. failure to submit DBE Affirmation Form(s)
3. failure to submit Request to Terminate/Reduce DBE Form(s) (as necessary) and/or
4. failure to meet the requirements of this note in a material way

is a material breach of the contract and may result in the issuance of sanctions as follows:

1st Tier: Letter of Reprimand

2nd Tier: Damages equivalent to the DBE shortfall

3rd Tier: If a pattern of paying damages persists or the Contractor has falsified, misrepresented, or withheld information, the Department can pursue other remedies available by law including suspension, revocation, and/or debarment.

Factors to be considered in issuing sanctions may include, but are not limited to the following:

1. The magnitude and the type of offense
2. The degree of the Contractor's culpability
3. Any steps taken to rectify.
4. The Contractor's record of performance on other projects including, but not limited to:
  - a. Annual DBE participation
  - b. Annual DBE participation on projects without goals
  - c. The number of complaints the Department has received regarding the Contractor.
  - d. The number of times the Contractor has been previously sanctioned by the Department.