Summary of 2016 Draft Revisions to NJ DOT Procedures and Contract Language

Regulation(s)	Forms & Procedures	Comments
49 CFR Part 26.11 (c)	**Form CR-261 List of All DBE and Non-DBE Firms Providing a Bid or Quote for the Contract** All bidders need to submit form CR-261 (new form) at time of bid. This new form lists all firms (DBE and Non-DBE) that provided a bid or quote to the bidder for any portion of the work on the project.	In addition to the information requested on the new form, NJDOT is also required to collect the age and gross receipts of each firm listed on Form CR-261. Currently, NJDOT staff plan to collect the additional information, but columns may be added to the form in the future to have bidders collect that information at time of bid.
49 CFR part 26.53 (b)(2) & 26.55	**Form CR-266 Schedule of DBE/ESBE/SBE Participation** All bidders submit form CR-266 (revised form) at time of bid for any project that has a DBE/ESBE/SBE goal. This form replaces old Form A and is to be used for Federal and State funded projects as well as for revisions during the term of the project.	Bidders may only include firms on form CR-266 (and count them toward goal commitment) if those firms have each additionally provided the bidder with written confirmation (Form CR-273) of their intent to participate on the contract should it be awarded to the prime bidder.
49 CFR part 26.53 (b) (2) (v)	**Form(s) CR-273 Confirmation of DBE/ESBE/SBE Firm** All bidders submit form(s) CR-273 (new form) at time of bid for each firm listed on Form CR-266. Form(s) CR-273 must also be submitted with each revised CR-266 submitted by the prime contractor during the term of the project. The form will be used for both Federal and State funded projects.	Any firm listed on Form CR-266 that is not accompanied by a corresponding form CR-273 may not be counted toward the DBE/ESBE/SBE goal commitment.
49 CFR part 26.55 (d)	**Form CR-274 DBE/ESBE/SBE Trucking Verification** All bidders submit form(s) CR-274 (new form) at time of bid for each trucking/hauling firm listed on Form CR-266. Form(s) CR-274 must also be submitted with each revised CR-266 submitted by the prime contractor during the term of the project if the change affects trucking/hauling firms. The form will be used for both Federal and State funded projects.	Any trucking/hauling firm listed on Form CR-266 that is not accompanied by a corresponding form CR-273 and CR-274 may not be counted toward the DBE/ESBE/SBE goal commitment. The form helps to determine the correct amount of credit the prime bidder/contractor may receive toward their DBE/ESBE/SBE goal commitment for trucking/hauling services.

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Regulation(s)	Forms & Procedures	Comments
49 CFR part 26.55 (e)	**Form CR-272 DBE/ESBE Regular Dealer/Supplier Verification** All bidders submit form(s) CR-272 (new form) at time of bid for each regular dealer/supplier firm listed on Form CR-266. Form(s) CR-272 must also be submitted with each revised CR-266 submitted by the prime contractor during the term of the project if the change affects regular dealer/supplier firms. The form will be used for only Federal funded projects.	Any regular dealer/supplier firm listed on Form CR-266 that is not accompanied by a corresponding form CR-273 and CR-272 may not be counted toward the DBE/ESBE goal commitment. The form helps to determine the correct amount of credit the prime bidder/contractor may receive toward their DBE/ESBE goal commitment for regular dealer/suppliers.
CFR part 26.53 & Appendix A to Part 26	**Evidence of Good Faith Effort** If the project has a DBE/ESBE/SBE goal, and the bidder has not demonstrated attainment of that goal on CR-266 (with accompanying certification Form CR-273 (and, if relevant, Forms CR-274 and CR-272), then the bidder is to submit (at time of bid) documentation of good faith effort made toward attaining the goal.	A firm engaging in good faith effort must: -Solicit through all reasonable & available means, the interest of all certified DBE/ESBE/SBE firms capable of performing the contract work -Provide interested potential DBE/ESBE/SBE sub firms with adequate information about requirements in a timely manner -Actually select portions of work to be performed by DBE/ESBE/SBE -Negotiate in good faith with interested DBE/ESBE/SBE
49 CFR 26.53 (d)	**Administrative Reconsideration** If the Department deems that the apparent lowest responsive bidder failed to meet the Contract goal AND failed to demonstrate adequate good faith effort to do so at time of bid, and the bid is rejected, the bidder may request Administrative Reconsideration.	If the bid of the lowest responsive bidder is rejected for the reasons listed to the left, the bidder may make a written request for Administrative Reconsideration within 1 State business day of being notified by Dept. that bid was rejected. The request must indicate whether the rejected bidder wants reconsideration in-person or via a written review. Within 2 State business days of filing a request for Administrative Reconsideration, a rejected bidder must submit written documentation or argument proving bidder, at time of bid, met the Contract goal or submitted adequate good faith effort documentation.

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49 CFR part 26.53 (f)	**Notification Requirements Before DBE Subcontracts are Changed/Terminated** DBE/ESBE/SBE firms listed on the CR-266 cannot be replaced or terminated before all of the following occur: -prior written notification from the prime to the sub, the RE, and Civil Rights indicating just cause -a 5-day opportunity for the sub to appeal to Civil Rights -a written determination from Civil Rights permitting or denying the change	Prime contractors must notify affected DBE/ESBE/SBE firms, RE, and NJDOT Civil Rights in writing in advance of a proposed change, indicating the reason for termination/change. Affected DBE/ESBE/SBE firms will have 5 State business days to respond to Civil Rights, RE, and prime contractor in writing of the reasons why they object to their services being terminated/changed. Civil Rights must consider the arguments and decide to approve or deny such changes BEFORE they are made.
Official Questions and Answers (Q&A's) Disadvantaged Business Enterprise Program Regulation (49 CFR 26), Transportation.gov U.S. Department of Transportation (last visited May. 23, 2016), **https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/official-questions-and-answers-qas-disadvantaged**	**Modification of the DBE/ESBE/SBE Goal Commitment** During the project construction phase, the project RE will alert Civil Rights to significant changes in the project's scope of work. Civil Rights will determine if the changes necessitate a change to the DBE/ESBE/SBE goal commitment percentage. If so, Civil Rights will notify the RE and prime contractor of the change in the goal commitment percentage and will ask the prime contractor to submit a revised Form CR-266 AND any good faith effort documentation needed to meet the revised goal commitment.	In determining whether a change in scope of work is significant to warrant a revised DBE/ESBE/SBE goal commitment percentage, Civil Rights will consider on a case by case basis a number of factors including, but not limited to: -whether the type of work has changed (if the same work items are scaled up or down, a change in the goal commitment percentage may not be warranted; if the type of work items change significantly, a change in the DBE/ESBE goal commitment percentage may be warranted) -the timing of the change -the dollar value of the change (relative to the overall value of the project)

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49 CFR part 26.55 (c)	**Commercially Useful Function Monitoring** For all DBE/ESBE/SBE firms listed on the CR -266, the RE must conduct a Commercially Useful Function (CUF) review via Form CR-270 (new form) which will be certified by the subcontractor. The prime 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 & performing their own work: -must have independent supervisor/work scheduler (this person should not appear on the certified payroll of the prime contractor or any other subs) -must use own staff (again, not staff who appear on the certified payrolls of the prime or other subs) -must use equipment obtained on its own (not equipment owned by the prime or other subs on the contract, even if it is leased to them; a prime may help a sub obtain equipment from the market, but may not provide or lease equipment to the sub.)
49 CFR part 26.29 & NJSA 52:32-41	**Prompt Payment of Subs** If the Contractor fails to pay the subcontractor within 30 days after the sub completes the specified work, the Department may withhold progress payments until the Contractor pays the sub 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 sub that the Contractor has not paid the amount due from a previous progress payment, the Contractor shall submit to the RE within 10 days of a request made by the RE, evidence that payment has been made.	NJDOT is also required to verify prompt payment by prime contractors to subcontractors. At a future date, NJDOT will be evaluating electronic systems for monitoring all payments to subcontractors by primes, and may implement such a system.
49 CFR part 26.13(b) & 26.53(h)	**Potential Payment Reduction for Not Attaining Goal or Providing GFE** 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 described on the right.	Calculation of the potential payment reduction: Calculate the difference between the Contract DBE/ESBE/SBE Goal percentage (either the original goal percentage, or if modified by the Department, the Modified Contract Goal percentage) and the attained DBE/ESBE/SBE goal percentage (based on what was actually paid to DBE/ESBE/SBE firms). Multiply the percentage difference by the Total Adjusted Contract Price (the total contract price minus applicable payment adjustments for things like FINAL LAYOUT, PERFORMANCE BOND AND PAYMENT BOND, etc.) to obtain the payment reduction.