

**EXHIBIT "E"**

**DISADVANTAGE BUSINESS ENTERPRISE (DBE) SPECIAL PROVISIONS FOR  
DESIGN-BUILD PROJECTS**

**(Exhibit E to Prime Contract)**

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## **A. POLICY STATEMENT**

Port has adopted Department's DBE/UDBE policy for the Project and intends to encourage the participation of DBEs on the Project, consistent with applicable laws and regulations. Proposers are advised that, as required by federal law, Port is implementing new DBE requirements for Underutilized Disadvantaged Business Enterprises ("UDBEs"). To ensure there is equal opportunity for the participation of the DBE groups specified in 49 C.F.R. §26.5, Port is specifying a goal for UDBEs.

References to DBEs include UDBEs, but references to UDBEs do not include all DBEs. Because Port and Department have programmed federally-sourced funds for the Project, the UDBE goal will apply to the Project and Design-Builder is obligated to comply with applicable federal laws and regulations related to DBEs.

Design-Builder and its Subcontractors and Suppliers will take all necessary and reasonable steps in accordance with 49 C.F.R. Part 26 to ensure that DBEs have the maximum opportunity to compete for and perform on this Contract.

## **B. CONTRACT ASSURANCE**

Design-Builder, and its Subcontractors and Suppliers shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Contract. Design-Builder shall carry out applicable requirements of 49 C.F.R. Part 26 in the award and administration of federally funded contracts. Failure by Design-Builder to carry out these requirements is a material breach of this Contract, which may result in the termination of this Contract or such other remedy, as Port deems appropriate.

## **C. UDBE GOAL**

The UDBE goal established for this Contract is as shown in Exhibit C-5 (DBE/UDBE Certification).

Port will monitor Design-Builder's activities to ensure they are conducted in a manner consistent with the requirements of 49 C.F.R. Part 26.

Only UDBE participation will count towards the UDBE goal.

Credit for materials or supplies purchased from UDBEs counts towards the goal in the following manner:

1. 100 percent counts if the materials or supplies are obtained from a UDBE manufacturer.
2. 60 percent counts if the materials or supplies are obtained from a UDBE regular dealer.
3. Only fees, commissions, and charges for assistance in the procurement and delivery of materials or supplies count if obtained from a UDBE that is neither a manufacturer nor regular dealer. 49 C.F.R. §26.55 defines "manufacturer" and "regular dealer."

Credit towards the goal will be received if employing a UDBE trucking company that performs a commercially useful function as defined in 49 C.F.R. §26.55(d)(1)-(4), (6).

## **D. DBE/UDBE PERFORMANCE PLAN**

Design-Builder shall prepare a Disadvantaged Business Enterprise/Underutilized Disadvantaged Business Enterprise Performance Plan ("DBE/UDBE Performance Plan") that is based on the Draft DBE/UDBE Performance Plan that Design-Builder submitted with the Proposal and that complies with all applicable Laws and Governmental Approvals, is consistent with the Contract Documents, and includes the following elements:

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1) A policy statement, signed by Design-Builder's authorized representative, which expresses Design-Builder's commitment to consider utilizing DBE/UDBEs for all aspects of the Work that DBE/UDBEs could perform at a reasonable cost, outlines the various levels of responsibility, and states the objectives of the DBE/UDBE Performance Plan. Design-Builder shall obtain the written commitment of all Design-Builder related entities to comply with and advance the intent of the policy statement;

2) Design-Builder's designation of a person responsible for the DBE/UDBE Performance Plan (the "Liaison Officer"), as well as support staff necessary and proper to administer the plan and a description of the authority, responsibility, and duties of the Liaison Officer and support staff. The Liaison Officer and staff are responsible for developing, managing, and implementing the DBE/UDBE Performance Plan on a day-to-day basis, for providing technical assistance to DBE/UDBEs, and for disseminating information on available business opportunities so that DBE/UDBEs are provided an equitable opportunity to engage in the Work as Subcontractors. The Liaison Officer shall work in close coordination with Port, and shall report quarterly on Design-Builder's success in attaining the UDBE goal for the Contract from the Effective Date until the date of the DBE Final Report (see Article R(e) below); and

3) A description of proposed actions to facilitate DBE/UDBE engagement in the Work as Subcontractors, such as:

a) On-going quarterly strategic planning sessions with Port to establish goals for specific bid item groups by reviewing the work, available firms, strategies, anticipated obstacles and means to overcome obstacles;

b) Conduct bid-item specific outreach meetings in coordination with Port for DBE/UDBE firms to highlight current and upcoming appropriate subcontracting opportunities;

c) Solicit statements of qualification, proposals, and/or price quotations from qualified DBE/UDBE firms and arrange a time for the review of qualifications, plans, quantities, specifications, and delivery schedules, and for the preparation and presentation of proposals and/or price quotations;

d) Provide assistance, in coordination with Port, to DBE/UDBEs so that these may overcome barriers such as the inability to obtain bonding, insurance, financing, or technical assistance;

e) Develop and conduct information and communication programs or workshops, in coordination with Port, on contracting procedures and specific contracting opportunities in a timely manner;

f) Encourage eligible DBE/UDBEs to apply for certification with Department;

g) Contact local/regional disadvantaged, underutilized, trade-specific contractor associations and appropriate city agencies with programs for disadvantaged individuals for assistance in recruiting and encouraging eligible DBE/UDBE contractors to apply for certification with Department or Port; and

(h) Maintain records and require Subcontractors and Suppliers utilizing DBE (including UDBE) firms in their Subcontracts to maintain records to verify DBE participation.

#### **E. SUBMITTAL OF DOCUMENTATION**

For all Subcontracts awarded during the Contract term, Design-Builder, Subcontractors and Suppliers, as applicable, will be required to: (a) utilize specific UDBEs to meet the UDBE goal; or (b) demonstrate good faith efforts to meet the UDBE goal. Design-Builder, Subcontractors and Suppliers, as applicable, must provide documented justification for rejecting bids, quotes, or proposals for subcontracted work received from properly certified, qualified UDBE firms.

In order to count towards the UDBE goal, the firms utilized as UDBE Subcontractors and

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Suppliers must be certified as DBEs by the California Unified Certification Program. For a list of DBEs certified by the California Unified Certification Program, go to:

[http://www.dot.ca.gov/hq/bep/find\\_certified.htm](http://www.dot.ca.gov/hq/bep/find_certified.htm)

Design-Builder submitted the following documents to Port prior to the Effective Date pursuant to the Instructions to Proposers:

1. Bidder's List (see Article L below);
2. Good Faith Efforts Documentation Form;
3. Supporting documentation to verify good faith efforts (see Article F below);
4. DBE/UDBE Certification; and
5. Subcontractor Commitment Form.

#### **F. GOOD FAITH EFFORTS DETERMINATION**

Port will determine whether Design-Builder made sufficient good faith efforts to meet the UDBE goal, in accordance with 49 C.F.R. §26.53 and Appendix A thereto. Design-Builder must show that it took all necessary and reasonable steps to achieve the UDBE goal or other requirement of 49 C.F.R. Part 26, which, by its scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient UDBE participation, even if it were not fully successful. Mere pro forma efforts are not good faith efforts to meet the UDBE contract requirements. Compliance will be determined on a case-by-case basis, based on a review of the Good Faith Efforts Documentation Form and supporting documentation to verify good faith efforts. Supporting documentation to verify good faith efforts includes documented evidence of the following types of activities:

(a) Soliciting, through all reasonable and available means (e.g., attendance at pre-proposal/pre-letting meetings, advertising and/or written notices), the interest of all certified UDBEs who have the capability to perform the Work. Design-Builder must solicit this interest within sufficient time to allow the UDBEs to respond to the solicitation. Design-Builder must determine with certainty if the UDBEs are interested by taking appropriate steps to follow up on the initial solicitations;

(b) Selecting portions of the Work to be performed by UDBEs in order to increase the likelihood that the UDBE goal will be achieved. This includes, where appropriate, breaking out the Work into economically feasible units to facilitate UDBE participation even when Design-Builder might otherwise prefer to perform those portions of the Work with its own forces;

(c) Providing interested UDBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation;

(d) Negotiating in good faith with interested UDBEs. Design-Builder has the responsibility to make a portion of the Work available to UDBE Subcontractors and Suppliers, to select those portions of the Work or material needs consistent with the available UDBE Subcontractors and Suppliers so as to facilitate UDBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of the UDBEs that were considered; a description of information provided regarding the plans and specifications for the work selected for contracting; and evidence as to why additional agreements could not be reached for UDBEs to perform the work;

(e) Design-Builder using good business judgment would consider a number of factors in negotiating with Subcontractors and Suppliers, including those who are UDBEs, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using UDBEs is not in itself sufficient

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reason for Design-Builder's failure to meet the UDBE Contract goal, as long as such costs are reasonable. Also, the ability or desire of Design-Builder to perform the Work with its own organization does not relieve Design-Builder of the responsibility to make good faith efforts. Design-Builder is not, however, required to accept higher quotes from UDBEs if the price difference is excessive or unreasonable;

(f) Not rejecting UDBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. Design-Builder's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for rejection or non-solicitation of proposals/bids in Design-Builder's efforts to meet the DBE Project goal;

(g) Making efforts to assist interested UDBEs in obtaining bonding, lines of credit, or insurance as required by Port or Design-Builder,

(h) Making efforts to assist interested UDBEs in obtaining necessary equipment, supplies, materials or related assistance or services; and

(i) Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, state and federal offices of minority/women business assistance; and other organizations, as allowed on a case-by-case basis, to provide assistance in the recruitment and placement of UDBEs.

#### **G. COUNTING UDBE PARTICIPATION**

In accordance with 49 C.F.R. §26.55, Port will utilize the following guidelines in determining the percentage of UDBE participation that will be counted toward the overall UDBE goal for the Contract:

1. If a firm is not currently certified as a DBE, in accordance with the standards of Subpart D of the regulations (49 C.F.R. §26.55(f)), at the time the Subcontract is executed, the firm's participation toward any UDBE goals will not be counted, except as provided for in 49 C.F.R. §26.87(i);

2. Design-Builder may count the participation of a decertified DBE firm towards the UDBE goal for the Contract in accordance with 49 C.F.R. §26.87(j);

3. The participation of a UDBE Subcontractor or Supplier toward Design-Builder's achievement of the overall UDBE goal will not be counted until the dollar amount being counted toward the goal has been paid to the UDBE;

4. When a UDBE participates in the Contract, the value of the work actually performed will be counted as follows:

(a) The entire amount of the portion of a construction contract (or other contract not covered by paragraph 49 C.F.R. §26.55 that is performed by the UDBE's own forces). Include the cost of supplies and materials obtained by the UDBE for the work, including supplies purchased or equipment leased by the UDBE (except that supplies and equipment the UDBE Subcontractor purchases or leases from Design-Builder or its Affiliate(s) will not be counted);

(b) The entire amount of fees or commissions charged by a UDBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a USDOT-assisted contract, count toward the UDBE goal, provided that Port determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services;

(c) When a UDBE subcontracts part of the work of its Subcontract to another firm, the value of the subcontracted work may be counted toward UDBE goals only if the UDBE's Subcontractor

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is itself a UDBE. Work that a UDBE subcontracts to a non-DBE firm will not count toward the UDBE goal;

(d) When a UDBE performs as a participant in an approved joint venture, Port will count a portion of the total dollar value of the Subcontract equal to the distinct, clearly defined portion of the work of the Subcontract that the UDBE performs with its own forces toward the UDBE goal; and

5. Port will count expenditures of a UDBE Subcontractor or Supplier toward the UDBE goal only if the UDBE is performing a commercially useful function on that Subcontract in accordance with 49 C.F.R. §26.55.

#### **H. CONTINUING GOOD FAITH EFFORTS**

During the term of the Contract, Design-Builder will make good faith efforts to ensure that UDBEs have maximum opportunity to successfully perform on the Contract, and that Design-Builder meets the UDBE goal. These efforts shall include but not be limited to the following:

(a) Negotiating in good faith to attempt to finalize Subcontracts with UDBEs committed to prior to Contract award;

(b) Continuing to provide assistance to UDBE Subcontractors and Suppliers in obtaining bonding, lines of credit, etc., if required by the Subcontract;

(c) Notifying a UDBE in writing of any potential problem and attempting to resolve the problem prior to formally requesting Port's statement of no objection to substitute the DBE;

(d) As with all Subcontractors and Suppliers, timely payment of all monies due and owing to UDBE Subcontractors and Suppliers;

(e) Timely submittal to Port of information regarding newly selected Subcontractors and Suppliers as required in Article J below;

(f) Submittal to Port of an updated Good Faith Efforts Documentation Form (and supporting documentation to verify good faith efforts) with Design-Builder's final DBE/UDBE Performance Plan and once every quarter thereafter for the term of the Contract;

(g) Informing Port in a timely manner of any problems anticipated in attaining the UDBE participation goal committed to in the Proposal; and

(h) If Design-Builder or any of its Subcontractors or Suppliers requests a substitution of a UDBE firm, Design-Builder or its Subcontractors or Suppliers must exert good faith efforts to replace the UDBE firm with another UDBE firm, subject to Port's statement of no objection.

#### **I. APPLICABILITY TO UDBE BIDDERS/PROPOSERS**

These good faith efforts requirements also apply to UDBE bidders/proposers for Subcontracts. The Work proposed to be performed with its own work force as well as Work committed to UDBE Subcontractors and Suppliers will count toward the overall UDBE goal for the Contract.

#### **J. DBE CONTRACTS**

Whenever a DBE (including UDBEs) is selected as a Subcontractor or Supplier and it has not been previously reported, Design-Builder or its designated Liaison Officer shall promptly provide Port with the following information regarding the Subcontract:

(a) The name of the Subcontractor or Supplier;

(b) The Subcontractor or Supplier's DBE certification number;

(c) The total dollar amount of the Subcontract;

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- (d) The specific work items covered by the Subcontract;
  - (e) Estimated quantities of each work item; and
  - (f) Individual unit prices (if applicable).

**K. TERMINATION OF DBE CONTRACTS**

Port requires that Design-Builder, and its Subcontractors and Suppliers, not terminate for convenience a DBE (including UDBE) Subcontractor or Supplier listed on the most current Summary of Subcontract Awarded (see Article R(c) below) (or an approved substitute DBE) and then perform the Work of the terminated Subcontract with its own forces or those of an affiliate, without prior written consent of Port. The request for removal must be made in writing to Port.

If a UDBE Subcontractor or Supplier is terminated or fails to complete its work on a Subcontract for any reason, Design-Builder must make good faith efforts to find another UDBE Subcontractor or Supplier to substitute for the original UDBE. These good faith efforts must be directed at finding another UDBE to perform at least the same amount of work under the Subcontract as the UDBE that was terminated, to the extent needed to meet the Contract-specified goal.

**L. BIDDER'S LIST**

Design-Builder must maintain and update the Bidder's List it submitted to Port pursuant to Section 4.4.2 of the Instructions to Proposers throughout the life of the Project. Design-Builder shall submit an updated Bidder's List in Microsoft Excel format with its final DBE/UDBE Performance Plan and once every quarter thereafter for the term of the Contract. The Bidder's List must comply with 49 C.F.R §26.11(C), and identify all firms quoting or bidding on Subcontracts for the Contract. For every firm quoting or bidding on Subcontracts for this Contract, the following information must be obtained and included in the Bidder's List:

- (a) The firm's name;
- (b) The firm's address;
- (c) The firm's status as a UDBE or non-UDBE;
- (d) The age of the firm; and
- (e) The annual gross receipts of the firm.

**M. EFFECT OF CONTRACT MODIFICATIONS**

The dollar amount of any Change Order or any other contract modification that increases the Contract Price or the dollar amounts of any Subcontract will be subject to the UDBE goal established for the Contract, and Design-Builder and its Subcontractors and Suppliers will be required to solicit UDBE participation for such increases. These revised dollar values shall be reflected in the Subcontractor Payment Monthly Progress Report submitted to Port.

**N. PROMPT PAYMENT**

The Subcontractor prompt payment requirements set forth in Book 1, Section 11.7.1 apply to all UDBE Subcontracts.

**O. CONSEQUENCES OF NON-COMPLIANCE**

**(1) BREACH OF CONTRACT** - Failure to carry out the UDBE requirements specified in the Contract Documents constitutes a breach of contract. Port will notify Design-Builder and the USDOT of such breach, including notification that the breach may result in termination of the Contract by Port or imposition of other appropriate sanctions. This notice is given pursuant to



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49 C.F.R. Part 26. For purposes of this section, "timely submittal" means received by Port by the close of business on the tenth day of the following month.

**(2) NOTICE** - If Design-Builder or any Subcontractor or Supplier is deemed to be in non-compliance with the UDBE requirements specified in the Contract Documents, Design-Builder will be informed in writing, by certified mail by Port that sanctions will be imposed for failure to meet UDBE utilization goals and/or submit documentation of good faith efforts. The notice will state the specific sanction to be imposed.

**P. SANCTIONS**

If it is determined that the Design-Builder's failure to meet all or part of the UDBE goal is due to Design-Builder's inadequate good faith efforts throughout the term of the Contract, including failure to submit required good faith efforts information and documentation as required herein, Design-Builder may be subject to Contract termination.

**Q. UDBE LIQUIDATED DAMAGES**

As defined in 49 C.F.R. Part 26, if it is determined that Design-Builder's failure to meet all or part of the UDBE goal is due to Design-Builder's inadequate good faith efforts, Design-Builder may be required to pay liquidated damages equal to 10% of the amount of the unmet goal.

**R. REPORTING**

**(a) DBE RECORDS** - Design-Builder shall maintain records and shall require its Subcontractors and Suppliers that are utilizing DBE (including UDBE) firms in their Subcontracts to maintain records to verify DBE participation as set forth in the Proposal and as modified during the term of the Contract. Such records shall show the name and business address of each DBE participating in the Contract, including DBE firms participating through Subcontracts, and the total dollar amount actually paid to each DBE and the date of payment.

**(b) SUBCONTRACTOR PAYMENT MONTHLY PROGRESS REPORT** - Design-Builder shall submit to Port a Subcontractor Payment Monthly Progress Report documenting Design-Builder's payments to all its Subcontractors and Suppliers, regardless of their tier or UDBE status, within ten days after receiving payment from Port until final payment is made. Design-Builder shall submit the Subcontractor Payment Monthly Progress Report in the form of Attachment A hereto.

Port will review the Subcontractor Payment Monthly Progress Report to monitor and determine whether the utilization of UDBE firms is consistent with the commitment of Design-Builder, as stated in its Proposal.

If it is determined that Design-Builder's UDBE utilization during performance of the Contract is not consistent with the commitment thereto, Design-Builder will be requested, in writing, to submit further evidence of its good faith efforts to meet the goal. Design-Builder shall be given ten Working Days to submit this documentation. Failure to respond shall place Design-Builder in breach, subject to sanctions as provided herein.

**(c) SUMMARY OF SUBCONTRACTS AWARDED** - Design-Builder shall submit to Port a report titled Summary of Subcontracts Awarded on a monthly basis, which report shall include the firm name, DBE certification number and expiration date (if applicable), address, phone number, contact person, amount of the Subcontract, description of work and length of the Subcontract for every Subcontract awarded prior to and during the reporting month.

Port will review the Summary of Subcontracts Awarded report to monitor and determine whether the utilization of UDBE firms is consistent with the commitment of Design-Builder, as stated in its Proposal.

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**(d) UDBE WORK AND PAYMENT SCHEDULE** - Not later than the first quarter following NTP1, Design-Builder shall submit to Port a report titled UDBE Work and Payment Schedule, which shall identify the UDBE firms Design-Builder has already procured and expects to procure during the next quarter, the amount of payments expected to be made to these UDBEs, and the percentage of each of these UDBE firm's contract that will be completed each month. The UDBE Work and Payment Schedule shall be updated every quarter.

During the three months following Design-Builder's submittal of each UDBE Work and Payment Schedule, Port will review the schedule against the Subcontractor Payment Monthly Progress Report and Summary of Contracts Awarded to determine if Design-Builder is not meeting the UDBE Work and Payment Schedule. If Design-Builder is not meeting the UDBE Work and Payment Schedule, Port will notify Design-Builder of the need for correction of UDBE participation levels to meet the UDBE Work and Payment Schedule by the next quarter. Within 60 Days following such notice, Port will evaluate whether Design-Builder has corrected UDBE participation deficiencies to meet the UDBE Work and Payment Schedule. If over the course of the Project such deficiencies are not corrected and Design-Builder is unable to show it made good faith efforts to do so, Port may impose liquidated damages in accordance with Article Q.

**(e) DBE FINAL REPORT** – Design-Builder shall submit to Port a DBE Final Report with the Request for Final Payment. The DBE Final Report shall consist of:

- (1) A Report listing all Subcontractors and Suppliers and DBE (including UDBE) activity (work performed) on the Contract; and
- (2) A Good Faith Efforts Documentation Form covering the entire Contract term if the UDBE goal has not been met for the Contract.

Port shall evaluate the DBE Final Report and make a determination as to whether Design-Builder made good faith efforts to meet the UDBE goal. Port shall issue a final report with its determination on Design-Builder's good faith efforts no later than 60 Days following Design-Builder's submission of the DBE Final Report.

#### **S. DBE CERTIFICATION STATUS**

If a DBE Subcontractor or Supplier is decertified during the term of the Contract, the decertified firm shall notify Design-Builder in writing with the date of decertification. If a Subcontractor or Supplier becomes a certified DBE during the term of the Contract, the Subcontractor or Supplier shall notify Design-Builder in writing with the date of certification. Design-Builder shall furnish the written documentation to Port.

Within 90 Days from Final Acceptance, Design-Builder shall sign, certify and submit to Port Form CEM-2403(F) (Disadvantaged Business Enterprises (DBE) Certification Status Change), indicating the certification status of DBE firms involved in the Project.

**Attachment A**  
**Subcontractor Payment Monthly Progress Report**

(Month Ending On \_\_\_\_\_)

The prime contractor to submit to the Engineer a monthly report of payments to its subcontractors. This applies to all tiers of subcontracting. Monthly updates are to be submitted on the form and provided to the resident engineer overseeing the Contract.

Business name and address of the contractor making payment.

POLB  
 CONTRACT  
 NUMBER

	UDBE (Y or N)	UDBE Commitment	Date invoiced by subcontractor	Amount Invoiced by Subcontractor	Date Subcontractor was Paid	Amount Paid for Work or Services	Amount Paid for Supplies	Amount Retained	Total Invoiced All Months	Total Paid All Months
Subcontractor name:										
Total subcontractor amount:										
\$										
Subcontractor name:										
Total subcontractor amount:										
\$										
Subcontractor name:										
Total subcontractor amount:										
\$										
Subcontractor name:										
Total subcontractor amount:										
\$										

Signature of authorized representative of the contractor:  
 Title of person signing:  
 Date Submitted:

The contractor attests that the information provided is accurate.