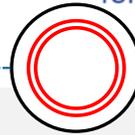




# New Jersey Department of Transportation Division of Civil Rights and Affirmative Action

the bridge to success

SUPPORTIVE SERVICES PROGRAM  
for Disadvantaged Business Enterprises



## Commercially Useful Function

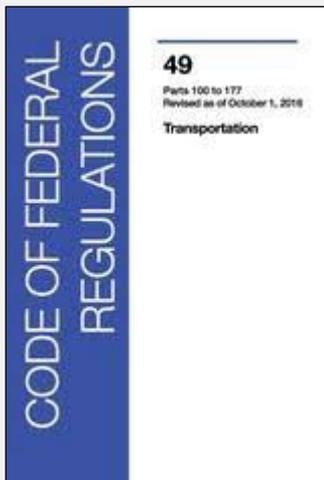


# DBE Program Regulations



## Code of Federal Regulations – Title 49: Transportation

### Part 26 - Participation By Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs (49 CFR Part 26)



These regulations apply to recipients of:

- Federal-aid highway funds
- Federal transit funds
- Airport funds



# Counting Participation Toward DBE Goal



DBEs generally perform work on a contract either as a prime or subcontractor, trucker, regular dealer, manufacturer or service provider.

Only the value of work actually performed by the DBE is counted toward the DBE goal.  
49 CFR 26.55

1. Work performed by DBEs own forces
  - Cost of supplies and materials obtained by the DBE for the work of the contract.
    - Supplies purchased or equipment leased by the DBE;
    - **Supplies or equipment purchased or leased from the prime contractor or its affiliates does not count toward DBE goal**
2. Fees and commissions charged by a DBE firm for providing a bona fide service provided it is determined that the fee is fair, reasonable and not excessive as compared with fees allowed for similar services.
  - i.e. professional, technical, consultant, or managerial services,
  - i.e. providing bonds or insurance specifically required for the performance of a DOT-assisted contract provided

# Counting Participation Toward DBE Goal



When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

When a DBE performs as a participant in a joint venture, the portion of the work clearly defined in the contract that the DBE performs with its own forces is counted toward DBE goals.

3. Expenditures to a DBE contractor are counted **only if the DBE is performing a Commercially Useful Function (CUF) on the contract.** 49 CFR 26.55(c)

# Commercially Useful Function



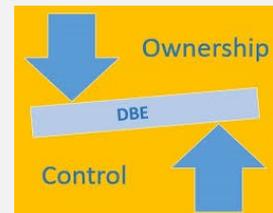
Verifies that every DBE firm providing services on the project is performing the work they were hired for, and that work is counting towards DBE contract goal attainment set forth in the project.

**CUF** is obtained when a DBE firm:

1. is responsible for execution of a distinct element of the work of a contract
  2. is carrying out its responsibility by actually performing, managing & supervising the work involved.
- CUF  $\neq$  a DBE whose role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation.

To determine whether a DBE subcontractor is performing a CUF, five (5) distinct operations are considered:

- management
- materials
- workforce
- performance
- equipment





## CUF EVALUATION FACTORS – Does the DBE?

### Management

- Schedule work operations
- Receive quotes, orders equipment & materials
- Prepare & submit payrolls
- Hire/fire employees
- Make operational & managerial decisions
- Supervise daily operations (owner/ knowledgeable full-time Superintendent)

### Workforce

- Keep a regular workforce
- Have employees under firm's control.
- Share employees with non-DBE/SBE firms
- Have responsibility for payroll & labor compliance of employees on contract
- Perform at least 30% of total cost of contract with own workforce.

### Equipment

- Use equipment (own/leased) - NOT that of prime, or leased from prime
- Operate equipment under DBE's control
- Lease specialized equipment, that is consistent with industry practice.
- Control & operate specialized equipment with an operator they provide

### Materials

- Negotiate price, arrange delivery, take ownership & pay for the materials & supplies itself
- Prepare estimate, order material - determine quantity & is responsible for quality
- Materials, supplies, equipment purchased/leased from prime is not counted toward contract goal.

### Performance

- Have responsibility for performance, management & supervision of a distinct element of work.

# Commercially Useful Function



## Management

- Supervise daily operations (owner or skilled & knowledgeable superintendent employed by DBE)
- Scheduling work operations
- Ordering equipment & materials
- Preparing & submitting certified payrolls
- Hiring & firing employees

## Red Flags



- DBE owner or superintendent provides little or no on-site supervision of the work.
- DBE's superintendent is not a regular employee of the firm or supervision is performed by key personnel associated with the prime contractor, or another business.
- Key staff and personnel are not under the control of the DBE.
- The DBE owner is not aware of the status of the work or the performance of the business.
- Inquiries by NJDOT or Federal Highway Administration (FHWA) representatives are answered by the prime contractor.

# Commercially Useful Function



## Workforce

- No sharing of employees with non-DBE contractors, particularly the prime contractor.
- Perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force.
- Must not subcontract a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved

## Red Flags



- Supervision of DBE employees by another contractor.
- Actual work is performed by personnel normally employed by the prime contractor or another business.
- Employees are paid by the DBE and the prime contractor.

# Commercially Useful Function



## Equipment

- May lease specialized equipment from a contractor, but not the prime contractor, if it is consistent with normal industry practices & at rates competitive for the area.
- Lease must specify the terms of the agreement.
- Lease must be for a short period of time & involve a specialized piece of equipment to be used at the job site.
- Lease may include an operator for the equipment who remains on the lessor's payroll if this is a generally acceptable practice within the industry.
- Operation of the equipment must be subject to the full control of the DBE.

## Red Flags



- Equipment used by the DBE belongs to the prime contractor or another contractor with no formal lease agreement.
- The equipment signs and markings cover another owner's identity, usually through the use of magnetic signs.
- A DBE trucking business uses trucks owned by the prime contractor

# Commercially Useful Function



## Materials

- For DBE contractors (furnish and install) to receive credit for supplying materials, they **must** perform **all** of the following four functions:
  - (1) negotiate price;
  - (2) determine quality and quantity;
  - (3) order the materials; and
  - (4) pay for the material itself
- If they do not, they aren't performing a CUF with respect to obtaining the materials and the cost of the materials may not be counted toward the DBE goal.
- Invoices for the material should show the payer as the DBE.

## Red Flags



- Materials for the DBE are ordered, or paid for, by the prime contractor;
- Two party checks or joint checks are sent by the prime to the supplier or manufacturer, instead of sent by the DBE;
- Materials or supplies necessary for the DBE's performance are delivered to, billed to, or paid by another business;
- Materials are delivered to the jobsite by a party separate from the DBE;
- Payment for materials is deducted by the prime contractor from payments to the DBE for work performed;
- A DBE prime contractor only purchases materials while performing little or no work.

# Commercially Useful Function



## Performance

- DBE must be responsible for the performance, management and supervision of a distinct element of the work, in accordance with normal industry practice (except where such practices are inconsistent with the DBE regulations)

## Red Flags



- Work is being done jointly by the DBE and another contractor;
- The work to be performed by the DBE is outside of the DBE's known experience or capability;
- Any portion of the work designated to be performed by a DBE subcontractor is performed by the prime contractor or any other firm;
- The DBE is working without a subcontract approved by the department, except in the case of trucking;

# Commercially Useful Function

## Red Flags cont'd. (Performance)



- A DBE prime contractor subcontracts more than 50% of the contract value;
- The agreement between the prime contractor and DBE artificially inflates the DBE participation;
- An agreement that erodes the ownership, control or independence of the DBE subcontractor;
- A DBE works for only one prime contractor, or a large portion of the firm's contracts are with one contractor;
- The volume of work is beyond the capacity of the DBE.

## What is Normal Industry Practice?

- Determining if the DBE is performing the work or services in the manner normally performed by all contractors—DBEs and non-DBEs.
- Even if a DBE is performing pursuant to normal industry practices, if those practices, in fact, erode the ability of the DBE to control its work and remain independent, the practice may affect how much can be credited toward the DBE goal and may raise questions about the DBE eligibility.



## Documentation Used to Evaluate CUF



Subcontracts/Written Contracts

Leases

Equipment Titles of Ownership

Equipment Leases/Rental Agreements

Purchase Orders

Invoices

Shipping tickets

Delivery tickets

Material/Supply Agreements

Invoices of materials/supplies

Hauling tickets

Bill of Lading

Daily Inspection Reports and Project Diaries

Certified Payrolls & payroll records

Copies of cancelled checks

# Enforcement Actions



Enforcement action may be taken under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action.

Suspension or debarment proceedings may be made against a firm under 2 CFR parts 180 and 1200 when:

- A firm not meeting the eligibility criteria attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty.
- A firm that, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria.



# False or Fraudulent Statements



Any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program or otherwise violates applicable Federal statutes may be referred to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law.





# Questions?



**If you have questions concerning Commercially Useful Function (CUF), please contact the New Jersey Department of Transportation, Division of Civil Rights and Affirmative Action's Contract Compliance Unit.**

## **Contract Compliance Unit Contact Information**

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