COMMERCIALLY USEFUL FUNCTION (CUF)

A DBE performs a commercially useful function when they perform and execute their subcontract with their own equipment, supervision and workforce.

A Commercially Useful Function (CUF), (NDOT Form 052-073) must be prepared by the Resident Engineer for each DBE working on federally funded construction contracts. This includes contractors, subcontractors, service providers, owner operators, truckers, regular dealers and manufacturers. The CUF review should be conducted when the Disadvantaged Business Enterprise (DBE) first begins work, throughout the course of the contract while the DBE is on site, and a final CUF at the completion of the DBE's portion of work. For multi-year contracts, the CUF must be completed as stated above for each year the DBE performs work on the contract. If the DBE is only going to be on site for a short time, then a CUF may only be required when the DBE first begins work. If the DBE is performing more than one operation of work (electrical, guardrail, pipe work, etc.), then a separate CUF form will be required for each type of work. For additional guidance, contact Contract Compliance. Upon completion of the CUF form, forward a copy to FHWA and a copy to Contract Compliance for their review.

The form is available at www.nevadadbe.com/website/contract-compliance.php. NDOT employees can also access this form on Sharepoint under Civil Rights - External.

If the Resident Engineer determines that a DBE is not performing a commercially useful function, he will notify Contract Compliance who will notify the prime contractor in writing, specifying those actions which violate the terms of the contract.

At the request of the Resident Engineer, Contract Compliance will investigate the non-performing DBE to determine if their job performance contains a pattern of relationships with non-minority businesses that brings the DBE's independence and control, and therefore its eligibility to participate, into question.

Additional information and guidance:

- NDOT Standard Specifications, Subsection 102.16
- Disadvantaged Business Enterprise Program 2012
- FHWA Tips on Evaluating a Commercially Useful Function
- 29 CFR 26.55

COMMERCIALLY USEFUL FUNCTION (CUF) PROJECT SITE REVIEW

Rev. 08/15

Per 49 CFR 26.55, "A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved… A DBE does not perform a CUF if its 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…" This form is for the purposes of reviewing DBEs for compliance with the CUF requirements for credit.

Resident Engineer's will perform CUF reviews for every DBE working on federally funded construction projects. The review should be conducted when the DBE first begins work. Monitor compliance through the course of the project.

Contract No.: 4000	**Resident Engineer:** Joe Resident
County(ies): Washoe	**NDOT Reviewer:** Joe Resident
Prime Contractor: Q Construction	**Reviewer Title:** Resident Engineer
DBE Superintendent / Foreman: Mike Michaels	**Review Date:** 1-5-17
DBE Start Date: 1-1-17	**DBE Anticipated Completion Date:** June, 2018

DBE Name: Diamond Asphalt

Provide a brief description of the DBE's scope of work: Haul liquid asphalt to the hotplant from the supplier.

		Yes	No
Supervision			
Does the DBE have a superintendent / foreman on project?		☐	☒
Does the superintendent / foreman work exclusively for the DBE?	SEE COMMENTS BELOW	☐	☐
If not, who does he / she work for?			
Who does the superintendent / foreman report to?			
Employees			
Does the DBE have employees on the job?		☐	☒
Do they appear on DBE's payroll?		☐	☐
If not, why?	SEE COMMENTS BELOW		
Do they appear on prime contractor's payroll?		☐	☐
Who assigns work to them?			
Performance			
Has any other contractor performed any of the DBE's work?	SEE COMMENTS BELOW	☐	☒
If yes, who and what work items?			
Equipment			
Whose name appears on the equipment?			
Does DBE own or lease equipment?	SEE COMMENTS BELOW	☒	☐
Does DBE use prime contractor's equipment?		☐	☒
CUF			
Does it appear the DBE is performing a CUF?		☒	☐
If DBE is not performing a CUF, contact Contract Compliance			

EXAMPLE

COMMENTS: Diamond Asphalt is not delivering to the project. Diamond Asphalt is not submitting certified payrolls.

Joe Resident
Reviewer (signature)

Joe Resident
Resident Engineer (signature)

NDOT 052-073
Rev. 06/15

Distribution: Original-Contract Compliance, FHWA, Resident Engineer

COMMERCIALLY USEFUL FUNCTION (CUF) PROJECT SITE REVIEW

Rev. 08/15

Per 49 CFR 26.55, "A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved… A DBE does not perform a CUF if its 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…" This form is for the purposes of reviewing DBEs for compliance with the CUF requirements for credit.

Resident Engineer's will perform CUF reviews for every DBE working on federally funded construction projects. The review should be conducted when the DBE first begins work. Monitor compliance through the course of the project.

Contract No.: 4001	**Resident Engineer:** Joe Resident
County(ies): Nye	**NDOT Reviewer:** Joe Resident
Prime Contractor: LLL Paving Corporation	**Reviewer Title:** Resident Engineer
DBE Superintendent / Foreman: Jim Jones	**Review Date:** 2-10-17
DBE Start Date: 2-1-17	**DBE Anticipated Completion Date:** December, 2017

DBE Name: Simple Construction Supplies, Inc.

Provide a brief description of the DBE's scope of work: Simple Construction Supplies, Inc. is a construction supply company that will be supplying epoxy coated dowels and the associated materials for the dowel bar retrofit and concrete slab replacement on Contract 4001.

	Yes	No
Supervision		
Does the DBE have a superintendent / foreman on project?	☒	☐
Does the superintendent / foreman work exclusively for the DBE? **This is a supplier**	☒	☐
If not, who does he / she work for?		
Who does the superintendent / foreman report to?		
Employees		
Does the DBE have employees on the job?	☐	☒
Do they appear on DBE's payroll?	☐	☒
If not, why?		
Do they appear on prime contractor's payroll?	☐	☒
Who assigns work to them?		
Performance		
Has any other contractor performed any of the DBE's work?	☐	☒
If yes, who and what work items?		
Equipment		
Whose name appears on the equipment? **This is a supplier**		
Does DBE own or lease equipment?	☒	☐
Does DBE use prime contractor's equipment?	☐	☒
CUF		
Does it appear the DBE is performing a CUF?	☒	☐
If DBE is not performing a CUF, contact Contract Compliance		

EXAMPLE

COMMENTS: Simple Construction Supplies, Inc. is a supply company that supplies a wide variety of materials for construction related activities. They are supplying epoxy coated dowels and associated hardware items for the dowel bar retrofit and slab replacement portions of this contract. As a supplier we can only track their DBE status through performance. We have received material certifications on company letterhead and verified the deliveries of those materials in the field.

Joe Resident
Reviewer (signature)

Joe Resident
Resident Engineer (signature)

NDOT 052-073
Rev. 06/15

Distribution: Original-Contract Compliance, FHWA, Resident Engineer

COMMERCIALLY USEFUL FUNCTION (CUF) PROJECT SITE REVIEW

Rev. 08/15

Per 49 CFR 26.55, "A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved… A DBE does not perform a CUF if its 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…" This form is for the purposes of reviewing DBEs for compliance with the CUF requirements for credit.

Resident Engineer's will perform CUF reviews for every DBE working on federally funded construction projects. The review should be conducted when the DBE first begins work. Monitor compliance through the course of the project.

Contract No.: 4002	**Resident Engineer:** Joe Resident
County(ies): Elko	**NDOT Reviewer:** Joe Resident
Prime Contractor: HB Paving Corporation	**Reviewer Title:** Resident Engineer
DBE Superintendent / Foreman: Larry McCoy	**Review Date:** 4-15-17
DBE Start Date: 3-1-17	**DBE Anticipated Completion Date:** October, 2018

DBE Name: Ace Trucking

Provide a brief description of the DBE's scope of work: Ace Trucking will be providing trucking service for this contract. They will be hauling materials required for a variety of construction activities.

	Yes	No
Supervision		
Does the DBE have a superintendent / foreman on project? **Linda Barr**	☒	☐
Does the superintendent / foreman work exclusively for the DBE? **She is the owner**	☒	☐
If not, who does he / she work for?		
Who does the superintendent / foreman report to? **She is the Owner**		
Employees		
Does the DBE have employees on the job?	☐	☒
Do they appear on DBE's payroll? **Ace is in LCP as a formality only. We are not tracking**	☐	☒
If not, why? **certified payrolls for this company. (DBE status ver.)**		
Do they appear on prime contractor's payroll?	☐	☒
Who assigns work to them? **Linda Barr**		
Performance		
Has any other contractor performed any of the DBE's work? **HB Paving, TLB Trucking, etc.**	☒	☐
If yes, who and what work items? **Hauling of various construction materials**		
Equipment		
Whose name appears on the equipment? **Various contractors / trucking companies**		
Does DBE own or lease equipment?	☒	☐
Does DBE use prime contractor's equipment?	☐	☒
CUF		
Does it appear the DBE is performing a CUF?	☐	☒
If DBE is not performing a CUF, contact Contract Compliance		

EXAMPLE

COMMENTS: Ace Trucking has both long term lease agreements as well as owner / operator agreements on this contract. We have reviewed those documents and they are on file for contract compliance review. The trucks we have seen recently do not fall under the umbrella of the documentation on file. It appears that Ace Trucking cannot perform the required tasks and is not on site performing a commercially useful function.

Joe Resident
Reviewer (signature)

Joe Resident
Resident Engineer (signature)

NDOT 052-073
Rev. 06/15

Distribution: Original-Contract Compliance, FHWA, Resident Engineer

COMMERCIALLY USEFUL FUNCTION (CUF) PROJECT SITE REVIEW

Rev. 08/15

Per 49 CFR 26.55, "A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved… A DBE does not perform a CUF if its 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…" This form is for the purposes of reviewing DBEs for compliance with the CUF requirements for credit.

Resident Engineer's will perform CUF reviews for every DBE working on federally funded construction projects. The review should be conducted when the DBE first begins work. Monitor compliance through the course of the project.

Contract No.: 4002	**Resident Engineer:** Joe Resident
County(ies): Elko	**NDOT Reviewer:** Joe Resident
Prime Contractor: HB Paving Corporation	**Reviewer Title:** Resident Engineer
DBE Superintendent / Foreman: Larry McCoy	**Review Date:** 3-15-18
DBE Start Date: 2-11-18	**DBE Anticipated Completion Date:** October, 2018

DBE Name: Ace Trucking

Provide a brief description of the DBE's scope of work: Ace Trucking will be providing trucking service for this contract. They will be hauling materials required for a variety of construction activities.

	Yes	No
Supervision		
Does the DBE have a superintendent / foreman on project? **Linda Barr**	☒	☐
Does the superintendent / foreman work exclusively for the DBE? **She is the owner**	☒	☐
If not, who does he / she work for?		
Who does the superintendent / foreman report to? **She is the Owner**		
Employees		
Does the DBE have employees on the job?	☐	☒
Do they appear on DBE's payroll? **Ace is in LCP as a formality only. We are not tracking certified payrolls for this company. (DBE status ver.)**	☐	☒
If not, why?		
Do they appear on prime contractor's payroll?	☐	☒
Who assigns work to them? **Linda Barr**		
Performance		
Has any other contractor performed any of the DBE's work? **HB Paving, TLB Trucking, etc.**	☒	☐
If yes, who and what work items? **Hauling of various construction materials**		
Equipment		
Whose name appears on the equipment? **Various contractors / trucking companies**		
Does DBE own or lease equipment?	☒	☐
Does DBE use prime contractor's equipment?	☐	☒
CUF		
Does it appear the DBE is performing a CUF?	☐	☒
If DBE is not performing a CUF, contact Contract Compliance		

EXAMPLE

COMMENTS: Ace Trucking has both long term lease agreements as well as owner / operator agreements on this contract. We have reviewed those documents and they are on file for contract compliance review. The trucks we have seen recently do not fall under the umbrella of the documentation on file. It appears that Ace Trucking cannot perform the required tasks and is not on site performing a commercially useful function.

Joe Resident
Reviewer (signature)

Joe Resident
Resident Engineer (signature)

NDOT 052-073
Rev. 06/15

Distribution: Original-Contract Compliance, FHWA, Resident Engineer

COMMERCIALLY USEFUL FUNCTION (CUF) PROJECT SITE REVIEW

Rev. 08/15

Per 49 CFR 26.55, "A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved… A DBE does not perform a CUF if its 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…" This form is for the purposes of reviewing DBEs for compliance with the CUF requirements for credit.

Resident Engineer's will perform CUF reviews for every DBE working on federally funded construction projects. The review should be conducted when the DBE first begins work. Monitor compliance through the course of the project.

Contract No.: 4003	**Resident Engineer:** Joe Resident
County(ies): Lyon	**NDOT Reviewer:** Joe Resident
Prime Contractor: Jay Construction	**Reviewer Title:** Resident Engineer
DBE Superintendent / Foreman: Debbie Jones	**Review Date:** 6-22-17
DBE Start Date: 6-5-17	**DBE Anticipated Completion Date:** October, 2017

DBE Name: Barricades and Signs of Nevada

Provide a brief description of the DBE's scope of work: Barricades and Signs of Nevada is providing temporary and permanent striping services. They are also replacing guardrail.

	Yes	No
Supervision		
Does the DBE have a superintendent / foreman on project? **Dave Budman**	☒	☐
Does the superintendent / foreman work exclusively for the DBE? **Yes**	☒	☐
If not, who does he / she work for?		
Who does the superintendent / foreman report to? **Barricades and Signs of Nevada**		
Employees		
Does the DBE have employees on the job? **Yes**	☒	☐
Do they appear on DBE's payroll? **Yes**	☒	☐
If not, why?		
Do they appear on prime contractor's payroll? **No**	☐	☒
Who assigns work to them? **Superintendent / Foreman**		
Performance		
Has any other contractor performed any of the DBE's work?	☐	☒
If yes, who and what work items?		
Equipment		
Whose name appears on the equipment? **Barricades and Signs of Nevada**		
Does DBE own or lease equipment?	☒	☐
Does DBE use prime contractor's equipment?	☐	☒
CUF		
Does it appear the DBE is performing a CUF?	☒	☐
If DBE is not performing a CUF, contact Contract Compliance		

EXAMPLE

COMMENTS:

Joe Resident
Reviewer (signature)

Joe Resident
Resident Engineer (signature)

NDOT 052-073
Rev. 06/15

Distribution: Original-Contract Compliance, FHWA, Resident Engineer

CUF DETERMINANTS

Rev. 08/15

If any Red Flag Conditions are identified, contact Contract Compliance

PERFORMING

- DBE must be responsible for performing its own work on the project
- The work listed in the subcontract must be performed by the DBE with its own workforce
- The DBE keeps a regular workforce and has its own employees
- The DBE is utilizing its own equipment
- Operation of the equipment must be subject to the full control of the DBE

RED FLAGS

- A portion of the DBE's work being done by the prime contractor or jointly with another contractor
- Employee working for both the DBE and the prime contractor
- Equipment used by DBE belongs to the prime contractor or another contractor with no formal lease agreement
- Equipment signs and markings cover another contractor's identity
- Equipment has another contractor's name on it

RECORDS / DOCUMENTS

- Subcontract agreement or purchase order
- Equipment ownership, rental or lease documents
- Certified payrolls

MATERIALS (for material credit)

- DBE is responsible for the delivery of the materials
- DBE is ordering the material and invoices indicate that DBE is the customer
- Material invoices indicate that DBE owner or superintendent is the contact person

RED FLAGS

- Materials for DBE credited work are delivered by the prime contractor
- Materials are ordered, billed to and / or paid by the prime contractor
- Invoices do not indicate that DBE is the customer
- Prime contractor's employee is listed as the contact person on invoices
- Materials come from prime contractor's stockpiles

RECORDS / DOCUMENTS

- Invoices
- Haul tickets or bill of ladings
- Material on hand documentation
- Joint check agreement
- Cancelled checks

SUPERVISING

- DBE supervisor is a full-time employee of the DBE
- Employees are being supervised by DBE supervisor
- DBE is scheduling work operations

RED FLAGS

- DBE's employees are being supervised by prime contractor or another contractor
- DBE provides little or no supervision of work
- DBE supervisor is not a full-time employee of the DBE

RECORDS / DOCUMENTS

- Certified payrolls
- Documented communication with DBE owner or superintendent

NDOT CIVIL RIGHTS PROGRAM

CONTRACT COMPLIANCE

Welcome to information about Nevada Department of Transportation Contract Compliance. Below you will find forms and information that you will need to administer your current contracts, as well as a link to identify upcoming contracts. The Contract Compliance Office is here to help. If you have questions or need assistance please contact us at (775) 888-7497.

Our mission in the Contract Compliance Office is to provide you the information you need to comply with federal and state laws, rules and regulations as they pertain to highway construction contracts. The staff of the Contract Compliance Office hopes you will take advantage of this resource.

Please refer to NRS Chapter 338 and Chapter 408 for regulations governing our work. Commonly referred to sections include:

- Prevailing Wages, NRS 338.010 to 338.090
- Payment and Retention, NRS 408.383

FORMS

Remember, if you ask first we can all avoid a problem down the road.

1. Certification Regarding Lobbying (Federally Funded Projects) .pdf
2. Commercially Useful Function Checklist, Rev. 06/15.pdf
3. Claim For Wages .pdf
4. Contract Compliance Review Checklist .doc | .pdf
5. Contractor/Subcontractor Registration .pdf
6. Contractor's Monthly Report of Payments to Subcontractors .xls | .pdf
7. Employee Interview, Rev. 08/15 .pdf
8. Federal-Aid Highway Construction Contractors Annual EEO Report (FHWA-1391).xls | .pdf
9. Federal-Aid Highway Construction Contractors Annual EEO Report - LCPtracker Instructions (1391) .pdf
10. Fringe Benefit Itemized Contributions-Deductions Statement .xls | .pdf
11. Inclusion of Contract (Federally Funded), Rev. 04/15 .pdf
12. Inclusion of Contract (State Funded), Rev. 08/15 .pdf
13. Non-Performance Payroll Report .pdf | .doc
14. Payroll Tracking Sheet .doc | .pdf
15. Request to Sublet, Rev. 06/15 .pdf
16. Request to Utilize Service Provider (for non-bid item work, excluding trucking), Rev. 06/15 .pdf
17. Request to Utilize Service Provider (for trucking), Rev. 06/15 .pdf
18. Supplemental Information/Construction Workers .doc | .pdf
19. Weekly Wage and Hour Report of Public Work Contractors Page 1 of 2 .pdf
20. Weekly Wage and Hour Report of Public Work Contractors Page 2 of 2 .pdf

NEVADA DEPARTMENT OF TRANSPORTATION
1263 South Stewart Street, Carson CityNevada89712
Telephone: 775-888-7000TTY: 1-855-878-NDOT (6368)
Email: info@dot.state.nv.us Visit NV.gov

Brian Sandoval - Governor
Rudy Malfabon, P.E. - Director

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NDOT Sharepoint Home

Rev. 08/15

NDOT Sharepoint www.NevadaDot.com Nevada DOT 511 Search this site

Home

For technical Sharepoint problems, please contact the HelpDesk - HelpDesk@dot.state.nv.us

Web Site Portals

- Live Streaming Meeting Video (Division Head Meeting/Muffins with Malfabon/ Employee Meet and Greet Event)
- Application Launch Pad
- Web Mail
- Business Intelligence
- iPD, Integrated Project Development (E Bidding)
- EBidding Portal Intranet
- EPATS (E- Procurement and Tracking System)
- PSAMS Dashboard - NDOT Project Status
- Facts about PSAMS Dashboard
- eSTIP (electronic Statewide Transportation Improvement Program)
- IRWIN
- Research Library Catalog – Transportation Publications and More
- Strategic Data Plan Group
- Transportation Asset Management Plan
- NDOT Photo Catalog/PowerPoint Templates/Logos
- NDOT Secure Meeting Portal
- Milepost Index Report
- RaLF (Route and Location Finder)
- Fuel and Gate Access
- State Maintained Highways Descriptions Index & Maps
- NDOT - Emergency Operations Plan
- Financial Management Project Reports
- MMS System - *password required*

Division Links

Division Site	Div #
Accounting	060
Administrative Services	070
Audit Services	007
Civil Rights - External	052
Civil Rights – Internal	005
Construction	040
Design Division	010
Director's Office	002
District 1	101
District 2	201
District 3	301
Environmental Services	013
Equipment Division	737
Financial Management Budget	053
Flight Operations	059
Human Resources	076
Information Technology	067
Location	017
Maintenance and Asset Management	050
Materials Division	020
Office Managers	000
Performance Analysis	006
Program Development	804
Project Management	015
Public Information Office	003
Research	803

The Civil Rights & Contract Compliance Sharepoint

A collaborative workspace providing the information and tools NDOT departments need to administer civil rights and contract compliance on our construction projects. The site also serves as a way to share ideas for process improvements.

Our Mission . . .

To foster understanding of NDOT compliance responsibilities under Nevada and Federal laws ensuring fairness in NDOT contracting and compliance with Title VI, ADA, DBE and labor laws. We do this by providing outstanding service to our internal and external customers.

What are You Looking For?

Contract Compliance	Civil Rights	ADA Compliance

Procedures and Tools for:
• DBE Goal-Setting
  ◦ Construction
  ◦ LPA
  ◦ Professional Services
• Using LCP Tracker
• Wage & Labor
• Subcontracting Procedures
	Detailed Information on:
	• Title VI
	• DBE Program
	• ADA
	• SBE Program
	• LEP Program
		Information and Tools for:
		• ADA/Title II & 504

Links

Contacts

Forms

Announcements

Calendar

Carson City, NV
At 2:35 PM PDT
Clear
90°F
W 14 G 24 MPH
WeatherForYou.com

August, 2015 (August, 2015)

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
27	28	29	30	31	1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

Forms

All Documents Find a file

Name
Certification Regarding Lobbying (Federally Funded Projects)
Commercially Useful Function Checklist, Rev. 06-15
Contract Compliance Review Checklist
Contractor's Monthly Report of Payments to Subcontractors
Employee Interview, Rev. 08-15
Federal-Aid Highway Construction Contractors Annual EEO Report - LCPtracker Instructions for FHWA-1391
Federal-Aid Highway Construction Contractors Annual EEO Report (FHWA-1391)
Fringe Benefit Itemized Contributions-Deductions Statement
Inclusion of Contract (Federally Funded), Rev. 04-15
Inclusion of Contract (State Funded), Rev. 08-15
Non-Performance Payroll Report
Payroll Tracking Sheet
Request to Sublet, Rev. 06-15
Request to Utilize Service Provider (for non-bid item work, excluding trucking), Rev. 06-15
Request to Utilize Service Provider (for trucking), Rev. 06-15
Weekly Wage and Hour Report of Public Work Contractors Page 1 of 2
Weekly Wage and Hour Report of Public Work Contractors Page 2 of 2

COMMERCIALLY USEFUL FUNCTION (CUF) PROJECT SITE REVIEW

Rev. 08/15

Per 49 CFR 26.55, "A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved... A DBE does not perform a CUF if its 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..." This form is for the purposes of reviewing DBEs for compliance with the CUF requirements for credit.

Resident Engineer's will perform CUF reviews for every DBE working on federally funded construction projects. The review should be conducted when the DBE first begins work. Monitor compliance through the course of the project.

Contract No.:	**Resident Engineer:**
County(ies):	**NDOT Reviewer:**
Prime Contractor:	**Reviewer Title:**
DBE Superintendent / Foreman:	**Review Date:**
DBE Start Date:	**DBE Anticipated Completion Date:**

DBE Name:

Provide a brief description of the DBE's scope of work:

	Yes	No
Supervision		
Does the DBE have a superintendent / foreman on project?	☐	☐
Does the superintendent / foreman work exclusively for the DBE?	☐	☐
If not, who does he / she work for?		
Who does the superintendent / foreman report to?		
Employees		
Does the DBE have employees on the job?	☐	☐
Do they appear on DBE's payroll?	☐	☐
If not, why?		
Do they appear on prime contractor's payroll?	☐	☐
Who assigns work to them?		
Performance		
Has any other contractor performed any of the DBE's work?	☐	☐
If yes, who and what work items?		
Equipment		
Whose name appears on the equipment?		
Does DBE own or lease equipment?	☐	☐
Does DBE use prime contractor's equipment?	☐	☐
CUF		
Does it appear the DBE is performing a CUF?	☐	☐
If DBE is not performing a CUF, contact Contract Compliance		

COMMENTS:

Reviewer (signature)

Resident Engineer (signature)

NDOT 052-073
Rev. 06/15

Distribution: Original-Contract Compliance, FHWA, Resident Engineer

CUF DETERMINANTS

Rev. 08/15

If any Red Flag Conditions are identified, contact Contract Compliance

PERFORMING

- DBE must be responsible for performing its own work on the project
- The work listed in the subcontract must be performed by the DBE with its own workforce
- The DBE keeps a regular workforce and has its own employees
- The DBE is utilizing its own equipment
- Operation of the equipment must be subject to the full control of the DBE

RED FLAGS

- A portion of the DBE's work being done by the prime contractor or jointly with another contractor
- Employee working for both the DBE and the prime contractor
- Equipment used by DBE belongs to the prime contractor or another contractor with no formal lease agreement
- Equipment signs and markings cover another contractor's identity
- Equipment has another contractor's name on it

RECORDS / DOCUMENTS

- Subcontract agreement or purchase order
- Equipment ownership, rental or lease documents
- Certified payrolls

MATERIALS (for material credit)

- DBE is responsible for the delivery of the materials
- DBE is ordering the material and invoices indicate that DBE is the customer
- Material invoices indicate that DBE owner or superintendent is the contact person

RED FLAGS

- Materials for DBE credited work are delivered by the prime contractor
- Materials are ordered, billed to and / or paid by the prime contractor
- Invoices do not indicate that DBE is the customer
- Prime contractor's employee is listed as the contact person on invoices
- Materials come from prime contractor's stockpiles

RECORDS / DOCUMENTS

- Invoices
- Haul tickets or bill of ladings
- Material on hand documentation
- Joint check agreement
- Cancelled checks

SUPERVISING

- DBE supervisor is a full-time employee of the DBE
- Employees are being supervised by DBE supervisor
- DBE is scheduling work operations

RED FLAGS

- DBE's employees are being supervised by prime contractor or another contractor
- DBE provides little or no supervision of work
- DBE supervisor is not a full-time employee of the DBE

RECORDS / DOCUMENTS

- Certified payrolls
- Documented communication with DBE owner or superintendent

NDOT STANDARD SPECIFICATIONS, SUBSECTION 102.16

DBE AND SBE CERTIFICATION AND BIDDING REQUIREMENTS

(c) Unsatisfactory performance record as shown by past work for the Department judged from the standpoint of workmanship and progress.

(d) Uncompleted work which in the judgment of the Department might hinder or prevent the prompt completion of additional work if awarded.

(e) Failure to pay or satisfactorily settle all bills due for labor, equipment, or material on prior or existing contracts.

(f) Failure to hold a valid license of a class corresponding to the work to be done as required by the State Contractor's License Law. However, it is not required to have a Contractor's license in order to bid on Federal-aid projects as long as licensed at time of award of the contract.

(g) Failure to comply with any qualification regulations of the Department.

(h) The FHWA has debarred certain companies and individuals from participation in Federally assisted projects for periods ranging from 6 months to 3 years.

You are advised to contact the Department's Contract Compliance Office, at (775) 888-7497, for the names of the debarred companies and/or individuals before accepting and relying on any quote from any company or individual. The debarred companies or individuals will not be allowed to participate in Federally assisted projects during the period of their debarment.

While this prohibition operates to preclude them from employment as prime contractors, subcontractors, consultants or employees on Federal-Aid projects, the named corporations and individuals may still serve as materials suppliers for prime or subcontractors.

102.13 Material Guaranty. The successful bidder may be required to furnish a complete statement of the origin, composition, and manufacture of any or all materials to be used in the construction of the work together with samples, which samples may be subject to the tests provided for in these specifications to determine their quality and fitness for the work.

102.14 Combination or Conditional Bids. On certain projects bids may be submitted on more work than is desired to be awarded. Indicate the total amount desired to be accepted and the Department will determine which of the low bids on these projects, up to the final total indicated, will be accepted. This limitation will only apply to those projects on which the following statement has been included in the proposal and is properly filled in.

"We desire to disqualify all of our bids at which in combination exceed the total of $ ..... or ..... contracts and hereby authorize the Department to determine which bids shall be disqualified. Bids have been submitted on the following contract(s) .....as of this date that have not yet been awarded and are to be considered in determining if the above total amount is exceeded."

"A proposal guaranty, conforming to Subsection 102.08, in the amount of $ ..... accompanies the proposal for contract number(s) ..... or has been filed with the Department in advance."

102.15 Motor Fuel Tax Refund. It is understood and agreed that the price bid for the work to be done under the contract shall include the applicable tax on motor vehicle fuel and special fuel as required by NRS Chapters 365 and 366.

Determine if subcontractors have reported fuel consumption to the Nevada Department of Motor Vehicles and Public Safety, as required by law.

102.16 DBE and SBE Certification and Bidding Requirements. This contract is subject to Title 49, Code of Federal Regulations, Part 26. Portions of those regulations are set forth in these Standard Specifications, and those regulations in their entirety are incorporated herein by this reference.

It is the policy of the Department that Disadvantaged Business Enterprises and Small Business Enterprises as defined in 49 CFR Part 26 and the Department's Disadvantaged Business Enterprise Program shall have an equal opportunity to participate in the performance of contracts financed in whole or in part with Federal funds under this agreement. All the DBE and SBE requirements of 49 CFR Part 26 apply to this agreement.

The Contractor agrees to ensure that DBEs/SBEs have an equal opportunity to participate in the performance of contracts and subcontracts financed in whole or part with Federal funds provided under this agreement. In this regard the Contractor shall take all necessary and reasonable steps in accordance with 49 CFR Part 26 to ensure that DBEs/SBEs have an equal opportunity to compete for and perform contracts.

The Contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of U.S. Department of Transportation assisted contracts. Failure by the Contractor to carry out these requirements is a material breach of contract, which may result in the termination of this contract or such other remedy as the Department deems appropriate.

DBEs/SBEs must be certified by the Nevada Unified Certification Program (NUCP) in accordance with 49 CFR Part 26. The department is an agency member of the NUCP. A list of certified DBEs/SBEs may be obtained from the Department's website at www.nevadadbe.com.

Certification as a DBE/SBE or a DBE/SBE joint venture shall be predicated on meeting the requirements of 49 CFR Part 26 and the following:

1. The completion and submission of a Disadvantaged Business Enterprise (DBE)/Small Business Enterprise (SBE) Certification Application and all required documents.
2. The submission of any additional documentation requested by the processing Agency.
3. The submission of any additional information which the Department may require to determine the firm's eligibility to participate in the DBE/SBE program.

Applications for certification by the NUCP are available at the Department's Contract Compliance Office, 1263 S. Stewart Street, Carson City, Nevada 89712 and on the Department's website at www.nevadadbe.com.

Applicants submitting a certification application shall agree to permit the Department to audit and examine the books, records, and files of their business.

Applications for certification may be filed with the Department at anytime, however, the firm must be certified at least 5 days prior to bid opening for the project on which the firm seeks to participate to count towards any goals. The Department will process applications in an expeditious manner. The Department will submit applications to the NUCP within 90 days of receiving a completed application and all relevant reference documents.

Bidders shall be responsible for being fully informed about the requirements of the Federal DBE Regulations; particular attention is directed to the following matters:

(a) A DBE/SBE may participate as a prime Contractor, subcontractor, joint venture partner with a prime or subcontractor, or vendor of material or supplies.

(b) A DBE/SBE joint venture partner must be responsible for a clearly defined portion of the work to be performed in addition to satisfying requirements for ownership and control.

(c) A DBE/SBE must perform a commercially useful function.

(d) Credit for a DBE/SBE vendor of materials or supplies is limited to 60% of the price unless the vendor manufactures or substantially alters the goods.

When a DBE/SBE participates in a contract, expenditures toward DBE/SBE goals will only count if the DBE/SBE is performing a commercially useful function on the contract. A DBE/SBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE/SBE shall also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE/SBE is performing a commercially useful function, you shall evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE/SBE credit claimed for its performance of the work, and other relevant factors.

The value of the work actually performed by the DBE/SBE toward DBE/SBE goals will count according to the following:

1. The entire amount of that portion of a construction contract (or other contract not covered by paragraph number 2 below) that is performed by the DBE's/SBE's own forces will count. The cost of supplies and materials obtained by the DBE/SBE for the work of the contract, including supplies purchased or equipment leased by the DBE/SBE (except supplies and equipment the DBE/SBE subcontractor purchases or leases from the prime contractor or its affiliate) will count.

2. The entire amount of fees or commissions charged by a DBE/SBE 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 DOT-assisted contract, toward DBE/SBE goals, will count provided the fee is determined to be reasonable and not excessive as compared with fees customarily allowed for similar services.
3. When a DBE/SBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE/SBE goals only if the DBE/SBE subcontractor is itself a DBE/SBE. Work that a DBE/SBE subcontracts to a non-DBE/non-SBE firm does not count toward DBE/SBE goals.
4. When a DBE/SBE performs as a participant in a joint venture, 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/SBE performs with its own forces toward DBE/SBE goals will count.

Expenditures for materials or supplies will count toward DBE/SBE goals according to the following:

1. If the materials or supplies are obtained from a DBE/SBE manufacturer, 100% of the cost of the materials or supplies will count. A manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
2. If the materials or supplies are purchased from a DBE/SBE regular dealer, 60% of the cost of the materials or supplies will count. A regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

Determination of whether a DBE/SBE trucking company is performing a useful function and the expenditures that count toward DBE/SBE goals will be as follows:

1. The DBE/SBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE/SBE goals.
2. The DBE/SBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
3. The DBE/SBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
4. The DBE/SBE may lease trucks from another DBE/SBE firm, including an owner-operator who is certified as a DBE/SBE. The DBE/SBE who leases trucks from another DBE/SBE receives credit for the total value of the transportation services the lessee DBE/SBE provides on the contract.
5. The DBE/SBE may also lease trucks from a non-DBE/non-SBE firm, including from an owner-operator. The DBE/SBE who leases trucks from a non-DBE/non-SBE is entitled to credit for the total value of transportation services provided by non-DBE/non-SBE lessees not to exceed the value of transportation services provided by DBE-owned/SBE-owned trucks on the contract (one to one rule for trucking).
6. For trucks leased to the DBE/SBE from either a DBE/SBE or non-DBE/non-SBE firm, the lease must indicate that the DBE/SBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE/SBE, so long as the lease gives the DBE/SBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE/SBE.

DBE/SBE subcontractors submitted by the prime Contractor as meeting the requirements of this Subsection must have a license, for the type and quantity of work to be performed by said DBE/SBE subcontractor, issued by the appropriate agency prior to the bid opening.

Upon bid submittal, by the prime Contractor, the prime Contractor becomes committed to those certified DBE/SBE firms listed in the bid proposal on the "NDOT Bidder Disadvantaged Business or Small Business Enterprise (DBE/SBE) Information" form.

Verify that all representations made by the Department concerning DBE/SBE subcontractors are in conformance with the State Contractors' Board Rules and Regulations as well as all other State laws and regulations.

Begin procedures for licensing early enough to insure that DBE/SBE subcontractors are properly licensed prior to the time of the bid opening.

A bidder unable to meet the DBE/SBE goal shall submit documentation which outlines in detail good faith efforts to meet the goal. The bidder must show that it took all necessary and reasonable steps to achieve the goal which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE/SBE participation. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE/SBE participation sufficient to meet the contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE/SBE contract requirements. The Department will consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. Some efforts which may be shown are as follows:

(a) Whether the Contractor attended any pre-solicitation or pre-bid meetings that were scheduled by the recipient to inform DBEs/SBEs of contracting and subcontracting opportunities.

(b) Whether the Contractor advertised in general circulation, trade association and minority-focus media concerning the subcontracting opportunities.

(c) Efforts to negotiate with DBEs/SBEs for specific sub-bids including at a minimum:

1. The names, addresses, telephone numbers, and dates the DBEs/SBEs were contacted and the DBEs/SBEs response.
2. A description of the information provided to DBEs/SBEs regarding the plans and specifications for portions of the work to be performed.
3. A statement of why additional agreements with DBEs/SBEs were not reached.

(d) Whether the Contractor followed up initial solicitations of interest by contacting DBEs/SBEs to determine with certainty whether the DBEs/SBEs were interested.

(e) Whether the Contractor selected portions of the work to be performed by DBEs/SBEs in order to increase the likelihood of meeting the DBE/SBE goals (including, where appropriate, breaking down contracts into economically feasible units to facilitate DBE/SBE participation).

(f) Whether the Contractor provided interested DBEs/SBEs with adequate information about the plans, specifications and requirements of the contract.

(g) Whether the Contractor negotiated in good faith with interested DBEs/SBEs, not rejecting DBEs/SBEs as unqualified without sound reasons based on a thorough investigation of their qualifications.

(h) Whether the Contractor made efforts to assist interested DBEs/SBEs in obtaining bonding, lines of credit, or insurance required by the recipient or Contractor.

(i) Whether the Contractor effectively used the services of available minority community organizations; minority contractors' groups; local, State, and Federal minority business assistance offices; and other organizations that provide assistance in the recruitment and placement of DBEs/SBEs.

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM MANUAL (2012)

NDOT CIVIL RIGHTS PROGRAM

DBE PROGRAM

The federal Disadvantaged Business Enterprise program is all about securing equal opportunity in business. Funded through the U.S. Department of Transportation (USDOT), the program helps businesses classified as small, woman-owned or disadvantaged to compete in a fair environment right alongside larger corporations. Broaden your business opportunities. Apply for your DBE certification today.

Read our DBE Permanent Program Plan (.pdf 461KB) (updated June 2012) for more information. Please note that Attachment B in this plan refers to the DBE Application listed below under 'FORMS'.

NDOT's current Disparity Study was completed in December, 2013. We encourage you to read and become familiar with its findings. For those not interested in reading the entire report, you may go to Chapter 7 for the actual disparity analysis. Our disparity study helps NDOT develop the information needed to effectively operate the disadvantaged business enterprise program.

The Nevada Department of Transportation (NDOT) is proposing an overall goal of seven percent (7%) for its Disadvantaged Business Enterprise (DBE) Program for Federal Fiscal Years 2014-2016. The goal and the rationale for establishing it are available for inspection during normal business hours at NDOT for a period of thirty (30) days from the date of this publication. Comments on the proposed overall goal will be accepted for a period of forty-five (45)days from the date of this publication.

ONLINE DBE CERTIFICATION

We encourage firms to submit their certification application online. Whether it's a new application or Annual No Change Affidavit, you can now complete your application and submit all your documents online with our new Compliance and Certification Management System.

To begin, please click on the following link: Online DBE Application

If you are unable to complete an online application, please contact our office at: Nevada Department of Transportation, External Civil Rights and Contract Compliance Division, 1263 So. Stewart Street, Carson City, NV 89712, (775) 888-7497 for assistance.

FORMS

1. Online DBE Application for the Unified Certification Program with Personal Financial Statement Form
   Refer to Code of Federal Regulation 49 Part 26 for updates to this application
2. Commercially Useful Function Checklist .pdf 100KB

QUESTIONS & ANSWERS

1. What is the mission of the Nevada DBE Program?
2. Who can be certified? Why should I consider DBE certification? nevadadbe.com certification?
3. What is the criteria to become DBE certified?
4. Do you have a separate WBE/MBE Program?
5. How long is the certification process from start to finish?
6. What is the Nevada Unified Certification Program?

Q: What is the mission of the Nevada DBE Program?

Nevada Department of Transportation

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

June 2012

Nevada Department of Transportation
Disadvantaged Business Enterprise Program

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POLICY STATEMENT

Nevada Department of Transportation
Disadvantaged Business Enterprise Program

The Nevada Department of Transportation (NDOT) has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (USDOT), 49 CFR Part 26. The Nevada Department of Transportation receives Federal financial assistance from the United States Department of Transportation (USDOT), and as a condition of receiving this assistance, NDOT has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy of NDOT to ensure DBE firms, as defined in part 26, have an equal opportunity to receive and participate in USDOT-assisted contracts. It is our policy:

- To ensure nondiscrimination in the award and administration of USDOT assisted contracts in the Department's highway, transit and airport financial assistance programs;
- To create a level playing field on which DBEs can compete fairly for USDOT assisted contracts.
- To ensure that the DBE Program is narrowly tailored in accordance with applicable law.
- To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs.
- To help remove barriers to the participation of DBEs in USDOT assisted contracts.
- To assist in the development of disadvantaged firms so that they can compete successfully in the market place outside the DBE Program.
- To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

The Contract Compliance Manager has been delegated as the NDOT DBE Liaison Officer. In that capacity, the Contract Compliance Manager is responsible for implementing all aspects of the DBE program. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by NDOT in its financial assistance agreements with the USDOT.

NDOT will ensure that this policy statement will be disseminated to all division heads and all of the components of the organization. NDOT will distribute this statement by mail to DBE and non-DBE business communities that work for NDOT on USDOT assisted contracts, and by posting it on the NDOT website.

for Rudy Malfabon
Susan Martinovich P.E.
Director

6-14-12
Date

I) INTRODUCTION

The Nevada Department of Transportation (NDOT) recognizes its responsibility to ensure that Disadvantaged Business Enterprise (DBE) firms have equal opportunity to participate in the performance of USDOT assisted contracts administered by NDOT. As part of our continued effort to fulfill this responsibility, NDOT has revised the DBE Program Plan to reflect the requirements and guidance contained in title 49 Code of Federal Regulations Part 26.

Significant changes in the Plan will be submitted to the local FHWA and FTA offices for approval.

A. Purpose

The purpose for the DBE Program Plan is to provide guidance for NDOT personnel in implementing 49 CFR Part 26 and provide DBEs and other contractor's information on their responsibilities on USDOT assisted contracts and NDOT's implementing procedures. It assures USDOT that NDOT will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award or performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex or national origin.

In administering the DBE program, NDOT will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race color sex or national origin.

B. Scope

The DBE Program applies to all USDOT-assisted transportation-related contracts administered by NDOT and authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) and Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21). Also included are federal transit funds authorized by Titles I, III, V, and VI of ISTEA or by federal transit laws in Title 49, USC or Titles I, III and V of TEA-21. Airport funds authorized by 49 USC 47101, et seq., are also included. This program remains in effect until the end of the fiscal year in which all such funds from USDOT have been expended.
The Program's requirements also apply to USDOT-funded non-construction programs including:

- Professional Service Agreements (training, computer, etc.)
- Architectural/Engineering Contracts

Other NDOT Divisions that receive USDOT funds include the Right of Way Division and The Transit Division within Planning. These Divisions have reviewed, adopted, and assure compliance with the conditions of the NDOT DBE Plan. As appropriate, NDOT's Civil Rights Unit will develop, an annual DBE participation goal using the methodology established in this DBE Plan. The goal will be provided by NDOT to the appropriate USDOT administration.

In accordance with 49 CFR 26.49, transit vehicle manufacturers, as a condition of being authorized to bid on FTA-assisted transit vehicle procurements, will also be required to establish and submit for FTA's approval an overall DBE percentage goal.

Sub-recipients who receive USDOT (FTA and FAA) funds through NDOT as noted above and award more than $250,000 in prime contracts in a fiscal year are required to comply with the provisions of 49 CFR Part 26 and develop their own DBE Program Plan, or adopt and utilize the NDOT DBE Program Plan.

Additionally, agreements between NDOT and all sub-recipients will contain assurances that sub-recipients will not discriminate on the basis of race, color, national origin, sex, age, disability/handicap, and income status in the performance of this contract as well as language that obligates sub-recipients to develop, and implement, their own DBE Plan or to adopt, and implement, the provisions of the NDOT DBE Program.

C. AUTHORITY AND APPLICABLE LAWS

USDOT regulations, 49 CFR Part 23 (revised) and Part 26 (revised), published in the Federal Registers, Volume 75, No. 22, dated February 3, 2010 and Volume 76, No. 19 dated January 28, 2011, revised the Disadvantaged Business Enterprise Program established in 1980.

D. FEDERAL FINANCIAL ASSISTANCE AGREEMENT ASSURANCE

NDOT has signed the following assurance, applicable to all USDOT-assisted contracts and their administration. Agreements with sub-recipients will also include this assurance:

> *The Nevada Department of Transportation shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any USDOT-assisted contract or in the administration of its DBE Program or the requirements of 49 CFR Part 26. The recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of USDOT-assisted contracts. NDOT's*

DBE Program, as required by 49 CFR 26 and as approved by USDOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to NDOT of its failure to carry out its approved program, the USDOT may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 USC 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 USC 3801 et seq.).

Any person who believes that NDOT has failed to comply with its obligations under this program may file a written complaint with the appropriate USDOT Modal Administration as listed under 49 CFR 26.103 and 26.105.

NDOT will not intimidate, threaten, coerce, or discriminate against any individual or firm for any reason.

II) ADMINISTRATION

A. DBE LIAISON OFFICER (DBELO)

1. DBE program objectives are implemented and monitored by Contract Compliance Office personnel under the direction of the Contract Compliance Manager who is designated as the DBE Liaison Officer with overall responsibility for the program. While the Contract Compliance Manager reports to the Civil Rights Officer (CRO), he/she has direct independent access to the Director concerning DBE program matters as reflected on the organization chart. Duties and responsibilities include:

   - Advising the Director and the Transportation Board on DBE matters and achievements; and
   - Providing direction and guidance to the Civil Rights Officer (CRO) and other staff on implementing all aspects of NDOT's DBE Program.

2. The Contract Compliance Manager has responsibility for administering the day-to-day operation of the program, and reports to the CRO. Duties and responsibilities include:

   - Gathering and reporting statistical data and other information required by USDOT;
   - Working with all internal and external entities to set overall annual goals;
   - Identifying contracts and procurements so that DBE goals are included, when possible, in solicitations and monitor results;

- Analyzing NDOT's progress toward goal attainment and identifies ways to improve progress;
- Participating in pre-bid and Pre-Construction meetings;
- Participating in the UCP Certification Committee certifying DBEs according to the criteria set by USDOT and act as liaison to the Uniform Certification Program in Nevada.
- In collaboration with project managers and Resident Engineers, to determine contractor compliance with commercially useful function requirements; and reviewing Good Faith Effort Documents as required on bids and proposals.
- Ensuring that bid notices and requests for proposals are correct and to assist DBEs in a timely manner;
- Planning and participating in DBE training seminars;
- Providing outreach to DBEs and community organizations to advise them of opportunities;
- Maintaining NDOT's directory of certified DBEs; and
- Providing information to the Nevada UCP.

These tasks account for approximately forty (40%) percent of the Contract Compliance Manager's work time.

3. The CCM has a staff of two Program Officer III's and two Program Officer I's and an Admin Assistant II to provide program support to the CCM, accounting for twenty (20) percent of the program Officers I's work time.

   In addition to the CCD staff, Resident Engineers and their staff assist in collecting data, conducting on-site interviews, and monitoring compliance with the DBE program.

B. OBJECTIVES OF THE DBE PROGRAM

In meeting the objectives of the DBE Program, as stated in our Policy Statement above, NDOT will not use quotas in any way.

C. DBE DIRECTORY OF CERTIFIED FIRMS

1. The CCM solicits potential DBE contractors for certification by working with the Nevada Small Business Development Center (NSBDC) through our DBE Supportive Service (DBESS) Program:

   a) Outreach to ethnic and minority groups and DBE and small business advocacy organizations throughout Nevada;

   b) Outreach through business fairs and statewide program presentations.

2. NDOT compiles and maintains a directory of firms currently certified as eligible to participate in transportation-related contracts under the DBE Program. The directory is available on the Internet at www.nevadadbe.com. Anyone interested in obtaining DBE services or supplies, may contact the following address:

   Nevada Department of Transportation
   Contract Compliance Office
   1263 S Stewart Street
   Carson City, NV 89712
   (775) 888-7497

3. The Directory contains: firm name, address, telephone number(s) and the types of work (by NAICS code) that the firm has been certified to perform as a DBE.

4. The Nevada Department of Transportation has determined that there are no financial institutions owned and controlled by socially or economically disadvantaged individuals in the State of Nevada. NDOT will check on the availability of DBE financial institutions on an annual basis. If any financial institutions owned and controlled by socially or economically disadvantaged individuals are identified, NDOT will make reasonable efforts to use these institutions and encourage prime contractors to use such institutions.

D. Small Business Element

Effective on February 28, 2012, federal fund recipients such as NDOT must include a Small Business Element (SBE) in its DBE Program to foster the participation of small businesses in NDOT projects. More specifically, the regulations provide that:

1. The SBE program element, once approved by the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) must be integrated into the body of the NDOT Civil Rights DBE program plan.

2. Following approval by the FHWA and the FTA, NDOT must implement the SBE element within nine months.

3. Pursuant to 49 CFR 26.39, NDOT as a recipient is responsible for taking **active, effective steps** to **increase small business participation.**

- **Professional, Technical, Consultant, or Managerial, Bonding or Financial Services** (provided a determination is made that the fees are reasonable)..... 100%
- **Construction Firms** (supply labor and materials to perform a distinct element of the work)..... 100%
- **Manufacturers** (must operate a factory that produces, on the premises, the materials, supplies, articles or equipment required under the contract and of the general character described in the specifications) 100%
- **Regular Dealer** (must own, operate or maintain a store or warehouse that regularly sells materials or supplies to the general public)..... 60%

  (NOTE: To be a regular dealer, the firm must be an established business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A regular dealer in bulk products (petroleum, steel, etc.) does not need to maintain a place of business, but must own and operate distribution equipment for the products. Any supplementing of a dealer's own distribution equipment shall be by a long-term lease agreement)
- **Packagers, Brokers, Manufactures' Representatives** (no credit for materials or supplies themselves) .....Brokerage Fee (if reasonable)
- **Trucking Firm**: (As defined by 49 CFR Part 26.53)

VII) CONTRACT PERFORMANCE

A. COMMERCIALLY USEFUL FUNCTION (CUF)

In order for DBE contractor payments to be counted toward DBE goals, the DBE contractors must perform a commercially useful function, i.e., it must be responsible for execution of the work of the contract and must carry out its responsibilities by actually performing, managing and supervising the work involved, consistent with standard industry practices.

This means that:

1. The DBE must be responsible for ordering its own materials and supplies, determining quantity and quality, negotiating price, installing (where applicable) and paying for the material itself;

   a) The use of joint checks will be allowed for the payment of materials and supplies when the following conditions are met:

i. Second party (typically the prime contractor) acts solely as a guarantor

ii. DBE must release the check to the supplier

iii. Use of joint checks is a commonly recognized business practice in the industry

iv. DBE submits request for pre-approval to NDOT

v. All CUF conditions are met and documented by DBE and prime.

2. The DBE must perform work commensurate with the amount of its contract;

3. The DBE's contribution cannot be that of an extra participant or a conduit through which funds are passed in order to obtain the appearance of DBE participation;

4. The DBE must exercise responsibility for at least fifty (50) percent of the total cost of its contract with its own workforce;

5. None of the DBE's work can be subcontracted back to the prime contractor, nor can the DBE employ the prime's, or other subcontractor's supervisors currently working on the project;

6. The DBE's labor force must be separate and apart from that of the prime contractor or other subcontractors on the project. Transferring crews between primes, subcontractors, and DBE contractors is not allowed;

7. The DBE owner must hold a Public Works license and any other professional or craft licenses required for the type of work he/she performs on the project;

8. The DBE may rent or lease, at competitive rates, equipment needed on the project from customary leasing sources or from other subcontractors on the project ; and

9. The DBE trucking firm must be responsible for management and supervision of the entire trucking operation for which it is responsible. The following rules also apply to DBE trucking firms:

   a) Must own and operate at least one fully licensed, insured and operational truck used on the contract. Owner/operators must have an agreement with the contractor or subcontractor that contains:

      - Owner/operators name
      - Social security number

- Copy of vehicle registration receipt
- Current vehicle license number
- Vehicle identification number
- Method of payment (hour, ton or load)

b) Leases must indicate that the DBE has exclusive use of and control over the truck, but does not preclude the leased truck from working for others during the term of the lease with consent of the DBE, provided the lease gives the DBE absolute priority for the use of the leased truck.

c) Leased trucks must display the name and identification number of the DBE.

d) Lease/rental/contract agreements must be approved by the Resident Engineer.

B. MONITORING COMPLIANCE

NDOT will bring to the attention of the FHWA or USDOT any false, fraudulent, or dishonest conduct in connection with the program so that USDOT can take the steps (e.g., referral to Justice Department or USDOT Inspector General) provided in 26.109. NDOT will also consider similar action under its own legal authority.

A copy of the contract DBE Special Provisions for Race/Gender Conscious Projects and Race/Gender Neutral Projects, containing provisions and contract remedies is attached as Exhibit D.

When the DBE subcontractor begins work on the project, the Resident Engineer reviews the DBE's operation and completes 052-073, Commercial Useful Function Determination.

1. The Resident Engineer ensures that DBE owners, supervisory personnel and employees are distinguishable from other personnel on the job.

2. If the Resident Engineer determines that a DBE firm is not performing a commercially useful function, he/she will notify the Contract Compliance Office who will notify the prime contractor in writing, specifying those actions which violate the terms of the contract.

3. If the contractor fails to remedy the violation, the Resident Engineer in conjunction with the Contract Compliance Office shall impose one or more sanctions, and the payments made to that DBE will not be credited toward the contract goal.

4. At the request of the Resident Engineer, the Contract Compliance Office will investigate the non-performing DBE to determine if its

job performance contains a pattern of relationships with non-minority businesses that brings the DBE's independence and control, and therefore its eligibility to participate, into question.

C. RECORD KEEPING

1. Contractors and Subcontractors

   a) All contract records relating to DBE participation must be maintained by contractors and subcontractors through the project and will follow provisions of the retention schedule from that point. NDOT, FTA, and FHWA employees must be allowed to interview contractors and DBE employees as necessary. (If a claim, audit, or investigation is underway, records must be retained until final resolution.)

   b) All DBE records maintained by contractors and subcontractors must be made available to NDOT as required by the retention schedule.

   c) Failure to comply with a) and b) above may result in the imposition of sanctions.

2. Nevada Department of Transportation

   a) NDOT obtains through a Bidder Registration Form a Bidders List, of all prime and subcontractors bidding on NDOT contracts. It contains the following information:

      - Firm Name
      - Firm Address
      - Firm's Status as a DBE or Non-DBE
      - Age of the Firm
      - Gross Receipts range of the Firm
      - Business Type
      - Work areas

   b) NDOT maintains a database to monitor contracts obtained by DBE firms, regardless of whether the DBE participation was race-neutral or race-conscious. The prime contractor provides a certified notice that payment has been made to the DBE firms on a monthly basis.

   c) NDOT reports DBE participation semi-annually to the FTA, the FHWA and to other USDOT modal administrations as directed.

EXHIBIT D

102.16 DBE Certification and Bidding Requirements. Add the following after the first paragraph of this Subsection of the Standard Specifications:

Commercially Useful Function. A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, you must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

Disadvantaged Business Enterprise. Disadvantaged business enterprise or DBE means a for-profit small business concern:

1. That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

2. Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

FHWA TIPS ON EVALUATING
A COMMERCIALLY USEFUL FUNCTION (CUF)

www.fhwa.dot.gov/federal-aidessentials/commusefunction.pdf

FHWA Tips on Evaluating a Commercially Useful Function

Of all the many elements in the DBE program there is one that can have the most detrimental impact on the ability of the prime contractor to meet its contract goal as well as the ability of a recipient to meet its overall goal. This element is commonly referred to as commercially useful function or "CUF". How can just one element of the program have such an impact achieving the results Congress intended when it established the DBE program?

Both the prime contractor and the State Transportation Agency (STA) receive credit toward the DBE goal (contract and overall) only when a DBE working on a contract performs a CUF. DBEs generally perform work on a contract either as a contractor, a trucker, a regular dealer, or a manufacturer. While each of these categories is evaluated differently when determining whether the DBE has performed a CUF, there is one guiding principle that must be followed. Under the terms established in 49 CFR §26.55, a DBE firm performs a CUF when it is:

> ***"Responsible for execution of the work of the contract or a distinct element of the work . . . by actually performing, managing, and supervising the work involved."***

The question contract administrators often face is, "What are the management, supervision, and performance actions of a DBE firm that satisfactorily meet this requirement?" Evaluating these areas will form the basis to render a determination that a DBE has in fact performed a CUF. The contract is the one key reference point for any contract administrator and it is essential for this evaluation process. The contract has an effective description of the work to be performed by a DBE and is a legally recognized document.

The USDOT DBE regulations identify the following key factors that should be analyzed when determining whether a CUF is being performed:

- Evaluation of the amount of work subcontracted, whether it is consistent with normal industry practices;
- Whether the amount the firm is paid under the contract is commensurate with the work that is actually being performed to be credited towards the goal;
- When the DBE furnishes materials, the DBE must be responsible for negotiating the price, for determining the quality and quantity of the material, ordering the material, and paying for it. As a contractor, a DBE firm would typically be hired to both furnish the material and install it with its own labor force;
- Whether the DBE's 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. In essence, was the role merely a contrived arrangement for the purpose of meeting the DBE contract goal?

  In determining whether a DBE is such an extra participant, you must examine similar transactions, particularly those performed by non-DBEs. A DBE must have a necessary and useful role in the transaction, of a kind for which there is a market outside the context of the program. The firm's role must not be a superfluous step added in an attempt to obtain credit towards the goal.

Normal Industry Practice

One of the most important elements to consider in any analysis of whether the DBE is performing a CUF is determining whether its role on the project is consistent with "normal industry practice." This means, one must determine if the DBE is performing the work or services in the manner normally performed by all contractors—DBEs and non-DBEs. However, 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.

One general rule of thumb that can be considered is whether a DBE would be performing in the same manner if there was no DBE program. As further evidence of meeting normal industry practice, one must consider if the DBE performs this work on non-federally assisted contracts.

Monitoring

In keeping with normal contract requirements, it is the primary responsibility of the prime contractor to ensure that the DBE is performing a CUF. The STA, as the contracting agency, has oversight responsibility to ensure that the prime contractor has effectively met this responsibility under its contract with the STA.

The STA needs to have sufficient field personnel and general headquarters staff to monitor the performance of work performed by DBEs on all federal aid projects, including those of sub-recipients. Contractors, DBEs, local public agencies, and all employees are required to cooperate in carrying out this responsibility. The STA should establish and enforce monitoring procedures that include the following:

- Clearly written directives defining the role and interrelationship of the STA's various departmental staff responsible to monitor and evaluate the contractor's compliance with the DBE contract provisions;
- Procedures that spell out specific monitoring activities and responsibilities of a project level monitoring program;
- Exchange of information between departmental, central and field offices in reporting accomplishments, violations and enforcement; and
- Procedures for the application of appropriate sanctions once a determination of failure to meet the DBE contract requirements is made.

DBE Performance - CUF

Highway firms certified in the DBE program typically perform in four (4) categories: prime or subcontractor, trucker, regular dealer, and manufacturer. The following is an overview of each category, typical CUF questions, and a list of documents to review.

While DBEs are occasionally awarded prime contracts, DBEs primarily work as subcontractors for the prime. Subcontractors typically perform specific contract items and provide their own labor and materials. To determine whether a DBE subcontractor is performing a CUF, five (5) distinct operations must be considered: management, workforce, equipment, materials, and performance.

These areas must be evaluated to make a CUF determination, and situations need to be reviewed on a case by case basis. Some of the CUF questions cited below may also be quite adaptable to the other three types of work categories.

MANAGEMENT

The DBE must manage the work that has been contracted to its firm. Management includes, but is not limited to:

- Scheduling work operations;
- Ordering equipment and materials;
- Preparing and submitting certified payrolls;
- Hiring and firing employees.

The DBE owner must supervise daily operations, either personally, or with a full time, skilled and knowledgeable superintendent employed by and paid wages by the DBE. The superintendent must be present on the job site and under the DBE owner's direct supervision. The DBE owner must make all operational and managerial decisions for the firm. Mere performance of administrative duties is not considered supervision of daily operations.

Red Flags

Red flags are questionable practices which may warrant further review. The red flags for management operations may include, but are not limited to:

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

Typical CUF questions could include:

- Is there a written legal document executed by the DBE to perform a distinct element of work?
- Who does the on-site DBE representative report to?
- Has this individual ever shown up on any other contractor's payroll?
- Has the DBE owner been present on the jobsite?

Typical documentation to evaluate:

- Written contract
- Daily inspection reports and project diaries
- Payrolls

WORKFORCE

In order to be considered an independent business, a DBE must keep a regular workforce. DBEs cannot "share" employees with non-DBE contractors, particularly the prime contractor. The DBE shall perform its work with employees normally employed by and under the DBE's control. All work must be performed with a workforce the DBE controls, with a minimum of **30%** of the work to be performed by the DBE's regular employees, or those hired by the DBE for the project from a source, such as a labor union. The DBE, in all instances, must have direct supervision over all of its employees.

The DBE must be responsible for payroll and labor compliance requirements for all employees performing on the contract and is expected to prepare and finance the payrolls. Direct or indirect payments by any other contractor are not allowed.

The DBE must perform at least 30% of the total cost of its contract with its own workforce. The DBE must not subcontract a greater portion of the work than would be expected on the basis of normal industry practice for the type of work involved.

Red Flags

Some questionable workforce practices which may warrant further review include, but are not limited to:

- 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.

Typical CUF questions could include:

- Who prepares the DBE's certified payroll?
- Have any of the DBE's employees ever shown up on any other contractor's payroll?
- Who does the DBE on-site representative contact for hiring, firing or to modify the contract due to site condition changes or change orders?
- Asking DBE employees on the jobsite who they report to and who signs their checks.

Typical Documents to evaluate:

- Written contract
- Daily inspection reports and project diaries
- Certified payrolls
- Copies of cancelled checks, if necessary

EQUIPMENT

A DBE may lease specialized equipment from a contractor, excluding the prime, if it is consistent with normal industry practices and at rates competitive for the area. The lease must specify the terms of the agreement. The lease must be for a short period of time and involve a specialized piece of equipment to be used at the job site. The 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. The operation of the equipment must be subject to the full control of the DBE.

The DBE is expected to provide the operator for non-specialized equipment and is responsible for all payroll and labor compliance requirements. A separate lease agreement is required. All lease agreements should be approved by the STA prior to the DBE starting the work.

On a case by case basis, the STA may approve the DBE to lease a specialized piece of equipment from the prime. However, the STA must ensure that the lease amount is not counted toward the contract goal. Equipment leased and used by the DBE with payment deducted from the prime contractor's payment (s) to the DBE is not allowed.

Red Flags

Some questionable equipment practices which may warrant further review include, but are not limited to:

- 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.

Typical CUF questions could include:

- List the major self-propelled (engine) equipment used by the DBE. Determine if the equipment belongs to the DBE. Is it owned or leased?
- If leased, is there an agreement identifying the terms and parties? Is it signed by the DBE owner?
- Does the equipment have the DBE's markings or emblems?
- Is the equipment under the direct supervision of the DBE?
- Is the operator of the leased equipment the DBE's employee?
- If the equipment is leased, is the payment for the equipment deducted from the work performed?

Typical Documents to evaluate:

- Written contract
- Daily inspection reports and project diaries
- Leases

MATERIALS

For a DBE contractor (furnish and install) to receive credit for supplying materials, the DBE must perform the following four functions: (1) negotiate price; (2) determine quality and quantity; (3) order the materials; and (4) pay for the material itself. If the DBE does not perform all of these functions, it has not performed 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 payor as the DBE.

While the regulations tell recipients to consider normal industry practices, this does not overrule the requirement that the DBE must perform the four functions enumerated above. For example, even if standard industry practices in certain areas of the country allow no subcontractor to perform all four functions enumerated above (e.g. manufacturers will only negotiate with a prime, thereby eliminating the DBE's ability to negotiate the price), the "furnish" portion of the transaction does not lend itself to the performance of a CUF by the DBE, and credit cannot be given for the acquisition or cost of the materials.

Red Flags

Some questionable material supply practices which may warrant further review include, but are not limited to:

- 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.

Typical CUF questions could include:

- Is there a written contract executed by the DBE to perform a distinct element of work? Is the work to be performed by a DBE a "furnish and install" item of work?
- Who makes arrangements for delivery of materials?
- Who are the material invoices made out to?
- Who scheduled delivery of materials?
- In whose name are materials shipped?
- Who actually delivered the materials?
- If two party checks are used, who are the parties identified as payable to?

Typical Documentation to evaluate:

- Written contract
- Delivery tickets
- Invoices
- Daily inspection reports and project diaries

PERFORMANCE

The 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

Some questionable performance practices which may warrant further review include, but are not limited to:

- 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;
- 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.

Typical CUF questions could include:

- Does the DBE on-site representative effectively manage the job site without any interference from the prime contractor?
- Does the DBE appear to have control over methods of work on its contract items?
- Is the DBE actually scheduling work activities, material deliveries and other related actions required for execution of the work?
- Has any other contractor performed any amount of work specified in the DBE's contract?

Typical Documents to evaluate:

- Written contract
- Daily inspection reports or project diaries

DBE TRUCKING FIRMS

To be certified in the DBE program as a trucking firm, the DBE is required to own and operate at least one fully licensed, insured, and operational truck used on the contract. To perform a CUF, a DBE must also be responsible for the management and supervision of the entire trucking operation or a specified portion of the trucking operation to which it has been committed. There cannot be a contrived arrangement for the purpose of meeting a DBE goal.

A DBE can supplement its fleet by leasing a truck(s) from an established equipment leasing business open to the general public. The lease must indicate that the DBE has exclusive use of and control over the truck. This requirement does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Otherwise, the DBE does not receive full credit for DBE participation.

Leased trucks must display the name and identification number of the DBE. The DBE trucker must also hold the necessary, where appropriate, license, hauling permit, etc., as required by the State to transport material on public highways.

To count the value of DBE trucking services toward a contract goal, the following can occur:

- The DBE may lease trucks from another DBE, including an owner-operator that is certified as a DBE. The DBE can count the entire value of services performed by these DBE trucks.
- The DBE may also lease trucks from non-DBEs and owner--operators. The DBE can count the value of these trucking services up to the value of services performed by the DBE trucks used on the contract.
- DBE participation can be counted for the value of services of non-DBE trucks that exceed the value of the services performed by DBE trucks only in the amount of the fee or commission a DBE receives as a result of the lease arrangement.

In order for the STA or subrecipient to monitor the performance of a DBE trucking firm, the work to be performed must be covered by a subcontract approved by the STA prior to performing the work. Additional documentation required when the DBE leases equipment is a valid lease to be provided to the STA for appropriate action. To be considered valid, the lease must include such items as the lessor's name, list of trucks to be leased by vehicle identification number (VIN), and the agreed upon amount of the cost and method of payment. It should be the responsibility of the DBE to provide the operator's fuel, maintenance and insurance for all leased trucks.

Typical CUF questions could include:

- Do the trucks used on the project belong to the DBE?
- If leased, is there a formal lease identifying the terms and parties?
- Are the rates appropriate?
- Is there an approved subcontract?
- If so, who are the parties?
- Are the DBE's employees shown on the certified payrolls?

Typical Documentation to evaluate:

- Subcontracts
- Leases
- Payroll records
- Daily inspection reports and project diaries

DBE REGULAR DEALERS

In order for a firm to operate as a regular dealer, it must perform CUF, and must also comply with other requirements applicable to regular dealers. It must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. In addition, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business, except as noted below.

It is important to make a distinction between a regular dealer and a firm that supplies a product on an *ad hoc* basis in relation to a particular contract or contractor. A regular dealer has a regular trade with a variety of customers. One of the key considerations of being a regular, established dealer is the presence of an inventory of materials and/or supplies. A regular dealer assumes the actual and contractual responsibility for the provision of the material and/or supplies.

A firm may be a regular dealer in bulk items such as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business if the firm both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an *ad hoc* or contract-by-contract basis.

If a DBE meets the requirements of a regular dealer, it may count 60% of the cost of the materials, if reasonable, toward the contract goal. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers.

Typical CUF questions could include:

- Does the regular dealer have an established storage facility and inventory?
- Does the dealer have a business that sells to the public on a routine basis in the product being supplied?
- Does the business stock the product for use on the project as a normal stock item?
- Who is delivering and unloading the material?
- Is distribution equipment owned or leased, long term by the DBE, used in delivering the product?
- For bulk items, where does the material come from? Does the DBE have a distribution agreement?

Typical Documentation to evaluate:

- Purchase Orders
- Invoices
- Delivery Tickets

DBE MANUFACTURERS

As described in 26.55(e)(1)(ii)), a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications. Examples of such items could be a concrete ready mix plant, a crushing operation, or a steel or concrete fabricating plant.

Typical CUF questions could include:

- Is the business's primary function to manufacturer construction products?
- Does the business stock the product altered for this project as a normal stock item?
- Is the quality of the materials controlled by the DBE?
- Does the DBE purchase the raw material used in its plant?

Typical Documents to evaluate:

- Purchase orders
- Bill of lading
- Shipping tickets

Sanctions for Compliance and Enforcement

The prime contractor is ultimately responsible for ensuring that a DBE performs a CUF. Failure of a DBE to perform a commercially useful function should result in the STA taking specific definitive actions to enforce the CUF requirement of the contract. Some of the actions an STA could take include, but are not limited to, the following:

- Deny or limit credit towards the contract goal;
- Require the prime to make GFE to replace the DBE to meet the goal on remaining work;
- Withhold progress payments;
- Terminate the contract;
- Reduce the contractor's prequalification limit.

Some questions that could be part of an evaluation procedure:

- If a CUF was not performed by the DBE, what action was taken to correct the deficiency?
- Did the action taken correct the deficiency?

List of Typical Documentation to Collect:

- Executed contracts

- Material/ supply agreements
- Invoices of materials/supplies
- Equipment titles of ownership
- Equipment lease/rental agreements
- Hauling tickets
- Delivery tickets
- Canceled checks
- Project inspection/diaries
- Payroll records

When a DBE is presumed not to be performing a CUF, the DBE may present evidence to rebut this presumption. Decisions regarding CUF determinations are subject to review by concerned operating administrations, such as the FHWA. However, CUF decisions are not appealable to USDOT, they are contract administration issues.

CUF & Certification

Certification and commercially useful function are separate and distinct issues. Certification decisions address the nature of a firm's ownership and structure while CUF primarily concerns the role a firm has played in a particular transaction. Even if the certification process has identified the DBE's ability to perform as a contractor, regular dealer, or manufacturer, it is important to review and determine what and how a DBE actually performs during the performance of the contract.

A DBE's repeated failure to perform a CUF may raise questions regarding the firm's control, as it relates to independence, and perhaps ownership. If there is evidence of a pattern of failing to perform a CUF that raises serious issues with the firm's ability to control the work and its independence from the non-DBE firm, the STA should address this matter. An STA may commence a proceeding under 26.87 to determine the continued eligibility of the DBE firm.

In cases of deliberate attempts to circumvent the intent of the DBE program, or fraud, these actions may lead to criminal prosecution of both the prime contractor and the DBE. If fraud is suspected the STA should contact the DOT Office of Inspector General.

CODE OF FEDERAL REGULATIONS (29 CFR 26.55)

PARTICIPATION BY DBE'S IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

ELECTRONIC CODE OF FEDERAL REGULATIONS

Electronic Code of Federal Regulations
e-CFR™

e-CFR data is current as of July 1, 2015

Title 49 → Subtitle A → Part 26

TITLE 49—Transportation

Subtitle A—OFFICE OF THE SECRETARY OF TRANSPORTATION

PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

Subpart A—GENERAL

Subpart B—ADMINISTRATIVE REQUIREMENTS FOR DBE PROGRAMS FOR FEDERALLY-ASSISTED CONTRACTING

Subpart C—GOALS, GOOD FAITH EFFORTS, AND COUNTING

Subpart D—CERTIFICATION STANDARDS

Subpart E—CERTIFICATION PROCEDURES

Subpart F—COMPLIANCE AND ENFORCEMENT

ELECTRONIC CODE OF FEDERAL REGULATIONS

e-CFR data is current as of July 1, 2015

Title 49 → Subtitle A → Part 26 → Subpart C → §26.55

Title 49: Transportation
PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS
Subpart C—Goals, Good Faith Efforts, and Counting

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§26.55 How is DBE participation counted toward goals?

(a) When a DBE participates in a contract, you count only the value of the work actually performed by the DBE toward DBE goals.

(1) Count the entire amount of that portion of a construction contract (or other contract not covered by paragraph (a)(2) of this section) that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).

(2) Count the entire amount of fees or commissions charged by a DBE 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 DOT-assisted contract, toward DBE goals, provided you determine the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(3) 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.

(b) When a DBE performs as a participant in a joint venture, 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 DBE goals.

(c) Count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.

(1) A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, you must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

(2) A DBE does not perform a commercially useful function if its 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. In determining whether a DBE is such an extra participant, you must examine similar transactions, particularly those in which DBEs do not participate.

(3) If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts 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, you must presume that it is not performing a commercially useful function.

(4) When a DBE is presumed not to be performing a commercially useful function as provided in paragraph (c)(3) of this section, the DBE may present evidence to rebut this presumption. You may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.

(5) Your decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to DOT.

(d) Use the following factors in determining whether a DBE trucking company is performing a commercially useful function:

(1) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.

(2) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.

(3) The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.

(4) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.

(5) The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE that leases trucks equipped with drivers from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE leased trucks equipped with drivers not to exceed the value of transportation services on the contract provided by DBE-owned trucks or leased trucks with DBE employee drivers. Additional participation by non-DBE owned trucks equipped with drivers receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the appropriate DOT operating administration.

Example to paragraph (d)(5): DBE Firm X uses two of its own trucks on a contract. It leases two trucks from DBE Firm Y and six trucks equipped with drivers from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. DBE credit could be awarded only for the fees or commissions pertaining to the remaining trucks Firm X receives as a result of the lease with Firm Z.

(6) The DBE may lease trucks without drivers from a non-DBE truck leasing company. If the DBE leases trucks from a non-DBE truck leasing company and uses its own employees as drivers, it is entitled to credit for the total value of these hauling services.

Example to paragraph (d)(6): DBE Firm X uses two of its own trucks on a contract. It leases two additional trucks from non-DBE Firm Z. Firm X uses its own employees to drive the trucks leased from Firm Z. DBE credit would be awarded for the total value of the transportation services provided by all four trucks.

(7) For purposes of this paragraph (d), a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

(e) Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

(1)(i) If the materials or supplies are obtained from a DBE manufacturer, count 100 percent of the cost of the materials or supplies toward DBE goals.

(ii) For purposes of this paragraph (e)(1), a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

(2)(i) If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals.

(ii) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

(A) To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.

(B) A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph (e)(2)(ii) if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

(C) Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph (e)(2).

(3) With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided you determine the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals, however.

(4) You must determine the amount of credit awarded to a firm for the provisions of materials and supplies (e.g., whether a firm is acting as a regular dealer or a transaction expediter) on a contract-by-contract basis.

(f) If a firm is not currently certified as a DBE in accordance with the standards of subpart D of this part at the time of the execution of the contract, do not count the firm's participation toward any DBE goals, except as provided for in §26.87(i)).

(g) Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward your overall goal.

(h) Do not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE.

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