

Counting DBE Participation & Assessing Commercially Useful Function (CUF)

Presented by: Ofelia Medina

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*ACHIEVING SAFETY
THROUGH DIVERSITY*



Counting and CUF

1. Regulatory Standard

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2. Counting by Work Type

- Contractor
- Manufacturer
- Regular Dealer
- Service Provider (Broker/Consultant)
- Trucking/Hauling

Counting and CUF

- 1. Regulatory Standard**
- 2. Counting by Work Type**
- 3. CUF Reviews**
 1. Evaluating Commitments
 2. Onsite Reviews

Counting and CUF

1. Regulatory Standard

Regulatory Standard

49 C.F.R. 26.55(a):

Count Value of Work Performed by DBEs Own Forces Including:

- Cost of Materials and Supplies Obtained by the DBE
- Fees or Commissions for Services Provided by DBE
(must be reasonable)

Regulatory Standard

49 C.F.R. 26.55(c)

A DBE performs a commercially useful function (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.”

Regulatory Standard

49 C.F.R. 26.55(c)

- Prime Contractor and Recipient only get credit when DBE performs a CUF

Do not confuse CUF with certification!

Counting and CUF

2. Counting by Work Type

Counting by Work Type

DBE Subcontractor

- Most common
- Performing specific work items with own forces pursuant to a contract agreement with prime
- **Example**--Furnish and install
- Count 100% of prime's payment to DBE toward contract goal (labor and materials)



Counting by Work Type

DBE Manufacturer

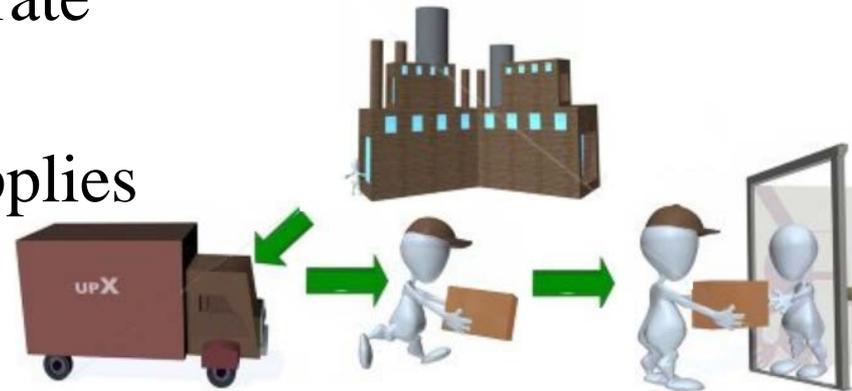
- Prime purchases materials from a DBE manufacturer
- DBE operates a factory that produces materials on the premises to meet contract specifications, or
- Takes product and alters it to meet contract specs
- Count 100%



Counting by Work Type

DBE Regular Dealer

- The prime contracts with a regular dealer to supply and deliver products
- Regular dealer owns, operates or maintains a store or warehouse or other establishment that contains products it sells or leases to public
- For bulk items, must own and operate distributing equipment
- Count 60% of cost of materials/supplies



Counting by Work Type

DBE Trucker

- Own and operate at least one truck
- Manage trucking operation for portion of contract for which it is responsible
- Long-term leases to supplement must be agreement for exclusive use and control
- DOT should require driver to provide valid lease agreement at job site



Counting by Work Type

DBE Trucker (cont.)

- Count value of trucking services provided by DBE with trucks it owns, insures, operates with its employees
- If DBE supplements its fleet:
 - Count value of trucking services provided by other DBE firms with their own trucks
 - Count value of trucking services provided by non-DBE firms in an amount not to exceed value of trucking services provided by DBE firms -- 1:1
 - Check State DOT Recipient Plan



Counting by Work Type

DBE Service Provider

- Prime hires a DBE to provide a service
 - Professional
 - Technical
 - Managerial
 - Brokerage (Facilitating a service or procurement)
 - Count entire amount of fees or commissions, **if reasonable**



Counting by Work Type

Count cost of materials or supplies **only if:**

- DBE negotiates the price, arranges delivery, takes ownership and pays for the materials and supplies for the project
- DBE prepares the estimate, quantity of material, and is responsible for the quality of materials
- May not count cost of material, supplies, equipment purchased/leased from prime



Counting by Work Type

DBE material suppliers that are not regular dealers (e.g., brokers)

- Count fees charged for assistance in procurement of materials and supplies, include transportation and delivery charges, if applicable
- Make sure charges are not inflated



Counting and CUF

3. CUF Reviews



CUF Reviews: Basic Principles for Determining CUF

- DBE performs at least **30%** of work with its own workforce
 - Independently **performs, manages, and supervises** the work specified under its contract
- Owns its materials
- **Owns or leases equipment** it uses
 - leases from primes are permitted but may not be counted unless prime is DBE



CUF Reviews: CUF Review Components

- Review the **subcontract/lease agreement**
 - Review what function the DBE was hired to perform
 - Is role on project **consistent** with normal industry practice?
- Would a prime contractor typically hire a **non-DBE subcontractor** to perform these services?
- Is the DBE performing in **the same manner** as other subcontractors?



CUF Reviews: CUF Onsite Assessment

Project oversight is not just the responsibility of Civil Rights staff !

- Recipient must have adequate staff to implement program requirements
- Field personnel are in the best position to observe/monitor DBE commitments and/or “suspicious behavior and practices”
 - Project Inspectors
 - Area/Project Engineers



CUF Reviews: DBE Performance Observations



Is the **DBE's work distinct** from that of another subcontractor or work performed by prime?

Is the **work designated** under the DBE's contract **being performed** by the prime or another company?

CUF Reviews: DBE Management Observations

Red Flags:



- DBE owner or manager provides **little or no supervision** of work
- DBE has no control over **scheduling** and **work operations**
- DBE's superintendent is **not** a regular employee of the firm, or the prime/prime's affiliate supervises the DBE's work



CUF Reviews:

DBE Workforce Interviews/Observations

Interview Project Employees:

- Do they readily know who they work for?
- Do they appear on DBE's payroll records?
- Does it appear that workers are controlled or supervised by another contractor or the prime?
- Do employees appear on prime contractor's or other contractor's payroll?
- Did DBE subcontract work to non-DBE?

CUF Reviews: Use of Equipment

Was there a reason for the use of prime's equipment (emergency situation)?

- Is DBE using equipment that belongs to the prime or other contractor that is not leased?
- Is the use of such equipment essential and integral to its business operations?
- Was the equipment used to complete a substantial portion of the work?



CUF Reviews: Use of Equipment

Leased equipment not under the direction or supervision of the DBE:

- Did the prime claim credit in its commitment for equipment it leased to the DBE?
- Does DBE equipment bear logos or markings?
- Or are there magnetic signs used to cover permanent markings?

CUF Reviews: Use of Materials

Furnish and install

- Do delivery slips, invoices, and certifications indicate ownership and that the DBE participated in all phases of procurement?

Material supply contracts (Regular Dealer)

- If participation was counted at 60%, did DBE transport materials or did they originate from the DBE's principal place of business?
- Did DBE take possession of the materials or were items "drop shipped" to prime by manufacturer?



CUF Reviews: DBE Trucking Firms

Recipient must have effective oversight mechanism to verify that the value of DBE vs. non-DBE trucking services aligns with the original commitment.



CUF Reviews: DBE Trucking Oversight

- Recipient should develop trucking requirements and include them in the contract
- Require DBE to provide a list of all trucks it will use in advance
- Verify trucking firm before allowed on jobsite
 - DBE must report payments to supplemental haulers, indicating whether or not DBE
 - Audits to verify accuracy of DBE reports



Caution: Joint Checks for Supplies Used by DBEs

Checks issued by a prime contractor to a DBE subcontractor and to a material supplier or another third party for items to be incorporated into a project

- Not prohibited, but proceed with caution
- Must satisfy all other CUF requirements
- See Q and A:

https://cms.dot.gov/sites/dot.gov/files/docs/Official_Questions_and_Answers_49_CFR_Part_26.pdf



Caution: Joint Checks for Supplies Used by DBEs, cont'd.

- Include process in DBE Program Plan
- Require documentation that the DBE used its own funds to pay the supplier
- Require the parties to obtain prior approval
- Require a written joint check agreement among parties



CUF Reviews: Approving DBE Commitments

- Is DBE certified to perform the type of work listed on the prime's commitment?
- Does the DBE have the capacity to perform the work listed?
- Is the prime automatically credited 60% of the cost of materials toward the contract goal based upon the assumption that a DBE material supplier will act as regular dealer?
- Is the dollar amount of the subcontract commensurate with the type of work to be performed?



CUF Reviews:

Approving DBE Commitments, cont'd.

- Beware of large dollar amounts for trucking commitments
- Do not accept DBE trucking commitments that clearly can't be met - consider a lack of GFE, or require prime use GFE to obtain additional DBEs (if recipient allows DBE commitments as a matter of “responsibility”)
- Best practice: ask for trucking plan/schedule at certain time - before contract award or before notice to proceed





Case Study 1



The Area Engineer learns that Infinity Construction, a DBE subcontractor, did not own or lease the equipment used in the performance of work related to its landscaping subcontract. The Area Engineer determined that the prime owned the equipment used by Infinity, and also discovered that the prime had ordered all materials. The DBE's subcontract was purported to represent the cost of labor and materials for seeding, planting, and the construction of a stone retaining wall.

The Area Engineer also determined that the DBE supervised the work and provided its own labor; the labor costs were deemed reasonable and represented 60% of the cost of its approved subcontract.

Poll Question

In this scenario, what portion of Infinity's work should count toward the goal?

- A. The cost of materials.
- B. The reasonable cost of labor provided by Infinity
- C. The reasonable cost of labor and the cost materials
- D. Items A and C

Explanation

- A. It's not the cost of materials, because the DBE did not meet all 5 CUF criteria relative to materials by allowing the prime to order.
- B. Correct Answer--**Labor was the only legitimate function performed independently and with the DBE's workforce. Some counting is warranted because the DBE performed at least 30% of the value of work under its subcontract with its own workforce.
- C. Because no CUF was performed relative to materials, "C" cannot be the correct answer.
- D. A and C are both wrong answers.



Case Study 2



Jackson Brothers Construction was awarded a Federal-aid contract. Through its stated DBE commitments, Jackson Brothers met its contract goal. However, the Area Engineer learned that one of Jackson Brothers' subcontracts for materials included a clause requiring a DBE regular dealer to obtain its materials using the prime's negotiated price with a specified manufacturer. The DBE subsequently procured and delivered the materials. In addition, the prime issued a "joint check" to its manufacturer/DBE. The joint check used was not approved under the State DOT's procedures stated in the DBE provisions and was required by the prime's manufacturer with whom the DBE had never done business.

Poll Question

Based on this scenario, which of the following actions is most appropriate?

- A. Count credit for the materials at 60%.
- B. Count credit only for fees and commissions deemed reasonable for costs incurred by the DBE in facilitating the transaction; waive the remaining goal shortfall.
- C. Disallow credit because no CUF was provided and the DBE Provisions were breached; require the contractor to demonstrate every good faith effort in making up the shortfall representing 60% of the material costs stated in the prime's commitment.
- D. All of the above.

Explanation

- A. The DBE did not meet all 5 CUF criteria; therefore “A” cannot be the answer.
- B. If you determined that the DBE was an extra participant in this case, which is likely, then there was no CUF and there should be no counting toward the prime’s contract goal. Furthermore, the prime should be required to demonstrate every good faith effort to make up the shortfall.
- C. Correct answer--**For the reason stated in “A” there was no CUF and it is a material fact that the prime did not comply with the joint check procedures of the recipient’s contract.
- D. Self-explanatory.

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http://www.faa.gov/about/office_org/headquarters_offices/acr/

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Q & A

