



# Understanding Commercially Useful Function (CUF)

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All Regional Construction Conferences

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Both the prime contractor and WisDOT receive credit toward the DBE goal (contract and overall) only when a DBE working on a contract performs a CUF. DBEs generally perform work 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.



## 49 CFR Part 26.55(c)(1)

A DBE performs a CUF when it is responsible for execution of the ...contract and is carrying out its responsibilities by actually **performing, managing, and supervising** the work involved. “ ... with respect for **materials and supplies** used on the contract, for **negotiating price, determining quality, quantity, ordering the material and installing** (where applicable) and **paying** for the material itself.

Onsite CUF monitoring is an essential factor in DBE credit approval. When CUF is confirmed the DBE credit can be substantiated.



# CUF ONSITE REVIEWS

- Recipients of the CUF form are required to implement compliance mechanisms and monitor contract performance to ensure compliance with 49 CFR 26.55.
- CUF monitoring must be completed for every DBE on every project for which DBE credit is claimed. Project Engineers must continue to monitor DBE performance through the life of the project and should contact the DBE Program Engineer if performance concerns arise
- For project oversight, field personnel are in the best position to observe if the reality reflects the commitments or to observe suspicious behavior/practices
  - Project Inspectors
  - Area/Project Engineers



# CONSIDERATIONS FOR EVALUATING CUF

- Amount of work subcontracted
- Standard industry practices
- DBE's role
- Payment is commensurate with the work actually performed





# DBE COMMERCIALLY USEFUL FUNCTION REVIEW AND CERTIFICATION

Wisconsin Department of Transportation

DT1011 2/2020

WisDOT Region/County	xxxxxxx/xxxxxxxxxxx
Prime Contractor	xxxxxxxxxxxxxxxxxxx
Project Number(s):	xxxx-xx-xxxx

CONTRACT DBE GOAL	
Advertised	Awarded (Post Evaluation)
xx.xx%, \$xx,xxx,xxx.xx	\$xx,xxx,xxx.xx / xx.xx%
Subcontract Value:	\$xxx,xxx.xx

PROJECT ENGINEER/CUF CERTIFIER	
Name	xxxxxxx xxxxxxxxxxxxxx
Title	xxxxxxxxxxxxxxxxxxx
Signature	→ either digitally sign or sign & scan

DBE SUBCONTRACTOR/CUF REVIEW RECIPIENT	
Firm Name	xxxxxxxxxxxxx, Inc.
Work Type for DBE Credit	xxxxxxxxxxxxxxxxxxx
Date	→ enter date



RECORDS AND DOCUMENTATION REVIEW	YES	NO	N/A
<p><b>Management/Supervision</b></p> <p>Yes, if a DBE on-site representative, a regular employee of the DBE, is providing the direct supervision of the DBE employees, and is in effective control of the DBE work.  <b>Name of DBE on-site representative:</b> <input type="text" value="Enter Name of DBE Representative (N/A for Trucking)"/></p> <p>No, if a prime or another contractor representative is providing direct supervision of the DBE employees, and appears to be in control of the DBE work.  <u>Examples of Records/Documentation for Verification:</u>  Subcontract or Documents submitted to Project Engineer regarding the project on letterhead  Document communication with DBE owner or Superintendent</p>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<p><b>Employees</b></p> <p>Yes, if the DBE firm is performing their work with individuals normally employed by the DBE firm, and on this project these employees are under DBE supervision, and appear on DBE payrolls.</p> <p>No, if the DBE work is being performed by individuals who normally work for other firms, are being "shared" by the DBE firm for this project or are not appearing on the DBE payrolls.  <u>Examples of Records/Documentation for Verification:</u>  Certified Payrolls  Name on equipment uniforms</p>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<p><b>Supply/Install</b></p> <p>Yes, if the DBE negotiated the cost of materials, arranged for the delivery, and paid for the materials or supplies.  Who and what work items? <input type="text" value="Enter Work Items (N/A for Trucking)"/></p> <p>No, if the DBE was not involved in the acquisition of the materials used to perform their work items.  <u>Examples of Records/Documentation for Verification:</u>  Invoices or Bills of Lading/Delivery Tickets  Cancelled checks or Documentation of Material On Hand</p>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<p><b>Equipment</b></p> <p>Yes, if the DBE is using their own equipment, and Yes if the DBE is leasing specialized equipment, from other than the Prime, consistent with normal industry practices and at competitive rates.  <b>Name(s) on DBE equipment:</b> <input type="text" value="Enter Name That Appears on Equipment/Trucks"/></p> <p>No, if the DBE is dependent on using or leasing equipment from the Prime.  <u>Examples of Records/Documentation for Verification:</u>  Titles, Lease Agreements, Invoice  Rental or lease documents</p>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<p><b>Commercially Useful Function</b></p> <p>Does it appear that the DBE is actually performing, managing, and supervising the work that they are performing for DBE credit?  <b>If no – alert the DBE Office or the servicing LCS – Labor Compliance Specialist.</b>  <u>Example of Records/Documentation for Verification:</u>  Subcontract Agreement, Purchase Order/Invoice, Hauling Ticket</p>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>





## Comment and Red Flag Checklist

FEDERAL STANDARDS FOR DBE UTILIZATION	RED FLAG CHECKLIST
<p><b><u>PERFORMANCE</u></b></p> <ol style="list-style-type: none"><li>1. DBE must be responsible for performing its own work on the project</li><li>2. The scope of the DBE subcontract must be performed with its own workforce</li><li>3. The DBE keeps a regular workforce and has its own employees</li><li>4. The DBE is utilizing its own equipment</li><li>5. Equipment operation must be subject to the full control of the DBE</li></ol> <p><b><u>MATERIALS</u></b></p> <ol style="list-style-type: none"><li>1. DBE is responsible for the delivery of the materials</li><li>2. DBE is ordering the material and invoices indicate that DBE is the customer</li><li>3. Material invoices indicate that DBE owner or Superintendent is the contact person</li></ol> <p><b><u>MANAGEMENT/SUPERVISION</u></b></p> <ol style="list-style-type: none"><li>1. DBE supervisor is a full-time employee of the DBE</li><li>2. Employees are being supervised by DBE supervisor</li><li>3. DBE is scheduling work operations</li></ol>	<p><b>Please check any that apply</b></p> <ul style="list-style-type: none"><li><input type="checkbox"/> A portion of the DBE's work being done by the prime contractor or jointly with another contractor</li><li><input type="checkbox"/> Employees are working for both the Prime and the DBE</li><li><input type="checkbox"/> Equipment used by the DBE belongs to another contractor and there is no formal lease agreement</li><li><input type="checkbox"/> Equipment signs and markings cover another contractor's identity</li><li><input type="checkbox"/> Equipment has another contractor's name on it</li></ul> <hr/> <ul style="list-style-type: none"><li><input type="checkbox"/> Materials for DBE credited work are delivered to the prime contractor</li><li><input type="checkbox"/> Materials are ordered, billed to, and/or paid by the prime contractor</li><li><input type="checkbox"/> Invoices do not indicate that DBE is the customer</li><li><input type="checkbox"/> Prime's employee is listed as the contact person on invoices</li><li><input type="checkbox"/> Materials come from prime contractor's stockpile</li></ul> <hr/> <ul style="list-style-type: none"><li><input type="checkbox"/> DBE firm's employees are being supervised by prime contractor or another contractor</li><li><input type="checkbox"/> DBE is not supervising the work of its employees</li><li><input type="checkbox"/> DBE supervisor is not a full-time employee of the DBE</li></ul>
<b>COMMENTS/NOTES</b>	
<p>→ If there are any red flag issues or you have additional information you would like noted, please enter here</p>	



# CUF FORM (DT 1011) – TRUCKING SPECIFICS

## CUF instructions specific ONLY to DBE trucking firms:

- In most cases for the DBE trucking firms, you can use N/A unless it is a “Yes” on the 1<sup>st</sup> page
- DBE trucking firms must complete the necessary work on site with their own equipment and labor. (There is a leased trucks exception). Please enter under Equipment on page 1, the name(s) on the DBE equipment (name on truck)
- Due to the nature of the work, trucking will not typically have supervision by the DBE trucking firm (Management/Supervision section) nor will order/invoice for materials (Materials section) on page 2 of the CUF form (DT 1011)
- The prime must inform project staff of any offsite hauling that DBE truckers perform on the project so that these hauls may be monitored. Please indicate on the CUF form in the equipment area on page one if offsite hauling is involved.



# TRUCKING & THE UPDATE TO THE “COMMITMENT TO SUBCONTRACT TO DBE” FORM ( DT 1506)

There is an update to the “Commitment to Subcontract to DBE” form (DT 1506) with specific sections that apply to trucking. This is the top section where the number of DBE owned (O) or leased (L) trucks needs to be indicated in Column 4.

## COMMITMENT TO SUBCONTRACT TO DBE

DT1506 12/2021 s.84.06(2) Wis. Stats.  Non-Traditional Project

Prime Contractor: \_\_\_\_\_  
 County: \_\_\_\_\_

This contract requires that a specified percentage of the work be subcontracted to a disadvantaged business enterprise and that this information be submitted as described in ASP-3. The submittal of this form with the bid proposal constitutes your DBE commitment. Include Attachment A for DBEs included on commitment.

Clear

Wisconsin Department of Transportation

Project ID: \_\_\_\_\_  
 Proposal #: \_\_\_\_\_

Letting Date: \_\_\_\_\_  
 Total \$ Value of Prime Contract: \$ \_\_\_\_\_  
 DBE Contract Goal: \_\_\_\_\_ %  
 DBE Goal Achieved: 0.00 %

**This form must be completed and returned for this proposal. See page 2 for instructions.**

1. DBE Firm	2. Work or Items to be subcontracted	3. Supplier Y/N	4. Trucking Only	5. DBE Full Subcontract \$	6. DBE Amount for Credit \$
_____	_____	_____	O# _____ L# _____	_____	_____
_____	_____	_____	O# _____ L# _____	_____	_____



# CREDIT FOR TRUCKING

There are specific requirements for the trucking industry that must be followed in order to receive DBE credit.

## Credit for Trucking

DBE crediting for the trucking industry is achieved in the following manner:

- a. A minimum of one truck owned by the DBE must be used on the contract
- b. 100% DBE credit is given for DBE-owned trucks and trucks leased from another DBE
- c. Trucks leased by a DBE from non-DBE firms will be given DBE credit of 10% of the subcontract value

All trucks used for credit must be listed and approved on the DBE firm's Schedule of Owned/Leased Vehicles for DBE Credit and/or a WisDOT approved trucking utilization plan

It is the Prime Contractor's and the DBE firm's responsibility to ensure that utilization of trucks and the DBE credit earned is in accordance with the above and will yield the subcontract dollar value listed on the Commitment to Subcontract to DBE form.



# TRUCKING - OFFSITE HAULING

What is offsite hauling?

- This is hauling from any site that is not the actual worksite, such as from pit to plant.
- Often a site not dedicated specifically to the project
- Prime can substantiate the amount of material hauled for the specific project
- Prime can substantiate the commitment to the DBE associated with the contract



# OFFSITE HAULING – CUF MONITORING

In order to complete CUF monitoring for offsite hauling, WisDOT will implement the following:

- Weekly progress meetings – Ask prime if DBEs will be doing offsite hauling in the coming week. Indicate potential for PE to visit pit/plant
- Conduct spot checks of pits/plants to verify DBE is hauling the materials and/or verify the hauling logs
- Prime is prepared to submit hauling tickets, plant/pit tickets, timecards, and other necessary documentation at the request of WisDOT to substantiate the offsite haul



# OFFSITE HAULING – “ATTACHMENT A” SPECIFIC INSTRUCTIONS

There is a new field on the “Attachment A” specific to offsite hauling and there is an addition of item #6 in the Instructions for completing the Attachment A form.

# Owned Trucks	# Leased Trucks	# DBE-Owned Leased Trucks	# Non-DBE-Owned Leased Trucks

Off site Hauling

6. Check "Off site hauls" box if DBE will be hauling materials from pit to plant and may not be on the project site
  - a. Be prepared to submit hauling tickets, pit/plant records, time sheets if requested to substantiate DBE participation on off site hauls for CUF verification purposes.



## Instructions for Completing DBE Commercially Useful Function Review & Certification Forms

### Regulatory Guidance

Per 49 CFR 26.55 A DBE performs a commercially useful function (CUF) when the DBE is responsible for execution of their work under the contract and the DBE is carrying out its responsibilities by **actually performing, managing, and supervising their work**. A DBE firm **does not** perform a CUF if the DBE 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. DBE Commitments become contractual requirements upon the execution of the contract and should be monitored and enforced accordingly. Modifications to the DBE commitment must be justified by the Department's project staff, in writing.

Per 49 CFR § 26.37 WisDOT must have a **monitoring and enforcement mechanism** to ensure that work committed to DBE firms on federally funded projects is actually performed by the DBE firm contracted with per the DBE Commitment Form (DT. This mechanism must include a **written certification** that the Project Engineer and/or WisDOT staff has adequately monitored the work site and contract records such that WisDOT staff confirms that the reviewed DBE firms have performed their work on the project with their own resources.

The Construction Project Engineer is responsible for reviewing the satisfactory work performance of all contractors, including DBE certified firms, on WisDOT contracts. However, anyone on the project team should alert the DBE Office if there are questions or issues regarding the performance of DBE subcontracted work.

On federal aid contracts, the signature of the Project Manager on the DT1582 Completion Certificate recorded in Project Tracking constitutes certification that the Project Engineer and/or project staff effectually monitored the DBE work performance and contract records to verify that the DBE firms were responsible for the execution of their work under the contract.





## Instructions

1. DBE Office will provide forms DT1011 with corresponding Project ID and DBE firms to Project Engineer or CUF Certifier.
2. This CUF Review should be conducted when work approved for each selected DBE consultant is underway.
3. The reviewer/certifier must answer all of the questions on page 1 and affirm that there were no red flags. The Comment page should be used to explain anything checked "No" on page 1 and/or any other red flags.
4. The reviewer/certifier should check the "YES" box when the DBE consultant is clearly performing the CUF area (i.e. Management/Supervision, Employees, Materials, and Equipment) and when the area directly applies to a DBE consultant's work type. The reviewer/certifier should check the "NO" box when the DBE is not performing the CUF area and when the area directly applies to a DBE's subcontracted work type. The reviewer/certifier should check the "N/A" box when the category does not apply to the DBE and its subcontracted work type (i.e. The "Materials" category would not apply to DBEs subcontracted for materials testing work).
5. All findings on this form should be substantiated with entries in the Project Diary when applicable. A complete review affirms that an inspection of the DBE firm's work was conducted by WisDOT staff during the execution of the referenced contract. **Red Flag observations must be forwarded to the DBE office promptly: [DBE.Alert@dot.wi.gov](mailto:DBE.Alert@dot.wi.gov)**



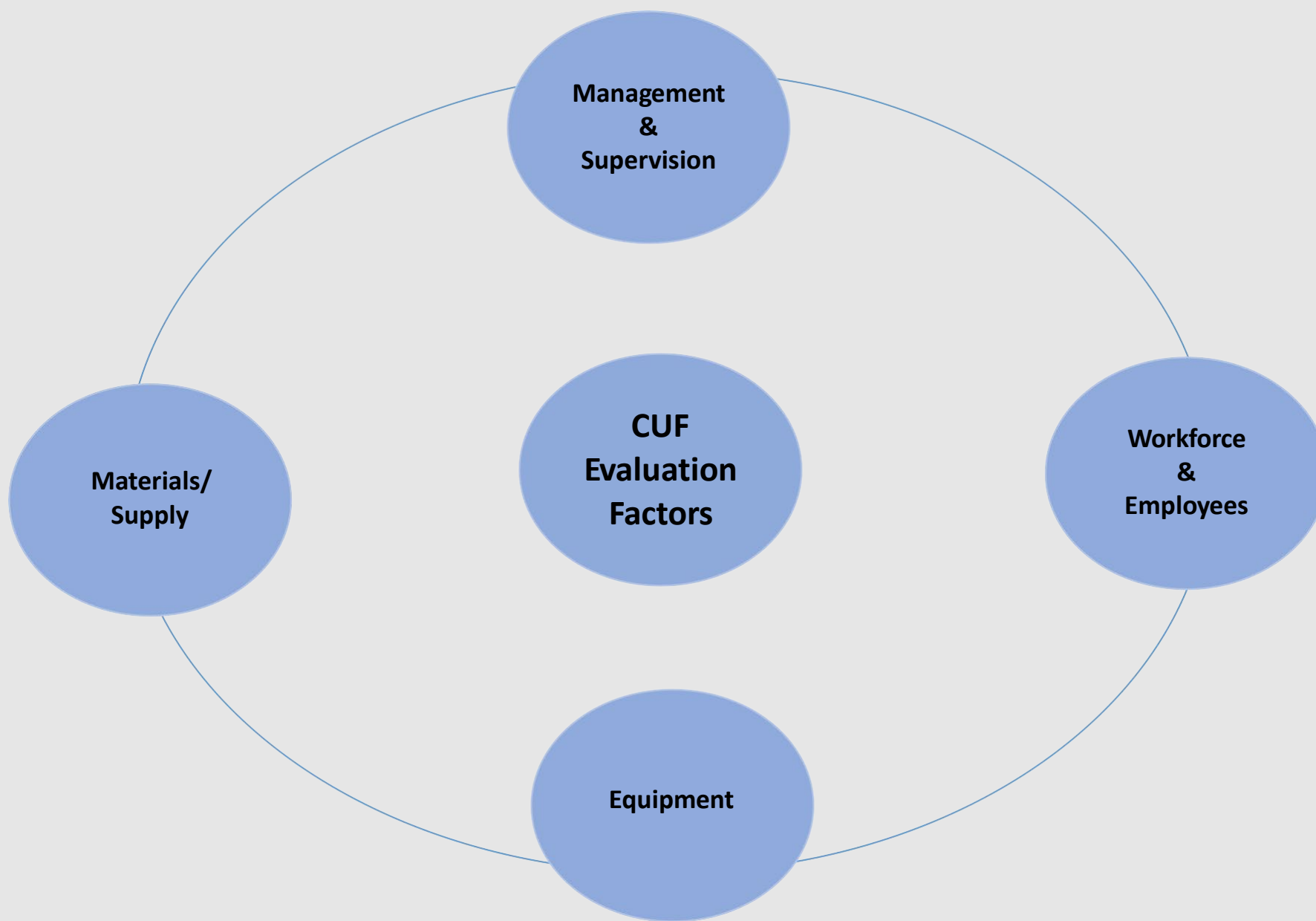
# CUF NON-COMPLIANCE

Failure of a DBE to perform a Commercially Useful Function could result in WisDOT taking specific definitive actions to enforce the CUF requirement of the contract.

Some of the actions WisDOT 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
- 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





# KEY FACTORS IN DETERMINING CUF PERFORMANCE

## Management & Supervision

- Supervises daily work operations, prepares and submits certified payrolls, hires/fires personnel, work is performed by DBE employees. DBE schedules work activities

## Workforce & Employees

- Controls its own workforce through direct supervision by owner or superintendent, work is performed by DBE employees

## Equipment

- Owns the equipment necessary to perform the work under contract, leased equipment is allowable except from the prime, provides personnel to run the equipment

## Materials/Supply & Install (No CUF DT1011 form is needed, CUF Reviewer handling)

- DBE contractor furnishes & install materials, negotiates price, determines quality & quantity of materials, orders materials, and pays for materials



# EVALUATION FACTOR - MANAGEMENT & SUPERVISION

**The DBE must manage the work**

**Management includes, but is not limited to:**

- Scheduling work operations
- Receive quotes & order equipment and materials
- Preparing and submitting certified payrolls
- Hiring and firing employees
- Make all operational and managerial decisions
- Supervise daily operations, either personally or with a full-time, skilled, and knowledgeable superintendent who is under the DBE owner's direct supervision

**Mere performance of administrative duties is not supervision of daily operations**



# MANAGEMENT & SUPERVISION **RED FLAGS**

- Supervision of DBE employees by another contractor
- DBE provides little or no supervision of work
- DBE's superintendent is not a regular employee
- Supervision is performed by personnel associated with the prime contractor or any other firm or business
- DBE firm's owner is not aware of the status of the work or the performance of the business
- Inquiries by WisDOT are answered by the prime contractor
- The work being performed is outside of the DBE's known experience or capability



## ***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

# EVALUATION FACTOR - WORKFORCE & EMPLOYEES

- DBE firms must keep a regular workforce
- DBE firms cannot "share" employees with non-DBE contractors, particularly the prime contractor or subsidiary
- DBE firm responsible for all payroll and labor compliance requirements for all employees within the control of the company
- Direct or indirect payments by any other contractor will not be allowed





# WORKFORCE & EMPLOYEES **RED FLAGS**

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



## ***Typical CUF questions could include:***

- Who prepares the DBE's certified payroll?
- Has 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 documentation to evaluate:***

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

# EVALUATION FACTOR - EQUIPMENT

- DBE firm may lease equipment if consistent with industry practices and at competitive rates
- A lease agreement is required and should be on long term basis
- A DBE firm may lease equipment on an ad hoc basis from another contractor, excluding the prime contractor or affiliate, with approval of WisDOT
- Equipment leased and used by the DBE firm with payment deducted from the prime contractor's payment(s) to the DBE is not allowed



# EQUIPMENT RED FLAGS

- Equipment used by DBE firm belongs to the prime contractor or another contractor with no formal lease agreement
- 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
- DBE does not own the right type of truck(s) for the contract work
- Drivers do not know who they work for when asked



# EQUIPMENT – QUESTIONS & DOCUMENTATION

## *Typical CUF questions could include:*

- Determine if equipment belongs to the DBE. is it owned or leased?
- If leased, is there an equipment agreement identifying the terms & 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? Is the payment for the equipment deducted from the work performed?

## *Typical documentation to evaluate:*

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



## Count cost of **materials 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

# MATERIALS / SUPPLY & INSTALL **RED FLAGS**

- Materials for the DBE, ordered or paid for by the prime contractor
- 2 party checks (joint checks) from prime to DBE subcontractor and supplier or manufacturer. Joint check OK with WisDOT approval
- Materials or supplies necessary for the DBE firm'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
- A DBE prime contractor only purchases materials while performing little or no work



## ***Typical CUF questions could include:***

- Is the work to be performed by a DBE a “Furnish & Install” item of work?
- Who makes arrangement for delivery of materials and 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





# WORK TYPE AND COUNTING



Subcontractors (100% or less)



Trucking Firms/Haulers (WisDOT has two options)



Regular Dealers/Suppliers (60%)



Manufacturers (100%)



Service Providers (Consultant/Broker) (reasonable fees and commission)

# SUBCONTRACTOR - WORK TYPE AND COUNTING



Subcontractors (100% or less)

## DBE subcontractor

- Performs specific work items with own workforce pursuant to a contract agreement with prime
- Must perform at least 30% of the work of its subcontract or contract
- Furnish and install
- Count 100% of prime's payment to DBE toward contract goal (labor and materials)



# TRUCKING FIRMS/HAULERS - WORK TYPE AND COUNTING



Trucking Firms/Haulers (WisDOT has two options)

## Two options for counting trucks:

- **Option 1: Count only DBE trucks** (owns, insures and operates, and employs drivers). DBE trucking firm can count other trucks leased from another DBE. **Option 2:** Permits limited DBE credit for non-DBE trucks, but it can't exceed the value of transportation services provided by DBE trucks.

- Example: DBE Firm has 3 trucks. It can use up to 3 non-DBE trucks (Credit received for 6 trucks).

- DBE credit can be given if DBE leases non-DBE trucks but uses DBE employees/drivers (new rule)

**Option 2 requires approval from FHWA before it can be used**



# REGULAR DEALERS/SUPPLIERS - WORK TYPE AND COUNTING



Regular Dealers/Suppliers (60%)

- Prime contracts with a regular dealer to supply and deliver products
- Regular dealer owns, operates a store or warehouse, that contains products it sells to the public
- For bulk items must own and operate distribution equipment
- **60% Credit** - If the DBE is performing as a **regular dealer** – Must determine the amount of credit on a **contract-by-contract basis**.



# MANUFACTURERS - WORK TYPE AND COUNTING



## Manufacturers (100%)

- 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 specifications
- **Count 100%**



# SERVICE PROVIDERS (Consultant/Broker) - WORK TYPE AND COUNTING



Service Providers (Consultant/Broker) (reasonable fees and commission)

Prime hires a DBE to provide a service:

- Professional
- Technical
- Managerial
- Brokerage (facilitate the procurement of materials and supplies). Count entire amount of fees or commissions, **if reasonable amount**



# REGULATORY AUTHORITY

## **49 CFR Part 26.13**

All recipients and subrecipients must comply with the requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Includes sanctions for noncompliance.

## **49 CFR Part 26.37**

Ensure that work committed to DBEs is performed by DBEs.

*Requires a written certification (Attachment A)*

## **49 CFR Part 26.53**

The bidder must submit enough DBE participation to meet the goal or documented adequate good faith efforts.

## **49 CFR Part 26.55**

The DBE must perform a Commercially Useful Function (CUF).



# INVESTIGATIONS

May 10, 2018

## FHWA Debars Pennsylvania Company and Owner

On May 10, the Federal Highway Administration debarred WMCC Incorporated (WMCC), Finleyville, Pennsylvania, and its owner, Watson Maloy, for a period of 3 years. Maloy previously pleaded guilty to conspiracy charges for his role in a fraud scheme involving federally funded bridge projects in Pennsylvania. WMCC, a certified Disadvantaged Business Enterprise (DBE), entered into DBE subcontracts valued at approximately \$1.9 million with prime contractors. However, the firm failed to perform a commercially useful function.

Maloy admitted that, in 2012 and 2013, he and co-conspirators employed by Century Steel Erectors Co. LP (CSE) used WMCC as a front company to obtain profits from contracts slated for legitimate DBE firms. CSE staff, rather than WMCC personnel, performed and supervised the DBE subcontracts. CSE completed all the DBE work, including negotiating crane rentals, ordering supplies and materials, and recruiting union workers. In addition, Maloy admitted, to conceal the scheme CSE officials used WMCC letterhead and email accounts when communicating with general contractors and officials at the Pennsylvania Department of Transportation. CSE personnel also possessed WMCC business cards, T-shirts, and hard hats, as well as magnetic WMCC placards to hide CSE logos on construction vehicles.

DOT-OIG conducted this investigation with the Federal Bureau of Investigation and the Pennsylvania Turnpike Commission OIG.





# INVESTIGATIONS

November 1, 2018

## New Jersey Contractor Settles Allegations of DBE Fraud

USAO, District of New Jersey - Press Release

On November 1, 2018, Kiewit Constructors, Inc. (Kiewit), a New Jersey-based construction company, entered into a civil settlement agreement with the U.S. Attorney's Office, District of New Jersey. Kiewit agreed to pay \$1.87 million to resolve allegations that it improperly reported Disadvantaged Business Enterprise (DBE) participation on a federally funded construction project.

In 2009, Kiewit entered into a \$63.8 million contract with the New York State Metropolitan Transportation Authority's (MTA) Long Island Rail Road (LIRR) to design and implement phase II of the Atlantic Avenue Viaduct Rehabilitation Project. The Atlantic Avenue Viaduct is an approximately 1.5-mile bridge that connects Queens and Brooklyn in New York. Kiewit's work included furnishing and installing new steel girders and spans, along with related steelwork.

The LIRR required its contractors to subcontract with DBEs and established DBE goals to ensure the contractors made "good faith efforts" to achieve those goals. Kiewit entered into an approximately \$11.9 million subcontract with Iron Eagle Construction Corp., a then DBE-certified steel erection company, to furnish and install steel spans. The United States asserts that Kiewit did not take contractually mandated steps to address Iron Eagle's failure to perform a commercially useful function and that it failed to meet its DBE obligations under the contract.

DOT-OIG conducted this investigation with the Port Authority of New York and New Jersey-OIG and MTA-OIG.



# INVESTIGATIONS

March 29, 2006

## Owner of Disadvantaged Business Enterprise (DBE) Firm Fined \$40,000 for Defrauding the Federal Government on a \$12 Million Oklahoma Highway Project

On March 29, Walter Alan Patton, owner and president of Patton Construction, Inc. (PCI), Tahlequah, OK was ordered by a U.S. District Court judge in Muskogee, OK to pay a \$40,000 fine and serve five years probation for conspiring to defraud the United States in connection with a scheme to violate DBE regulations on a nearly \$12 million federally-funded highway widening project. As a certified DBE, PCI's \$280,000 subcontract for concrete work on drainage ditch boxes and culverts would have met requirements of the prime contractor for utilizing the direct services of a DBE. Instead, Patton conspired with a non-DBE to perform the work and made false representations in the form of **fraudulent payroll reports**. Investigation determined that employees listed on PCI payroll reports actually worked for the non-DBE. Patton pled guilty to the felony conspiracy charge in October 2005. The ongoing investigation is being conducted jointly with DCIS, the Oklahoma DOT, and the Air Force Office of Special Investigations.



# SUMMARY

- CUF is a counting issue – Not to be confused with certification
- Key elements of CUF – Actually performing, managing, & supervising the work involved
- DBE credit toward goal based on the type of work
- A DBE must perform a CUF in order for the contractor/consultant to receive credit toward the assigned contract goal
- Payments to DBEs will determine if the contractor/consultant fulfilled its DBE goal obligation

**Commercially Useful Function confirmed** ➡ **DBE credit approved!**



**For CUF related questions please contact the WisDOT Office of Business Opportunity  
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**Reference Links:**

**<https://awpkb.dot.wi.gov/Content/constr/Pantry/Pantry.htm>**  
**<https://wisconsindot.gov/Pages/doing-bus/civil-rights/dbe/cntrcting-with-dbe.aspx>**

