



# INDIANA DEPARTMENT OF TRANSPORTATION

Driving Indiana's Economic Growth

100 North Senate Avenue  
Room N925  
Indianapolis, Indiana 46204

PHONE: (317) 232-5502  
FAX: (317) 234-5133

**Mitchell E. Daniels, Jr., Governor**  
**Michael B. Cline, Commissioner**

July 01, 2011

## CONSTRUCTION MEMORANDUM 11-05

TO: District Deputy Commissioners  
Technical Service Directors  
District Construction Directors  
District Area Engineers  
Project Engineers/Supervisors  
District EEO Officers  
District LPA Coordinators  
Economic Opportunity Division  
Internal Audit Section, Internal Affairs Division

FROM : Mark A. Miller, Director   
Division of Construction Management

Subject: GIFE § 2.7.3 Rental /Lease Agreements

To ensure INDOT is complying with federal regulation (49 CFR § 26.55) and that we are counting DBE participation accurately on the jobsite, INDOT's Construction Management Division and Economic Opportunity Division have made changes to GIFE § 2.7.3 Rental/Lease Agreements. These changes primarily address questions regarding when a contractor should submit a Rental/Lease Agreement to the PE/S.

These changes are important for INDOT to determine when a DBE is performing a commercially useful function. Under 49 CFR §26.55, a Prime Contractor may only count expenditures toward the contract's DBE goal if the DBE, "is performing a commercially useful function (CUF);" therefore, INDOT must be able to determine which DBE subcontractors are doing what type of work, at any given time throughout the duration of a contract. INDOT performs CUF reviews to determine if the DBE, "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" as required by 49 C.F.R. § 26.55(c)(1).

The new changes to the GIFE clarify that INDOT must receive a Rental/Lease Agreement whenever a DBE company is involved, either as the lessee or the lessor. GIFE §2.7.3 also allows INDOT to request a copy of the Rental/Lease Agreement as needed. Specifically, this section reads: "If the PE/S suspects a problem on the project because of a rental /lease agreement with any contractor, subcontractor, lessee or lessor, including non-DBEs, the PE/S has the right to request and receive the agreement for review." In addition, the amended GIFE § 2.7.3 will also address the issue of payrolls and that they must be relinquished to the PE/S whenever the work in question is covered by the Davis Bacon Act. In an attempt to help clarify these changes, a chart depicting the review process has been included with the revised GIFE. Please direct any questions you may have on Rental/Lease Agreements to the District EEO Officer.

The revised GIFE provisions will go into effect upon the publication of this memo. We will uniformly enforce these instructions throughout all six districts within the state of Indiana. All PE/Ss and EEO Officers should review the attached section of the GIFE to ensure that they are securing the required Rental/Lease agreements from the Contractor.

### **2.7.3 Rental /Lease Agreements**

The purpose of a Rental/Lease Agreement is to allow the contractor to rent or lease a piece of equipment.

All work not performed by an approved subcontractor must be performed by personnel hired by the prime contractor and the certified payroll must reflect that the persons have been paid directly. The contractor or subcontractor is permitted to rent or lease equipment from other contracting firms or rental agencies as long as there is a bona fide rental/lease agreement. The agreement cannot contain any provisions that might cause it to be construed as a subcontract agreement. Such an agreement would be in violation of the contract.

The difference between a subcontract and a rental/lease agreement is that a subcontract will stipulate items of work by unit of measure such as: EACH, TON, CYS, LFT, etc., along with specific quantities and unit prices. A standard rental/lease agreement will stipulate the basis for payment as an hourly, weekly, or monthly rate for the rental of equipment or trucks (with or without operators). If the operator is provided by the prime or subcontractor, the operator must be paid directly by the prime or subcontractor. If the operator is furnished with the equipment, the operator must be paid by the lessor.

The rental/lease agreements could cover such items as traffic control devices, trucks, equipment (with or without operators), etc., and the agreement must be signed by the parties involved and shall contain a statement that this is the only agreement that exists between the parties.

The PE/S will need to secure copies of the rental/lease agreements from the contractor or subcontractor when a DBE firm is involved (either as a first tier lessee or a lower tier lessee). Times when a rental/lease will be secured would be when a lease is made with a DBE firm either as the lessee or the lessor; a hauling lease with a DBE firm; a situation where a DBE hauling lessor subleases a portion of their hauling to another DBE firm etc. Rental/lease agreements will also need to be secured by the PE/S if a DBE firm leases to a non-DBE firm. Again, any time a DBE is a part of a rental/lease agreement on a project, an agreement must be secured.

If the PE/S suspects a problem on the project because of a rental/lease agreement with any contractor, subcontractor, lessee or lessor, including non-DBE's, the PE/S has the right to request and receive the agreement for review. The PE/S should make the request through the Prime Contractor.

Payrolls will also need to be secured from the Prime Contractor by the PE/S for workers involved with rental/lease agreements when the work is covered by the Davis Bacon Act so that it can be determined that the wage rates meet the predetermined wage rates set out in the contract.

Upon receipt of an agreement, the PE/S is to review same to determine if it is a standard rental/lease agreement and if it is, retain the agreement in the project file. If the agreement contains any provisions that seem beyond the scope of a standard rental/lease agreement, such as labor, then it is to be forwarded to the DO for review and interpretation. When the PE/S becomes aware of an obvious violation, the contractor is to be instructed to stop the operation involved until the violation is corrected.

All contracts contain a Special Provision that requires the contractor to provide the Engineer copies of any lease agreements between DBE trucking subcontractors and any DBE or non-DBE

trucking firms or owner/operators that will be used to supplement the DBE trucking subcontractor's trucks for the purpose of meeting the DBE goal. Copies of these lease agreements shall be provided by the time of use of any supplemental trucks on the contract.

Questions that the PE/S may have on the issue of rental/lease agreements or payrolls related to rental/lease agreements should be addressed to the district's EEO Officer. The following chart is being provided for added guidance.

<b>Documents Required Yes/No</b>
----------------------------------

<u>Lease Agreements Between</u>	<u>Lease Agreement</u>	<u>Certified Payrolls Davis-Bacon Act Work</u>	<u>Certified Payrolls Non-Davis-Bacon Act Work</u>
Prime and DBE Lessor	Yes	Yes	No
Prime and Non-DBE Lessor	No	Yes	No
DBE Subcontractor and DBE Lessor	Yes	Yes	No
DBE Subcontractor and Non-DBE Lessor	Yes	Yes	No
Non-DBE Subcontractor and DBE Lessor	Yes	Yes	No
Non-DBE Subcontractor and Non-DBE Lessor	No	Yes	No
DBE Lessor (1) and DBE Lessor (2)	Yes	Yes	No
DBE Lessor (1) and Non-DBE Lessor (2)	Yes	Yes	No
Non-DBE Lessor (1) and DBE Lessor (2)	Yes	Yes	No
Non-DBE Lessor (1) and Non-DBE Lessor (2)	No	Yes	No
Hauling Lease DBE	Yes	Yes	No
Hauling Lease Non-DBE	No	Yes	No