

How is DBE Participation Counted Toward Goals?

This article will provide the contracting community and DBE with an overview of the evaluation of commercially useful functions on contracts and how and when DBE participation is counted toward contract goals. Finally, real-world examples will be provided that have resulted in DBE participation being reduced or discounted altogether.

To begin with, the DBE rules and regulations apply to INDOT contracts that are funded in whole or in part with USDOT financial assistance. Under these rules and regulations (49 CFR Part 26), DBE participation may only be counted when a DBE is performing a Commercially Useful Function ("CUF"). A DBE performs a CUF 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. With respect to providing materials and supplies used on a contract, a DBE must also be responsible for: (1) negotiating price; (2) determining quality and quantity; (3) ordering the material and installing (where applicable); and (4) paying for the material itself. If all four of these activities are not carried out by the DBE, then the DBE is not deemed to be performing a CUF. In addition, a DBE does not perform a CUF if its role is limited to that of an extra participant where funds are "passed" through in order to obtain the appearance of DBE participation – whether intentional or not. CUF evaluations are conducted on every DBE on every contract that involves USDOT funds.

Credit for DBE participation on contract goals is awarded based on how the DBE is participating on a given contract. When a DBE participates on a contract, the entire amount of a contract that is performed by the DBE's own forces - including the cost of supplies and materials obtained by the DBE for the work of the contract should be counted. With respect to materials and supplies purchased from a DBE, credit is provided as follows: (1) if materials or supplies are obtained from a DBE manufacturer, count 100% of the cost toward the DBE goal; (2) if materials or supplies are purchased from a DBE regular-dealer, count 60% of the cost toward the DBE goal; and (3) if materials or supplies are purchased from a DBE which is neither a manufacturer nor a regular dealer, and its role can better be described as that of a broker, count only the fees or commissions charged for assistance in the procurement of the materials and supplies.

A DBE 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. A DBE 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 by the contract, are bought, kept in stock, and regularly sold or leased to the general public. This would not include items that are "drop-shipped" directly from the manufacturer's facility to the project site, never being in the physical possession of or transported by the DBE.

Let's now discuss three of the more common CUF concerns that are encountered on INDOT federal-aid contracts – (1) brokered arrangements; (2) pass-through arrangements; and (3) affiliate arrangements.

(1) Brokered Arrangements: In certain situations, items are "drop-shipped" directly from a manufacturer's facility to a jobsite and are never in the physical possession of or transported by the DBE. In many such cases, the DBE's role may involve nothing more than contacting the manufacturer and placing a job-specific order for an item that the manufacturer causes to be transported to the jobsite. In such a situation, the DBE's role is better described as that of a "broker" and DBE credit is limited to the fee or commission the firm receives for its service. A broker role can also occur with bulk items such as petroleum products (i.e., fuel and liquid asphalt) whereby the items in question are ordered by one party, but picked up and transported by another party on behalf of the other through a lease agreement. The key to obtain regular dealer credit rather than brokerage credit in a scenario like this is that the DBE must take physical possession of the product and deliver it to the project site with its own employees. Employees must be regular employees of the DBE and not be assigned to the project on an ad hoc basis.

(2) Pass-Through Arrangements: In certain situations, a DBE firm may enter into a subcontract with a prime contractor to provide a wide array of services; however, the DBE cannot perform and is not certified to perform certain elements of its subcontract. As a result, the DBE enters into a lease agreement with another firm to furnish and install these items so that it can deliver on that portion of its subcontract. A common example of this is when a DBE outsources a portion of its subcontract to a third party through a lease agreement whereby the third party furnishes and installs the items in question with its own employees and equipment.

In such a situation, DBE credit would be reduced by the amount of the services provided under the lease agreement. Although bona fide lease agreements (with or without operators) are not prohibited by INDOT, the counting and awarding of DBE credit is predicated on the DBE performing work with its own forces. This "pass-through" relationship is inconsistent with the most

important principal of counting DBE participation, which is that credit should only be counted for the value that is added to the transaction by the DBE itself. Please note that any other services performed by the DBE with its own workforce would be counted toward the contract goal. It should also be noted that anytime a DBE plans on outsourcing a portion of its subcontract to another party through a bona fide lease agreement, its quote to the prime contractor should clearly identify what portions of the quote are not eligible for DBE credit so that the prime contractor can plan accordingly for counting participation as part of its Affirmative Action Certification, if necessary.

(3) Affiliate Arrangements: As mentioned earlier in this article, it is permissible to count the entire amount of a contract that is performed by the DBE's own forces, including the cost of supplies and materials obtained by the DBE; however, there are a few exceptions to this rule. With respect to counting DBE participation, the practice of having a DBE purchase materials or lease equipment from the prime contractor or any of the prime contractor's affiliates to achieve all or a portion of the DBE goal is strictly prohibited.

If either prime contractors or DBEs have questions about the CUF process, the type of role contemplated for a project, or counting proper DBE credit, please feel free to contact the Equal Employment Opportunity Officer in the district you are working or the Economic Opportunity Division's Contract Compliance Manager, David Alyea at 317-234-7843 or dalyea@indot.in.gov.