

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 one 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 STA receives credit toward the DBE goal (contract and overall) only when a DBE working on a contract performs a CUF. DBEs generally perform work of a contract either as a contractor, a trucker, a regular dealer or a manufacturer. While each of these categories are evaluated differently when determining whether the DBE has performed a CUF, there is one guiding principle that must be met. Under the terms established in 49 CFR 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 meets this requirement?" Evaluating these areas will form the basis to render a determination that a DBE has in fact performed a CUF. The subcontract is the one key reference point for any contract administrator and it is essential for this evaluation process. The subcontract has an effective description of the work to be performed by a DBE and is a legally recognized document.

The USDOT has described the following key factors in its DBE regulations to help determine 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 contracted to furnish and install or just to install an item in the contract
- ❑ Whether the DBE's role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed through 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 in which DBEs do not participate. 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

The most consistent thread through a CUF evaluation is whether the role the DBE is playing in any transaction is consistent with "normal industry practice." The concern is that the normal industry practice is determined largely by non-DBE firms and is often simply a practice repeated enough to set the normal industry practice. However, if normal practices in fact erode the ability of the DBE to control

its work and remain independent, the practice is inconsistent with the DBE program. In such cases, the DBE program requirements must prevail.

One general rule of thumb that can be considered is whether a DBE firm would be performing in the manner it is if there was no DBE program. As further evidence of meeting normal industry practice, does the DBE firm perform this work on non-federal work?

Monitoring

In keeping with normal contract requirements, it is the primary responsibility of the prime contractor to ensure that the DBE firm is performing a CUF. The State Transportation Agency (STA), as the contracting agency, has a further oversight responsibility to ensure that the prime contractor has effectively met this responsibility under his/her contract with the STA.

The STA needs to have sufficient field personnel and general headquarters staff to monitor the performance of work to be performed by DBE firms 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 various departmental levels of the STA responsible to monitor and evaluate the contractor's compliance with the 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: contractor, trucker, regular dealer and manufacturer. The following is an overview of each category, typical CUF questions and a list of documents to review.

CONTRACTOR

A contract administrator will most frequently work with a contractor, versus a regular dealer or manufacturer. Contract administration responsibilities for contractors have a broader scope of review and evaluation. To determine whether a DBE is actually performing their work, 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 his/her 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 under the DBE owner's direct supervision. The DBE owner must make all operational and managerial decisions of the firm. Mere performance of administrative duties is not supervision of daily operations.

Red Flags

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

- The DBE 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 firm;
- The DBE firm'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 contractual obligation document
- Daily Inspection report
- Project Inspection and Diary
- Payrolls

Workforce

In order to be considered an independent business, a DBE firm must keep a regular workforce. DBE firms 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 firm controls, with a minimum of **30%** of the work to be performed by the DBE firm's regular employees, or those hired by the DBE firm for the project from a source other than the prime contractor. The DBE, in all instances, must have direct supervision of all employees. This arrangement should be approved by the STA prior to commencing the work of the contract.

The DBE firm must be responsible for all 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 or exercise responsibility for at least 30% of the total cost of its contract with its own work force. 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 DBEs certified payroll?
- Has this individual 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?
- List the name of DBE's crew. Have any of the employees ever shown up on any other contractors' payroll?

Typical Documents to evaluate:

- Written contractual obligation document
- Daily Inspection report
- Project Diary

Equipment

A DBE firm 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. A rental agreement must specify the terms of the agreement. The lease must be for a short period of time and involve a specialized piece of equipment readily available at the job site. The lease may allow the operator to remain 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 this amount is not counted toward the contract goal. Equipment leased and used by the DBE firm with payment deducted from the prime contractor's payment (s) to the DBE is not allowed.

Red Flags

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

- ❑ Equipment used by the DBE firm 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 utilizes 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 a formal agreement identifying the terms and parties?
- ❑ 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 document
- ❑ Daily Inspection report
- ❑ Project Diaries
- ❑ Lease Agreements

Materials

The DBE must assume the actual and contractual responsibility for the provision of the material to be incorporated into the item of work being performed by the DBE. The DBE must negotiate the cost, arrange delivery, and pay for the materials and supplies for the project. The DBE must prepare the estimate, quantity of material, and be responsible for the quality of materials. Invoices for material should show the payee as the DBE.

Red Flags

Some questionable material 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
- Materials or supplies necessary for the DBE firm's performance are delivered to, billed to or paid by another business.
- Payment for materials is deducted by the prime contractor from payments to 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 legal document 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?
- If two party checks are used, who are the parties identified as payable to?

Typical Documentation to evaluate:

- Written contract document
- Delivery Tickets
- Invoices
- Daily Inspection report

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 that is being done jointly by the DBE firm 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 firm is working without a subcontract agreement 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 firm artificially inflates the DBE participation;
- ❑ An agreement that erodes the ownership, control or independence of the DBE subcontractor;
- ❑ A DBE firm 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 firm.

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 contractual obligation document
- ❑ Daily Inspection report
- ❑ Project Diary

DBE TRUCKING FIRMS

To be certified in the DBE program as a trucking firm, the DBE firm is only required to own and operate at least one fully licensed, insured, and operational truck used on the contract. To perform a CUF, a DBE firm must also be responsible for the management and supervision of the entire trucking operation on a contract-by-contract basis. There cannot be a contrived arrangement for the purpose of meeting DBE goals.

A DBE can lease 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 DBE trucks toward a contract goal, the following can occur:

- ❑ The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE can count these trucks up to the number of trucks that the DBE owns/leases on the contract.
- ❑ The DBE may also lease trucks from a non-DBE firm and owner operators. The DBE can count the number of trucks up to the amount of the DBE trucks used on the contract.
- ❑ Additional DBE participation can be achieved from non-DBE trucks. However, the additional participation is only entitled to credit for the fee or commission it receives as a result of the lease arrangement.

In order for the STA to monitor the performance of a DBE trucking firm, the work to be performed must be covered by a subcontract or written agreement approved by the STA prior to performing the work. Additional documentation required when the DBE firm leases equipment is a valid lease agreement to be provided to the STA for appropriate action. To be considered valid, the lease agreement 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 agreement identifying the terms and parties?
- ❑ Are the rates appropriate?
- ❑ Is there an approved subcontract or written agreement?
- ❑ If so, who are the parties? _____
- ❑ Is DBE trucking firm's employees shown on the certified payroll?

Typical Documentation to evaluate:

- ❑ Subcontract or written agreements
- ❑ Lease agreements
- ❑ Payroll records

DBE REGULAR DEALERS

In order for a firm to be deemed a regular dealer, 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.

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. The latter does not meet the requirements of a regular dealer because supplier like functions is performed on an ad hoc basis or for only one or two contractors with supplier relationships. 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 supply.

A firm 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 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.

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 used in delivering the product the DBE?
- Is it owned or leased?

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. Another valuable source for defining what constitutes a manufacturer is Webster's dictionary that defines a manufacturer as a process or operation carried out systematically with division of labor and the use of machinery for making any material product from raw material by forming, shaping, and altering it into a form suitable for use. Examples of such items could be a concrete ready mix plant, a crushing operation, fabricating plant either steel or concrete, etc.

Typical CUF questions could include:

- Is the business primary business 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?

Typical Documents to evaluate:

- Purchase orders
- Bill of Laden
- 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 firm 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 a STA could take include but are not limited to the following:

- Deny or limit credit towards the contract goal;
- Require GFE to replace the DBE or 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/Diary
- 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. Failure to perform a commercially useful function can be considered during the certification process; however it must not necessarily be the sole factor.

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. A 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 firm.

COMMERCIALLY USEFUL FUNCTION CHECKLIST

Project Name and Number: _____

Prime Contractor: _____

DBE Firm's Name: _____

Type of Operation

- Contractor, Trucker, Regular Dealer, Manufacturer

Date Contract/Subcontract/Agreement Approved: _____

Start Date(s) of DBE's Work: _____ Date DBE to Complete Work: _____

Date of review:

Describe the type of work observed: _____

Check off each item used in conducting this review. The documents checked need not be attached to the review report, but should be filed with the report for easy reference if needed. If the answer is no to any of the following questions provide an explanation in the general notes at the end of the report.

1. Management:

a. Is there a legal contract executed by the DBE to perform a distinct element of work? Yes No

b. Name of the on-site representative: _____

c. On-site representative reports to: _____

d. Is the on-site representative been identified as an employee of the DBE? Yes No

e. Has this individual ever shown up on any other contractor's payroll? Yes No

f. Does the DBE on-site representative effectively manage the job site without interference from any other non-DBE contractor? Yes No

g. Who does the DBE on-site representative contact for hiring, firing, or to modify the contract? _____

h. Has the DBE owner been present on the jobsite? Yes No

i. Does the DBE appear to have control over methods of work on its contract items? Yes No

- j. Is the DBE maintaining its own payroll?
 Yes No
- k. Who prepares the DBEs certified payroll? _____
- l. Is the DBE actually scheduling work activities, material deliveries and other related actions required for prosecution of the work?
 Yes No
- m. Did the DBE sublet any items or portions of the work to any other firm?
 Yes No
 If yes, what % was sublet? _____%
 Name of the firm _____

2. Equipment

- a. List the major self-propelled (engine) equipment used by the DBE: _____
- b. Does the equipment have the DBE's markings or emblems?
 Yes No
 If another firm's markings are discernable, note the Name: _____
- c. Is the DBE's equipment?
 Owned Leased from _____
- d. If leased, is there a formal agreement identifying the terms and parties?
 Yes No
- e. Is the equipment under the direct supervision of the DBE?
 Yes No
- f. Is the operator of the leased equipment the DBE's employee?
 Yes No
 If not the DBE's whose employee is it? _____
- g. If the equipment is leased, is the payment for the equipment deducted from the work performed?
 Yes No

3. Workforce:

- a. List the name of DBE's crew as observed during the operation described above:

- b. Has any of this crew ever shown up on any other contractors' payroll?
 Yes No

4. Materials:

- a. Is the work to be performed by a DBE a furnish and install item of work?
 Yes No
- b. Is the quality of the materials controlled by the DBE?
 Yes No
- c. If two party checks used, who are the parties identified as payable to:

- d. Who makes arrangements for delivery of materials? _____
- e. Material Invoices made out to: _____
- f. Who scheduled delivery of materials? _____
- g. In whose name area materials shipped? _____
- h. Does the prime contractor direct who the DBE is to obtain the material from and at what price?
 Yes No

4. Performance:

- a. Does the DBE appear to have control over methods of work on its contract items?
 Yes No
- b. Has any other contractor performed any amount of work specified in the DBE contract?
 Yes No

5. Other Work categories:

Truckers:

- a. Is it the DBE's trucks? Yes No
 Are they Owned Leased from _____
- If leased, is there a formal agreement identifying the terms and parties?
 Yes No
- b. Are the rates appropriate?
- c. Is there an approved subcontract or written agreement?
 Yes No
 Who are the parties? _____
- d. Is DBE trucking firms' employees shown on the certified payroll?
 Yes No

Regular Dealers:

- a. Does the regular dealer have an established storage facility and inventory?
 Yes No
- b. Does the dealer have a business that sells to the public on a routine basis in the product being supplied?
 Yes No
- c. Does the business stock the product for the use on the project as a normal stock item? Yes_____ No_____
- c. Is the quality of the materials controlled by the DBE?
 Yes No
- e. In whose name are the materials shipped? _____
- f. Who is delivering, and unloading the material? _____
- g. Is the distribution equipment used in delivering the product the DBE's?
 Yes No
 Is it Owned
 Leased

4. Manufacturer

- a. Is the business's primary function to manufacturer construction products?
 Yes No
- b. Does the business stock the product altered for this project as a normal stock item?
 Yes No
- b. Is the quality of the materials controlled by the DBE?
 Yes No

General Notes: