



INDIANA DEPARTMENT OF TRANSPORTATION

Driving Indiana's Economic Growth

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CONSTRUCTION MEMORANDUM

10-09

TO: District Deputy Commissioners
District Construction Directors
District Area Engineers
District LPA Coordinators
Project Engineers/Supervisors
Office of Project Management
Economic Opportunity Division
District EEO Officers

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

SUBJECT: INDOT-Economic Opportunity Division Commercially Useful Function Policy

Attached please find the INDOT-Economic Opportunity Division Commercially Useful Function Policy.

The policy exists because it is the responsibility of INDOT staff as well as the Prime Contractors to ensure that every Disadvantaged Business Enterprise (DBE) that performs on federal aid contracts performs a Commercially Useful Function (CUF) in order for INDOT to remain in compliance with its federal DBE requirements.

In its recent review, the FHWA National Review Team stressed that CUF reviews need to be done often and early on in the life of a project. Therefore this should be something that is stressed with the PE/S and EEO Officers.

It is hoped that the distribution of this policy will give everyone a better understanding of this issue.

MAM/GGP

Indiana Department of Transportation – Economic Opportunity Division

Commercially Useful Function Policy

I. Introduction

Federal aid prime contractors and INDOT are responsible for ensuring that every Disadvantaged Business Enterprise (DBE) that performs on federal aid contracts performs a Commercially Useful Function (CUF) in order to remain in compliance with federal DBE requirements. Failure of a DBE to perform a CUF will result in that work not being counted toward the prime contractor's DBE goal. In severe cases it could result in non-payment to the prime or ineligibility for the prime or DBE to work on future INDOT contracts. INDOT is required to conduct CUF reviews early and regularly throughout the life of the project. To determine a DBE's CUF compliance, the following essential questions must be answered:

- Who supervises and carries out the work?
- Who pays the DBE's employees?
- Who owns the equipment used by the DBE?

Three Contract Areas

Generally, INDOT expects prime contractors to answer the following question: how would a subcontractor or lessor perform the work assigned to it if it was not a certified DBE? In most cases, standard industry practices are used as a benchmark for ascertaining CUF compliance; however, if the standard practices conflict with the CUF management and control requirements, then the CUF requirements prevail. CUF requirements fall into three major contract areas:

A. Management

The DBE must actually manage the work that has been contracted. Management includes scheduling daily operations, ordering equipment and materials, preparing and submitting certified payrolls, and executing decisions related to personnel. This means:

1. The DBE owner must make all operational and managerial decisions of the firm.
2. All work must be performed with the DBE's own workforce.
3. The DBE owner must supervise daily operations either personally or with a full time, skilled, and knowledgeable superintendent. The superintendent must be under the DBE's direct control.

B. Materials

The DBE shall negotiate the cost, arrange delivery, and pay for the materials and supplies for the job. INDOT or project management staff will review invoices to determine if they are billed to and paid by the DBE. Also, the DBE must determine the

quantity of the material and be responsible for the quality of the material. Two-party checks for payment may be made to the DBE and the supplier only if approved by INDOT Central Office in advance. No credit toward the DBE goal will be given to the cost of materials or supplies paid directly by the prime contractor for the DBE.

C. Employees

The DBE's work must be performed by personnel employed and under the control and direction of the DBE firm. These include employees of the DBE or those recruited through traditional recruitment or employment avenues. To be considered independent businesses, DBEs shall keep a regular workforce. DBEs shall not share employees with non-DBE contractors, especially the prime contractor. The DBE firm must be responsible for all payroll and labor compliance requirements for all employees within the control of the firm and is expected to prepare and finance the payrolls. With union employees, the same individuals *may* work for primes on some days, DBEs on others, provided the DBE controls, manages, and pays for all individuals when they work for the DBE.

II. Counting DBE Participation

A. DBE Subcontractor - 49 CFR § 26.55 (a).

May count 100% of the amount paid to a DBE contractor for labor and materials provided to perform a defined and distinct item of the contract work. The work must be performed by the DBE's own employees and the DBE must order and pay for all supplies and materials. The DBE must meet all subcontractor requirements in the contract, including payroll and labor compliance requirements.

B. DBE Manufacturer - 49 CFR § 26.55 (e)(1).

May count 100% of the value paid for materials furnished that become a permanent part of the project. 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.

C. DBE Supplier (regular dealer) - 49 CFR § 26.55 (e)(2).

May count 60% of the value paid for materials furnished that become a permanent part of the project. A supplier 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. The firm 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.

D. DBE Broker - 49 CFR § 26.55 (e)(3).

May count 100% of the *fee* or *commission* received by the DBE for the materials purchased and resold to the contractor that become a permanent part of the project. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals. A facilitator, packager, manufacturers' representative, or other person who arranges or expedites transactions but does not manufacture or supply on a regular basis can not be a regular dealer or manufacturer.

E. DBE Trucking Company – 49 CFR § 26.55 (d).

The DBE trucker must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals. Also, the DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract. Prime contractors receive credit toward the DBE goal based on the following factors:

1. The DBE receives 100% credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
2. The DBE receives 100% credit for any trucks it leases from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
3. The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE is entitled to credit for the total value of transportation services provided by non-DBE lessees equal to the value of transportation services provided by DBE-owned trucks on the contract.

Example: DBE Firm X, used to meet a DBE goal, uses **2** of its own trucks on a contract. Firm X leases **2** trucks from DBE Firm Y for work on the contract. Firm X also leases **6** trucks from non-DBE Firm Z for the contract. The DBE would get the following credit:

Firm X: **2** trucks

+ Firm Y: **2** trucks

4 DBE Trucks

+ Prime may count **4** (out of the 6) additional non-DBE trucks (the number that is equal to but not more than the number of DBE trucks provided by the DBE above).

Therefore the total DBE credit = 8 trucks

III. CUF Red Flags

The Federal Highway Administration has provided guidance to INDOT in the form of “red flags” that

may suggest that a DBE is not performing a Commercially Useful Function. The presence of one or more of these “red flags” must result in a more thorough investigation by INDOT.

When an INDOT or project manager staff member detects a “red flag”, he or she will notify the District EEO Officer immediately and log the information in the daily report. The District EEO Officer will then notify the Central Office Equal Opportunity Division about the “red flag(s)” and will commence an investigation as soon as possible with the expected complete cooperation of the Contractor(s). The “red flags” as identified include the following:

- The work to be performed by the DBE is outside of the DBE’s known experience or capability.
- The DBE provides little or no supervision of the work, the DBE superintendent is not a regular employee of that firm or supervision is performed by personnel associated with the prime contractor, another business or personnel not under the control of the DBE firm.
- The DBE work force is not under the DBE firm’s control and direction or work is performed by personnel normally employed by the prime contractor or another business.
- Any portion of the work designated to be performed by a DBE subcontractor is performed by the prime contractor.
- Any equipment used by the DBE firm belongs to the prime contractor or another contractor with no formal lease agreement or the equipment signs and markings cover another owner’s identity, usually through the use of magnetic signs. The EEO Officer will determine “substantial portion” on a case by case basis.
- Materials or supplies necessary for the DBE firm’s performance are delivered to, billed to, or paid by another business.
- DBE firm subcontracts or assigns any portion of work to another firm.
- DBE trucking business uses trucks owned by the prime contractor.
- DBE prime contractor subcontracts a greater percentage than the specific contract allows.
- DBE prime contractor only purchases materials while performing little or no work.
- The agreement between the prime contractor and the DBE firm artificially inflates the DBE participation or erodes the ownership, control or independence of the firm.
- The DBE firm works primarily for only one prime contractor.
- Employees work for both the DBE firm and the prime contractor or mentor (shared

employees).

- The volume of work is beyond the capacity of the DBE firm.
- Inquires made by INDOT or FHWA representatives are answered by the prime contractor or mentor.
- The DBE firm's owner is not aware of the status of the work or the performance of the business.