



WASCITO

CIVIL RIGHTS TRAINING SYMPOSIUM | AUSTIN 2019

Commercially Useful Function (CUF)

Basic Requirements, Monitoring & Enforcement, Fraud Prevention, and More...

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Learning Outcomes

At the end of this session, you will be able to:

1. Know the requirements for a Monitoring & Enforcement Mechanism
2. Identify DBE commitments that effectively meet Federal requirements
3. Apply the CUF & Counting Requirements
4. Identify best practices to effectively document CUF Monitoring
5. Implement measures to prevent DBE Program fraud



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Learning Outcome #1

Know the requirements for a Monitoring & Enforcement Mechanism



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Why is CUF Monitoring Important?

- Ensures a level playing field; fair competition
- Ensures DBEs are engaged in meaningful contracting activities
- Serves as a deterrent to fraud
- Preserves the integrity of the DBE Program



USDOT Guidance

Q & A, posted 8/22/2018

- Must conduct CUF reviews and make determinations for all DBE participation (RC & RN) claimed by the prime or recipient in its reporting
- “Written certification” –not a statement, but a signed and dated record that supports a CUF determination—hard copy or electronic record that a CUF review was conducted



USDOT Guidance

Q & A, posted 8/22/2018

- Monitoring includes evaluation of the DBE's performance while active on the jobsite; recommended at the early stages of work
- Monitoring at project close-out by itself is insufficient
- Reviews are standards-based to ensure credit is only given for work conforming to the CUF requirements and according to commitments where applicable



USDOT Guidance Q & A, posted 8/22/2018

Monitoring may be combined with other contract administration activities, but the record used must reflect specific consideration of the DBE requirements



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Questions?



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Learning Outcome #2

Identify DBE commitments that effectively meet Federal requirements (26.53)



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DBE Commitment Content

- Must be a condition of contract award
- DBE name and address
- Description of work should be thorough
 - NAICS code/description applicable to the work
 - Include type and quantities for counting purposes
- Dollar amount of the participation of each DBE firm participating (price per unit also recommended)



DBE Commitment Content

- The bidder's written commitment to use the DBE whose participation it submits
- Written confirmation by the DBE that it is participating in accordance with the bidder's commitment
- Evidence of good faith efforts when the contract goal is not met
- "5 Tips for Effective DBE Commitments"



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Learning Outcome #3

Apply CUF & Counting Requirements



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DBE Certification and CUF

- Certification addresses ownership and control; CUF evaluates actual DBE performance on a contract
- NAICS codes and descriptions relate to the type of work that may be claimed as DBE participation; CUF determines that the DBE's role was consistent with counting
- Terms used in certification are different than CUF terms at 49 CFR §26.55



What is CUF?

- CUF relates to a DBE's role or "function" on a particular contract; the DBE's role determines how its participation is counted
- A CUF review results in a determination that the DBE's performance was consistent with pre-award counting



CUF is Not...

- Predetermined or assumed for any DBE
- Solely based on self-certifications
- Intended to be a time-consuming investigation that affects work progress
- Intended to have a chilling effect on the relationship between DBEs and primes



Basic Requirement

49 CFR 26.55

A DBE 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.”



Basic Principles

- A DBE must perform at least 30% of work under its contract with its own workforce
- Independently performs, manages, and supervises the work specified under its contract
- Owns its materials
- Owns or leases equipment it uses (leases from primes are permitted but not be counted)



Work Type and Counting



Contractor/Subcontractor (100% or less)



Trucking Firms/Haulers

(STA has two options)



Regular Dealers (i.e. suppliers) (60%)



Manufacturers (100%)



**Service Providers (consultant/broker)
(reasonable fees and commission)**



DBE Contractor/Subcontractor

- Perform a distinct element of work with own forces under a contract agreement at any level
- Typically “furnish and install”
- If “labor only” (certain conditions apply)
- **Count 100%** the cost of labor and supplies purchased or leased by the DBE - 49 CFR §26.55(a)



DBE Contractor/Subcontractor (Materials)

- DBE must negotiate price, order the materials, and pay for the materials and supplies
- DBE must be responsible for quantity and quality of materials
- May not count cost of material, supplies, equipment purchased/leased from prime or its affiliates (49 CFR §26.55(a))

Trucking/Hauling

- DBEs must own & operate at least 1 truck (licensed, insured, operational on the contract)
- Must control (manage & supervise) the entire portion of the work it is committed to perform and use at least one of its own trucks



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Counting Trucking/Hauling

- **Option 1: Count only DBE Trucks** (owns, insures and operates, and employed drivers) includes DBE operated leases
- Other DBE owner/operators
- Subcontracts to a DBE trucking firm



Counting Trucking/Hauling

- **Option 2**: (aka 1:1) Permits limited credit for non-DBE trucks, not to exceed the value of transportation services provided by DBE trucks
- What is the measure in the DBE's contract with the prime?
 - Example 1: DBE firm has 3 trucks, it can use up to 3 non-DBE trucks (credit received for 6 trucks)
 - Example 2: Value of non-DBE trips may equal the value of DBE trips

Option 2 requires FHWA approval before it can be used



Counting Trucking

Additional Participation - If a DBE firm leases additional trucks from non-DBE firm(s) and uses non-DBE drivers, count only fees or commissions, (not the actual transportation services).

Get a breakdown of the trucking fees:

- Fuel?
- Operator wages and benefits?
- Wear and tear?
- Surcharges, commissions, mark-ups?



DBE Manufacturer

- 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 specs
- **Count 100%**

49 CFR §26.55(e)(1)(i)



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DBE Regular Dealer

- Prime or lower-tier subcontractor contracts with a DBE supplier to provide products
- Two types:
 - Those with warehouses/stores or other establishments
 - Bulk item dealers-no warehouse/store or establishment; must own and operate distribution equipment
- **60% Credit** - If the DBE is performing as a **regular dealer**



DBE Regular Dealer (w/Establishment)

- A *regular dealer* owns and operates an establishment where it keeps and regularly sells its products
 - Keeps product quantities typically needed on a contract
 - Regularly sells the products from inventory
- Delivery method unspecified; however, a pattern or practice of selling goods not from inventory questions DBE's ability to provide sufficient quantities typically needed on a contract



Regular Dealer Capacity

Scenario #	Kept in Sufficient Quantities (to effectively Supply a typically contract)	Regularly Sold/Leased (evidenced by inventory turnover measures, quantities or cost of goods sold over time)
1.	NO	YES
2.	NO	NO
3.	YES	YES
4.	YES	NO



DBE Regular Dealer (Bulk Items w/o Establishment)

- Must own and operate distribution equipment to deliver products or materials
- DBE may have a long-term lease agreement, but must operate equipment
- Third party hauling agreements are not allowed
- **Count 60%** of cost of materials/supplies



DBE Regular Dealer (All Delivery Slips)

Recommended

- Operator name
- Operator's employer
- Vehicle registration or USDOT #
- Quantity and type of material
- Origin of products/materials hauled (where were they loaded for hauling?)



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DBE Regular Dealer (Unique Arrangements)

- Liquid asphalt: Refinery to Plant
- Fuel: Late night or off-site
- Special order or specialty Items:

Not typically kept in stock and regularly sold are considered brokered unless taken into possession and distributed by the DBE; State should apply more scrutiny relative to the products for which the DBE is certified



DBEs Suppliers not Acting Dealers

as Regular

- When not performed according to the requirements, count fees charged for assistance in procurement of materials and supplies, include transportation and delivery charges, if applicable
- Costs must be reasonable; do not count the cost of goods sold/hailed



DBE Service Provider

- Professional
- Technical
- Managerial
- Brokerage (facilitate the procurement of materials and supplies)

Count entire amount of fees or commissions **if reasonable** - 49
CFR §26.55(a)(2)



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Learning Outcome #4

**Identify best practices to effectively document CUF
Monitoring**



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CUF Best Practices

- Have a scheduling and tracking system that ensures CUF for all DBE participation
- Set review criteria that is appropriate for project staff; and
- Use a tiered approach to evaluate CUF requirements that are beyond the role of project staff



CUF Best Practices

- Document CUF for Regular Dealers separately to avoid confusion of material requirements
- Use electronic fillable smart forms and tablets devices for efficiency



CUF Best Practices

- Use self-contained and comprehensive forms that support CUF determinations;
- Minimize attachments to only what is necessary—payment certifications, copies of eFund transfers or cancelled checks, trucking/hauling logs, delivery slips, invoices



CUF Best Practices

- Use action-oriented questions:

“Do any DBE employee names appear on certified payrolls of the prime or an upper-tier subcontractor?”

- Require comments and corrective action where responses indicate non-compliance, e.g. DBE work that was terminated or self-performed by prime



CUF Best Practices

Conduct an initial CUF to ensure participation is on schedule; then conduct a subsequent CUF when the major portion of work is performed



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CUF Best Practices

- Regular Dealers: Implement a supplemental process to evaluate DBE suppliers with establishments—are products “*kept and regularly sold,*” as well as a “*quantity*” requirement; and do field staff know which DBE suppliers meet this requirement?
- Also evaluate the sufficiency of distribution equipment owned by bulk item dealers



CUF Best Practices

- Trucking/Hauling: Implement an effective process to control and count DBE/non-DBE hauling to/from the project site
- Use of trucking logs
- Electronic scanning systems
- Control points at project sites



FHWA's Implementation Plan

- FHWA CUF Workgroup
- Practical Tools: comprehensive and intuitive to guide the user
 - Contractor CUF form
 - Regular Dealer/Manufacturer CUF Form
 - Professional Services CUF Form
 - Regular Dealer Decision Tool, and more...
- Pilot process to examine the capacity of DBE to perform as regular dealers
- Enhanced Training: fraud awareness and prevention; practical and tailored for various audiences



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Learning Outcome #5

Implement measures to prevent DBE Program fraud



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DBE Program Fraud

According to OIG reports:

- DBE Program Fraud—category with the most referrals, indictments, and convictions
- Most fraud occurs in the area of material purchases; second to that is pass-through arrangements



DBE Program Fraud

CUF Practices

- Know the capacity of certified DBEs
- Implement a verification system for regular dealers to support on-site CUF determinations
- Make use of affidavits and declarations to ensure the accuracy of information and to preserve federal interest when fraud occurs



DBE Program Fraud

- Work closely with your UCP; share information regarding patterns/practices that implicate eligibility concerns
- Require specific commitments & obtain certifications that set the conditions for counting and the DBE's subsequent performance



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DBE Program Fraud

Enforcement

- Have a progressive enforcement mechanism
 - ✓ Non-punitive then contract sanctions
- Put contractors on notice for violations to educate and deter repeat infractions
 - ✓ Contemporaneous with immediate impact
 - ✓ Corrective in nature



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