



QUESTIONS AND ANSWERS

Disadvantaged Business Enterprise Program



Q: Are prime contractors required to report race neutral (RN) DBEs?

A: Yes, prime contractors are required to report DBE RN participation on federal-aid projects with and without goals. The prime contractor can identify RN DBEs on the monthly progress report form 4903 and in the DMS.

Q: A DBE is contracting 100% of its workforce through a staffing agency. Is this acceptable?

A: Yes, as long as all the direction and management of those employees is coming from a DBE supervisor.

Q: Can a DBE purchase material from a prime contractor and use its equipment?

A: The purchasing of material or leasing of equipment is permissible but DBE goal credit for such activities is not allowed. In addition, the DBE needs to get permission from the Department prior to leasing the prime contractor's equipment and provide a copy of the lease agreement.

Q: What percentage of work must a DBE perform in order to perform a commercially useful function (CUF)?

A: If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, you must presume that it is not performing a CUF.

Q: Does a CUF have to be performed on a DBE prime contractor?

A: Yes. 49 CFR Part 26 does not differentiate between a DBE prime and a DBE subcontractor. They simply state that a DBE must perform a CUF to allow goal credit.

Q: The district/area office failed to conduct a CUF review and the project is completed. Should the DBE goal credit be deducted from the project?

A: The office in charge of oversight should review any pertinent project records that are available to come to a conclusion of a CUF being performed or not. They should document which records they are utilizing to come to a conclusion such as material invoices, hauling tickets, etc.

By not confirming that a DBE has performed a CUF, the entire amount of work performed by that DBE for goal credit could be removed.

The District DBE Coordinator should take proper steps to ensure the District /Area office staff is aware of the oversight and provide the training so that it does not happen again.

Q: “With the implementation of DMS are all aspects of the new CUF Report still required? Maybe have a more streamlined CUF report similar to the old form to meet the Federal requirements.”

A. Content from CUF Form 2182 is in DMS under the Reviews tab.

Contract Management: Reviews Help & Tools

Main View Settings Subs Docs Change Orders & Task Orders Alerts Comments Messages Closeout

Compliance Audit List Compliance Audit Summary Compliance Audit FY **Reviews** Site Visits Reports

0009-11-999: Turn Lanes, Rehab Shoulders and Overlay Status: Open
Prime: TxDOT Test Prime Vendor 8
9/1/2016 - 3/31/2017

Current Award: \$2,250,000
Goal: 12.00% Total Paid: \$1,725,000
% Credits: 9.71% For Credit: \$167,500

New Review Filters: Any Review Type ▼ Any Contractor ▼ Go

Reviews					
Actions	Status	Review Type	Contractor	Date Created/Submitted	Reviewer/Creator
View Edit	Complete	Commercially Useful Function (CUF) Project Site Review	TxDOT Test Sub Vendor 3	5/1/2017	TxDOT Admin 4
View Edit	Complete	Commercially Useful Function (CUF) Project Site Review	TxDOT Test Sub Vendor 2	5/1/2017	TxDOT Admin 4

District and area office staff enter CUF review information in DMS. (For projects let February 2017 and thereafter) Supporting documents can be added in DMS.

The District DBE Coordinator needs to review all CUF reports completed in DMS.

District and area office staff need to use Form 2182 and Form 2669 for material suppliers when applicable. (For projects let prior to February 2017)

Content from CUF Form 2183 for Professional and Scientific Services will be added in DMS in the near future.

Q: Does the prompt payment requirement apply only to DBE subcontractors?

A: No. The prompt payment is a race- and gender-neutral requirement that applies to DBE and non-DBE subcontractors alike. It is intended to apply to all subcontractors at all tiers.

Q: When does the time period for payment of subcontractors begin to run?

A: The 10 day time period for payment of subcontractors begins when the contractor receives payment from the Department for satisfactory completion of the work.

Satisfactory completion is defined by the regulations as “when all the tasks called for in the subcontract have been accomplished and documented as required by the recipient.”

In cases of a second or third tier subcontract, the 10 day time period begins to run when the 1st tier subcontractor receives payment from the prime contractor or when the 2nd tier subcontractor receives payment from the 1st tier subcontractor.

Q: Is it necessary for prime contractors to submit Prompt Payment Certification Form 2177 for projects let February 2017 and thereafter?

A: No, not for DBEs.

Yes for non-DBE subcontractors.

Yes for DBEs and non-DBEs on federal-aid projects let prior to February 2017.

Q: What happens when there is a dispute over the satisfactory completion of the work performed by the subcontractor?

A: The obligation to promptly pay subcontractors does not arise if there is a legitimate dispute over the subcontractor's performance. The Construction Division has a dispute resolution process to ensure compliance with the purpose and intent of the prompt payment.

A prime contractor may not withhold payment to a subcontractor that has satisfactorily completed work on the contract (Contract A) as a means to address a dispute between the prime contractors on an unrelated contract (Contract B). This would not constitute a legitimate dispute over the subcontractor's performance on contract A.

Q: What records should the Department and contractors retain to document compliance with the prompt payment requirement?

A: To ensure compliance with the prompt payment provision, the Department may require prime contractors to provide information concerning payment to subcontractors. Data collected from contractors may include copies of cancelled checks.

Contractors are required to full and promptly cooperate with requests for information pursuant to 49 CFR Part 26.109(c).

Q: “Tracking of the DBE program has moved from SMS/paper files to DMS, which is all electronic and attachments added into DMS system. As for project records does the Construction Division still want these records as part of the project records or is having them in DMS good enough?”

A: District and Area Office staff can add documents into DMS and save them to the contract record. This may entail converting a paper document to an electronic one and then adding it into DMS. This makes it easy to locate all DBE forms and documents associated with the contract record/CSJ.

Districts can also file DBE paper records or save them as electronic documents outside of DMS.

All DBE records should be available for inspection and retained in accordance with TxDOT's record retention schedule.

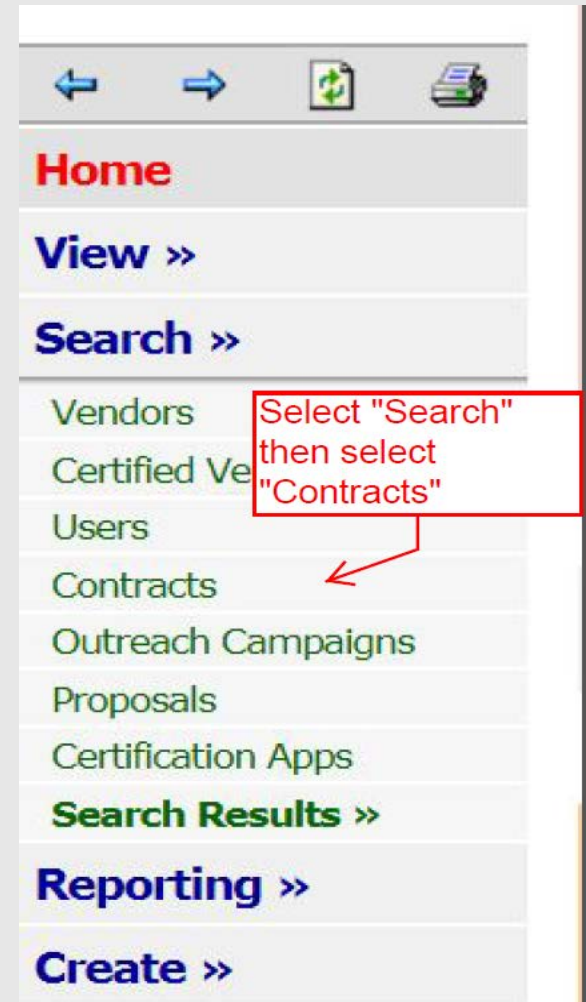
Q: “Is the Diversity Management System (DMS) connected on a per project level?”

A. Contract records in DMS are set up by contract number.

You can search and view contracts in DMS by contract number or CSJ.

To search for a contract:

1. From the **Search** menu, click **Contracts**.



2. Enter or select the search parameters.

Search: Contracts [Help & Tools](#)

[Users](#) [Vendors](#) [Contracts](#) [Proposals](#) [Outreach](#)

Search your organization's contract database. Enter information into any of the boxes below and click Search. Some parameters are required.

[Search First 20 Matches](#) [Search All Matches](#) [Clear Form](#)

Search Parameters

Contract/Reference Number	<input type="text" value="← Enter CSJ"/> <small>(Contract number, financial system reference, project number)</small>
Contract Title	<input type="text"/>
Containing Text	<input type="text"/> <small>(Contract description, summary, notes, comments)</small>
Contractor	<input type="text"/> <input checked="" type="radio"/> Prime <input type="radio"/> Subcontractor <input type="radio"/> Either
Buyer/Project Manager	<input type="text"/> <small>(Organization name, contact name)</small>
Compliance Officer	<input type="text" value="None selected"/>

[Search First 20 Matches](#) [Search All Matches](#) [Clear Form](#)

3. Click **Search First 20 Matches**.

The matching results display. You can click a contract number to view more information about a specific contract.

Search: Contracts [Help & Tools](#)

Users Vendors **Contracts** Proposals Outreach

Search your organization's contract database. Enter information into any of the boxes below and click **Search**. Some parameters are required.

Click Search → Search First 20 Matches Search All Matches Clear Form

Search Parameters

Contract/Reference Number
(Contract number, financial system reference, project number)

Contract Title

Containing Text
(Contract description, summary, notes, comments)

Contractor
 Prime Subcontractor Either

Buyer/Project Manager
(Organization name, contact name)

Compliance Officer

Search First 20 Matches Search All Matches Clear Form

Q: Would everyone have access to DMS for auditing purposes?

A: If District or Area Office staff needs access to DMS, they should contact the District DBE Coordinator.

If Construction Division staff needs access to DMS, they should contact CIV Compliance at 512-416-4700 or e-mail CIV_Compliance@txdot.gov

New users will receive an email showing their username and temporary password. You will be required to update your password when you first sign on.

Q: Does DMS follow records retention schedules?

A: Records in DMS are maintained in accordance with TxDOT's Records Retention Schedule.

TxDOT's retention of FHWA records should mirror the guidance established in the FHWA Records Disposition Manual (Chapter 2), which states in part:

Disadvantage Business Enterprise (DBE) Files

Information, policy, and correspondence relative to the utilization of minority and women contractors and subcontractors on Federal-aid construction projects; include reports periodically received from the Divisions, State highway agencies, and contractors relative to the utilization of minority and women contractors.

DISPOSITION: Cut off at end of fiscal year. Transfer to FRC 3 years after cutoff. Destroy 9 years after cutoff.

TxDOT's records management office is in the process of updating TxDOT's Records Retention Schedule to mirror the FHWA Records Disposition Manual. This action will be completed by the last working day of June and submitted to the Texas State Library and Archives for review and approval.

Q: The prime contractor met the DBE contract goal; however, it did not fulfill one of its race conscious commitments. Is this acceptable?

A: The prime contractor made a contractually binding commitment to meet the goal by submitting its DBE commitments. Therefore, it has a contractual obligation to honor each race conscious commitment or provide good faith effort documentation to justify why it did not meet each individual commitment.

The district staff must evaluate whether the prime contractor's explanation is justified.

Q: Can a prime contractor reduce the amount of work committed to a DBE at contract award?

A: The prime contractor cannot reduce the amount of work committed to a DBE at contract award without good cause. This means the prime contractor would need to provide a valid regulatory reason. The prime contractor would have to follow the termination procedures as specified in the DBE special provision.

Q: Do the DBE Program and DBE contract goals apply to change orders in contracts?

A: TxDOT's DBE program applies to all its DOT-assisted contracting, including change orders to an existing contract which have more than a minimal impact on the contract amount.

If there is a change order to a contract on which there is a DBE contract goal, then that contract goal applies to the change order as well as to the original contract. This is true whether TxDOT or the contractor initiates the change order.

For example, suppose that a recipient awards a \$1 million contract to Firm X. The contract goal is 15 percent. Firm X meets the contract goal by obtaining DBE participation (commitments) from subcontractors or suppliers amounting to \$150,000.

Part way through performance of the contract, TxDOT determines that additional work is necessary, and issues a change order that will add \$500,000 to the total contract price. The 15 percent contract goal applies to this additional \$500,000.

To meet the contract goal as applied to the change order, Firm X would have to make good faith efforts to obtain an additional \$75,000 in DBE participation. It could meet this obligation either by obtaining the additional \$75,000 in work by DBE subcontractors or suppliers or by documenting good faith efforts.

TxDOT would determine on a case-by-case basis, what would constitute good faith efforts in the context of a particular change order. There may be situations in which the change order has such a minimal effect on the overall contract amount or the expected DBE participation on a contract that it would not be sensible to alter DBE requirements affecting the contract.

QUESTIONS?

Texas Department of Transportation

Civil Rights Division

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