

# Local Government DBE Compliance and Monitoring Guide



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## **Manual Notice: 2019-1**

**From:** Michael D. Bryant, Director, Civil Rights Division

**Manual:** *Local Government DBE Compliance and Monitoring Guide*

**Effective Date:** January 01, 2019

### **Purpose**

The *Local Government DBE Compliance and Monitoring Guide* provides guidance for the Local Government (LG) on the federal and state requirements of the Disadvantaged Business Enterprise (DBE) Program. The Guide contains the processes and procedures to be used by the LG to manage and monitor all phases of DBE compliance from project initiation to project close-out to ensure DBE Program compliance.

### **Changes**

The following sections have been revised to reflect changes in policies and procedures:

Chapter 10, Section 1: Subcontracts

- Updated DBE program requirements

Chapter 12, Section 1: Performing a CUF Review

- Clarified CUF Review supporting documentation definition

Other minor edits have been made throughout the manual.

### **Contact**

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### **Archives**

Past manual notices are available in a [PDF archive](#).

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# Chapter 1: Introduction

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## **Section 1: Purpose of the Guide**

The Local Government DBE Compliance and Monitoring Guide provides guidance for the Local Government (LG) on the federal and state requirements of the Disadvantaged Business Enterprise (DBE) Program. This Guide contains the processes and procedures to be used by the LG to manage and monitor all phases of DBE compliance from project initiation to project close-out to ensure DBE Program compliance.

This Guide is not meant to supersede any federal, state, or contract specific requirements. If a conflict of instructions should arise, always refer to the published regulations or the LG DBE Special Provision for guidance.



## Section 2: Overview of the DBE Program

The DBE Program is a legislatively mandated United States Department of Transportation (USDOT) program that applies to federal-aid highway dollars expended on federally- assisted contracts issued by USDOT recipients such as the Texas Department of Transportation (TxDOT).

The program is administered by the USDOT's three modal administrations: Federal Highway Administration (FHWA), Federal Transit Administration (FTA) and Federal Aviation Administration (FAA). Implementation of the DBE Program is guided by USDOT regulations found at 49 Code of Federal Regulations (CFR), Part 26.

TxDOT has established a DBE Program in accordance with regulations of the USDOT. The DBE Program applies to Local Government Agency's highway contracts, funded in whole or in part from federal funds received through TxDOT and the Federal Highway Administration

TxDOT's primary DBE Program objectives are:

- To ensure nondiscrimination in the award and administration of USDOT-assisted contracts in TxDOT's highway, transit, and airport financial assistance programs.
- To create a level playing field on which DBEs can compete fairly for USDOT-assisted contracts.
- To ensure that TxDOT's DBE Program is narrowly tailored in accordance with applicable law.
- To ensure that only firms that fully meet 49 CFR, Part 26 eligibility standards are permitted to participate as DBEs.
- To help remove barriers to the participation of DBEs in USDOT-assisted contracts.
- To promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients.
- To assist the development of firms so they can compete successfully in the marketplace outside of the DBE Program.
- To provide appropriate flexibility to recipients of federal financial assistance in establishing and providing opportunities for DBEs.

## Section 3: Acronyms, Terms and Definitions

### Acronyms

Acronym	Description
AE	Area Engineer
AFA	Advanced Funding Agreement
AO	Area Engineer Office
CFR	Code of Federal Regulations
CIV	Civil Rights Division
CSJ	Control Section Job
CUF	Commercially Useful Function
DBE	Disadvantaged Business Enterprise
DDC	District DBE Coordinator
DE	District Engineer
DMS	Diversity Management System
DOC	Director of Construction
FAA	Federal Aviation Administration
FHWA	Federal Highway Administration
FTA	Federal Transit Administration
GFE	Good Faith Effort
LG	Local Government
LGP	Local Government Projects Office
MOU	Memorandum of Understanding
NAICS	North American Industry Classification System
TAC	Texas Administrative Code
TUCP	Texas Unified Certification Program
TxDOT	Texas Department of Transportation
USDOT	United States Department of Transportation

## Terms and Conditions

**Advance Funding Agreement** - The form of contract most frequently used for development of projects with LGs.

**Commitment** – The bidder’s commitment to use a DBE subcontractor whose participation is required to meet contract goal.

**Commercially Useful Function (CUF)** - A DBE performs a CUF when it is responsible for execution of a distinct element of work of a contract or subcontract and carries out its responsibilities by actually performing, managing, and supervising the work involved.

**Disadvantaged Business Enterprise (DBE)** - A for-profit, small business concern where socially and economically disadvantaged individuals own at least a fifty-one percent interest and also control management and daily business operations.

**Federally Assisted Contract** - Any contract between TxDOT and a contractor which is paid for, in-whole or in-part, with USDOT financial assistance.

**Goal Credit** - The value of DBE participation on a project that qualifies towards the DBE goal.

**Good Faith Effort** - A contractor’s efforts to achieve a DBE goal by its scope, intensity, and appropriateness to the objective can reasonably be expected to fulfill the program requirement.

**Guide** – Local Government DBE Compliance and Monitoring Guide

**Joint Venture** – A joint venture is an association of a DBE firm and one or more other firms to carry out single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills, and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose shares in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

**Local Government** - Includes municipalities, counties, county and regional toll authorities, metropolitan planning organizations (MPOs), regional mobility authorities (RMAs), and some private entities that receive government funding.

**Local Government Project**- A project in which at least one phase of project development is managed by a local government agency for which it is being reimbursed with federal or state funding or a locally funded project managed by a local government on the state highway system.

**NAICS** - The North American Industry Classification System is the primary industry classification system which best describes the primary business of a firm. The NAICS is used by federal statistical agencies for the purpose of collecting, analyzing, and publishing statistical data related to the US economy. (<http://www.census.gov/eos/www/naics/>)

**Race-Conscious** - Measures taken to meet DBE Program objectives that focus specifically on assisting only DBEs.

**Race-Neutral** - Measures taken to meet DBE Program objectives that are tailored to assist all small businesses including DBEs and do not single out a specific minority group.

**Shortfall** - A contractor's failure to meet a project assigned DBE goal.

**Sub recipient** - Any entity, public or private, to which USDOT financial assistance is extended through a recipient, through programs of the FHWA, FAA, or FTA.

**Special Provision** - Additions or revisions to standard specifications or special specifications of the contract.

**Texas Unified Certification Program (TUCP)** - A certification program for the federal DBE Programs in Texas.

## Chapter 2: Resources

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[Section 1: Resources](#)

## Section 1: Resources

### Overview of the DBE Program – Videos

Below are web resources from the USDOT and FHWA on the DBE Program:

- DBE Program: <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise>
- DBE Program Overview: <http://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?id=73>

### TxDOT DBE Guides

TxDOT has five guides for DBE program administration.

- DBE Contractors' Guide
- Prime Contractors' DBE Guide
- Local Government DBE Compliance and Monitoring Guide
- District DBE Compliance and Monitoring Guide
- CIV DBE Compliance and Monitoring Guide

These guides and accompanying training materials are available on TxDOT's website. TxDOT's Civil Rights Division can provide guidance and training.

## Chapter 3: DBE Program Authorities

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## Section 1: Overview

The DBE participation requirements in federal-aid highway contracts are contract provisions like any other contract provision and should be administered as such. DBE administrative issues that will require review and attention may arise during a project. These issues will require the LG to have an adequate background of the DBE program. The LG should solicit the advice of TxDOT in resolving these issues as needed.

The most current version of the DBE Special Provision is included in the bid documents of all federally-funded projects. The goal will be a percentage of the contract amount and is listed in the bid documents.

LG DBE specification and contract provisions include the following:

- Advance Funding Agreement (AFA) / Memorandum of Understanding (MOU)
- Definitions
- DBE contract goal
- Eligibility criteria
- Good faith effort provisions
- Commercially useful function evaluations
- Sanctions on failure to comply with DBE requirements
- Determination procedures on counting DBE participation toward the DBE goal
- Award documentation procedures
- Post-award compliance provisions, and
- Records and reporting requirements.



## **Section 2: Regulations and Provisions**

The following is a list of the DBE contract regulations and provisions that contractors must comply with:

- USDOT DBE regulations 49 CFR, Part 26
- Special Provision 000-0394L - - (Disadvantaged Business Enterprise in Federal-Aid Contracts)
- Special Provision Item 9L Measurement and Payment - (Payment Provisions for Subcontractors)

### **Section 3: Memorandum of Understanding and Advance Funding Agreement**

The Federal Highway Administration (FHWA) has determined a LG must operate under TxDOT's DBE program even if it has its own program already approved by USDOT. Participation in TxDOT's approved DBE program requires the execution of a memorandum of understanding (MOU) between the LG and TxDOT. This can be accomplished through reference to the MOU in the Advance Funding Agreement (AFA) executed by both parties but eventually should be accomplished by joint execution of a MOU by the LG and TxDOT. LGs are encouraged to contact TxDOT's Civil Rights Division for assistance.

The LG must implement TxDOT's DBE program and coordinate closely with the TxDOT Districts. This includes TxDOT pre-approval of procurement procedures and periodic LG reporting requirements.

## Chapter 4: DBE Program Responsibilities

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[Section 3: LGP Office](#)

[Section 4: TxDOT Districts](#)

[Section 5: Local Government](#)

[Section 6: Prime Contractor](#)

## Section 1: Overview

### Condition of Federal Funding

TxDOT receives federal financial assistance from USDOT through programs of the FHWA, FAA, and FTA. As such, TxDOT becomes a recipient of federal funds and is responsible for administering its DBE Program and is legally accountable for expenditures of USDOT financial assistance in accordance with federal requirements.

As a condition of receiving this assistance, TxDOT has signed an assurance that it will comply with 49 CFR, Part 26 in the establishment and administration of a DBE Program.

Local governments, prime contractors, subcontractors, suppliers, manufacturers, and consultants all become sub recipients of USDOT federal funds when they enter into federally assisted contracts, subcontracts, and agreements with TxDOT.

As sub recipients of federal funds, TxDOT requires sub recipients comply with the requirements of 49 CFR, Part 26, TxDOT DBE Program, and DBE contract provisions.

As sub recipients of federal funds, and as a condition of contract award, local governments, prime contractors, subcontractors, suppliers, manufacturers, and consultants must affirm that they will carry out DBE obligations, and will work with TxDOT and the federal government in their review of its activities under the contract.

## Section 2: Civil Rights Division

### Overview

TxDOT's DBE Program is established under TxDOT's Civil Rights Division (CIV). CIV is responsible for implementing all aspects of the DBE Program and ensuring that TxDOT complies with all provisions of 49 CFR, Part 26. CIV accomplishes this responsibility through a tiered approach of contract oversight, program administration, and verification of contractor compliance at division and district levels.

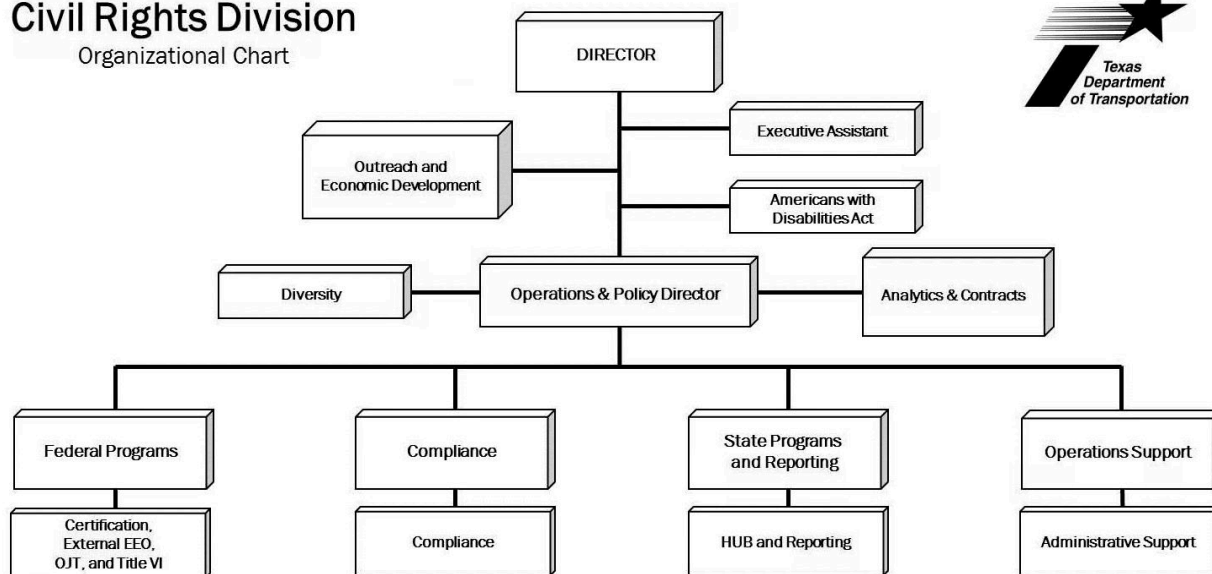
### CIV Staff

CIV's director and staff are responsible for:

- Implementation and oversight of TxDOT's DBE Program.
- Recommending and establishing policy and procedure in administration of the DBE Program.
- Coordination of DBE Program requirements with the Districts, FHWA, and all sub recipients.
- Setting overall DBE state participation goal.
- Setting specific DBE project or contract goals.
- Annual reporting requirements to FHWA.
- Providing training on DBE Program requirements, processes, and procedures.
- Providing support and guidance to districts, divisions and sub recipients.
- Conducting annual DBE Program compliance audits on districts, local governments, and other entities that are recipients of federal funds.
- Oversight and administration of the Texas Unified Certification Program (TUCP).

## CIV Organization Chart

### Civil Rights Division Organizational Chart



*Civil Rights Division Organization Chart*

## CIV Contact

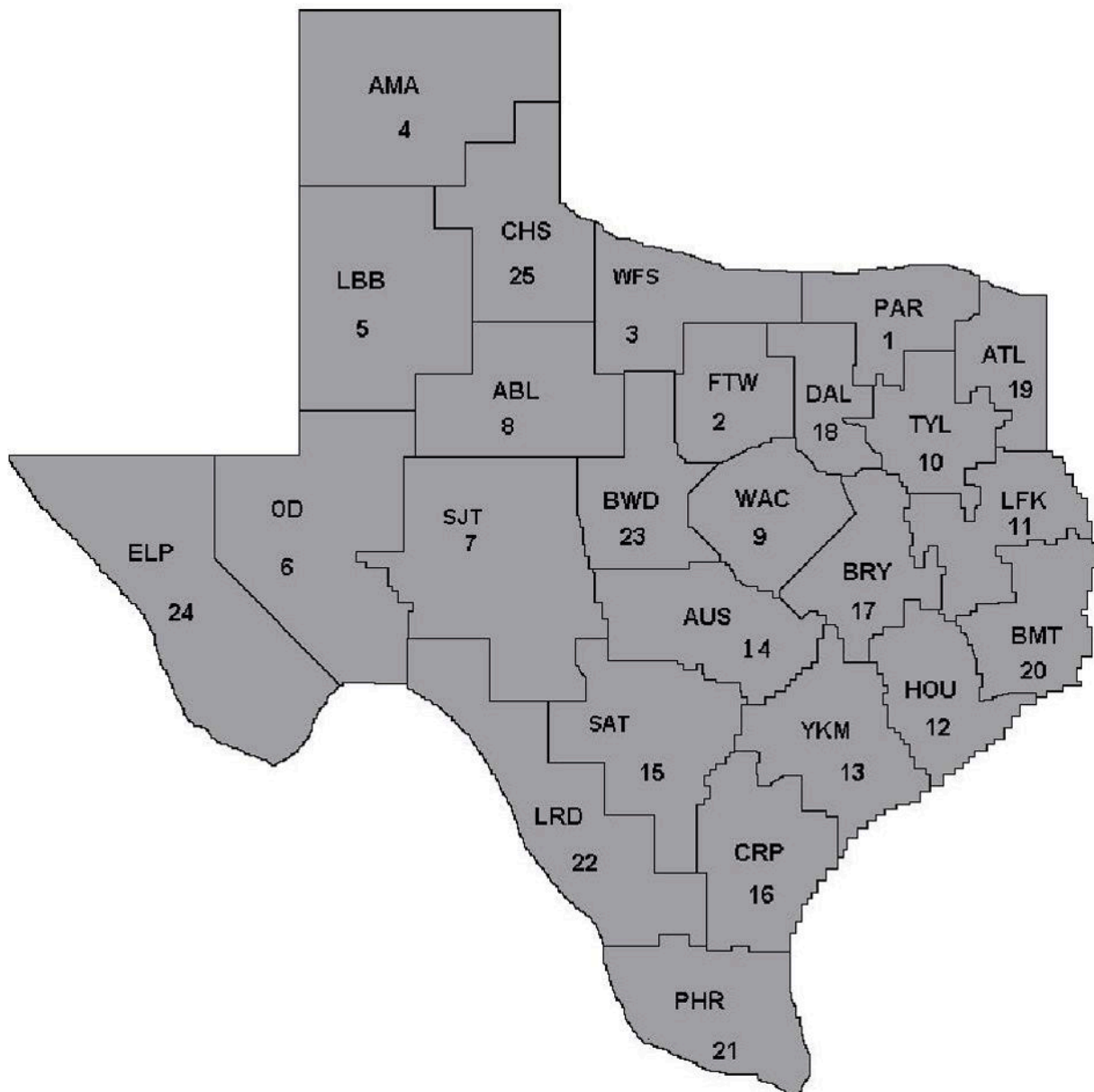
For assistance please contact the Civil Rights Division at 512-416-4700

### **Section 3: LGP Office**

The TxDOT Local Government Projects Office (LGP) is located in Austin and provides guidance and training for local government and TxDOT personnel in the development of transportation projects under TxDOT oversight. LGP develops policies and procedures, provides guidance to Districts, and maintains documents, resources, and training tools for LGs, consultants, and TxDOT staff.

## Section 4: TxDOT Districts

The Districts oversee the construction of state highways. The oversight responsibility includes monitoring contractor compliance with the DBE Program requirements. District offices are the initial and primary contact for LGs and subcontractors and provide oversight for LG projects. Area offices (under the District office) support the District office during different stages of the project. The oversight responsibility includes monitoring contractor compliance with the DBE Program requirements.





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## District Staff Responsibilities

The TxDOT District actively participates in the initiation of the construction phase and maintains oversight responsibility during construction to ensure projects are managed, developed and constructed in accordance with approved policies, procedures, plans and specifications.

District responsibilities include:

- Provide general oversight and DBE Program technical support.
- Meet with the LG liaison to make sure he or she understands the LG's DBE contract administration responsibilities. Provide technical assistance.
- Instruct the LG to use the Local Government (LG) Project Disadvantaged Business Enterprise (DBE) Compliance Monitoring Checklist (Form 2658) to document compliance with the DBE program requirements during the course of the project.
- Inform the LG to retain the checklist and to have it available for inspection by TxDOT district staff.
- Spot-check the LG's subcontract approvals for Contractor's Assurance.
- Confirm the LG properly adopted the MOU/AFA.
- Assure the applicable special provisions are included in LG bid and contract documents.
- Spot check the LG's subcontract approvals for compliance.
- Obtain the DBE Monthly Progress Report (Form SMS.4903) from the LG (even if the DBE goal is zero).
- Update the DBE Monthly Progress Report spreadsheets and post on the LGPs' SharePoint site by the 20th of every month.
- On a monthly basis, monitor the attainment of the project DBE goal.
- Conduct an audit of LG federally-funded projects with an assigned DBE goal.
  - Verify information on Local Government (LG) Project Disadvantaged Business Enterprise (DBE) Compliance Monitoring Checklist (Form 2658).
  - Assess LG's contract administration of DBE program requirements.
  - Make recommendations regarding corrective actions deemed necessary and appropriate.
  - Maintain compliance review report and supporting documentation.
  - Follow-up on LG's corrective actions and document corrective actions in a final audit report.
  - Ensure the assessment of any sanctions are in accordance with contract and DBE Program.

### District DBE Coordinator (DDC) Contact List

Below is a list of DDCs. Contact your DDC should you have any questions regarding compliance with the DBE Program.

District	Name	Phone	Email
Abilene	Tammy Sanders	(325) 676-6858	Tammy.Sanders@txdot.gov
Amarillo	Elizabeth Dominguez	(806) 356-3274	Elizabeth.Dominguez@txdot.gov
Amarillo	Radina Turner	(806) 356-3261	Radina.Turner@txdot.gov
Atlanta	Donna Barnes	(903) 799-1241	Donna.Barnes@txdot.gov
Austin	Ben Engelhardt	(512) 832-7032	Ben.Engelhardt@txdot.gov
Austin	Beth Garza	(512)832-7037	Beth.Garza@txdot.gov
Beaumont	Andrea Murry	(409) 898-5720	Andrea.Murry@txdot.gov
Beaumont	Patrick Ryan	(409) 898-5838	Patrick.Ryan@txdot.gov
Brownwood	Tonya Shaw	(325) 643-0464	Tonya.Shaw@txdot.gov
Bryan	Andy Berlan	(979) 778-9758	Andy.Berlan@txdot.gov
Bryan	Jennifer Mascheck	(979) 778-9756	Jennifer.Mascheck@txdot.gov
Childress	Chris Reed	(940) 937-7251	Chris.Reed@txdot.gov
Corpus Christi	David Chapa	(361) 808-2256	David.Chapa@txdot.gov
Dallas	Noraima Perez	(214) 319-6456	Noraima.Perez@txdot.gov
Dallas	Richard Barker	(214) 320-6182	Richard.Barker@txdot.gov
El Paso	Letty Delira	(915) 790-4327	Letty.Delira@txdot.gov
Fort Worth	Greg Gorecki	(817) 370-6517	Greg.Gorecki@txdot.gov
Fort Worth	Marcia Burren	(817) 370-6830	Marcia.Burren@txdot.gov
Houston	Jannie Blackmon	(713) 802-5008	Jannie.Blackmon@txdot.gov
Laredo	Lilia Gutierrez	(956) 712-7464	Lilia.Gutierrez@txdot.gov
Lubbock	Barry Turner	(806) 748-4404	Barry.Turner@txdot.gov
Lufkin	Doug Y'Barbo	(936) 633-4314	Doug.YBarbo@txdot.gov
Odessa	Theresa Conner	(432) 498-4777	Theresa.Connor@txdot.gov
Paris	Karen Jackson	(903) 737-9238	Karen.Jackson@txdot.gov

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District	Name	Phone	Email
Pharr	Judy Sanchez	(956) 702-6219	Judy.Sanchez@txdot.gov
San Angelo	Diane Weishuhn	(325) 947-9260	Diane.Weishuhn@txdot.gov
San Antonio	Jose Castro	(210) 615-5848	Jose.Castro@txdot.gov
Tyler	Stacie Holcomb	(903) 510-9205	Stacie.Holcomb@txdot.gov
Waco	Rendy Drews	(254) 867-2771	Rendy.Drews@txdot.gov

## Section 5: Local Government

### LG Staff Responsibilities

The LG must administer the contract and ensure the contractor and subcontractors abide by the DBE requirements and clauses contained in the contract documents. The LG must perform contract administration responsibilities that include monitoring and enforcement activities. These responsibilities include:

- Ensure Contractors Assurance is in bid documents.
- Execute AFA/MOU.
- Ensure plans and bid documents include TxDOT/LG approved project DBE goal and DBE Provision prior to advertisement.
- Ensure Bid Document Checklist includes DBE elements.
- Accept DBE commitments for review and approval.
- Review and approve pre-and post-contract GFEs.
- Conduct pre-bid, project coordination and pre-construction meetings that include pertinent DBE compliance information.
- Ensure DBE contract provision is included in prime contractor and subcontractor agreements.
- Ensure periodic inspections include DBE elements.
- Utilize the Local Government Project DBE Compliance Monitoring Checklist (Form 2658) during the course of the project.
- Receive monthly progress reports (MPR) from prime contractor.
- Monitor race-conscious and race-neutral goal credit.
- Monitor change orders and impacts to DBE contract goal.
- Forward MPR summary to the district.
- Receive, review, and approve requests for termination and substitution.
- Conduct a minimum of one CUF review on all DBE firms and maintain CUF records.
- Notify the prime contractor if a DBE is not performing a CUF.
- Enforce remedies the LG has determined for non-DBE CUF compliance.
- Receive, review, and approve requests for use of joint checks.
- Monitor and audit joint check usage for allowable goal credit and DBE compliance.
- Receive prompt payment certifications from prime contractors to ensure compliance with prompt payment provisions.

- Respond to prompt payment non-compliance issues.
- Enforce non-compliance actions and remedies based on the LG's determinations.
- Receive Final Reports from prime contractors and determine if the project DBE goal and race-conscious commitments were met.
- Review and approve GFE documentation if DBE goal and or commitments were not met.
- Enforce administrative remedies if the prime contractor did not provide evidence of good faith efforts.

## **Section 6: Prime Contractor**

### **Prime Contractor Staff**

Having adequate staff that fully comprehends the DBE Program requirements is the most effective way to ensure compliance with all provisions of 49 CFR, Part 26.

### **Prime Contractor Responsibilities**

- Sponsor or participate in outreach events with small, disadvantaged, minority or women-owned businesses.
- Vet subcontractors to identify if they are certified and capable DBE firms.
- Document good faith efforts to meet the DBE contract goal.
- Report monthly payments to DBE subcontractors and suppliers.
- Ensure DBE subcontractors perform a commercially useful function on the project.
- Monitor change orders and impacts to DBE contract goal.
- Make prompt payment to DBE and non-DBE subcontractors as required by the LG Prompt Payment Provision.
- Submit termination requests that comply with DBE Program requirements.
- Submit substitution requests that comply with DBE Program requirements.
- Submit DBE joint check approval request.
- Maintain records of DBE activities to comply with DBE Program requirements.
- Communicate with LG personnel to seek guidance regarding DBE compliance.

## **Chapter 5: The Texas Unified Certification Program (TUCP)**

### **Contents:**

[Section 1: Background on the TUCP](#)

## Section 1: Background on the TUCP

49 CFR, Part 26.81(b)(2) states: “The UCP shall provide ‘one-stop shopping’ to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.”

In support of this requirement, the State of Texas established a TUCP Committee that certifies DBEs for participation in USDOT federal contracting projects across the State of Texas.

### TUCP Certifying Agency Requirements

Six certifying agencies make all certification decisions in accordance with 49 CFR, Part 23, Part 26, and the TUCP Memorandum of Agreement. Agencies must keep complete files on applicants and provide information as required and annually require its DBE firms to submit an affidavit of no change form, due on their certification anniversary date.

A business' DBE certification received from any of the TUCP agencies is valid and can be relied upon by any Texas entity that receives USDOT funds.

The following agencies are members of the TUCP:

- City of Austin, Small Business Development
- City of Houston, Office of Business Opportunity
- Corpus Christi Regional Transportation Authority
- North Central Texas Certification Agency
- South Central Texas Certification Agency
- Texas Department of Transportation

### TUCP Directory

The firms listed in the TUCP directory meet the DBE certification requirements to perform the specific work codes granted. All requests for additional work codes must be approved prior to the execution of any contract the DBE firm wishes to perform work on as a DBE. The TUCP DBE directory should be relied on as primary source for soliciting DBEs.

The [TUCP directory](#) of all certified DBE firms in Texas is available online. The TUCP directory includes a list of certified DBE firms; including the name, address, telephone, and NAICS codes.



## Chapter 6: Commercially Useful Function

### Contents:

[Section 1: Overview](#)

[Section 2: Counting DBE Participation](#)

[Section 3: CUF and Certification](#)

[Section 4: DBE Fraud Indicators](#)

## Section 1: Overview

A DBE firm performs a commercially useful function (CUF) when it is responsible for execution of the contract and is carrying out its responsibilities by performing, managing, and supervising the work involved. The regulations provide that with regard to materials and supplies, the DBE must be responsible for negotiating price, determining quality, quantity, ordering the material, installing (where applicable), and paying for the material itself.

In summary, the DBE should:

- Possess the required experience.
- Be financially independent.
- Employ its own laborers.
- Own or rent its own equipment.
- Handle its own payroll, invoicing, and negotiations.

To count toward the DBE goal, a DBE firm's work must serve a CUF. This means that the DBE firm has a necessary and useful role in the project. For example, the DBE firm supplies the material and performs, manages and supervises the work.

Prime contractors are responsible for determining that the subcontractors they are using to claim DBE credit meet this requirement. It is incumbent on prime contractors who work on projects with DBE participation requirements to hire independent, certified DBE firms to perform a CUF. Prime contractors should adopt a DBE compliance program to closely monitor its DBE subcontractor relationships.

A DBE firm's appearance on TUCP does not confirm that it is ready or capable of performing a CUF on a project. The prime contractor should ask potential DBE firms these questions to confirm that the DBE is ready and able to perform a CUF.

- How long has your company been in business?
- Will the DBE manage and supervise the work with its own managers and superintendents?
- Will the DBE perform the work with its own forces?
- Will the DBE be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, installing (where applicable) and paying for the material itself?
- What work, if any, does the DBE intend to subcontract and is that amount consistent with industry practice?

The regulations make clear that a DBE firm does not perform a CUF if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. If the DBE firm serves only to provide the appearance

of DBE participation, the work cannot count toward the DBE goal. CUF violations may indicate possible fraud and abuse of public funds.

“[FHWA Tips on Evaluating a Commercially Useful Function](#)” is an excellent resource for evaluating a CUF.

## Section 2: Counting DBE Participation

### Counting Overview

Once the LG determines that work on a project qualifies as a CUF, it then calculates the amount it can count toward its DBE goal. Only the value of the work performed by the DBE firm counts toward the goal. Depending on the nature of the work, different guidance applies.

The following is guidance for counting participation when a DBE firm is:

- DBE Subcontractor
- Manufacturer
- Regular Dealer
- Packager, Broker, Manufacturer's Representative
- Trucking Firm
- Joint Venture

### DBE Subcontractor

When a DBE firm is a subcontractor it must perform at least thirty percent (30%) of its contract using its own employees, equipment, materials, and resources. When this condition is met, all DBE work performed counts toward the DBE goal. A DBE subcontractor typically furnishes and installs the work item. One hundred percent (100%) of the prime contractor's payment to the DBE firm will count toward the contract goal. This includes payment for labor and materials.

When a DBE subcontracts to another DBE firm, the value of the subcontracted work may be counted toward the DBE goal. However, work subcontracted to non-DBE firms does not count toward the goal.

### Manufacturer

A prime contractor purchases materials or supplies from a DBE manufacturer. A DBE manufacturer produces, on its premises, materials or equipment used for a project. A DBE manufacturer can also take product and alter it to meet contract specifications. The LG counts one hundred percent (100%) of the value of manufactured materials and equipment toward the DBE goal.

### Regular Dealer

A prime contractor purchases material or supplies from a DBE regular dealer. There are two ways a DBE firm can perform as a regular dealer.

- A DBE firm may have a store or warehouse out of which it sells or leases products to the public.
- For bulk items such as petroleum, steel, cement, gravel, stone, or asphalt, a DBE firm must own and operate distribution equipment for the product it is supplying. Any supplementing of regular dealer's own distribution equipment shall be by a long-term lease agreement and not on an ad-hoc or contract-by-contract basis. The DBE must lease the equipment itself, as well as run the equipment with its own workforce.

If a DBE firm is acting as a regular dealer, sixty percent (60%) of the value of items sold to the project counts toward the DBE goal. The LG determines the amount of credit on a contract-by-contract basis.

For example, a dealer will provide pipes for \$100,000. Because the DBE firm regularly sells this product as a part of its business, the LG counts \$60,000 toward the DBE participation goal, or sixty percent (60%) of the value of the items provided.

### **Packager, Broker, Manufacturer's Representative**

A prime contractor purchases material or supplies from a DBE firm, which is neither a manufacturer nor a regular dealer. The LG will count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies. Goal credit will be granted if the fees or commissions are reasonable.

### **Differences between a Manufacturer, Regular Dealer, and Broker**

The following example shows the difference under the requirements of the DBE Program between a manufacturer, a regular dealer, and a broker. The example is the furnishing of crushed aggregate meeting a state DOTs specification for such items as aggregate base course.

- **Manufacturer (100%)** - A DBE as its principal business and under its name produces on its premises crushed aggregate and meets state standard specifications would be considered a manufacturer and the cost of the crushed aggregate produced can be credited 100% towards meeting the goal.
- **Regular Dealer (60%)** - A DBE is considered a regular dealer of crushed aggregate if the material is purchased in its name, and it engages as its principal business the purchase and sale of crushed aggregate to the general public, or owns and operates the necessary distribution equipment (since aggregate is considered a bulk item) to deliver the crushed aggregate. Under these circumstances, the DBE can be considered a regular dealer and 60% of the cost of the crushed aggregate purchased is credited towards the goal.
- **Packager, Broker, or Manufacturer's Representative - (100% Fees or Commissions)** - If the DBE firm does not meet all or any of the functions presented in defining a manufacturer or regular dealer in crushed aggregate but arranges or expedites transactions consistent with industry practice in the delivery of such materials, then the services in the amounts of fees or

commissions charged in the procurement and/or delivery of such materials can be credited towards the goal.

### **Trucking Firm**

There are several ways to count DBE credit for the services of DBE trucking firms. The DBE must have at least one truck and driver of its own, but it can lease the trucks of others, both DBEs and non-DBEs, including owner operators.

The following are ways to count DBE credit for the services of DBE trucking firms:

- For work done with its own trucks and drivers, and for work with DBE lessees, the primary DBE trucking firm receives 100% credit for all transportation services provided.
- If a non-DBE trucking firm hires second tier DBE trucking firms and DBE truck owner-operators, then 100% credit will be counted. Credit will not count for the amount of any fees that are deducted from the DBE trucking firm's payment, such as, fuel costs, other fees, etc.
- If the primary DBE trucking firm leases trucks from non-DBE firms, but uses its own employees as the drivers, then 100% credit will be counted. No credit will be allowed for 1099 employees. The primary DBE trucking firm must own and operate at least one truck used on the project.
- For work done with non-DBE lessees, the primary DBE trucking firm gets credit only for the fees or commissions it receives for arranging the transportation services.
- A primary DBE trucking firm may lease non-DBE trucks on a 1 for 1 basis for credit of the value of transportation services provided. If the hauling services performed by non-DBE trucks exceed the hauling services provided by the primary DBE trucking firm, the credit is limited to the fees and commissions only.

Primary DBE firm X has one (1) truck and leases one (1) truck from DBE firm Y.  
 Primary DBE firm also leases three (3) trucks from non-DBE firm Z.

Primary DBE firm X hauling services	\$3,000
DBE Firm Y hauling services	\$3,000
<b>Total DBE hauling services</b>	<b>\$6,000</b>
Non-DBE firm Z hauling services (20% commission charged)	
Truck 1	\$3,000
Truck 2	\$4,000
Truck 3	\$4,000
<b>Total non-DBE hauling services</b>	<b>\$11,000</b>
<i>(The value of hauls by non-DBE trucks exceeds the value of hauls by DBE owned trucks.)</i>	
Credit allowed for DBE Trucks	\$6,000
Credit allowed for non-DBE Trucks 1 and 2	\$6,000
<i>(1 for 1 not to exceed value of the DBE hauls)</i>	
Commission for Truck 3	\$800
<i>(Derived by multiplying value of haul at \$4,000 times the 20% commission)</i>	
<b>Total Hauling credit to count towards goal</b>	<b>\$12,800</b>

Figure 6-1. Trucking Example

## Joint Venture

A joint venture is defined as an association of a DBE firm and one or more other firms to carry out single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills, and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose shares in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

When a DBE firm performs as a participant in a joint venture, the LG will count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward the DBE goal.

The LG will assess each joint venture agreement proposed to meet all or a portion of a DBE participation goal by using the following criteria:

- Does the relationship, or any aspect of such, between the DBE and non-DBE conflict with the ownership and control requirements specified in contract provisions?
- Is the DBE an independent business concern separate and apart from the non-DBE partner in the proposed agreement?

- Is the DBE's share in the ownership, control, management responsibilities, risks, and profits of the joint venture commensurate with the DBE's ownership in a joint venture?
- Does the agreement clearly define the work to be performed by the DBE?
- Is the work to be performed by the DBE in conformance with the contractual and statutory provisions governing the DBE's performance of a Commercially Useful Function?



### **Section 3: CUF and Certification**

Certification and CUF 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 transaction.

A DBE firm'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 LG will forward this matter to TxDOT and TxDOT may commence or initiate a proceeding under 49 CFR, Part 26.87 to determine the continued eligibility of the DBE firm.

If a DBE firm is a mere pass-through or middle man between two performing parties, the contractor seeking participation credits may be exposing itself to serious criminal and civil liability. 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.

## Section 4: DBE Fraud Indicators

### DBE Fraud Indicators

The LG will report any false, fraudulent, or dishonest conduct in connection with the DBE program to the USDOT Office of the Inspector General (OIG) for appropriate action. The OIG looks at ten key indicators, or “red flags,” in determining whether to investigate a contractor for DBE fraud. These red flags include:

- DBE firm’s owner lacking background, expertise or equipment to perform subcontract work
- Employees shuttling back and forth between prime contractor and DBE-owned business payrolls
- Business names on equipment and vehicles covered with paint or magnetic signs
- Orders and payment for necessary supplies made by individuals not employed by DBE-owned business
- Prime contractor facilitated purchase of DBE-owned business
- DBE owner never present at job site
- Prime contractor always uses the same DBE
- Financial agreements between prime contractor and DBE contractors
- Joint bank accounts (prime contractor/DBE)
- Absence of written contracts

Under 49 CFR, Part 26.107, businesses working in the DBE program who engage in the conduct may be subject to suspension or debarment, enforcement actions under 49 CFR Part 31, Program Fraud and Civil Remedies, or criminal prosecution. USDOT OIG makes investigating and prosecuting DBE fraud a priority. The OIG, working with U.S. Attorney’s offices has helped to create successful criminal prosecution for fraudulent conduct in the DBE program. Anyone who becomes aware of fraud, waste, or abuse in these programs should inform the OIG as well as TxDOT staff.

### Reporting Fraud

TxDOT has established a hotline for employees, contractors, and others to report suspected fraud or abuse. The TxDOT Watch reporting system allows individuals to anonymously report suspected unethical and illegal activities within the agency in one of two ways:

- Report incidents by visiting TxDOT Watch
- Call toll-free (877) 769-8936.

## Chapter 7: Contract Letting

### Contents:

[Section 1: Overview](#)

## Section 1: Overview

Prior to letting a construction project, a DBE project goal will be set by TxDOT. For projects with a specified percentage DBE goal, prime contractors make a commitment to meet the goal by signing the proposal and submitting a bid.

### Pre-Estimate Actions

It is recommended the prime contractor take the following pre-estimate actions prior to beginning an estimate for a specific project:

- Review the contract documents for the DBE goal on the project.
- Review the TUCP directory for the list of certified DBEs.

## **Chapter 8: Good Faith Effort Process**

### **Contents:**

[Section 1: Overview](#)

## Section 1: Overview

### Contractor Commitment Responsibilities

The apparent low bidder must submit a completed DBE Commitment Agreement ([Form SMS 4901](#)), DBE Trucking Commitment Agreement ([Form SMS 4901-T](#)), or DBE Material & Supplier Commitment Agreement ([Form SMS.4901-MS](#)) for each DBE he/she intends to use to satisfy the DBE goal, or a good faith effort ([Form 2603](#)) to explain why the goal could not be achieved.

The prime contractor must provide these forms to the LG so as to arrive no later than 5 calendar days after bid opening. No extension of the 5-calendar day timeframe will be allowed for any reason.

The LG will review commitment(s) to ensure DBE requirements are satisfied in accordance with the DBE Special Provision. If the commitment(s) include a GFE, there will be an additional review process concerning the GFE documentation.

### Reviewing Commitment(s)

The LG must ensure DBE requirements are satisfied in accordance with the DBE Special Provision. Below is list of items that a LG will be tasked with verifying depending on the participation type:

- The commitment includes the DBE firm's signature of confirmation.
- DBE is certified per the TUCP.
- DBE is certified for the type of work they are performing per NAICS codes.
- The dollar amount listed for the work the DBE is to perform corresponds to appropriate goal credit and consistent with the actual value of that work.
- If the DBE is a manufacturer, question 1 has been completed on the DBE Material & Supplier Commitment Agreement (Form SMS.4901-MS).
- If the DBE is a regular dealer, questions 2 thru 4 have been completed on the DBE Material & Supplier Commitment Agreement (Form SMS.4901-MS).
- If DBE is a hauling firm, questions 1 thru 3 on the DBE Trucking Commitment Agreement (Form SMS 4901-T) have been completed; and if applicable, question 4 has been completed.
- The prime contractor met the contract goal.

The prime contractor may be contacted during this review process, and asked to submit further information to support its commitment. It may also be required to submit additional DBE commitments or a GFE in the event that the assigned goal is found to be inadequate.

Once the LG has reviewed and approved each DBE commitment and verified that the DBE participation goal has been met, the LG will notify the prime contractor.

A DBE prime contractor is not required to submit a GFE but must report subcontractor activity for non-DBEs on DBE Prime Contractor Payments to Non-DBE Subcontractors (Form SMS . 4902).

## Good Faith Efforts

Prime contractors must make Good Faith Efforts (GFE) to meet the DBE contract goal, either by meeting the goal or by documenting GFE to meet the goal. Prime contractors should make sincere and aggressive efforts to meet the DBE goal. Attempting to obtain a contract on the basis of documented GFE should be a contractor's last resort.

If the goal cannot be met in whole or in part, the prime contractor should document steps it has taken to satisfy GFE requirements and attach Contractors Certification of Good Faith Efforts (Form 2603) and all supporting documentation to the LG. Prime contractors should understand the list of the types of GFE found in 49 CFR, Part 26, Appendix A.

Contractors will not be penalized if they fail to meet contract DBE goals as long as they follow the good faith effort guidelines in 49 CFR, Part 26, Appendix A and submit their good faith effort to their appropriate LG DBE contract administrator for review, guidance, and approval. Contractors who fail to meet DBE goals and fail to make a good faith effort may be penalized.

The penalty may consist of:

- Termination of the contract
- Deduction of the dollar amount of DBE goal not accomplished, or
- Other remedy or remedies as deemed appropriate.

## Administrative Reconsideration

If the LG determines that the apparent successful bidder has failed to meet the requirements of 49 CFR Part 26.53(a), the LG, before awarding the contract, will provide the bidder an opportunity for administrative reconsideration. As part of this reconsideration, the bidder will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so.

The LG's decision on reconsideration will be made by an official who did not take part in the original determination that the bidder failed to meet the goal or make adequate good faith efforts to do so.

The bidder will have the opportunity to meet in person with the LG's reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so.

The LG will send the bidder a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the DOT.



## **Chapter 9: Race-Neutral Participation**

### **Contents:**

[Section 1: Overview](#)

## Section 1: Overview

The Federal DBE Program requires state transportation agencies to meet the maximum feasible portion of their overall DBE goals using race-neutral measures. Race-neutral measures are initiatives that encourage the participation of all businesses, or all small businesses, and are not specifically limited to DBEs.

As part of doing so, agencies must project the portion of their overall DBE goals that they expect to meet through race-neutral and race-conscious means.

- TxDOT uses a combination of race-neutral and race-conscious measures to meet its overall DBE goals. TxDOT projects that some percent of its overall DBE goal would be met through neutral means and that the remainder would be met through race-conscious means.
- Prime contractors must report race-neutral participation, on federal-aid contracts on which the assigned goal is 0% or on projects with goals greater than 0%.
- Any work done by a race-neutral DBE, regardless of NAICS codes, may be counted provided they are performing a CUF.
- Termination and substitution policy and procedures do not apply to race-neutral participation.
- CUF reviews must be performed on all race-neutral participation on projects with and without goals.

## **Chapter 10: Contract Award and Subcontract Execution**

### **Contents:**

[Section 1: Subcontracts](#)

## Section 1: Subcontracts

In accordance with TxDOT Standard Specifications, the prime contractor must submit a copy of the executed subcontract agreement or purchase order for all DBE subcontracts including all tiered DBE subcontracts on federal-aid projects.

### Subcontract Agreement

The prime contractor must incorporate the following TxDOT provisions in all subcontract agreements or material purchase agreements:

- Disadvantaged Business Enterprise in Federal-Aid Contracts ([000-394L](#))
- Special Provision Measurement and Payment ([Item 9L](#))
- Contract Assurance (49 CFR, Part 26.13)

The prime contractor should review these provisions with the DBE.

It is considered a best practice to include language into the subcontract regarding the ability of a DBE to perform a CUF. Advise the DBE that it is expected to manage, supervise, and perform its work, with its own organization and resources. A DBE's failure to perform a CUF is considered by TxDOT as a valid cause for termination. For more information regarding the CUF requirements, please refer to Chapter 6 of this Guide and 49 CFR, Part 26.55.

### Multiple-Tier Subcontracts

The prime contractor is ultimately responsible for the actions of its subcontractors and any second-tier DBE subcontractors. The prime contractor should, therefore, ensure that any subcontract between a first-tier subcontractor and a DBE subcontractor contains language that the DBE goals are to be met and that the DBE performs a CUF. Additionally, the prime contractor should be certain that the first tier subcontractors understand the process of terminating a DBE subcontractor.

### Submitted Contracts

The LG will check /verify the following to ensure the Contractor's Assurance and DBE Program requirements have been satisfied:

- Are the following provisions incorporated in contracts, regardless of tier?
  - Disadvantaged Business Enterprise in Federal Aid Contracts (000-394L)
  - Special Provision Measurement and Payment (Item 9L)
- Is 49 CFR, Part 26.13(b) assurance language present in contracts, regardless of tier?
- Is the DBE's certification valid at the time of subcontract execution?

- Is the DBE's scope of work different from the commitment?
- DBE's subcontract amount is the same as or greater than the amount in the commitment document (scope of work may differ if the line items are in addition to what was originally committed).
- Is the subcontract default or termination clause consistent with 49 CFR, Part 26.53(f), and includes prior written consent from LG that termination and replacements are for good cause?
- The dollar amount of DBE subcontract is equal or greater than the commitment and the scope of work does not differ from the commitment.

If deficiencies are found, the LG will contact the prime contractor in writing and request a copy of the modified subcontract.

## **Chapter 11: Project Coordination/Pre-Construction Meetings**

### **Contents:**

[Section 1: Overview](#)

## Section 1: Overview

LG staff will discuss the DBE requirements of the contract at the Project Coordination and Pre-Construction meetings to ensure key personnel, prime contractor, and subcontractors are aware of project DBE obligations and informed of the administrative and reporting procedures that will be utilized by TxDOT.

The LG staff will discuss, at a minimum, the following:

- The assigned DBE goal for the project
- The DBE subcontractors that will be participating in the project
- The prime contractor requirement to make a good faith effort to meet the assigned goal
- LG responsibility to monitor and ensure a commercially useful function (CUF) is performed
- The prime contractor complies with prompt payment requirements
- The reporting process to include:
  - Reporting payments within fifteen days after the end of a calendar month.
  - Adding subcontractors to include race-neutral DBEs
- The Termination/Substitution process
- The approval process and use of joint checks

## Chapter 12: Performing a CUF Review

### Contents:

[Section 1: Performing a CUF Review](#)

[Section 2: Daily Monitoring](#)



## Section 1: Performing a CUF Review

To ensure each DBE firm is performing a CUF, the LG must monitor contract activity and certify in writing that DBE firms are performing a CUF. To determine whether a DBE firm is performing a CUF, five elements must be considered: management, workforce, equipment, materials, and performance. These areas must be evaluated to make a CUF determination.

A CUF review is required for all DBE firms on all federally-funded projects, including projects with a 0% DBE goal. This also includes DBE truckers, suppliers and other vendors where a subcontract is not required.

### CUF Reviews

LG field personnel, such as project inspectors, conduct CUF reviews and inspect the jobsites to check that the DBE firm is performing and managing the work. The reviewer's activities include making observations and interviewing DBE personnel. CUF reviews should be initiated within 60 days of the DBEs start of work on a project and completed within 30 days by the LG once all documentation is received.

CUF reviews are accomplished through the use of DBE Program Commercially Useful (CUF) ([Form 2182](#)) and Commercially Useful Function Review – Material Supplier ([Form 2669](#)). CUF reviews must be performed for all DBEs, including race-neutral DBEs and DBE prime contractors on federally-funded projects with and without DBE goals. DBE material suppliers are required to complete Commercially Useful Function Review – Material Supplier (Form 2669) and furnish copies of certain items such as purchase orders, invoices, cancelled checks, and inventory lists.

The following actions should be taken:

- Conduct a CUF review on every race-conscious and race-neutral DBE.
- CUF reviews should be conducted when the DBE is scheduled to perform the major portion of its work.
- Attach appropriate supporting documentation of findings, which may include:
  - Executed subcontracts
  - Certified payrolls
  - Invoices
  - Purchase orders
  - Cancelled checks for material payments
  - Material tickets / delivery slips

- Trucking logs
- Delivery tickets and equipment title of ownership and/or lease agreements

The above documents identify and support who is paying and supervising employees, ordering and paying for materials, and whose equipment is used on the project. These documents, particularly those that pertain to the prime contractor's commitments or the approved DBE subcontract, should be attached to each CUF review as supporting evidence.

### **Non-Compliance with CUF Requirements**

LG staff needs to notify DBE firms that are presumed not to be performing a CUF. The prime contractor should be copied on the letter. The DBE firm will be given an opportunity to present evidence and rebut the presumption it is not performing a CUF. The DBE firm has ten days from the date it receives the letter to respond to the LG. The LG staff will review the rebuttal response, make a determination, and then notify the DBE and prime contractor in writing of the determination. If the CUF determination results in a DBE goal shortfall, the LG will need to notify the prime contractor in writing that it will need to find a substitute DBE or provide good faith efforts to meet the project DBE goal.

Non-compliance determinations include the following possible outcomes:

- No violation of federal regulations found.
- Violations of federal regulations found. The prime contractor will be determined to have a deficiency in DBE participation corresponding to the dollar value of the DBE's work that did not meet federal regulations. The prime contractor will need to submit good faith efforts to meet the project DBE goal. The LG may recommend and/or conduct a full certification review of a firm's DBE status which could lead to the removal of that firm from the DBE program if it is determined that violations indicate a lack of independence or control of the DBE firm by its owner.

## Section 2: Daily Monitoring

LG staff should monitor work performed by DBEs. The following observations should be noted in the daily work reports specific to their operations:

- The names of the DBEs working on the project.
- Does the DBE have a foreman supervising the work or is the prime contractor or another subcontractor supervising the DBE's work?
  - Note the name of the foreman and who he/she works for.
- Is the DBE using its own equipment or that of the prime contractor?
  - Note the company name on the equipment being used by the DBE.
- Is the DBE performing the work it was subcontracted to do or is the prime contractor or another subcontractor performing the work?
  - Note the general description of the work the DBE subcontractor is performing or note if the prime contractor or another subcontractor is performing work that the DBE should be performing.
- Are the DBE's employees performing the DBE's work?
  - Note if the DBE and prime contractor or other subcontractors are sharing employees.

If the LG project site inspector has reason to believe the DBE subcontractor is not performing a CUF, document the observations and bring them to the attention of the LG DBE Coordinator for further investigation and action. These observations may warrant a need to perform a CUF review. Daily work report records should be considered in the CUF review.

## Chapter 13: Payments

### Contents:

[Section 1: Payments](#)

[Section 2: Monthly Progress Reports](#)

## Section 1: Payments

### Prompt Payment

49 CFR, Part 26.29 requires DBE and non-DBE subcontractors to be paid promptly. TxDOT interprets prompt payment to mean the prime contractor will pay each subcontractor for satisfactory performance of its contract no later than ten days from receipt of each payment the prime contractor receives from the LG. The prime contractor will pay any retainage on a subcontractor's work within ten days after satisfactory completion of all the subcontractor's work.

The prompt payment clause is referenced in the LG's Special Provision Item 9L Measurement and Payment. The prime contractor should include in its subcontracts the same prompt payment provision.

Satisfactory completion is accomplished when:

- The subcontractor has fulfilled the contract requirements of both the LG and the subcontract for the subcontracted work, including the submittal of all information required by the contract and LG.
- The LG has inspected and approved the subcontractor's work, and paid by the LG.

The LG may pursue actions against the prime contractor for failure to execute prompt payment requirements. The penalties imposed by the LG may include, but are not limited to: withholding all or a portion of an estimate, suspending work, withholding project acceptance, placing prime contractor in default for breach of contract, or other actions deemed appropriate.

### Prompt Payment Certification

During the course of the project, the prime contractor must submit the Prompt Payment Certification ([Form 2177](#)) monthly and in the month following final acceptance.

The LG will initiate the following actions for receipt and review of the required certification form:

- Verify the form is received by the due date and any payments withheld are based on a dispute.
- If payment is withheld without a stated dispute or the prime contractor fails to provide the monthly or final certifications, contact the prime contractor with a reminder of its contractual obligation.
- When required, take administrative actions. Administrative actions may include suspending work, withholding all or a portion of an estimate, withholding project acceptance, placing contractor in default for breach of contract, or other actions deemed appropriate.

**Processing Complaints**

Reference the prompt payment complaint procedures in TxDOT's Construction Contract Administration Manual.

Investigate the complaint and provide a timely response to the complainant. According to the DOT, "a timely response should be no more than the time required to promptly pay the subcontractor for completed work."

**Final Reimbursement to Prime Contractor**

The LG cannot make the final reimbursement to the prime contractor until it approves the completion of the project construction and has received and reviewed all necessary documentation, including the DBE Program requirements.

## Section 2: Monthly Progress Reports

### Monitoring Monthly Progress Reports

The prime contractor is required to submit monthly reports, after work begins, on DBE payments to meet the DBE goal and for DBE race-neutral participation to the LG. These reports are due within fifteen days after the end of a calendar month. These reports will be required until all DBE subcontracting or material supply activity is completed. The DBE Progress Report ([Form SMS.4903](#)) is to be used for monthly reporting. The DBE Final Report ([Form SMS.4904](#)) is to be used as a final summary of DBE payments submitted upon completion of the project.

The Prime Contractor is required to report race-conscious and race-neutral participation. Verify the prime has included race-neutral participation on the Monthly Progress Report form and that expenditures are entered correctly in the LG's system of record.

### Monitoring DBE Prime Contractor Payments to Non-DBE Subcontractors

DBE prime contractors may receive credit toward the DBE goal for work performed by its own forces and work subcontracted to DBEs. In the event a DBE prime contractor subcontracts to a non-DBE, that information must be reported on the DBE Prime Contractor Payments to Non-DBE Subcontractors ([Form SMS.4902](#)).

### Progress Payment Information

The LG must report contractor/subcontractor progress payment information monthly throughout construction to TxDOT project personnel.

The LG must report final contractor/subcontractor progress payment information to TxDOT project personnel within thirty days after making final payment to a contractor.

## Chapter 14: Joint Checks

### Contents:

[Section 1: Joint Check Process](#)

[Section 2: Use of Joint Checks to Guarantee Payment for Materials and Supplies](#)



## Section 1: Joint Check Process

A joint check is a two-party check between a DBE subcontractor and a prime contractor to submit to a material supplier of the DBE. The prime contractor issues a check as payer to the DBE subcontractor and the materials supplier jointly to guarantee payment to the supplier for the materials or supplies used by the DBE subcontractor.

Any joint check arrangement must be pre-approved by the LG before the arrangement or transaction takes place. The prime contractor must submit to the LG the DBE Joint Check Approval ([Form 2178](#)).

Prime contractors need to attach:

- DBE Joint Check Approval (Form 2178)
- Correspondence showing the rejection of a line of credit from the material supplier to the DBE subcontractor
- A joint check agreement

The use of joint checks for payment of materials or supplies is acceptable when the following conditions are met:

- The prime contractor issuing the check acts solely as guarantor.
- The DBE subcontractor must release the check to the supplier.
- The DBE subcontractor (not the prime contractor) negotiates the quantities, price and delivery of materials.
- The DBE subcontractor is responsible for both furnishing and installing the materials or supplies.
- The prime contractor cannot require the subcontractor to use a specific supplier or the prime contractor's negotiated price.
- The arrangement is short-term with the purpose being the DBE subcontractor's establishment or increase of a credit line with the material supplier.
- The DBE subcontractor and the prime contractor must keep records of paid invoices and canceled checks as the LG will regularly be requesting them to ensure compliance.

## Section 2: Use of Joint Checks to Guarantee Payment for Materials and Supplies

### LG Responsibilities

**Step 1:** Review DBE Joint Check Approval (Form 2178) and supporting documentation:

- DBE's written request to the prime contractor for the use of a joint check agreement.
- Documentation of DBE subcontractor applying for credit with the material supplier.
- Material supplier's response to DBE subcontractor denying credit.

**Step 2:** Verify or ensure the following:

- The prime contractor has not required the subcontractor to use a specific supplier or the prime contractor's negotiated unit price.
- The DBE subcontractor is more than an extra participant in releasing the check to the material supplier.
- The DBE subcontractor (not the prime contractor) negotiates the quantities, price and delivery of materials.
- The prime contractor issuing the check acts solely as guarantor.
- The DBE subcontractor releases the check to the supplier.
- The arrangement is short-term with the purpose being the DBE subcontractor's establishment or increase of a credit line with the material supplier.
- The DBE subcontractor is responsible for both furnishing and installing the material/work item.
- The DBE subcontractor and the prime contractor must keep records of paid invoices and canceled checks as the LG will regularly be requesting them to ensure compliance.

**Step 3:** Complete the DBE Joint Check Approval (Form 2178) approving or denying joint check arrangement.

**Step 4:** Respond in writing to prime contractor, with a copy to the DBE subcontractor, approving or denying joint check arrangement.

**Step 5:** Periodically monitor the use of joint checks.

**Step 6:** Request a copy of cancelled checks for the months the contractor issued a joint check to each DBE with an approved DBE Joint Check Approval.

**Step 7:** Ensure allowable goal credit begins the date the joint check request is approved.

## **Chapter 15: Assistance to DBE Firms**

### **Contents:**

[Section 1: Overview](#)

## **Section 1: Overview**

According to 49 CFR, Part 26, Appendix A, it is appropriate for prime contractors to provide assistance to DBEs in a variety of areas, such as bonding, credit, insurance, equipment, materials, and supplies.

In providing such assistance, a prime contractor should be careful not to provide so much assistance to a particular DBE in so many areas that the LG would conclude that the DBE is not viable without the relationship to the prime contractor. This assistance should be transparent and arms-length. As part of its contract performance oversight functions, the LG will continue to scrutinize the independence of DBEs as they work on projects.

Prime contractors with questions about the appropriateness of their assistance relationships with DBEs should consult the LG staff.

## Chapter 16: Change Orders

### Contents:

[Section 1: Overview](#)

## **Section 1: Overview**

Circumstances may arise during construction requiring changes to the scope of the work contained in the contract; these are referred to as change orders. The prime contractor should closely monitor change orders to verify if adjusted items or work will impact DBE subcontracted items. The DBE goal applies to the final value of a contract to include all change orders.

### **Increases of Scope of Work**

If the LG issues a change order which increases or adds new work items, the prime contractor must ensure that it has obtained sufficient DBE participation to meet the contract goal on the final contract value or has made good faith efforts to do so.

If the prime contractor determines that additional DBE participation cannot be obtained, the prime contractor shall request a waiver of the participation after submitting documentation of good faith efforts to meet the DBE goal.

### **Reduction of Scope of Work**

If a change order eliminates work designated in a DBE commitment, the prime contractor must follow the termination procedures and must make a good faith effort to meet the DBE goal on the final contract value.

## **Chapter 17: Termination and Substitution Requests**

### **Contents:**

[Section 1: Termination and Substitution of a DBE](#)

[Section 2: LG Responsibilities](#)

## Section 1: Termination and Substitution of a DBE

### Overview

The prime contractor shall not terminate for convenience, in whole or part, a DBE subcontractor listed on the commitment without the written concurrence of the LG. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm. Unless consent is provided, the prime contractor will not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE subcontractor.

Good cause for termination of the DBE includes, but is not limited to, the following circumstances:

- The listed DBE subcontractor fails or refuses to execute a written contract.
- The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor.
- The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements.
- The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness.
- The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to 2 CFR, Parts 180 and 1200 or applicable state law.
- The prime contractor has determined that the listed DBE subcontractor is not a responsible contractor.
- The listed DBE subcontractor voluntarily withdraws from the project and provides written notice of its withdrawal.
- The listed DBE firm is ineligible to receive DBE credit for the type of work required.
- A DBE firm owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract.
- Other documented good cause that the prime contractor determines may compel the termination of the DBE subcontractor.

Good cause does not exist if the prime contractor seeks to terminate a DBE subcontractor it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE subcontractor was engaged or so that the prime contractor can substitute another DBE or non-DBE subcontractor after contract award.



## **Commitment Reductions**

A prime contractor cannot reduce the amount of work committed to a DBE at contract award without good cause. A reduction is considered a partial termination of the DBE's contract with the prime contractor.

## **Termination Procedures**

**Step 1:** The prime contractor shall submit to the LG request and justification for DBE termination.

- The prime contractor shall first give notice in writing to the DBE firm of its intent to terminate and the reason for the termination.
- The prime contractor will copy the LG on the Notice of Intent to Terminate correspondence.
- The DBE has five calendar days to respond to the prime contractor's notice and will advise the prime contractor and the LG of the reasons, if any, why it objects to the proposed termination of its subcontract and why the LG should not approve the prime contractor's request for termination.

**Step 2:** The LG will review the termination request and related information and if necessary seek additional information to formulate its response.

**Step 3:** The LG will provide written consent to the termination request within seven days only if the LG agrees, for reasons stated in its concurrence document, that the prime contractor has good cause to terminate the DBE firm. The LG may provide a shorter response time if required in a particular case as a matter of public necessity.

**Step 4:** If the LG does not approve the request, the prime contractor shall continue to use the committed DBE in accordance with the contract.

## **If Termination Does Not Result in DBE Shortfall**

If termination of a DBE firm does not result in a DBE contract goal shortfall, the prime contractor is not required to find a substitute DBE firm.

## **If Termination Results in a DBE Shortfall**

When a termination of a DBE firm results in a shortfall, the prime contractor must make good faith efforts to find, as a substitute for the original DBE, another DBE to perform, at least to the extent needed to meet the established contract goal. The prime contractor will document its good faith efforts to find and secure a substitute DBE within seven days, which may be extended for an additional seven days if necessary at the request of the contractor. The prime contractor must submit the DBE Program Replacement Request ([Form 2228](#)) to the LG and a signed DBE Commitment Form for the certified DBE that will replace the terminated DBE.

The LG will respond in writing to the prime contractor's request to use the substitute DBE and may seek additional information as necessary to formulate its response.

The substitute DBE cannot work on the contract until its work eligibility has been confirmed and required subcontracts, supply, trucking commitments, or other services have been approved by the LG.

### **Process When a Contractor Fails to Secure a Substitute DBE**

If a substitute DBE firm is not found that can perform at least the same amount of work as the terminated DBE, the prime contractor shall submit good faith effort documenting the steps taken.

Such documentation shall include, but not be limited to, the following:

- Copies of written notification soliciting DBEs.
- Efforts to negotiate with DBEs to include at a minimum:
  - The names, addresses, and telephone numbers of DBEs who were contacted.
  - A description of the information provided to DBEs regarding the plans and specifications for portions of the work to be performed.
- A list of reasons why DBE firm quotes were not accepted.

The LG will provide the prime contractor with a written response either accepting or rejecting the prime contractor's good faith efforts. If the prime contractor's good faith efforts are rejected, the LG shall assess whether administrative remedies are appropriate.

## Section 2: LG Responsibilities

**Step 1:** Review termination request letter from prime contractor along with supporting documentation:

- DBE statement of concurrence or rebuttal of the termination request;
- A signed DBE letter of voluntary removal, if applicable;
- Statement of DBE non-responsive, if applicable.

**Step 2:** Make a determination to approve or deny termination request.

- When to approve termination requests:
  - The prime contractor has submitted the supporting documentation and documentation to support the DBE is unwilling and unable to perform the work and therefore good cause exists to terminate the original DBE. (Refer to the list of reasons for good cause.)
  - The DBE has submitted concurrence for termination or has submitted a signed voluntary removal request that has been confirmed by the LG.
- When to deny termination requests:
  - The prime contractor fails to submit the proper documentation to justify the termination request;
  - The prime contractor is attempting to negotiate a more advantageous contract with another subcontractor.
  - The prime contractor is attempting to perform the work with its own resources or those of an affiliate, a non-DBE firm, or with another DBE firm offering a lower contract price.
  - The DBE requested to be terminated has objected to the termination and is willing and able to perform the work.

**Step 3:** Provide the determination in writing to the prime contractor and DBE within seven business days.

**Step 4:** If the DBE termination is approved and results in a DBE goal shortfall, review the prime contractor's good faith efforts to find a substitute DBE to meet the goal.

- Review and approve the prime contractor's substitution request.
- If the prime contractor cannot find a replacement, review the prime contractor's good faith
- Write the prime contractor accepting or rejecting its good faith efforts.

## **Chapter 18: Monitoring DBE Activity**

### **Contents:**

[Section 1: Monitoring DBE Goal Attainment](#)

## **Section 1: Monitoring DBE Goal Attainment**

It is the prime contractor's responsibility to monitor its progress towards meeting the goal. Progress towards meeting the established DBE goal should be monitored on a monthly basis during the course of the project.

This includes information relating to:

- DBE commitment amounts
- Payments to DBE subcontractors
- Modifications to the original contract amount by change order

The prime contractor should contact the LG should a concern arise that it will not meet the contract DBE goal and seek options available to meet the goal.

The LG will also be monitoring the DBE project goal on a monthly basis. If a prime contractor is not meeting the project's DBE goal, the LG will notify the prime contractor to review its DBE goal attainment progress, and provide a corrective action plan to meet the goal or provide good faith efforts.

## Chapter 19: Enforcement

### Contents:

[Section 1: Enforcement](#)

## Section 1: Enforcement

If the LG determines the prime contractor has failed to meet the established DBE goal, has not demonstrated good faith efforts, or failed to correct DBE Program deficiencies, the LG will initiate administrative action against the prime contractor in accordance with applicable regulations.

Administrative actions may include the following:

- Withholding all or a percentage of monthly partial payments
- Liquidated damages
- Initiation of appropriate suspension or debarment or decertification proceedings
- Termination of the contract
- Referral of any unlawful actions to the appropriate enforcement agencies
- Other actions as appropriate

The LG will notify the prime contractor in writing of the determination. The notice will include the reasons for the determination and specify the administrative action.

## Chapter 20: Project Close Out

### Contents:

[Section 1: LG Responsibilities](#)

[Section 2: Records Retention](#)



## Section 1: LG Responsibilities

### Processing Final Reports & Close Outs

The DBE Final Report ([Form 4904](#)) will be submitted by the prime contractor to the LG. The LG will be responsible for submitting the final report to the TxDOT District DBE Coordinator (DDC) for each project and a completed Local Government (LG) Project Disadvantaged Business Enterprise (DBE) Compliance Monitoring Checklist ([Form 2658](#)).

The LG will review and ensure:

- Dollar amounts match the final report form, including race-neutral dollar amounts.
- The overall assigned DBE project goal percentage was met as shown on the commitment.
- The project goal and individual commitments were met.

### Addressing DBE Goal Shortfalls

The LG will review the final report and supporting documentation to determine if the prime contractor has addressed a DBE goal shortfall. Shortfalls will have either of the following scenarios:

- The final report reflects the DBE goal was met, but also reflects individual DBE commitments were not met. If so, the prime contractor should have submitted a statement to justify the individual shortfall.
- If the final report does not meet the DBE goal and commitment, the prime contractor should have submitted documentation supporting good faith efforts.

The LG will first consider if the following possible circumstances apply when reviewing DBE goal shortfalls:

- DBE item under-runs occurred. Under-runs may be a justification for DBE goal shortfalls.
- DBE goal waivers approved by the LG at the time of conditional award or during project.
- CUF findings that resulted in a non-compliance and a denial or reduction in goal credit.

If the project has met the DBE subcontractor participation goals for the contract, no further action from the prime contractor is required.

If a project falls short of the contract DBE goal, the prime contractor will submit a letter to the LG explaining the shortfall. Prime contractors should include documentation of any good faith efforts to justify the shortfall. The LG will review this documentation and make a determination.

## **Section 2: Records Retention**

Records retention is the final step in the project closeout process. The project records the prime contractor has collected must be retained. Supporting documentation for the project must be securely filed and available upon request for audits or reviews by the LG, TxDOT, FHWA, or other government officials. Federal regulation requires the retention of all federal-aid project records for a minimum of three years after final payment.

According to the Texas State Retention Schedule (5.1.001 and Government Code, 441.1855) records for all contracts must be kept for seven years after close if executed, renewed or amended on or after September 1, 2015. For contracts executed, renewed, or amended on or before August 31, 2015, records must be retained for four years after close.

## **Appendix A: References**

### **Contents:**

[Section 1: Website](#)

[Section 2: Reference Documents](#)

## Section 1: Website

This section has a list of helpful resources from USDOT, FHWA, or TxDOT. Bookmark these useful websites.

- USDOT - DBE Program Overview: <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/dbe-program-overview>
- USDOT - Departmental Office of Civil Rights (Official Questions and Answers regarding 49 CFR, Part 26): <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/official-questions-and-answers-qas-disadvantaged>
- FHWA - DBE Code of Federal Regulations: [http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26\\_main\\_02.tpl](http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26_main_02.tpl)
- FHWA - DBE Program: <http://www.fhwa.dot.gov/civilrights/programs/dbess.cfm>
- TxDOT - DBE Program: <http://www.txdot.gov/inside-txdot/division/civil-rights/dbe.html>
- TxDOT - DBE Forms: <http://www.txdot.gov/inside-txdot/forms-publications/doing-business/dbe-forms.html>

## Section 2: Reference Documents

### Chapter-Section Index of Forms and Documents

The forms and documents referenced in this Guide can be found by clicking the links below:  
(Internet Explorer required as web browser)

- 3-2 [00-394L Special Provision DBE in Federal-Aid Contracts](#)
- 3-2 [Special Provision Item 9L Measurement & Payment](#)
- 4-4 [Local Government Project DBE Compliance Monitoring Checklist Form 2658](#)
- 4-4 [DBE Monthly Progress Report Form SMS.4903](#)
- 4-5 [Local Government Project DBE Compliance Monitoring Checklist Form 2658](#)
- 6-1 [FHWA Tips on Evaluating a CUF](#)
- 8-1 [DBE Commitment Agreement Form SMS.4901](#)
- 8-1 [DBE Trucking Commitment Agreement Form SMS.4901 T](#)
- 8-1 [DBE Program Material and Supplier Commitment Agreement Form SMS.4901 MS](#)
- 8-1 [DBE Prime Contractor Payments to Non-DBE Subcontractors Form SMS.4902](#)
- 8-1 [TxDOT DBE Contractors Certification of Good Faith Efforts Form 2603](#)
- 12-1 [DBE Program Commercially Useful Function \(CUF\) Form 2182](#)
- 12-1 [Commercially Useful Function Review – Material Supplier Form 2669](#)
- 13-1 [Prompt Payment Certification \(Federal-Aid Projects\) Form 2177](#)
- 13-2 [DBE Monthly Progress Report Form SMS.4903](#)
- 13-2 [DBE Final Report Form SMS.4904](#)
- 13-2 [DBE Prime Contractor Payments to Non-DBE Subcontractors Form SMS.4902](#)
- 14-1 [DBE Joint Check Approval Form 2178](#)
- 20-1 [DBE Final Report Form SMS.4904](#)
- 20-1 [Local Government Project DBE Compliance Monitoring Checklist Form 2658](#)

### Additional Forms

- [DBE Program Substitution/Termination Request Form 2228](#)
- [Memorandum of Understanding Regarding the Adoption of TxDOT's Federally-Approved DBE Program Form 2395](#)

## **Appendix B: FHWA Q&A**

### **Contents:**

[Section 1: Federal Highway Administration Q & A for the DBE Program](#)

## Section 1: Federal Highway Administration Q & A for the DBE Program

### Assurance Statement

**Question:** Do all prime and subcontracts have required DBE program assurance statements incorporated? (49 CFR 26.13(b))

- **Answer:** Each contract a State Transportation Agency (STA) signs with a contractor and sub-recipient must have physically incorporated in it the standardized assurance statement prescribed under 26.13(b) which states that: 1) these parties will not discriminate based on race, color, national origin, or sex in the performance of any DOT-assisted contract; 2) The contractor shall carry out the requirements of 49 CFR 26 in the award and administration of DOT-assisted contracts; and 3) Failure by the contractor to carry out these requirements is a material breach of contract, which may result in contract termination or other remedy as deemed appropriate by the recipient.

### Local Agencies

**Question:** Does the STA's DBE program apply to all sub-recipients? (49 CFR 26.21(a)(1))

- **Answer:** The FHWA's approval of STA's program applies to all of STA's DOT-assisted programs including those federal funds transferred to other state and local agencies (i.e., MPOs, City and County governments) and are expended on federally assisted contracts.

### Design-Build Projects

**Question:** If a goal has been established in a design-build project, does the recipient maintain oversight of the project goal and other requirements? (49 CFR 26.53(e))

- **Answer:** Recipients must maintain oversight of the developer's activities to ensure they are conducted consistent with the requirements of this part. This monitoring is especially important in the case of a design-build project because the developer can only provide a plan of action (DBE performance plan) it intends to take throughout the project since the exact contracting opportunities and timing of any subsequent awards is unknown at the start of a design-build.

### Contract Goals

**Question:** Does the STA establish contract goals based upon factors such as type of work, location, DBE and availability that cumulatively results in meeting only the portion of the overall goal that cannot be met through race-neutral means? (49 CFR 26.51(e)(2))

- **Answer:** Contract goals can be based upon factors such as type of work, location, and DBE availability. The goal should essentially represent the percent of the dollar amount of

contracting opportunities for DBEs that exist on that contract. Goals must be set so they will cumulatively result in meeting that portion of the overall goal not being met through race-neutral means.

### **Race–Neutral Participation**

**Question:** Does the STA count as race-neutral contracts won by DBE primes, DBE subcontracts when there is no contract goal, and primes that do not consider DBE status? (49 CFR 26.51(a))

- **Answer:** Contracts won by DBE primes, DBE subcontracts when there is no contract goal, and DBE subcontracts where a prime did not consider the DBE status in awarding the subcontract are all methods of race-neutral DBE participation. The measurement of when a prime did not consider the firm's DBE status in its selection, is to count all work going to a DBE above the contract goal figure as race-neutral.

**Question:** Does a DBE have to be certified with the proper NAICS code if it will be used by the prime contractor as race-neutral DBE participation?

- **Answer:** DBEs must be certified in the work categories in which the Prime wants to count that participation towards the contract goal (race-conscious). However, any work done by a non-committed (race-neutral) DBE regardless of NAICS codes should be counted as race-neutral participation provided they are performing a CUF. Prime contractors may be allowing a DBE to expand its capabilities on projects, the work is legitimate and the DBE could then build its resume to expand its NAICS codes in the future.

### **Commitments**

**Question:** Are all bidders required to submit DBE information, i.e., name, description of work, and dollar amount before award of the contract? (49 CFR 26.53(b)(2) and (c))

- **Answer:** Dependent on whether STA makes the receipt of the information as a matter of responsiveness or responsibility, you can receive information from all bidders or just the apparent low bidder. The receipt of this information in the form of a commitment, when in the presence of a contract goal, is a condition upon which the award of the contract is given by the STA. (As a matter of responsibility, TxDOT receives information from the apparent low bidder.)

**Question:** Does the STA require as a condition of award, the submission DBE information including the name, description of work, dollar amount, written documentation of commitment, and written confirmation from the DBE that it is participating in the contract (49 CFR 26.53(b)(2) (c))

- **Answer:** The STA must make sure all DBE information is complete and adequately document the bidder's good faith efforts as a condition of awarding the contract.



**Question:** A prime submitted a subcontractor request document. The District found that three (3) of the items on the subcontract agreement were less than what was originally committed. This reduced amount is \$43,503.51. Even with this reduction, the prime contractor is still far over the DBE goal. Can TxDOT accept the prime contractor's reduced subcontract amount in this situation?

- **Answer:** Regulations prohibit the reduction of a submitted DBE commitment without the request and written approval of the STA. The District should investigate the matter and contact the DBE to discuss why the subcontract is less than the commitment (and if they were aware). Depending on the findings, TxDOT should take appropriate action. At the very least, if the DBE knew and was ok with the reduction in commitment, TxDOT should request the Prime contractor to submit something in writing showing the reduced commitment with reasoning for TxDOT approval. This will cover both the Prime and TxDOT.

### **Good Faith Efforts – Prior to Contract Execution**

**Question:** Does the evidence of good faith efforts provided by the bidder document those efforts to meet the goal, even though such efforts did not succeed in obtaining enough DBE participation to do so? (49 CFR 26.53(a)(2))

- **Answer:** The STA must not deny award of the contract on the basis that the bidder simply failed to meet the goal if the bidder documents adequate good faith efforts. The adequate good faith efforts are those the bidder undertook prior to submitting its bid on the contract.

### **Administrative Consideration**

**Question:** Does the STA provide an opportunity for administrative consideration when it determines the apparent successful bidder failed to meet good faith efforts? (49 CFR 26.53(d))

- **Answer:** The STA should have an administrative reconsideration process that affords a bidder the opportunity to seek a further ruling on the adequacy of its good faith efforts.

**Question:** Are reconsideration decisions made by an official who did not take part in the original good faith effort determinations? (49 CFR 26.53(d)(2))

- **Answer:** An official who did not take part in the initial determinations by the STA of inadequate good faith efforts by the bidder must make reconsideration decisions.

### **Determining Credit When a DBE Firm is Ineligible – Prior to Subcontract Execution**

**Question:** When the prime contractor executes a subcontract prior to your notification that the DBE firm is ineligible, do you count the subcontract amount toward the prime contractor's goal? (49 CFR 26.87(j)(2))

- **Answer:** If a prime contractor has executed a subcontract with a DBE firm before you have notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work.

## Goal Credit – Materials and Supplies

**Question:** Does the STA count towards the contract goal the value of materials and supplies used on the contract work only if the DBE is responsible for paying for the material and supply? (Factor – joint checks) (49 CFR 26.55(c)(1))

- **Answer:** The DBE must be responsible, with respect to materials and supplies used on the contract, for paying for the material. The use of joint checks has been allowed in the DBE program under certain conditions and/or circumstances. Even under this situation all payments need to be made by the DBE.

## Reporting DBE Participation on Contracts With and Without Goals

**Question:** Does the STA in its running tally capture DBE participation on all contracts with or without contract goals? (49 CFR 26.51(g))

- **Answer:** The STA must report DBE participation in all contracts with and without contract goals awarded during the fiscal year in order to effectively adjust due to both race-neutral and race-conscious achievements to use of contract goals only as necessary to just meet the annual goal. One important consideration in being prepared to make such adjustments is to know the dollar amount that needs to be achieved based on the overall goal before the contract year begins for comparison purposes against the actual RC/RN achievements for making the key decision of when and how much to make any adjustment.

## Commercially Useful Function

**Question:** Does the STA count toward contract goals the value of work only if the DBE performs a Commercially Useful Function (CUF) when a DBE is responsible for a distinct element of the contract work and it carries out its responsibilities by actually performing, managing and supervising the work involved? (49 CFR 26.55(c)(1))

- **Answer:** You count the total contract value of the work the DBE performs itself. The STA needs to have sufficient resources and procedures that effectively determine whether a DBE performs a CUF. In addition to this monitoring responsibility, the STA needs to have appropriate supporting documentation for counting this work as performed by a DBE.

**Question:** Does the STA count toward contract goals the value of work performed by the DBE's own forces and does not count the DBE's cost of equipment leased from the prime contractor and/or material purchased from the prime contractor? (49 CFR 26.55(a)(1))

- **Answer:** DBE subcontractor's purchases of supplies and equipment and leases from the prime contractor cannot be counted.

**Question:** Does the STA DBE program require the DBE to perform at least 30% of its work and does not allow DBEs to serve as an extra participant in the contract? (49 CFR 26.55(c)(2)(3))

- **Answer:** A DBE is not performing a CUF when it is not performing the work itself and if the DBE under this rule subs out more than 70% of the work. There are additional instances when a DBE could be considered as serving as an extra participant in the contract or project such as being a pass-through in the payment of materials and supplies.

**Question:** When a STA presumes a DBE is not performing a CUF, do they allow the DBE to present evidence to rebut this presumption? (49 CFR 26.55(c)(4))

- **Answer:** The DBE may present evidence to rebut the presumption of not performing a CUF when a STA has initially determined that a DBE is not performing a CUF. The STA must have a CUF reconsideration process established as part of its normal contract administration procedures.

### **When a DBE Subcontracts its Work to a Non-DBE**

**Question:** When a DBE subcontracts part of its work to a non-DBE, does the STA have a mechanism to deduct that amount from the overall contract goal? (49 CFR 26.55(a)(3))

- **Answer:** Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals. The STA's normal subcontracting approval procedure is an effective way to monitor such possible situations.

### **Joint Venture**

**Question:** In a joint venture does the STA count only the defined portion of work a DBE performs with its own forces? (49 CFR 26.55(b))

- **Answer:** Count the dollar value of the contract equal to the defined portion of the work that the DBE performs with its own forces toward the DBE goals.

### **Termination / Substitution**

**Question:** Does the STA have a procedure that requires STA approval of the substitution and/or replacement of DBEs for good cause when replacing DBE subcontractors for any reason? (49 CFR 26.53(f)(1)&(2))

- **Answer:** The STA must give written consent prior to a prime contractor terminating a DBE subcontractor (or an approved substitute DBE firm) when that DBE is either unable or unwilling to perform the work. There are procedures in some States that require the DBE to actually signoff on its termination. There are DBE program rules that effectively prohibit termination for convenience and then performing the work by the prime itself or use an affiliate.

**Question:** Does the STA require prime contractors to make good faith efforts when replacing DBE subcontractors for any reason? (49 CFR 26.53(f)(1)&(2)).

- **Answer:** The STA must require the prime contractors to make good faith efforts to find another DBE subcontractor to substitute for the original DBE when the DBE is either unable or unwilling to perform.

### Counting Credit for Manufacturers, Regular Dealers, Packagers and Brokers

**Question:** Does the STA DBE program allow for appropriate counting for manufacturers, regular dealers and packagers and brokers? (49 CFR 26.55(e)(1)&(2)(ii)(c))

- **Answer:**
  - If materials and supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies.
  - If materials or supplies are purchased from a DBE regular dealer, count 60% of the cost of materials or supplies. To be a regular dealer, the firm must be an established, regular dealer that engages as its principal business and under its own name, in the purchase and sale or lease of the products in question.
  - Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers. Often times the definition of what constitutes a manufacturer from a regular dealer and a regular dealer from a broker becomes a matter of circumstances of the particular situation and to be determined on a case-by-case basis.
  - For example, if the material is crushed aggregate, then in order to be a manufacturer the firm needs to have the prerequisite equipment to crush and screen the aggregate for sell pursuant to the STA's gradation requirements. If no such process is being performed by the DBE, but has the necessary distribution equipment to pick up and drop off as a normal course of business the firm is considered to be a regular dealer.

### Trucking – Counting Credit

**Question:** Does the STA DBE program allow DBE truckers to count leased trucks from DBEs and non-DBE truckers toward the goal appropriately? (49 CFR 26.55(4)(5))

- **Answer:**
  - The DBE that leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
  - If the STA adopted the revised trucking counting rule in the June 16, 2003 DBE Program Final Rule, the DBE who leases trucks from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks on the contract.
  - Additional participation by non-DBE lessees receives credit only for the fee or commission it receives as a result of the lease agreement.

NOTE: The appropriate Department Operating Administration must approve this approach.

### **Goal Credit – Final Compliance (Payment to DBEs)**

**Question:** Does the STA have a process to ensure a contractor's final compliance with DBE obligations based on payments to the DBEs? (49 CFR 26.55(h))

- **Answer:** Until the amount being counted has been paid to the DBE, do not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract.

### **Joint Checks**

**Question:** Does the STA count towards the contract goal the value of materials and supplies used on the contract work only if the DBE is responsible for paying for the material and supply? (Factor – joint checks) (49 CFR 26.55(c)(1))

- **Answer:** The DBE must be responsible, with respect to materials and supplies used on the contract, for paying for the material. The use of joint checks has been allowed in the DBE program under certain conditions and/or circumstances. Even under this situation all payments need to be made by the DBE.

### **Prompt Payment / Retainage**

**Question:** Does your DBE program provide appropriate means to enforce prompt payment and return of retainage? (49 CFR 26.29(a)(1))

- **Answer:** The STA must have the necessary mechanisms to monitor and enforce the prime contractor's prompt and full payment of retainage. Again, with the flexibility USDOT built into the program, it was the STA to determine its approach towards meeting this and other requirements of the program. The USDOT did not present one prescribed way of meeting it, so there may be various methods employed by a recipient to meet this requirement. The most common enforcement practice is for the prime contractor to provide a payment certification that would certify that all payments have been made and would normally be submitted with a progress estimate for payment. The enforcement of this method is through non-payment of the progress payment, until proper evidence that all previous payments due are paid.

### **Monitoring - Payments and CUF Reviews**

**Question:** Does the STA conduct compliance reviews, audits and/or assessments of all program participants, (e.g., contractors, and other state and local governments/agencies? (49 CFR 26.37(a))

- **Answer:** The STA must ensure that all program participants are in compliance with 49 CFR Part 26. TxDOT must have appropriate mechanisms for monitoring and enforcement set forth in its DBE program.

**Question:** Does the STA have a monitoring and enforcement mechanism that ensures work committed to DBE is actually performed? (49 CFR 26.37(b))

- **Answer:** The STA must ensure DBEs do the work committed to them. To ensure this is happening, the STA must in its normal contract administration take the necessary steps to compare actual subcontract awards to commitments and payments to awards.

### Unified Certification Program

**Question:** Does your UCP have a process to determine specific types of work a potential DBE has the ability to control and possess the equipment and key personnel to perform the work? (49 CFR 26.71(m)(n) & 26.83(c)(4))

- **Answer:**
  - The UCP must have a provision that allows the STA or certifying agency to consider whether the firm owns equipment necessary to perform its work. However, the STA or certifying agency must recognize that leasing equipment is a normal industry practice and should not use this practice to determine that a DBE owner does not control his or her company. The STA or certifying agency must make sure that the leasing of equipment does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.
  - You must grant certification only for specific types of work in which the socially and economically disadvantaged owner has been able to demonstrate his or her ability to control the firm. This specific type of work needs to be clearly defined in forms consistent with the type of work such firm will be competing to perform. Such designation as “general contractor” does not fit this definition.

### Administrative Remedies

**Question:** Does the STA contract provisions include administrative remedies that will be invoked if prime contractors fail to comply with good faith efforts? (49 CFR 26.15(b))

- **Answer:** If prime contractors fail to comply with good faith efforts, the STA contract provisions must include appropriate administrative remedies that will be invoked. The most common administrative remedy is to withhold payment to the prime equal to the short fall that occurred since the prime failed to comply with the good faith efforts provision. It is not intended that the STA exercise this oversight activity at the very end of the contract, but should be monitoring the actual participation of DBE firms throughout the contract so any necessary adjustments can be made by the prime in a timely fashion towards meeting the goal.