



Business Engagement & Compliance



PART 2

A Green Light to Contract Administration NEW DBE Special Provisions

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Objectives

- Training Overview
- Counting DBE Participation
- CUF Requirements
- Race Neutral Participation
- DBE Subcontract Requirements
- Joint Checks
- DBE Termination/Substitution
- Certification of Final DBE payments
- Meeting or not meeting DBE goal
- Fraud in the DBE Program



Overview

Training Purpose

www.azdot.gov/bec



Present information contained in revised DBE EPRISE Specifications as a result of:

- 2012 and 2014 DOT revisions to federal regulations
- USDOT audits, studies and investigative findings of the DBE program
- ADOT experience working with the program since 2011



Overview DBE Program



ADOT, as a condition to receive federal funds, is required to implement a Disadvantaged Business Enterprise (DBE) Program under 49 CFR Part 26.

ADOT DBE Program is outlined in:

- ADOT DBE Program Plan
- ADOT DBE Policy
- ADOT DBE Specifications (EPRISE)



Overview

ADOT DBE Goals



FHWA: 8.90%

FTA: 7.25%

FAA: 4.87%



Overview

New specifications effective date



- DBE Special Provisions (EPRISE 06/09/2016) and Prompt Pay Specifications (109RET and 109PAY)
 - **Effective for projects opened after August 26, 2016**



Counting DBE Utilization



ADOT measures progress towards its overall DBE goals and on project goals to ensure minority and women-firms are competing fairly on all types of federal-aid contracts and procurements

Counting Rules:

- DBE must be certified as of the deadline for submission of bids
- DBE must be certified in each NAICS code of work performed on contract



Section 18.0

(Section 18.05)

Counting DBE Utilization



Other Services

Count 100% of commissions or fees for providing:

- Bonds or insurance
- Temporary labor
- Off-duty police officers



Counting DBE Utilization



- What else can be counted toward DBE goal:
 - Services specifically required for the performance of a DOT-assisted contract
 - Value of work subcontracted to another DBE
 - Value of joint venture contract equal to distinct portion of work performed by DBE venture partner



Counting DBE Utilization



| | | |
|---|--|--|
| DBE Manufacturer Count 100% of materials or supplies obtained for the project | Owns factory or produces on premises according to specs | ➤ ADOT will credit towards DBE goal on a contract-by contract basis. No carry over from contract to contract |
| DBE Regular Dealer Count 60% of materials or supplies | Owns an establishment that buys, stocks, and sells/leases to the public | ➤ Qualifying under a type of work for one contract does not mean DBE will qualify for the same type of work on another contract |
| Packagers, Brokers, Manufacturers' reps Count only fees and commissions | Assist with procurement, and/or transporting of materials/ supplies to the project | ➤ The bidder is responsible for verifying qualification as a manufacturer, regular dealer or supplier |

EPRISE Section 18.08

Counting DBE Utilization

Loss of DBE Eligibility



If a DBE is deemed ineligible, decertified or suspended and **Contract is not Executed**:

- Ineligible DBE does not count toward contract goal
- Prime must meet goal with eligible DBE firm(s) or, demonstrate good faith effort

EPRISE Section 18.03

Counting DBE Utilization

Loss of DBE Eligibility



If a DBE is deemed ineligible, decertified or suspended and **the Prime Contract is Executed, but Subcontract is Not Executed:**

- Ineligible DBE does not count toward contract goal
- Prime must meet goal with eligible DBE firm(s) or, demonstrate good faith effort

EPRISE Section 18.03

Counting DBE Utilization

Loss of DBE Eligibility



If a DBE is deemed ineligible, decertified or suspended and **the Prime Contract is Executed, and the Subcontract is Executed:**

- Ineligible DBE continues to count toward contract goal
- Does not count toward ADOT's overall annual goal

EPRISE Section 18.03

Counting DBE Utilization DBE Prime Contractors



- A DBE firm bidder is responsible for meeting the DBE goal on the contract or making good faith efforts to meet the goal, just like any other bidder
- The DBE bidder shall list itself along with any DBE subcontractors and suppliers, on the DBE Intended Participation Affidavit and Summary in order to receive credit toward the DBE goal.

EPRISE Section 18.02

Test Your Knowledge



Question 1: A DBE Manufacturer may count 100% towards DBE participation. True or False.

Question 2: If a contract is executed, an ineligible DBE firm work will count toward DBE participation. True or False.

Question 3: A DBE's work performed under any NAICS code will count toward DBE participation. True or False.

Commercially Useful Function (CUF) Requirements



- A prime contractor can get credit toward the DBE goal only if the DBE performs a “Commercially Useful Function (CUF).”
- A DBE firm performs a CUF when it is:
“Responsible for execution of the work of the contract or a distinct element of the work...by actually performing, managing, and supervising the work involved.”
- *“CUF begins at the time of Contract Award”*

EPRISE Section 18.06

Commercially Useful Function (CUF) Requirements



- DBE firm must perform at least 30 percent of its contract using its own employees, equipment, materials and resources
- All DBE work performed counts toward the DBE goals.
- Work subcontracted to non-DBE firms does not count towards the goal.

EPRISE Section 18.06

Commercially Useful Function (CUF) Requirements



- The Department will determine if a firm is performing a CUF
- Project site visits will be conducted to confirm DBEs are performing CUF
- Department will make every effort not to disrupt work on the project

EPRISE Section 18.06

Commercially Useful Function (CUF) Requirements



- The Department will notify the contractor, in writing, if it determines that the contractor's DBE subcontractor is not performing a CUF
- The contractor will be notified within seven calendar days of the Department's decision
- CUF Decisions may be appealed to the State Engineer

EPRISE Section 18.06

Commercially Useful Function (CUF) Requirements



A trucking firm

- It must oversee the entire portion of the work it is committed to perform and use at least one of its own trucks
- When these conditions are met, the portion of services provided using the firm's truck plus any fees for leasing additional trucks count toward the goal
- The value of services performed with leased trucks can also count depending on the situation
 - For example, when another DBE firm provides leased trucks, the contractor can count the entire value. However, a contractor can only count non-DBE trucks up to the number of the DBE trucks used

Commercially Useful Function (CUF) Requirements



A trucking firm

- A DBE trucking firm may lease trucks without drivers from a non-DBE truck leasing company. If the DBE leases trucks from a non-DBE leasing company and uses its own employees as drivers, it is entitled to credit for the total value of these hauling services



Commercially Useful Function (CUF) Requirements



| DBE Commercially Useful Function (CUF) Checklist | | |
|--|-----------------------------------|--------------------------|
| Construction Project - Project Profile | | |
| Project No./TRACS: | Date of Review: | |
| DBE's Start Date: | ADOT Reviewer: | |
| DBE's Completion Date: | Prime Contractor: | |
| District: | DBE Firm's Name: | |
| Org: | Date Contract/Agreement Approved: | |
| Purpose: To document DBE Contractors/Subcontractors/Trucking Companies' compliance with the CUF requirements for DBE participation pursuant to 49 CFR 26.55, et seq. | | |
| Type of Operation: <input type="checkbox"/> Contractor <input type="checkbox"/> Trucker <input type="checkbox"/> Regular Dealer <input type="checkbox"/> Manufacturer | | |
| Contractor (Sec. 1-4) Trucker (Sec. 5) Regular Dealer (Sec. 6) Manufacturer (Sec. 7) | | |
| Provide a brief description of the DBE's scope of Work (Must include Pay Items Number(S)). | | |
| 1. Management - Contractor | YES | NO |
| a. Name of the onsite representative: | | |
| b. Onsite representative reports to: | | |
| c. Have you performed any other work for any other contractor / subcontractor on this project? | <input type="checkbox"/> | <input type="checkbox"/> |

Effects of Contract Change



1. Contractor should immediately notify the Engineer and BECO
2. Continue to make a Good Faith Effort to meet DBE goal
3. Not required to take work committed to another subcontractor and assign it to a DBE subcontractor in order to meet the committed DBE percentage
4. Additional work – give the DBE the opportunity to complete
5. Department will take into account who made change in determining if contractor met DBE goal



EPRISE Section 19.0

Race Neutral Participation



- Strongly encourage use of additional DBEs above the DBE goal requirement
- Less administrative requirements – no affidavits or GFE required
- DBEs are treated as any other subcontractor on the project.



EPRISE Section 20.0

DBE Subcontract Requirements



All subcontracts shall include, as a physical attachment, DBE Subcontract Compliance Assurances (provided on BECO website)

- Assurances of Non-Discrimination
- DBE Payment Reporting
- Crediting DBE Participation
- Effect of Loss of DBE Eligibility
- Notify the Contractor of DBE certification status
- CUF
- Effect of Contract Changes

EPRISE Section 21.0

DBE Subcontract Requirements



All subcontracts shall include, as a physical attachment, DBE Subcontract Compliance Assurances (provided on BECO website)

- Race Neutral Participation
- Required Provisions for DBE subcontracts
- Contract Performance
- Joint Checks
- DBE Termination/Substitution
- Certification of Final DBE Payments
- False, Fraudulent or Dishonest Conduct

EPRISE Section 21.0

Joint Checks



- Under specific conditions, a DBE subcontractor and supplier (material or equipment) may request permission for the use of joint checks for payments from the prime.
- BECO must approve the agreement in writing before any joint checks are issued
- The prime shall submit a DBE joint check request form, available from the BECO website, along with the joint check agreement, to BECO through email within seven calendar days from the time the subcontract is executed

EPRISE Section 23.0

Joint Checks



- Copies of cancelled checks must be submitted electronically to BECO and made available for review at the time of the onsite CUF review
- The prime contractor, DBE, and supplier each have an independent duty to report to the Department in the case of any change from the approved joint check arrangement



EPRISE Section 23.0

Joint Checks



ARIZONA DEPARTMENT OF TRANSPORTATION DISADVANTAGED BUSINESS ENTERPRISE (DBE) Joint Check Request

| | | | |
|--------------------|----------------------|-----------------------------|----------------------|
| TRACS No(s): | <input type="text"/> | Project/Contract No.: | <input type="text"/> |
| Prime Name: | <input type="text"/> | AZ UTRACS Registration No.: | <input type="text"/> |
| DBE Firm: | <input type="text"/> | AZ UTRACS Registration No.: | <input type="text"/> |
| Material Supplier: | <input type="text"/> | AZ UTRACS Registration No.: | <input type="text"/> |
| Requestor: | <input type="text"/> | Email: | <input type="text"/> |
| | | Phone Number: | <input type="text"/> |

ADOT will closely monitor the use of joint checks. To receive DBE credit for performing a commercially useful function with respect to obtaining materials and supplies, a DBE must "be responsible for negotiating price, determining quality and quantity, ordering the material and installing (where applicable) and paying for the material itself." Only when a DBE meets all of these requirements should credit be counted for the procurement of the items by the DBE. Please refer to the DBE Special Provisions Section 23 Joint Checks for qualifying conditions. If proper procedures are not followed or ADOT determines that the arrangement results in lack of independence for the DBE involved, no credit for the DBE's participation as it relates to the material cost will be counted toward the contract goal requirement.

Joint Checks

www.azdot.gov/bec



ARIZONA DEPARTMENT OF TRANSPORTATION JOINT CHECK AGREEMENT

TRACS No(s): _____ Project/Contract No.: _____

1. _____ is the general contractor on the project known as _____ ("Project"), and which is being constructed for Arizona Department of Transportation ("Owner").
2. Contractor has entered a Subcontract agreement dated the _____ day of _____, _____ with _____ ("Subcontractor") for the performance of the following work on the project: _____.
3. _____ ("Vendor") is supplying the following materials to the Subcontractor pursuant to a Purchase order or other contract dated _____, and for use in connection with Subcontractor's work on the project: _____.
4. Subcontractor or Vendor hereby requests Contractor to issue joint checks payable to Subcontractor and Vendor. The total amounts sought in Subcontractor's Payment Application reflect the value of material furnished by the Vendor to the Subcontractor for use on the project.

Test Your Knowledge



1. How much work is a DBE required to perform using their own employees, equipment, materials and resources in order for the prime contractor to receive credit?
A. 30% B. 50% C. 100%
2. The prime contractor may count the entire value of DBE trucks leased by a DBE subcontractor. True or False
3. Regarding joint checks, BECO must approve the agreement in writing before any joint checks are issued. True or False
4. The prime contractor may count the entire value of Non-DBE trucks leased by a DBE subcontractor. True or False

DBE Termination/Substitution



General Requirements:

- *The contractor shall make all reasonable efforts to avoid terminating or substituting a DBE listed on the DBE Intended Affidavit Summary*
 - Negotiate with DBE in good faith
 - Give timely notices and/or extend deadlines
 - Reasonable methods to resolve performance disputes must be applied and include documentation to ADOT before attempting substitution or termination

EPRISE Section 24.01

DBE Termination/Substitution



- The contractor shall not terminate a DBE listed on the Affidavit without ADOT's written consent
- Must contact ADOT within 24 hours of the first sign of potential termination/substitution
- The contractor shall not complete DBE work with its own forces or with a non-DBE firm without ADOT's written consent

EPRISE Section 24.02

DBE Termination/Substitution



Contractor Notice of Termination/Substitution

- Contractor to notify the DBE before request to ADOT for termination/substitution
 - Copy to BECO
 - DBE has five calendars days to submit written response to contractor

EPRISE Section 24.03

DBE Termination/Substitution



Contractor must submit to BECO:

- DBE Termination/Substitution Form
- DBEs written response
- Any other documentation

BECO considers:

- Contractor's request
- DBE's response
- Explanation/documentation
- Resident Engineer/Field Office documentation
- Good cause

EPRISE Section 24.03

DBE Termination/Substitution



DBE Termination/Substitution Form



ARIZONA DEPARTMENT OF TRANSPORTATION DISADVANTAGED BUSINESS ENTERPRISE (DBE) TERMINATION/SUBSTITUTION REQUEST



Fill out Form

Contract/TRACS No.: _____ Mod: _____ Task Order: _____

Prime: _____ AZ UTRACS Registration No.: _____

DBE Firm: _____ AZ UTRACS Registration No.: _____

Requestor: _____ Email: _____ Phone Number: _____

Type of request: ☐ Termination ☐ Substitution ☐ Reduction

1. Is this request due to an ADOT Change Order/Scope?

☐ Yes, explain below the Change Order/Scope impact on DBE participation.

☐ No, select below the fact(s) and the reason(s) for the request (see attached instructions). **DBE:**

- ☐ Fails or refuses to execute written contract
- ☐ Fails or refuses to perform work in accordance with normal industry standards
- ☐ Fails or refuses to meet prime contractor's reasonable, nondiscriminatory bond requirements
- ☐ Becomes bankrupt, insolvent or exhibits credit unworthiness
- ☐ Is ineligible to work because of suspension or debarment proceedings
- ☐ Is not a responsible contractor
- ☐ Voluntarily withdraws from the project and provides to the Department written notice of its withdrawal
- ☐ Is ineligible to receive DBE credit for the term of the contract

DBE Termination/Substitution



What is Good Cause?

- Fails/refuses contract
- Fails/refuses to perform industry practice work
- Fails/refuses contractor's bond/insurance requirements
- DBE bankrupt, insolvent, exhibits credit unworthiness
- DBE suspended/debarred from public works projects
- Not a responsible contractor
- DBE voluntarily withdraws with written notice to ADOT
- Ineligible to receive DBE credit for type of work required
- DBE owner dies or becomes disabled resulting in inability to work

EPRISE Section 24.04

DBE Termination/Substitution



➤ Good Faith Effort (GFE)

- Contractor's efforts to find a replacement DBE
- Contractor must provide to BECO within seven calendar days from request to terminate/substitute
- Required even when ADOT eliminates a work item

➤ Unacceptable GFE reasons:

- Unable to match original price
- Contractor able to perform work

EPRISE Section 24.05

DBE Termination/Substitution



- Contractor to submit DBE Affidavits with new DBE to BECO for approval
- BECO must approve before new DBE starts work
- Obtaining prior approval before terminating/substituting DBE is essential to staying in compliance
- Failure to obtain ADOT prior approval will lead to sanctions

EPRISE Section 24.05

DBE Termination/Substitution Sanctions



Liquidated Damages for DBE termination/substitution non-compliance:

- The dollar amount of the wrongfully substituted/replaced DBE subcontract plus 25 percent of the amount remaining to be paid to the DBE
- This in addition to all other retention or liquidated damages provided for elsewhere in the contract



EPRISE Section 24.06

Certification of Final DBE Payments (COP)



- Contractor must submit COPs to Field Office no later than 30 days after the DBE completes work
- Form to be completed by the prime contractor & DBE subcontractor to indicate the total final dollar amount paid to each DBE firm on a project
- Contractor not released from obligations



EPRISE Section 25.00

Meeting DBE Goal



- Meeting DBE goal at the end of a project keeps contractor in compliance
- Suggest contractor use DBEs above contract goal to ensure goal is met if extenuating circumstances occur during project
- Department will take contractor GFE and all circumstances in consideration in determining if DBE goal was met
- Sanctions will be applied if DBE goal is not met at the end of project



EPRISE Section 26.00

Sanctions for not meeting DBE Goal



- LDs of two times the amount of the unattained portion of established DBE goal from monies due or becoming due to the contractor
- Decision made by State Construction and Materials Engineer
- Appeal can be made to State Engineer



EPRISE Section 26.00

False, Fraudulent or Dishonest Conduct



WHAT IS FRAUD?

- intentional misrepresentation for personal or corporate gain involving deception to gain an unfair advantage over another -The Office of Inspector General (OIG)
- Actions with intent to deceive to obtain something of value



False, Fraudulent or Dishonest Conduct



DBE FRAUD SCHEMES

FRONT COMPANY

- Company exists only on paper
- Work done by the prime or non-DBE subcontractor
- DBE is paid a small fee

PASS-THROUGH

- Company qualified to be a DBE, but performs no commercially useful function
- Some or all work done by the prime or non-DBE subcontractor
- DBE is paid a small fee

False, Fraudulent or Dishonest Conduct



DETECTING DBE FRAUD

Adequate on-site visits and reviews of:

- DBE hiring process
- Equipment lease
- Negotiations with vendors/suppliers (order and payment details)
- Certified payrolls



False, Fraudulent or Dishonest Conduct



DBE FRAUD CASES

- In 2015, Weber Steel, a New York bridge construction contractor, ran 224 projects using Karen Construction as a pass-through DBE
- Used phony invoices to mask profit transfers from Karen Construction to Weber Steel
- \$18.7 million criminal DBE fraud scheme
- FHWA debarred, home confinement, probation and paid millions in restitutions



False, Fraudulent or Dishonest Conduct



DBE FRAUD CASES

- December 18, 2014, Elizabeth Perino, former owner, Perdel Contracting Company, a DBE in Chicago, Illinois
- Perino falsified various Perdel documents in order to disguise the fact that Perdel did not meet the DBE requirements, and thus the prime contractor did not either.
- Perdel did not perform any labor or provide any equipment



False, Fraudulent or Dishonest Conduct



Any appearance of fraud or dishonest conduct in working with DBEs will result in:

- USDOT being advised
- Referral to the Department of Justice for Criminal Prosecution
- Referral to USDOT Inspector General for possible suspension and department proceedings against offending parties
- Application of USDOT “Program Fraud and Civil Penalties” rules

EPRISE Section 27.00

Test Your Knowledge



Question 1: Contact ADOT to Terminate DBE:

- A. At the end of the project
- B. After DBE is terminated
- C. Within 24 hours of first sign
- D. Don't contact ADOT

Question 2: Fails/refuses contract is not a good cause to request termination of DBE. True or False.

Question 3: DBE cannot start work before termination request is approved by ADOT. True or False.

Questions and Answers

