



# On-site Reviews

## Removing Roadblocks to Success

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# Contractor Compliance Program Objective



A Contractor Compliance Program ensures that Federal contractors and subcontractors performing work on Federal and federally assisted highway contracts comply with nondiscrimination and affirmative action requirements

# Contractor Compliance Program Objective



A contractor's minimum EEO requirements are set forth in the contract provisions referenced in Form FHWA-1273 as "Section II, Nondiscrimination." These include acceptance of a general operating policy that prohibits discrimination based on race, color, religion, sex, national origin, age, or disability.

## Key Responsibilities



- Ensure the EEO Contractor Compliance Program is being implemented in accordance with regulations
- Ensure that FHWA funded projects are providing EEO to minorities and women in each of the highway construction trades, commensurate with their availability in the workforce.
- Conduct periodic program reviews of contractor's EEO program implementation to determine the extent of EEO on FHWA projects, and identify areas where process improvements/changes are needed

# Non-discrimination

EEO and Affirmative Action

applies to all terms and conditions of employment

- Hiring
- Upgrading
- Demotion
- Transfer
- Recruitment/advertising
- Layoff/termination
- Training (OJT)



# Contractor Compliance Review

[www.azdot.gov/bec](http://www.azdot.gov/bec)



## 1. Contractor/project selection and review scheduling

- BECO determines the contractor or project to review
- BECO determines a proposed document submission date and onsite review date



# Contractor Compliance Review



## 2. Contractor/project notified of selection

- BECO notifies the contractor of selection for review and review dates (Document Review and On-site Review)
- Contractor gathers required documents (e.g., Contractor Compliance Data Report, Form FHWA-1391) and information and forwards to BECO
- Contractor provides a meeting space for the onsite review

# Contractor Compliance Review



## 3. Phase 1: Desk Audit

- BECO analyzes document for employment patterns, policies, practices, and contractor programs
- BECO reviews contractor's workforce, relationship with unions, employment agencies, minority and female organizations, pending EEOC or DOJ cases, and availability of minorities and females



# Contractor Compliance Review



## 4. Phase 2: Onsite Review

- BECO conducts onsite review: verification of submitted materials and employee interviews to determine EEO awareness and union status; tour of project site for EEO compliance and non-segregation, and OJT compliance
- BECO determines the method used to place employees on the job and EEO compliance

# Contractor Compliance Review



## 5. Exit Conference

- BECO discusses with the contractor any preliminary finding that would necessitate a determination of noncompliance
- BECO and the contractor negotiate a 15-day Voluntary Corrective Action Plan, if necessary
- Contractor provides BECO with the Voluntary Corrective Action Plan

# Contractor Compliance Review

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## 6. Analyze contractor/project information and prepare report

- BECO prepares a Contractor EEO Compliance Report
- BECO sends the Contractor EEO Compliance Report to FHWA for review and comment with FHWA Compliance Notification (if applicable)

# Contractor Compliance Review



## 7. Compliance Determination and Formal Notification

- BECO determines compliance when there is sufficient information to determine that the EEO requirements of the contract have been effectively implemented
  - BECO issues a Compliance Notification to the contractor

# Contractor Compliance Review



- BECO determines noncompliance when there is sufficient information to determine that the contractor failed to effectively implement the EEO requirements
  - BECO issues a Show Cause Notice (SCN)
  - Contractor has 30 days from receipt of the SCN to develop and submit a Corrective Action Plan (CAP)
- BECO notifies the contractor of the compliance determination

# Contractor Compliance Review



- Contractor accepts or rejects BECO determination
  - BECO will impose formal sanctions if the CAP is not accepted



# Contractor Compliance Review

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## 8. Conduct Compliance Conference (15 days from receipt of a Show Cause Notice)

- BECO will conduct a Compliance Conference with the contractor to:
  - Verify performance on the correction of deficiencies
  - Review the contractor's CAP
  - Validate the contractor's Progress Report information
  - Discuss rescinding the SCN

# Contractor Compliance Review

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## 9. Formal Hearing

- Contractor rejects, does not respond/unacceptable response to BECO's determination
  - BECO refers the matter to the appropriate federal office (FHWA, OFCCP, DOJ)
  - Federal office reviews full reports of findings, case files, and any related correspondence
  - Federal office notifies BECO of determination
  - BECO notifies contractor

# COMMERCIALLY USEFUL FUNCTION (CUF)

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A DBE performs a CUF when it is responsible for execution of the contract and is carrying out its responsibilities by **actually**

**performing, managing, and supervising** the work involved.

The DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality, quantity, ordering the material and installing (where applicable) and paying for the material itself.

# CUF Key Factors:

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To determine whether a DBE subcontractor is performing a CUF, these distinct operations must be considered:

- A. Management & Supervision**
- B. Labor/Workforce**
- C. Equipment**
- D. Materials & Supplies**

These areas must be evaluated to make a CUF determination and specific situations are to be reviewed on a case by case basis.

# A. Management & Supervision

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## **DBE's Responsibilities:**

- ▶ **Schedule work operations**
- ▶ **Receive quotes & orders equipment, materials & supplies**
- ▶ **Prepare and submit certified payrolls**
- ▶ **Hire and fire employees**
- ▶ **Make all operational & managerial decisions**
- ▶ **Supervise and control daily operations, either personally or with fulltime, skilled & knowledgeable superintendent who is under DBE owner's direct supervision**

# MANAGEMENT REVIEW

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## Management Interviews/Observations

- ▶ Is there a written contract to perform a distinct element of work?
- ▶ Who does the DBE Superintendent/Manager report to?
- ▶ Does that individual show up on another contractor's payroll?
- ▶ Has the DBE owner been present on the jobsite?
- ▶ Who answers the questions about the status of the DBE's work on the project?

**Mere Performance of Administrative Duties Is Not Supervision of Daily Operations**



## **B. Labor/Workforce**

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- ▶ **Directly supervise employee(s)**
- ▶ **Keep regular workforce (i.e., employee(s) normally employed by DBE and not by non-DBE)**
- ▶ **Does not “share” employees with non-DBEs**
- ▶ **Hire and fire employees (i.e., responsible for all payroll and labor compliance requirements for all employees within the control of company)**

# LABOR/WORKFORCE REVIEW

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## Workforce Interviews and Observations

- Interview Employees: Do they readily know who they work for? Do they appear on payrolls?
- Does it appear that workers are controlled or supervised by another contractor or prime?
- Do employees appear on prime contractor or other contractor payroll?
- Did DBE subcontract work to non-DBE?

# C. Equipment

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## DBE-owned or leased equipment/vehicles

### ▶ Owned

- Manage
- Supervise
- Operate

### ▶ Leased

- DBE leases from DBE – 100% DBE participation
- DBE leases from non-DBE – 100% DBE participation if operated by DBE

### *Notes:*

- 1. Owned/Leased vehicles must display DBE's name & ID number on vehicles.*
- 2. No credit towards the DBE goal when the prime contractor back-charges the DBE for use of equipment.*

# EQUIPMENT

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- Operation of the Equipment Must Be Subject to the Full Control of the DBE
- DBE Is Expected to Provide the Operator for Equipment and Responsible for All Payroll and Labor Compliance Requirements
- An Operator May Be Provided If the Equipment Is Specialized, Part of the Lease and Subject to Approval by State

# EQUIPMENT REVIEW

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## Equipment Interviews and Observations

- Is DBE using equipment that belongs to the prime or other contractor that is not leased?
- Is the use of such equipment essential and integral to its business operations?
- Was the equipment used to complete a substantial portion of the work?
- Was there a reason for the use of equipment (emergency situation)?
- Did the prime claim credit in its commitment for equipment it leased to the DBE?
- Does the equipment leased by the DBE under the direction or supervision of the DBE?

## D. Materials & Supplies

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- Negotiate cost, arrange delivery of and pay for materials for the project.
- Prepare estimate, determine quantity and quality of materials.
- If materials or supplies are obtained from a DBE *manufacturer*, count **100%** of the cost of materials or supplies toward the DBE goal.
- If the materials and supplies are purchased from a DBE *regular dealer*, count **60%** of the cost of materials or supplies toward the DBE goal.



# MATERIALS REVIEW

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## Materials Review and Observations

- Furnish and install
  - Do delivery slips, invoices, and certifications indicate ownership and that the DBE participated in all phases of procurement?
- Material supply contracts
  - If participation was counted at 60%, did DBE transport materials or did they originate from the DBE's principle place of business?
  - Did DBE take possession of the materials or were items "drop shipped" by manufacturer?

# Suppliers Key Points

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Manufacturers – **100%** DBE participation towards project goals

Brokers – Reasonable *fee* or *commissions* charged for services or assistance

- Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions

Regular Dealer/Distributor – **60%** DBE participation towards the project goals

- *Regular dealer* - a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment bought, kept in stock, and regularly sold or leased to public in usual course of business.

# Regular Dealer CUF Factors

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1. Must be responsible for performance, management and supervision of *entire* material distribution operation for which it is responsible on a contract.
2. Must be an **ACTIVE** participant; not an EXTRA/PASSIVE participant in the delivery and storage of materials.
3. Must own, operate, or maintain a store, warehouse, or other establishment in which the materials, supplies, articles or equipment bought, can be:
  - Kept in stock and
  - Regularly sold or leased to public in the usual course of business

## Regular Dealer CUF Factors *(Cont'd.)*

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4. There cannot be a contrived (*pro forma*) arrangement for purpose of meeting DBE goals.
5. Bulk item exemption such as steel, huge pipe & large amounts of aggregates –
  - Both owns and operates distribution equipment for the products
  - Inspections
  - Customize products

# WORK TYPE AND COUNTING

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## DBE Service Provider

Prime hires a DBE to provide a service:

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

Count entire amount of fees or commissions **if reasonable** - 49 CFR §26.55

# Furnish & Install Key Points

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- ▶ **Material Costs**
  - **Expensive**
  - **Financial Liability**
  
- ▶ **Prime Involvement with Supplier - Little to no interference**
  - **Material price negotiation**
  - **Crane and hoisting services exception**
  - **Joint Check Arrangements**

# **Furnish & Install Key Points *(Cont'd.)***

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**Remember that DBE must estimate, manage, supervise and perform its own work.**

- **DBE must solicit its own quotes for materials and supplies**
- **DBE must do its own procurements with its vendors**
- **Prime contractors should not accept submittals directly from DBE's vendors (suppliers or subcontractors)**

# Trucking Key Points

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## Essentials:

- **DBE Ownership/Certification**
- **Trucking Utilization and Counting**
  - DBE trucking lease
  - DBE/non-DBE lease

[49 CFR Part 26.55 \(d\)](#)

**CERTIFICATION IS NOT UTILIZATION!!!**



# Trucking CUF Factors

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## DBE Trucks

1. DBE must be responsible for the management and supervision of the *entire* trucking operation for which it is responsible on a contract.
2. There cannot be a contrived (*pro forma*) arrangement for the purpose of meeting the DBE goals.
3. DBE must itself own and operate at *least one* fully licensed, insured, and operational truck used on the contract.
4. DBE receives credit for using trucks it owns, insures, and operates using drivers it employs.

# Trucking CUF Factors (Cont'd.)



## Leased DBE Trucks

5. DBE may lease trucks from another DBE firm, including an owner-operator who is a certified DBE.
6. DBE who leases trucks from another DBE receives credit for total value of transportation services the lessee DBE provides on contract  
*Note: As long as the DBE lessee meets the same CUF criteria as any DBE Trucker*

## Leased non-DBE Trucks

7. DBE may lease trucks from a non-DBE firm, including an owner-operator.
8. DBE who leases trucks from a non-DBE is entitled to credit for total value of transportation services provided by non-DBE lessees *not to exceed* the total value of transportation services provided by DBE-owned trucks on contract.

# TRUCKING REVIEW

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## **DBE Trucking**

- Require DBE to provide a list of all trucks it will use
- Verify trucking firm before allowed on jobsite
- DBE must report payments to supplemental haulers, indicating whether or not DBE
- Audits to verify accuracy of DBE reports
- State DOT should require driver to provide valid lease agreement at job site.

# HOW IS CUF MONITORED?

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## **Project oversight – Not just Compliance staff**

Field personnel are in best position to observe

- Project Inspectors
- Area/Project Engineers

### Onsite Visits

- Regular basis
- At least once on each project for each DBE

### Desk Audits

- Match paperwork with what you observed
- Follow-up

# CUF Onsite Reviews

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## Overall Performance Observations

- Is the DBE's work distinct from that of another subcontractor or work performed by prime?
- Is the work designated under the DBE's contract being performed by the prime or another company?

# CUF Onsite Reviews

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## Subcontractors

- Review the subcontract/lease agreement
- Review what function the DBE was hired to perform

## Conduct Interviews

- DBE supervisors/superintendents
- DBE employees

## Look at DBE Equipment

- Logos, marking, or magnetic signs
- Owned or leased?



# BEWARE OF THE RED FLAGS!



**Regular Dealer Supplier:** If the materials or supplies are purchased from a DBE *regular dealer*, count **60%** of the cost of the materials or supplies toward DBE goals if DBE firm acts as an **active** participant in the process.

**Furnish & Install Contractors:** DBE contractors that need to purchase large amounts of materials (e.g., steel, concrete) to **self-perform** their work must ensure they have the contracts and relationship with the suppliers to receive credit.

- Joint check arrangements are available to assist small firms if executed correctly.

**Trucking:** DBE trucking is the only time credit is counted towards the goal when a non-DBE is utilized (*i.e., leased non-DBE trucks including non-DBE owner-operators*)

- For DBE credit: The dollar volume of the trucks must be *no more than twice* the number of trucks on a contract owned by a DBE or leased from another DBE

# Summary

- ▶ CUF is a counting issue – Do not confuse it with certification.
- ▶ Key elements of CUF: actually performing, managing, supervising the work, and paying for materials and supplies.
- ▶ A DBE must perform a CUF to receive credit toward a DBE goal. **No CUF – No Goal Credit!**
- ▶ DBE credit toward goal based on the type of work.
- ▶ Payments to DBEs will determine if prime fulfilled its DBE goal obligation.

39



# Questions and Answers

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