

Commercially Useful Function

A prime contractor will be given credit, towards the applicable DBE contract goal, for the amounts paid to the DBE firm only if that firm performs a commercially useful function. Failure to fulfill this obligation will be considered a breach of contract and liquidated damages will be assessed by Metro. Metro will determine compliance with the commercially useful function requirement through application of the following principals:

- (a) the DBE is responsible for the performance, management and supervision of a distinct element of the work, in accordance with normal industry practice (except where such practices are inconsistent with the DBE regulations and these guidelines)
- (b) the firm receives compensation, as agreed upon, for the work performed, regardless as to whether or not the agreement is standard industry practice. If the agreement erodes the ownership, control or independence of the DBE firm or does not meet the commercially useful function requirements, the contractor will not receive credit towards the contractual goal.

The following situations are examples of a DBE firm that is not performing a commercially useful function under the definition above.

- (a) the work to be performed by the DBE is outside of the DBE's known experience or capability
- (b) the DBE provides little or no supervision of the work, the DBE superintendent is not a regular employee of that firm or supervision is performed by personnel associated with the prime contractor, another business or personnel not under the control of the DBE firm
- (c) the DBE's workforce is not under the DBE firm's control and direction or work is performed by personnel normally employed by the prime contractor or another business
- (d) any part of the work designated to be performed by a DBE subcontractor is performed by the prime contractor
- (e) a substantial portion of the equipment used by the DBE firm belongs to the prime contractor or another contractor with no formal lease agreement or the equipment signs and markings cover another owner's identity, usually through the use of magnetic signs. The Office of Supplier Diversity will determine "substantial portion" on a case-by-case basis.
- (f) materials or supplies, necessary for the DBE firm's performance, are delivered to, billed to or paid by another business
- (g) the DBE firm subcontracts or assigns any portion of work to another firm
- (h) the DBE firm is working without a subcontract agreement approved by Metro, except in the case of trucking
- (i) a DBE trucking business utilizes trucks owned by the prime contractor
- (j) a DBE prime contractor subcontracts more than 50% of the contract value

- (k) a DBE prime contractor only purchases materials while performing little or no work
- (l) the agreement between the prime contractor and DBE firm artificially inflates the DBE participation or erodes the ownership, control or independence of the firm
- (m) a DBE firm works for only one prime contractor
- (n) employees work for the DBE firm and the prime contractor or mentor
- (o) the volume of work is beyond the capacity of the DBE firm
- (p) inquiries by Metro or FTA representatives are answered by the prime contractor or mentor
- (q) the DBE firm's owner is not aware of the status of the work or the performance of the business.

DBE's Work Force

The DBE must have a full time superintendent supervising the project. That superintendent, or the owner, must supervise and exert complete control over that portion of the project. Little or no supervision by the DBE, supervision by personnel associated with the prime contractor or supervision by personnel not under the control of the DBE, indicates that no commercially useful function is being performed.

The DBE's work must be performed by personnel regularly employed by the firm and under direct control and direction of the DBE company. These include permanent employees of the DBE, or those recruited through the traditional recruitment or employment centers available and are employed on any subcontracts with other contractors.

A regular employee will not have been employed recently by the prime contractor on the present project, another subcontractor on the project or the owner/lessor of equipment being used on the project. However, specialized equipment may be leased with the operator. The employee should not be an unemployed contractor, "between jobs" or a member of a non-certified contractor's workforce. A new or expanding business may have difficulty obtaining a permanent work force until sufficient work is available to justify the expense. When project personnel encounter a new or expanding company, the firm's intentions for securing personnel must be communicated to Metro prior to the beginning of work, in order for the Office of Supplier Diversity to evaluate the DBE's efforts to fulfill the commercially useful function requirement.

A request to use any of the prime contractor's work force or the regular employees of another business must be submitted to the Office of Supplier Diversity for approval. The request must be received prior to the beginning of work by the DBE firm. At no time may more than 50% of the workforce be the regular employees of the prime contractor or any other business. In addition, the superintendent can not be a regular employee of the prime contractor or any other company.

In case of emergency, for a short period of time only, Metro may allow a prime contractor to assist a DBE in performance of the subcontract. The Office of Supplier Diversity must be immediately notified when this situation occurs.

The DBE firm must be responsible for all payroll and labor compliance requirements for all employees within the control of the company and is expected to prepare and finance the payrolls. Direct or indirect payments by any other contractor will not be allowed.

Equipment Leased or Borrowed by DBE

A DBE firm may lease equipment from contractor, including the prime, if it is consistent with industry practices and at rates competitive for the area. A rental agreement, separate from the subcontract, must specify the terms of the agreement. The lease must be for a short period of time and involve a specialized piece of equipment readily available at the job site. The lease may allow the operator to remain on the lessor's payroll, if this is a generally acceptable practice within the industry. The operation of the equipment must be subject to the full control of the DBE.

The DBE is expected to provide the operator for non-specialized equipment and is responsible for all payroll and labor compliance requirements. A separate lease agreement is required.

Equipment leased and used in the DBE firm's work with payment deducted from the prime contractor's payment(s) to the DBE is not allowed. This situation should be reported to Metro for review by the Office of Supplier Diversity personnel.

Materials

The DBE must negotiate the cost, delivery and pay for any materials and supplies required for the project. Invoices for materials must be in the name of the DBE firm, not the prime contractor. Metro is responsible for periodic reviews of invoices to ensure compliance.

Occasionally it may be necessary for a prime contractor to pay suppliers directly for materials used by a subcontractor. The cost of those materials can be included in the payment to meet the contractual goals for DBE participation, if such action is available to all subcontractors and the DBE firm involved participates in scheduling the delivery of the materials and is fully responsible for ensuring the materials meet specifications. Such payments should be made by jointly endorsable checks to be signed by the prime contractor and DBE firm.

No credit towards the DBE goal will be allowed for payment deducted from the prime contractor's payment to the DBE, unless, this arrangement is clearly set out in a formal written agreement between the two parties and is approved by Metro.

Good Faith Efforts

Metro, must monitor the contractor's progress in achieving the contractual DBE participation for each project. At any time during the project, if Metro determines that achievement of the DBE goal is in jeopardy, the Office of Supplier Diversity should be contacted immediately. The Office of Supplier Diversity will investigate the circumstances and determine if the contractor has made a "good faith effort" to meet the goal. The contractor is required to submit documentation of good faith efforts made and the circumstance that prevent them from meeting the goal. The Office of Supplier Diversity will evaluate the efforts and determine if they are acceptable and constitute compliance with the DBE contract requirements.

"Good faith efforts" require more than mass mailed form letters and advertisements. The efforts should be intense, aggressive, and sincere actions on the specific project and must go beyond simple paper exercises. Efforts should include personal contact, follow-up and negotiations with DBE firms. The contractor must document steps taken to obtain DBE participation. Good faith efforts include, but are not limited to:

- (a) attending pre-bid meetings where DBE firms would be informed of contracting and subcontracting opportunities
- (b) advertising for subcontracting opportunities in general circulation, trade association and minority mediums
- (c) written notices to all certified DBEs capable of performing the work required for the project. The notice must be given in sufficient time to allow the DBEs to respond
- (d) contacting DBEs notified, to determine their interest in submitting a bid
- (e) determining portions of work to be performed by DBE firms. This may include breaking down contracts to facilitate DBE participation
- (f) providing DBEs with plans, specifications and requirements of the contract
- (g) negotiating in good faith with interested DBEs. Documentation of negotiation efforts must include the name, address, and telephone number of DBEs considered, a description of the information provided, the work selected for subcontracting and a statement explaining why agreements with DBEs could not be executed
- (h) documentation of sound reasons for rejecting a DBE firm's bid based on a thorough investigation of their capabilities
- (i) efforts to assist interested DBEs in obtaining bonding, a line of credit or insurance as required by Metro or prime contractor
- (j) efforts to assist interested DBEs in obtaining equipment, supplies, materials and any other necessary or related services
- (k) contacting and using the services of minority community organizations, minority contractors associations, local, state and federal minority business assistance offices and any other organization that provides assistance in the recruitment and placement of DBE firms

The Office of Supplier Diversity will review the contractor's types of effort and the quality, quantity, and intensity of those efforts. If the Office of Supplier Diversity determines that the contractor's efforts were merely superficial and could not reasonably be expected to produce sufficient DBE participation, Metro will not approve an adjusted goal.

A lower quote from a non-DBE subcontractor is not sufficient reason to excuse the contractor from utilizing a DBE. The contractor must submit an acceptable explanation for the assertion that the DBE's quote was unreasonable. Prime contractors are not required to accept unreasonable quotes.

If the Office of Supplier Diversity determines that the contractor has demonstrated good faith efforts the DBE contract goal may be reduced.