

Commercially Useful Function & Fraud Awareness

DBE Contract Responsibilities and Red Flags

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Disadvantaged Business Enterprise (DBE) **fraud** involves a broad range of schemes.

Federal regulations require that Oregon Department of Transportation ensures only eligible firms participate in the DBE program. An **eligible DBE** firm is a for-profit, small business that is at least 51% owned by one or more *socially and economically disadvantaged* individuals. *The firm's management and daily operations must be controlled by the socially and economically disadvantaged owner(s).*

Federal regulations for DBEs require that ODOT count DBE expenditures toward the DBE goal **only if** the DBE is performing a “**commercially useful function.**”

What constitutes “commercially useful function” or “CUF”?

To perform a commercially useful function, a DBE must carry out its contract responsibilities by *actually performing, managing, and supervising* the work involved.

Described below are the responsibilities of the DBE and the **RED FLAGS** field personnel **should report** if observed relating to five key areas of concern in performing a CUF review:

1. DBE Management
2. DBE Equipment
3. DBE Workforce
4. DBE Materials
5. DBE Performance

Red Flags should be reported to the Project Manager and the Region OCR Field Coordinator responsible for the DBE oversight of the project.

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1. DBE MANAGEMENT is counted towards the contract goal when the DBE:

- ✓ Schedules the work operations
- ✓ Receives quotes and orders equipment and materials
- ✓ Prepares and submits certified payrolls
- ✓ Hires and fires employees
- ✓ Makes all operational and managerial decisions
- ✓ Supervises daily operations, either personally or with a full time, skilled, and knowledgeable superintendent who is under the DBE owner's direct supervision (*exclusively employed by the DBE, i.e., doesn't appear on another company's payroll or have their own business*)

- Management Red Flags include:

- ❖ Supervision of DBE employees by another contractor, either prime or subcontractor
 - ❖ DBE provides little or no supervision of work
 - ❖ DBE's superintendent is not a regular, full-time, *exclusive* employee of the DBE
 - ❖ Supervision is performed by personnel associated with the prime contractor or any other firm or business
 - ❖ DBE firm's owner is not aware of the status of the work or the performance of the business
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2. DBE EQUIPMENT is counted towards the contract goal when the DBE:

- ✓ DBE owns or has a valid lease or rental agreement for equipment consistent with industry practices and at competitive rates
 - A DBE firm may lease or rent equipment on an ad hoc basis from another contractor, **excluding the prime contractor or subsidiary of the prime**. This type of lease is **allowed only for specialized equipment and circumstances**. *If you see the DBE using another contractor's equipment please contact the Region OCR Field Coordinator responsible for your project.*
- ✓ Operation of the equipment is under the full control of the DBE
- ✓ DBE provides the operator for the equipment and is responsible for all payroll and labor compliance requirements
 - An operator may be provided with the equipment, if the equipment is specialized. *Please contact the Region OCR Field Coordinator if this situation exists on your project.*
- ✓ DBE "regular dealer" supplier of bulk materials (e.g., aggregate, asphalt, fuel) has "long term" lease agreements for any supplemental "distribution equipment" (usually trucks and trailers or tankers) and employs its own operators (drivers)
- ✓ Committed DBE trucking subcontractors own and operate at least one truck on the project
 - DBE may lease additional trucks from both DBE and non-DBE sources (owner-operator leases are allowed), but the value of work performed by non-DBE trucks should not exceed the value of work performed by DBE trucks.
 - Lease agreements must provide the DBE with "exclusive use and control"
 - All trucks should be identified on the DBE's Work Plan. *If your project has a committed DBE trucking subcontractor, please work with your Region OCR Field Coordinator to ensure there is a project-specific plan in place to collect DBE Trucking Logs and perform an independent trucking verification.*

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- **Equipment Red Flags include:**

- ❖ Equipment leased and used by the DBE firm with payment deducted from the prime contractor's payment(s) to the DBE
 - ❖ Equipment used by DBE firm belongs to the prime contractor or another contractor with no formal lease agreement in place
 - ❖ Equipment signs and markings cover another owner's identity, usually through the use of magnetic signs
 - ❖ DBE trucking business uses trucks owned by the prime contractor
 - ❖ DBE regular dealer/supplier materials (e.g., aggregate, asphalt, fuel) are delivered to project site or batch plant using the manufacturer's trucks or another carrier
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3. DBE WORKFORCE when:

- ✓ DBE firm keeps a regular workforce
- ✓ DBE firm is not "sharing" employees with non-DBE contractors, particularly the prime contractor or subsidiary
- ✓ DBE firm is responsible for all payroll and labor compliance requirements for all employees within the control of the company

- **Workforce Red Flags:**

- ❖ Movement of employees between contractors
 - ❖ Employee paid by DBE and prime
 - ❖ Employee working for prime in morning and DBE in afternoon.
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4. DBE MATERIALS are counted when:

- ✓ DBE negotiates the cost, arranges delivery, takes ownership and pays for the materials and supplies for the project
- ✓ DBE prepares the estimate, determines the quantity of material, and is responsible for the quality of materials

- **Material Red Flags:**

- ❖ Materials for the DBE ordered, or paid for, by the prime contractor
 - ❖ 2 party checks from prime to DBE subcontractor and supplier or manufacturer
 - ❖ Materials or supplies necessary for the DBE firm's performance are delivered to, billed to or paid by another business
 - ❖ Materials submittals (e.g., required drawings or certificates) for the DBE-supplied materials are prepared by the prime or other controlling contractor
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5. DBE PERFORMANCE is counted when:

- ✓ The DBE is responsible for the performance, management and supervision of a distinct element of the work, in accordance with normal industry practice.

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- Performance Red Flags:

- ❖ Work is being done jointly by DBE firm and another contractor.
 - ❖ The work to be performed is outside of the DBE's known experience or capability
 - ❖ Any portion of the work is performed by the prime contractor or any other firm
 - ❖ The DBE firm is working without a subcontract agreement
 - ❖ A DBE prime contractor subcontracts more than customary or standard industry practice
 - ❖ Agreement between the prime and DBE artificially inflates the DBE participation
 - ❖ Agreement that erodes the ownership, control or independence of the DBE subcontractor
 - ❖ DBE works for only one prime contractor or a large portion of the firm's contracts are with one contractor
 - ❖ The volume of work is beyond the capacity of the DBE firm
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Engaging in any of the referenced practices *may* result in the following actions by the Project Manager and/or the Office of Civil Rights:

- ◆ Prime to show *Continued Good Faith Efforts* to meet DBE goals (documentation or meeting)
- ◆ Cessation or withholding project payments
- ◆ Immediate suspension of work
- ◆ Refer to USDOT Office of the Inspector General for investigation and/or the US Attorney
- ◆ Recommend revocation of DBE certification; and/or
- ◆ Pursue debarment of the DBE firm, prime contractor and/or subcontractor

Federal Crimes Equal Federal Penalties

- ◆ False Statements
- ◆ False Claims
- ◆ Bribery
- ◆ Mail Fraud/Wire Fraud

Not every red flag means that DBE fraud is being committed, but every red flag should be reported on the [CUF Review Form 3B \(734-2165\)](#) and to the Project Manager for review and follow-up. Contact the Office of Civil Rights Field Coordinator for additional technical assistance

- Use the [DBE Work Plan Proposal Form 3A \(734-2165\)](#) to identify the management, workforce, and equipment the DBE has stated it will use in the performance of its work.
- Use the DBE Subcontract to verify the scope of work being performed correlates to their work plan and subcontract.