



CONTRACTOR COMPLIANCE & DBE COMMERCIALY USEFUL FUNCTION

1. If a DBE fails a Commercially Useful Function (CUF) review by ODOT, does the firm become decertified as a DBE?

Generally, no. Certification status and performance of a Commercially Useful Function (CUF) are two separate issues.

- The [OMWESB Directory](#) shows whether a DBE is currently certified and what types of work the firm is certified in.
- Federal DBE regulations prohibit OMWESB from considering whether a DBE firm performs a CUF or is a regular dealer when making a certification decision, *unless* the DBE has exhibited a pattern of conduct to evade or subvert program requirements. [49 CFR 26.73\(a\)](#).
- OMWESB may investigate whether the underlying causes of one or more CUF failures to determine whether the DBE lacks independence, or the eligible owner is not in control of the daily operations of the firm or has exhibited a pattern of conduct to evade or subvert program requirements.
- A DBE remains certified until and unless OMWESB has decertified the firm, in whole or in part, according to the due process procedures included in the DBE regulations. [49 CFR 26.83\(h\)](#) and [26.87\(i\)](#).

Bidders may rely on the certification status shown in the OMWESB Directory on bid day for purpose of meeting contract goals.

2. May bidders still commit work to DBEs rumored or known to be under investigation?

Generally, yes. A DBE remains eligible for use even while a decertification process is underway. To receive credit toward meeting a contract goal, the DBE must still meet CUF requirements once on the project.

- ❖ However, the fact that a DBE is certified does not alleviate the requirement that bidders do their *due diligence* by actually contacting the DBE to find out whether the DBE *will be able* to perform CUF-compliant work once on the project.
- ❖ The DBE Commitment Certification and Utilization Forms states, “*Bidder certifies that it had direct contact with the named DBE firms regarding participation of this project. Bidder certifies, if awarded this project, that it shall award subcontracts to or enter into agreements with the named DBE’s.*”

3. How does DBE decertification impact a prime contractor’s ability to meet a contract goal?

A prime contractor’s ability to meet a contract goal depends on whether the decertification occurs before or after the contract with the DBE has been executed.



CONTRACTOR COMPLIANCE & DBE COMMERCIALY USEFUL FUNCTION

- If a DBE is decertified while a project is already underway, and the prime contractor has *already executed an approved subcontract* with the DBE, payment for the DBE's work may still count toward the contract goal, provided the DBE also meets CUF requirements.
- If a DBE is decertified *prior to execution and approval of its subcontract*, the prime contractor must commit enough subcontract work to a substitute DBE to meet the goal, or make adequate good faith efforts to do so.

4. If a DBE performs CUF-compliant work on one project, can I assume the DBE will meet CUF requirements on another project?

No. Whether a DBE performs a commercially useful function must be determined on a contract-by-contract basis. In the case of asphalt suppliers the DBE must meet the regular dealer requirements.

- **DBE Work Performance:** "A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved." [49 CFR 26.55](#) (c).
- **DBE Materials or Supplies:** To meet CUF requirements and receive credit for DBE-provided materials and supplies used in performing the DBE's work, the DBE must be responsible for *all* of the following:
 - 1) negotiating price
 - 2) determining quality and quantity
 - 3) ordering the material
 - 4) paying for the material itself
 - 5) and, where applicable, installing the materials or supplies. [49 CFR 26.55](#) (c).
- **Relevant Scope of Work and Industry Standards:** When determining whether a DBE is performing a CUF, the Agency must evaluate:
 - 1) the amount of subcontracted work
 - 2) industry practices
 - 3) whether the amount paid to the DBE is commensurate with the work the DBE actually performed
 - 4) the amount of DBE credit claimed
 - 5) and other relevant factors. [49 CFR 26.55](#) (c).

DBE failure to perform a CUF may not be an "all or nothing" situation. ODOT must apply appropriate DBE credit under the circumstances.

- **Appropriate DBE Crediting:** The regulations require ODOT to apply appropriate DBE credit under the circumstances. This means that a portion of a DBE's work on a project may meet CUF requirements, while another portion may not. See, USDOT, [Official Q&A – DBE Program Regulation \(49 CFR 26\)](#), at *Commercially Useful Function*, at question on "furnish and install" contracts.



CONTRACTOR COMPLIANCE & DBE COMMERCIALY USEFUL FUNCTION

- ODOT is required to only credit CUF-compliant work or materials toward meeting the goal.
For example:

A DBE subcontractor is hired to furnish and install guard rail on a project. However, the prime contractor has obtained the guard rail from a particular source at a particular, advantageous price and has specified that the DBE must use that source on the project.

- *Because the DBE was not responsible for sourcing the materials and negotiating price, the CUF requirements have not been met for the value of the materials, and no DBE credit is allowed for the value of the materials.*
- *However, DBE credit is allowed for the value of the DBE's installation work. The DBE's subcontract and Work Plan Proposal (3A) should accurately reflect this information.*

5. How are DBE Suppliers counted?

DBE suppliers must comply with the materials requirements of the CUF rules. With respect to materials provided as a supplier, the DBE must be responsible for **all** of the following:

- negotiating price
- determining quality and quantity
- ordering
- and paying for the materials.

Materials and supplies provided by eligible DBEs are credited toward meeting assigned contract goals as follows:

- **Manufacturer** – 100% credit is given for the value of materials supplied by a DBE manufacturer.
- **Regular Dealer** (includes bulk items distributor) – 60% credit is given for the value of the materials. When the DBE is acting as a regular dealer by distributing bulk items such as asphalt or fuel, the 60% credit includes the value of the delivery services, as the value of delivery services is incidental to the DBE's distribution of the supplies.
- **Broker / Expediter** – Credit may be given for the *reasonable value* of the *broker commission or expediter transaction fees* for securing or arranging delivery of materials, but no credit is given for the value of the materials.
- **Delivery Services** – Credit may be given for the *reasonable value* of the *delivery services* actually provided by the DBE, but no credit is given for the value of the materials.

6. Can DBE suppliers be certified as “regular dealers” for work on all projects?

No. DBE firms are not “certified” as a regular dealer, but may be certified in a NAICS code related to performing a supplier function. Whether a DBE acts as a regular dealer in a particular transaction must be determined on a case-by-case basis. See, USDOT, [Official Q&A – DBE Program Regulation \(49 CFR 26\)](#), at Counting, at question on “regular dealers.”



CONTRACTOR COMPLIANCE & DBE COMMERCIALY USEFUL FUNCTION

Whether a DBE acts as a regular dealer in a particular transaction must be determined on a contract-by-contract basis.

- DBE Supplier crediting rules are shown in [49 CFR 26.55](#) (e).
- According to the DBE crediting rules, 60% of the value of materials purchased from a DBE “regular dealer” may be credited toward the goal.
- Ordinarily, a DBE regular dealer must have a place of business where it keeps in-stock and sells to the public the materials or supplies of the general character required on the contract. However, under [49 CFR 26.55](#) (e)(2)(ii), a person may also be considered a regular dealer for bulk items such as petroleum products or asphalt without maintaining a place of business “if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers’ own distribution equipment shall be by a long-term lease agreement . . .”
- When materials are purchased from a DBE supplier that does not act as a regular dealer in a given transaction, DBE credit may be provided for the reasonable value of broker / expediter fees or delivery services, as applicable, but ODOT may not count any portion of the cost of the materials toward the DBE goal.
- If the firm does not provide any commercially useful function (meaning, the DBE is simply inserted as an extra participant in a transaction to create the appearance of DBE participation), then no DBE credit can be counted.

7. How do DBE suppliers meet “regular dealers” requirements?

- **The DBE must regularly deal in the supplies to the general public:** To meet the requirements the DBE firm must first regularly deal in materials or supplies that match the general kind or type of supply involved in the contract for which DBE credit is being sought. This means that the DBE must, in the usual course of its business, engage in the purchase and sale (or lease), to the general public the products of the general kind and type to be used on a particular contract.
- **The DBE must actually provide the contract materials or supplies as a regular dealer.** Secondly, with respect to the actual materials or supplies to be provided on the contract in question, the DBE role should be consistent with that of a regular dealer rather than that of a broker or transaction expediter. Due to project location or the nature of the products being supplied, a DBE that acts a regular dealer for materials or supplies on one project may act as broker or transaction expediter on another.
 - For example, a DBE regularly deals in the supply of pipe to the general public and has historically provided pipe out of its warehouse on ODOT projects for 60% regular dealer credit. However, on a particular project, an unusually large pipe and coupling must be specially ordered. The DBE contacts the manufacturer and orders delivery of the special pipe and coupling directly to the project. The DBE never takes physical possession or transports the pipe and coupling. Thus, for the pipe and coupling, only the reasonable value of the DBE’s broker services or transaction expediter fees may be counted.



CONTRACTOR COMPLIANCE & DBE COMMERCIALY USEFUL FUNCTION

- In the case of supplying asphalt or fuel, the DBE must use their own distribution equipment (owned or long-term leased trucks and trailers) to deliver the full quantity of materials for which 60% credit is sought. The DBE must use its own employees to perform the work (operate the equipment). The use of other commercial carriers or owner-operated trucks, even other DBE carriers or owner-operator trucks, does not meet this requirement.
- **ODOT must review and determine whether the DBE will meet regular dealer requirement on a case-by-case basis:** In determining whether a DBE meets the regular dealer requirements, ODOT must consider the activities of the business *over time*, both inside and outside of the context of the DBE program. ODOT must consider whether the firm regularly sells or leases the products in question or deals in them on an *ad hoc* or occasional basis and look at the particular transactions proposed for the contract in question.
 - **Proof of Regular Dealings:** To make this determination, ODOT may request that the DBE provide documentation showing that the DBE regularly deals in the materials or supplies in question, including copies of its supplier or distributor agreements for the products. These documents will be requested as part of the DBE Work Plan Proposal – Form 3A review. However, because these agreements may include the DBE’s confidential business information, the DBE may make arrangements to submit these agreements directly to ODOT for review rather than through the prime contractor.
 - **DBE Distribution Equipment:** For regular dealers in bulk items such as asphalt and fuel supply, ODOT will request proof of DBE ownership of the distribution equipment.
 - If the DBE intends to supplement its owned distribution equipment with leased equipment, ODOT will request copies of the lease agreements, which should show the DBE has entered into a long-term lease.
 - ❖ **Long Term Lease:** While the regulations do not specify what “long term” lease means, the lease should not be made with the intent of just servicing the particular project that is being reviewed.
 - ❖ **Note on Operators:** Additionally, the regular dealer leased equipment must be operated by the DBE’s employees. The regular dealer requirements for leased equipment are different from the truck leasing requirements under the DBE truck crediting rules in which trucks may be driven by owner operators.
- **Other important supplier compliance information:** Invoices for materials are to be invoiced to the DBE firm and not to the prime contractor. Payments are to be made directly from the DBE firm to their materials source. The Agency may request copies of invoices to confirm payment information.
 - ❖ **Note on Prime Involvement with DBE Suppliers:** The prime contractor should communicate with the DBE to arrange for and coordinate delivery of the DBE-supplied materials. The prime contractor should not be dealing directly with the



CONTRACTOR COMPLIANCE & DBE COMMERCIALY USEFUL FUNCTION

DBE's source of materials (e.g., the manufacturer) for the materials being supplied by a DBE regular dealer.

ODOT will periodically review invoices and proof of payment for materials to ensure compliance. The prime and DBE must promptly cooperate with requests for these documents.

8. What can prime contractors do to ensure CUF and DBE crediting requirements will be met on their projects?

The DBE Work Plan Proposal – Form 3A is intended to provide a preview of whether the way a DBE proposes to perform its work on the project will meet CUF requirements. The purpose of the form is to head-off CUF compliance concerns and DBE crediting issues before they become violations on the project.

- **Form 3A** must include sufficient and accurate information to allow the agency to determine whether there will be CUF or DBE crediting concerns. The agency will offer written comments for potential corrective action.
- Any requested attachments, such as personnel lists, equipment lists, supplier agreements, joint check agreements, or lease or rental agreements need to be submitted with the Form 3A for review and approval.
 - ❖ **Note on Joint Checks:** If a prime contractor agrees to pay a DBE for DBE-supplied work or materials through a joint check arrangement, this information should be noted on the Form 3A in Section E. - Prime Contractor Resources or Section F. – Additional Information, as appropriate. Attach a copy of the joint check agreement to the Form 3A submittal.
 - To receive credit for DBE work paid for under a joint check arrangement, the DBE must take possession of the payment from the prime before releasing payment to the joint payee. Once the project is underway, the Agency may request copies of cancelled checks or other documentation to show the DBE was in control of the making payment.
 - Use of a joint check agreement between a prime and a DBE should be consistent with industry practice and the prime's policy on entering into joint check arrangements with other subcontractors, suppliers, or services providers.
 - See, USDOT, [Official Q&A – DBE Program Regulation \(49 CFR 26\)](#), at *Counting*, at question on “joint checks.”
- In the event the agency identifies CUF-compliance concerns while work is underway on a project, ODOT will compare actual performance to what is shown on the DBE's Work Plan Proposal (Form 3A).



CONTRACTOR COMPLIANCE & DBE COMMERCIALY USEFUL FUNCTION

- The prime contractor is required to sign off on the DBE's Work Plan Proposal – Form 3A. The prime should review the work plan to identify any concerns it may have with respect to meeting CUF requirements on the project.
 - ❖ **NOTE on Changed Circumstances:** If circumstances change once the project is under way, the DBE's Work Plan Proposal needs to be revised and re-submitted to the agency for review and approval.
 - ❖ **In the event the prime identifies CUF-compliance concerns on the project,** the prime should act quickly and in a **transparent** manner to notify the agency and the DBE of the problem; develop a plan to correct or resolve the problem; seek DBE input and agency approval.

9. Can DBE work be counted toward an assigned contract goal when the work is being performed by equipment being leased or purchased from the prime contractor?

No. The regulations expressly exclude DBE credit for the value of work performed using equipment leased or being purchased from the prime contractor.

- **Count the entire amount of that portion of a . . . contract . . . that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).** [49 CFR 26.55](#) (a)(1) (emphasis added).

10. What happens if a DBE fails to perform a CUF?

Section 09.00 of the DBE provisions make the Prime Contractor responsible to ensure DBE firms working on the project perform a commercially useful function (CUF). Under this section, the *“Contractor shall receive credit toward meeting the assigned DBE goal and payment for DBE commercially useful function performed work only.”*

- This means that if a DBE fails to perform a CUF, the prime has not met an obligation of the contract to ensure the DBE firms working on the project have performed a CUF.
- Additionally, the value of the non-CUF-compliant work cannot be credited toward meeting the assigned DBE contract goal. Because meeting the DBE goal is a material requirement of the contract, the prime contractor may be found in breach of contract for failure to meet the goal.

11. What happens if a prime contractor fails to meet DBE requirements?

Under section 01.00(a)(2) of the DBE provisions, failure by the Contractor to carry out the applicable DBE requirements of 49 CFR 26 is a material breach of the Contract, which may result in the termination of the Contract or other remedy as ODOT deems appropriate.

- **Each situation will be considered on a case-by-case basis, taking into account the circumstances as a whole.** This includes, but is not limited to, considering whether the prime



CONTRACTOR COMPLIANCE & DBE COMMERCIALY USEFUL FUNCTION

contractor made all reasonable efforts to enable the DBE to perform their work, and to perform it in a CUF-compliant manner.

- **Remedies:** Section 13.00 sets out the remedies that may apply, including:
 - ❖ Temporarily withholding progress payments until the Contractor complies with these [DBE] provisions through future performance.
 - ❖ Permanently withholding payment for work already performed in a manner that constitutes a breach of contract.
 - ❖ Suspension of work according to the Oregon Standard Specifications for Construction, subsections 00150.00 and 00180.70.
- Additionally, failure to meet DBE requirements will be reflected in the Contractor's performance evaluation.