



# DBE ENTERPRISES

AUGUST 2003 ISSUE 8

## Counting DBE Participation

In accordance with 49 CFR section 26.55, the Metropolitan Council will utilize the following guidelines in determining the percentage of DBE participation that will be counted toward the overall DBE goal:

**A.** If a firm is not currently certified as a DBE in accordance with the standards of subpart D of the regulations at the time of the execution of the contract, the firm's participation toward any DBE goals will not be counted, except as provided in 49 CFR section 26.87(i).

**B.** The dollar value of work performed under a contract with a firm after it has ceased to be certified will not be counted toward the overall goal.

**C.** The participation of a DBE subcontractor toward the CONTRACTOR's DBE achievements or the overall goal will not be counted until the amount being counted toward the goal has been paid to the DBE.

**D.** When a DBE participates in a contract, the value of the work actually performed will be counted as follows:

1. *The entire amount of that portion of a construction contract (or other contract not covered by paragraph 49 CFR part 26.55) 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 CONTRACTOR or its affiliate).*

2. *The entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as*

*professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a USDOT-assisted contract, toward DBE goals, provided that the COUNCIL determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.*

3. *When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontract work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm will not count toward DBE goals.*

**E.** When a DBE performs as a participant in a joint venture, the COUNCIL will count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.

**F.** The COUNCIL will count expenditures to a DBE Contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract:

1. *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. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, the COUNCIL will evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.*

(to be continued on next page)

2. A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which the funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, the COUNCIL will examine similar transactions, particularly those in which DBEs do not participate.

3. If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, the COUNCIL will presume that it is not performing a commercially useful function.

4. When a DBE is presumed not to be performing a commercially useful function as provided in this program, the DBE may present evidence to rebut this presumption. The COUNCIL may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.

5. The COUNCIL's decisions on matters of whether a DBE performs a commercially useful functions are subject to review by the concerned operating administration (FTA), but not subject to an administrative appeal to USDOT.

**G.** The COUNCIL will use the following factors in determining whether a DBE trucking company is performing a commercially useful function:

1. The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.

2. The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on its contract.

3. The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.

4. The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for

the total value of the transportation services the lessee DBE provides on the contract.

5. The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by the DBE.

6. For purposes of this section, a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for the use of the leased truck. Leased trucks must display the name and identification number of the DBE.

**H.** The COUNCIL will count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

The COUNCIL will count 100% of the cost of the materials or supplies toward DBE goals if the materials or supplies are obtained from a DBE manufacturer. For purposes of this paragraph, a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described in the specifications.

The COUNCIL will count 60% of the cost of the materials or supplies toward DBE goals if the materials or supplies are purchased from a DBE regular dealer. For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold to or leased to the public in the usual course of business.

**I.** To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and

# Construction Humor

## SIX Phases of a Project

- ◆ Enthusiasm
- ◆ Disillusionment
- ◆ Panic
- ◆ Search for the Guilty
- ◆ Punishment of the Innocent
- ◆ Praise & Honors for the  
Non-Participants

operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease and not on an ad hoc or contract-by-contract basis.

**K.** Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of 49 CFR section 26.55(e)(2).

**L.** With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, the COUNCIL will count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided that the COUNCIL has determined the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. The COUNCIL will not count any portion of the cost of the materials and supplies themselves toward DBE goals, however.

under its own name, in the purchase and sale or lease of the products in question.

**J.** A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone or asphalt without owning, operating, or maintaining a place of business as provided in 49 CFR section 26.55(e)(2)(ii) if the person both owns and

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Contractor/Consultants	Total Contract Amount	Total Paid to Date	DBE Paid to Date	(1) DBE % Actual to Date	(2) DBE % Total Contract Value	Target DBE % Goal
Minnesota Transit Constructions (MnTC)	306,598,035	231,600,455	33,206,013	14.34%	10.83%	15%
Other Contractors	5,819,825	5,597,704	739,754	13.22%	12.71%	
O'Brien Kreitzberg (OBK) (3)	14,411,331	13,781,148	2,659,162	19.30%	18.45%	15%
Marsh	545,000	395,000	112,419	28.46%	20.63%	5%
Other Consultants	33,560,037	29,139,594	1,339,685	4.60%	3.99%	
<b>SUB-TOTAL</b>	<b>360,934,228</b>	<b>280,513,901</b>	<b>38,057,033</b>	<b>13.57%</b>	<b>10.54%</b>	
Other Commitments *	82,374,229	73,258,104	N/A	N/A	N/A	N/A
<b>TOTAL</b>	<b>443,308,457</b>	<b>353,772,005</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>

\* ROW Cooperative Agreements, Other Direct Costs, etc. (1) Calculates DBE percentage based upon DBE dollars expended vs. contract dollars paid to-date (actuals). (2) Calculates DBE percentage based upon DBE dollars expended vs. total contract value. (3) Value as of June 2003 - Preliminary