



## CONSTRUCTION LAW E-UPDATE

### FEDERAL DBE REGULATION: THE CREDITING OF DBE “PARTICIPATION” FOR CERTIFIED TRUCKERS AND SUPPLIERS

By Christopher K. Smith

JULY 2012

As any prime contractor working on a federally-funded project knows, compliance with DBE requirements is increasingly becoming one of the most scrutinized aspects of its performance on the project. Frequent concerns have been voiced by our clients regarding DBE “credits” to be given for the use of truckers and suppliers on federal, or federally-funded, projects. Prime contractors often look to DBE certified trucking companies and suppliers as an easy way to meet goals. However, the DBE rules and regulations governing these areas can be dangerous.

The following clarifies important aspects of the applicable federal regulations regarding trucking companies and suppliers.

#### DBE Trucking Companies

With respect to participation by DBE trucking companies, the general rule is that a prime contractor will be credited the value of the transportation services directly provided by a DBE trucking company itself, using trucks it owns, insures and operates with drivers it employs.<sup>[1]</sup> However, the credit calculation changes where a DBE firm leases trucks from a non-DBE firm. In such a situation, a prime contractor can still count the full value of the services provided by the DBE trucking company itself, but can only count the fees or commissions (i.e., markup) the DBE firm itself receives for arranging the truck lease from the non-DBE firm. No

DBE credit is awarded for the actual transportation services provided by the non-DBE firm and its trucks.

However, there is a seldom-utilized procedure to count DBE trucking participation under federal regulations, whereby prime contractors can actually obtain additional DBE credit for the use of trucks leased from non-DBE firms. Under this option, a prime contractor can receive credit for the use of non-DBE trucks not to exceed the value of transportation services provided by the DBE company’s trucks. By way of example, if DBE firm X uses two of its own trucks in the performance of your contract, but leases six trucks from non-DBE firm Y, DBE credit could be awarded for the total value of the transportation services provided by the two trucks actually provided by DBE firm X, and may also be awarded the total value of transportation services provided by two of the six trucks provided by non-DBE firm Y. Thus, whatever trucks the DBE owns can be “leveraged.” With respect to the other four trucks provided by the non-DBE firm Y, DBE credit will be awarded the general contractor only for the fees or commissions received by DBE firm X for the lease of such trucks from non-DBE firm Y.

#### DBE Suppliers

The major issue that arises with regard to the use of DBE suppliers is whether the DBE is, in fact, a supplier, or a “regular dealer” as defined by federal regulations, or merely a “broker”



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which arranges or expedites the procurement of supplies. The distinction is significant because under federal regulations, a prime contractor receives DBE credit equal to 60% of the value of the items it procures from a regular dealer. However, with a broker, it is only given DBE credit for the fee or commission a broker receives for arranging the procurement of the supplies. However, no credit is given whatsoever for the value of the supplies obtained through a DBE broker. Accordingly, it is important that prime contractors accurately and correctly classify their DBE suppliers as regular dealers or brokers so that they take the appropriate DBE credit.

Initially, prime contractors must remember that DBE firms are not certified as “regular dealers.” Rather, they are certified according to the most specific NAICS code for the type of work they perform. While a firm may be certified in an NAICS code related to performing specific supplier functions, there is no NAICS code for “regular dealer.” “Regular dealer” status only concerns a prime contractor’s counting of participation by certified DBE firms.

This is an area fraught with the possibility for abuse and the government knows it. Consequently, determining whether a DBE is a “regular dealer,” such that the prime contractor can count 60% of the value of the supplies provided by such DBE, becomes an important contract-by-contract determination. Recent U.S. DOT guidance advises that, in determining whether a DBE is a “regular dealer” on a particular contract,

two questions must be answered.

First, does the firm “regularly” engage in the purchase, sale or lease to the general public, in the usual course of its business, of products of the general character involved in the contract and for which DBE credit is sought? This question is designed to distinguish between the regular sale or lease of the products in question and merely occasional or ad hoc involvement “out of one’s living room.” While it is not necessary for every single item the DBE firm supplies to always be stored in the DBE’s warehouse, the place where the DBE firm keeps the supplies should be more than just a token location, such as a sales-oriented showroom. Such places are usually not sufficient to show that a DBE firm regularly deals in the items.

Second, is the role the firm plays with regard to your specific contract consistent with the regular sale or lease of the products in question, as compared to a role better described as that of a broker or manufacturer’s representative, who merely arranges the procurement of the supplies? For instance, if a DBE firm merely places an order for an item with a manufacturer, who delivers it directly to the job-site, the DBE is nothing more than a “broker,” in which case DBE credit is limited to the fee or commission earned for arranging the transaction. Although somewhat disappointing, this is a clearly more liberal rule than, for example, is found with New York City projects. New York City follows Local Law 129. No credit at all is given on New York City projects for brokers or suppliers.



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#### G&C Commentary

Since prime contractors frequently, and for good reason, use DBE trucking firms and/or suppliers to meet a portion of the DBE goals they confront, it is extremely important to properly calculate the credit to be claimed for the use of such DBE firms consistent with federal regulations.

For DBE trucking firms, be sure to explore the enhanced or “leveraged” counting option, which permits certain additional credit for the use of non-DBE trucks. The additional credit available will allow prime contractors to maximize the credit when its DBE trucking company leases part of the trucks it requires from a non-DBE firm. The challenge will be, however, convincing agency owners to accept and permit counting of DBE trucking participation under this enhanced option, because federal regulations permit the contracting agency to choose which method of calculation for DBE trucking credit it wants to use. Carefully review your bid package and general conditions for the calculations/rules applicable to DBE trucking firms. If they do not permit counting under the enhanced option, contact the owner agency and discuss the use of additional credit for non-DBE trucks under that option. The agencies’ goal should be to assure your lawful compliance, and not to deprive you of recognized mitigating rules.

With regard to suppliers, it is absolutely imperative that on

every contract, prime contractors closely review the role that their DBE suppliers are playing to ensure they qualify as “regular dealers” eligible for 60% credit. Do not accept the DBE’s representation that it is “certified” as a supplier, because that only begs the question. A certified supplier may or may not be a “regular dealer.” You must analyze the actual nature of the DBE’s business for each contract. If it appears that the DBE supplier is not regularly in the business of procuring the types of materials/supplies it intends to provide or is really only facilitating the delivery of supplies from some other entity, then you must treat the DBE as a broker and take credit only for the fees or commissions earned by the DBE on the project.

Careful planning during the bid preparation stage can avoid DBE “credit” miscalculations later, during contract performance, when it is often too late to remedy deficiencies. Finally, where the rules appear to be intentionally “gamed,” certainly not an unheard of circumstance regarding trucking and supplier services, significant civil and criminal penalties could result. If in doubt, be certain to consult with counsel competent in this rapidly evolving field.

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[1] Remember, also, that in order to be regarded as performing a “commercially useful function,” a DBE trucking company must own at least one insured and operable truck.