

**Updated 01/05/2024**

## **Disadvantaged Business Enterprise Program (DBE) Frequently Asked Questions (FAQ)**

DISCLAIMER: These questions and answers provide guidance and information in conjunction with the provisions under 49 CFR part 26, pertaining to the implementation of the North Dakota Department of Transportation (the Department's) Disadvantaged Business Enterprise (DBE) program. These questions and answers are not, in themselves, legally binding or mandatory, and do not constitute regulations. While these questions and answers are not mandatory, they are derived from extensive DOT, DBE, and contractor experience and input concerning the determination of compliance with Part 26.

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## **1. What is a Disadvantaged Business Enterprise (DBE)?**

A disadvantaged business enterprise (DBE) is a for-profit small business concern that is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged. In the case of a corporation, 51 percent of the stock is owned by one or more such individuals; and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

## **2. What is the North Dakota Unified Certification Program?**

The North Dakota Unified Certification Program (UCP) was developed under a mutual agreement between certifying agencies, creating “one-stop shopping” for Disadvantaged Business Enterprise (DBE) certification in North Dakota. The UCP Board certifies eligible firms throughout the state for Federal Aviation Administration, Federal Transit Administration, and Federal Highway Administration.

## **3. What are the DBE program objectives?**

To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs; to create a level playing field on which DBEs can compete fairly for DOT-assisted contracts; to ensure that the Department's DBE program is narrowly tailored in accordance with applicable law; to ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs; to help remove barriers to the participation of DBEs in DOT-assisted contracts; to assist the development of firms that can compete successfully in the marketplace outside the DBE program; and to provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

## **4. What are the criteria for DBE certification?**

Eligibility requirements for certification as a DBE are stated in 49 CFR, Part 26. Eligibility must be proved by a DBE applicant. The following are six of the requirements stated in the regulation. For more specific criteria, refer to 49 CFR, Part 26.

**A. Social and Economic Disadvantage:** A disadvantaged owner must be a U.S. Citizen (or resident alien) and meet the federal definition of socially and economically disadvantaged as defined in 49 CFR Part 26.67. Presumptive groups include women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian-Americans, or other minorities found to be disadvantaged by the regulations or any individual found to be socially and economically disadvantaged on a case-by-case basis.

**B. Personal Net Worth:** Only disadvantaged persons having a personal net worth (PNW) of less than \$1.32 million can be considered as a potential qualified DBE. Items excluded from a person's net worth calculation include an individual's ownership interest in the applicant firm, and his or her primary residence.

- If an asset is held as community property, or jointly between two people, 50 percent of the value of the asset is normally attributed to each person. For example, suppose a woman owner of a firm applying for DBE certification has, with her husband, a \$100,000 joint savings account. Half of this asset -- \$50,000 -- would be counted toward her personal net worth. The recipient to which her firm applied would not count the full \$100,000 toward her personal net worth.
- North Dakota is a state that also uses the economic criteria of the majority owner(s) Adjusted Gross Income (AGI). If the majority owner(s) average AGI over the most current 3-year period exceeds \$350,000 the firm may be found ineligible and/or graduate from the program.

**C. Business Size Standard:** A firm (including affiliates) must be a small business as defined by the Small Business Administration (SBA). It must not have annual gross receipts over \$30.4 million in the previous three fiscal years. Depending on the type of work the business performs, other size standards may apply.

**D. Ownership:** Must be a for-profit small business concern where socially and economically disadvantaged individuals own at least 51% interest and control management AND daily business operations.

**E. Independence:** The business must not be affiliated with another firm in such a way as to compromise its independence and control. These include, but not limited to, such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

**F. Management and Control:** The socially and economically DBE owner(s) must possess the power to direct or cause the direction to the management and policies of the firm and to make day-to-day decisions, as well as long-term decisions on matters of management, policy, and operations.

- The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the

firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. **Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.**

## 5. What are the benefits of becoming DBE certified?

Because NDDOT receives federal funding they are required to set DBE goals on federally funded highway construction projects. Primes bidding those projects must meet the goals by subcontracting to certified DBEs or provide Good Faith Efforts to meet the goal. Being DBE certified gives firms a higher likelihood of being used on a Race Gender Conscious project (a project with a DBE goal higher than 0%).

Other benefits to being certified include business development and a wide range of training opportunities to assist the firm in becoming successful.

## 6. How can I prove my group membership?

Any of the following documentation which indicates group membership will be considered: Your Birth Certificate, your Parent's or Grandparent's Birth Certificate, Naturalization Papers, Passport, Military Discharge Paper (D.D. 214), Tribal Enrollment Card or any other documentation that provides evidence of group membership. However, if you do not have any of the preceding documentation as evidence of group membership, you will have to submit one (1) notarized statement from a relevant community organization attesting that you are regarded as a member of the group and stating how long you have been regarded as a member of that particular group. Group membership cannot be claimed solely upon being born in a certain country; and personal photographs are not acceptable as evidence of group membership. Any documents presented as evidence of group membership, in a language other than English, must be translated and notarized.

Typically, individuals in the following groups are rebuttably presumed to be socially and economically disadvantaged, however those outside of these are assessed on a case-by-case basis: Black Americans, which includes persons having origins in any of the Black racial groups of Africa; Hispanic Americans, which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race; Native Americans, which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians; Asian-Pacific Americans, which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong; Subcontinent Asian Americans, which

includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka; and Women.

## **7. If I do not fall within the presumptive groups can I still be considered a DBE?**

Yes, but you must prove by providing documentary evidence that you are socially and economically disadvantaged. Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who meets the criteria based on 49 CFR Part 26, and any individual who the Department finds to be socially and economically disadvantaged on a case-by-case basis.

Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of individual social disadvantage must include the following elements:

(A) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(B) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and

(C) Negative impact on entry into or advancement in the business world because of the disadvantage. Recipients will consider any relevant evidence in assessing this element. In every case, however, recipients will consider education, employment, and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

## **8. How do you determine the eligibility of firms owned by an Indian Tribe?**

Any Indian Tribe may own a DBE firm as an entity. It is not necessary, in these cases, that disadvantaged individuals (i.e., natural persons) own the firm.

- However, the firm must be controlled by socially and economically disadvantaged individuals.
  - For example, suppose the CEO of a firm owned by an Indian Tribe is a non- disadvantaged white male, or that such persons effectively control the day-to-day business operations of the firm. The firm would not be an eligible DBE, because it is not controlled by socially and economically disadvantaged individuals.
- One implication of the control requirement is that disadvantaged individuals involved in controlling the firm must meet personal net worth (PNW) standards. Not every member of the Indian Tribe must meet these standards or complete a PNW statement. Only the disadvantaged officers, board members, CEO, etc. who

actually **control** the firm must do so. These individuals would also be responsible for submitting the certification of disadvantage required by §26.67(a) (1).

Affiliation is an important concept in the DBE program. It does apply to firms owned by Indian Tribes. If it did not, then these firms could enjoy a significant competitive advantage over other DBE firms, because they could have access to the resources of their affiliates. At the same time, the Department recognizes that Indian Tribes often own a variety of businesses that could be considered affiliates because of common ownership by the entity. Literal application of the affiliation rule might therefore result in precluding firms owned by Indian Tribes from participating in the DBE program.

Consequently, the Department interprets its rule to treat firms owned by Indian Tribes as entities as not being affiliated with other businesses owned by the entities if there is a legally binding mechanism in place to prevent the firms from accessing the resources of the entities' other businesses.

- For example, suppose an Indian Tribe owns a small construction company that is seeking DBE certification. The Tribe also owns several non-transportation related businesses. To avoid being considered an affiliate of the other businesses, the construction company would have to be subject to a legally binding provision precluding it from receiving any funds or other resources, directly or indirectly, from the other businesses.

## **9. Which business owner should fill out the Financial section of the online application?**

The majority disadvantaged owner(s) whose ownership and control is/are being relied upon for DBE certification should provide a personal financial statement. Usually this is the person who owns 51% or more of the firm. If two disadvantaged owners make up a majority of 51% ownership, both will be required to complete the PFS. For example, if Owner A owns 33%, Owner B owns 33% and Owner C owns 34% the two disadvantaged owners whose ownership and control is being relied upon must complete personal financial statements.

## **10. Why is it required to have an on-site evaluation of my business?**

It is a regulatory requirement. The Federal regulations states in 49 CFR Part 26.83 subpart C, section 1: "Perform an on-site visit to the offices of the firm. You must interview the principal officers of the firm and review their résumés and/or work histories. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area. You may rely upon the site visit report of any other recipient with respect to a firm applying for certification."

## **11. I'm an out-of-state business seeking work in North Dakota, can I be certified as a DBE?**

Yes, however your firm must first be certified in your home state. For example, if your firm is based in Minnesota, you must proceed through Minnesota's DBE certification process before seeking DBE

certification in North Dakota. Once you are certified as a DBE in your home state, you can then apply for interstate certification in North Dakota.

## **12. Is there a cost to the applicant for the certification process?**

No, there is no cost to the applicant.

## **13. I have questions regarding the DBE application; who can I contact for assistance?**

There are detailed application instructions available online at the Civil Rights Certification and Compliance System webpage. If you have questions about the program, the Department's DBE Supportive Services provider Project Solutions, Inc., is available free of charge to answer any additional questions.

Project Solutions, Inc., [dbe@projectsolutionsinc.com](mailto:dbe@projectsolutionsinc.com), (701) 214-5775.

## **14. What are my appeal rights if I am denied DBE certification?**

You may appeal a decision if you feel all the facts have not been duly considered. To do so, you must respond in writing within 90 days from the date of your denial letter to:

U.S. Department of Transportation  
1200 New Jersey Avenue, SE  
Room W78-338  
Washington, DC 20590 Phone: 202-366-4070

Your letter to the U.S. Department of Transportation must contain the following:

- Information and arguments concerning why the North Dakota Department of Transportation's decision should be reversed
- The name and address of any other U.S. DOT recipient/agency which currently certified the firm, which has rejected an application for certification from the firm or removed the firms' eligibility within one year prior to the date of the appeal, or before which an application for certification or a removal of eligibility is pending.

## **15. How long is the certification process from start to finish?**

Each application is reviewed in the order it is received. At times there may be quite a few applications pending review ahead of yours. The number of applications we have at one time can vary greatly. If an application is started in the online system and not submitted within 90 days or have any progress to be completed, it will be deleted, and a new application will have to be started.

The time it takes to process your application can be delayed due to an application being submitted incomplete. If your application is missing any required items, you will be contacted through the system's Q&A function and informed of specific item(s) that are still needed. Your application is not moved to the next step in the review process until it is considered complete.

If you are submitting an interstate application (firm located outside of North Dakota) a complete application is still needed before moving to the next step in the certification process. Once a

complete application is received, the home state the firm is certified in is contacted to provide the most current copy of their Home Office/On-Site Review. Home states are supposed to provide this information within 7 days of request per CFR, however, at times it may take longer which could also delay the certification process.

Civil Rights tries their best to process applications in a timely manner. The process can take anywhere from 2 weeks once an application is considered complete to 1 month or more depending on scheduling.

Here is an overview of each step in the process:

1. Application is submitted
  - a. If application is complete proceed to step 2
  - b. If application is incomplete a Q&A is sent requesting any further information needed. Application is considered incomplete and not “accepted” until all items are received.
2. Home Office/On-Site Review – this may be a virtual or in-person meeting with Civil Rights Staff to complete the standard form for each new firm. Pictures of large equipment may also be requested. (Request from home state if Interstate application)
3. Interview with UCP Board – formal interview with 3 NDDOT staff:
  - a. Civil Rights Director or DBE Program Administrator – will ask general questions about why the applicant wants to be certified
  - b. Financial Management Division Representative – will ask general questions about the firm’s finances
  - c. Subject Matter Expert (typically Construction Services Representative if a highway construction firm) – will ask questions to determine the expertise of the applicant in the field they work in as well as their control of the business  
**Or** if Interstate application,
  - d. Review of application documents and home state on-site review to meet all criteria for DBE certification
4. Certification or Denial (final step)

## **16. I’m a prime contractor, how can I find DBE firms?**

All certified firms are listed in the DBE directory. To access the directory, visit <https://dotnd.diversitycompliance.com> and select “DBE/ACDBE Certified Directory” in the left column. You may choose the parameters of the search or display the full directory by satisfying the reCAPTCHA prompt and selecting: “Download Entire Directory”

## **17. My business is certified as a DBE, what resources are available to help me secure subcontracting opportunities on NDDOT highway construction projects?**

1. DBE Supportive Services provides an orientation to “Doing Business with NDDOT.” This orientation is a valuable tool for firms actively looking to work in our state.



2. The DBE Newsletter contains valuable information to DBEs working and searching for work in the state on highway transportation related jobs.
3. View DBE Newsletters for each regularly scheduled bid opening at <https://www.dot.nd.gov/divisions/civilrights/dbeprogram.htm>
4. Visit the Department's website to view all upcoming jobs currently out for bid or for RFPs announcing consulting opportunities: <https://www.dot.nd.gov/business/>

## **18. Does North Dakota accept my home-state DBE certification without further procedures as allowed in 49 CFR § 26.85 Interstate certification?**

No, North Dakota follows the second option identified in 49 CFR § 26.85 and does not accept another state's certification "without further procedures." Therefore, out-of-state applicants must submit all documentation that the home-state received on which it based the decision to grant the firm's DBE Certification. A complete list of required documents is stated in the federal rule starting at 49 CFR §26.85 (c).

- **NDDOT only accepts online applications through our Certification and Compliance System. Any paper applications sent to the Department are returned to the applicant. This applies to both in-state and interstate applications.**
- Before an out-of-state firm will be considered in North Dakota, the firm must first be certified in its home state.
- Your firm does not need to create a new certification application. Instead, you need to simply provide all documentation that your home-state received on which the DBE Certification decision was based.
- As required in 49 CFR Part 26, the home-state will have made its determination to certify based on:
  - Federal tax returns – both personal and business
  - Proof of ownership
  - Proof of group membership
  - Your company's organizational documents such as by-laws, partnership agreements, articles of incorporation and the like.
  - A list of equipment used to perform the work your firm is certified to perform.
  - No Change Affidavits (NCA)
  - Other items may have been included in the supporting materials on which your certification was based.

Submitting an interstate certification application through NDDOT's online application system allows a quick and paper-less means to apply for DBE Certification in North Dakota. To begin your application, navigate to: <https://dotnd.diversitycompliance.com/>

## **19. How should I let the UCP know that my DBE firm's address has changed or that we have a new telephone number?**

For any simple change of contact information that needs to be made in the system, email [civilrights@nd.gov](mailto:civilrights@nd.gov) or contact the DBE Supportive Services Consultant.

You will receive a list of any additional information that may need to accompany contact information changes made intermittently between annual eligibility reviews and annual Notices of Change Affidavits.

## **20. What types of documents do I need to submit with my annual No Change Affidavit (NCA)?**

Material changes to your business operations necessitate supporting documentation. Questions related to documentation may be directed to DBE Supportive Services or [civilrights@nd.gov](mailto:civilrights@nd.gov)

- Equipment – include new titles, registration cards, proof of insurance, and proof of purchase.
- Agreements/Contracts – include new business agreements/contracts, i.e., lease or rental, consultant, workforce/employment, management, loans, partnership.
- Updates/changes in governing documents such as articles of incorporation or by-laws.
- Minutes of stockholders/ board of directors' meetings.
  - Stock ownership – any changes in stock issued, sold, transferred, etc.
- New Certifications or Denials – (DBE, SBA 8 (a) or SDB) made by any state or agency.
- Interstate Certifications - Current Home-state DBE certificate/letter/directory entry
- Every 3-5 years a firm may be requested to submit an updated Personal Net Worth statement with the No Change Affidavit to determine continued eligibility in the ND DBE Program.
- Businesses that provide trucking operations must submit the Trucking Firm Equipment List
- Businesses that act as Regular Dealer/Suppliers must submit the Products Materials List

## **21. If there is a change in the ownership of a DBE-certified firm, is the firm automatically decertified?**

No. A certified DBE firm remains certified until and unless it is decertified. A recipient or UCP can decertify a firm only by using the procedures set forth in section 26.87.

- Under section 26.83(i), a certified DBE firm is required to notify the recipient or UCP in writing within 30 days of any material change in circumstances that could affect its ability to meet certification requirements, or any material change in the information provided in the firm's application form, including those pertaining to ownership and contact information (see Section 3: Majority Owner Information, in Appendix F of 49 CFR Part 26).
- The DBE must send this notice to all recipients or UCPs with which it is certified.
- If the firm fails to provide this written notice within 30 days of the occurrence of the change, the firm is subject to decertification for failure to cooperate as provided in sections §26.73(c) and 26.109(c).
- Along with the notice of change, the DBE must attach supporting documentation describing the change in detail, including documentation that supports the disadvantaged status of any new owner(s) and their ownership and control of the firm.
- The recipient or UCP may require the firm to provide additional documentation if necessary to determine whether the new owner meets disadvantage, ownership, and control requirements, and it may conduct a new on-site review of the firm.
- If the firm's notice and documentation concerning a change in ownership or other

material change leads a recipient or UCP to determine that the firm has become ineligible (e.g., because the new owner is not a disadvantaged individual or does not control the business), the recipient or UCP should initiate a section 26.87 decertification proceeding. The firm remains certified pending the outcome of the proceeding.

## 22. How can I find contracting opportunities on transportation related projects in North Dakota?

- Prime contractors and large subcontractors sign in to the Advertisement and Sign-In System to indicate their interest in bidding on work. Navigate to <http://www.dot.nd.gov/business/bidinfo.htm> to access the Report for Prime Contractor & Sub over \$500K Sign-In. Then call, email, or fax bidders with your quote using the contact information provided there.

## 23. How does my business structure impact my eligibility?

Different business structures can mean that monies from your business flow through your personal income, specifically when your business is an S-Corporation. When monies flow through your personal income they are counted towards your adjusted gross income unless you can provide proof that those funds were allocated back into the business or used to pay business related expenses. If you cannot and your adjusted gross income exceeds the dollar threshold for DBE Certification eligibility requirements your firm may graduate. There is no clause for the type of business structure a firm has in CFR so be mindful how it may impact your certification.

## 24. Does North Dakota graduate firms based on the \$350,000 three-year average adjusted gross income threshold?

The short answer is yes. In 49 CFR 26.67 it states

*(ii)(A) If the statement of personal net worth and supporting documentation that an individual submits under paragraph (a)(2) of this section demonstrates that the individual is able to accumulate substantial wealth, the individual's presumption of economic disadvantage is rebutted. In making this determination, as a certifying agency, you may consider factors that include, but are not limited to, the following:*

- (1) Whether the average adjusted gross income of the owner over the most recent three-year period exceeds \$350,000.*

Because CFR states certifying agencies may consider the \$350,000 three-year average adjusted gross income threshold as a determining factor to rebut the economic disadvantage some states chose to use this criterion and some do not. North Dakota has historically used this criterion as a threshold and maintains that position currently.

## TRUCKING

### 25. What requirements differ for DBE trucking firms?

A DBE trucking company must own and operate at least 1 truck. Once they do, they may then lease trucks from a **reputable dealer** that is driven by their own employees. A DBE may not lease trucks from a non-reputable dealer, such as a friend or someone else with a trucking company that has extra trucks for use. Project personnel may request lease agreements to determine the trucks have been leased from a reputable dealer and can legitimately be counted towards the DBE participation

on the project. Trucks must also clearly display the DBE company name in clear view for project personnel to identify them.

If a DBE trucking company is utilizing the 1:1 Ratio (more can be learned about this in the DBE Special Provision as well as the DBE Manual) the non-DBE match trucks used must work under the DBE in a legitimate subcontract. The non-DBE match trucks cannot be owned by the Prime contractor. The DBE is responsible for reporting their payments to the non-DBE subcontractor in the Certification and Compliance System as well as ensuring the non-DBE is submitting their certified payrolls in LCPtracker. The DBE Weekly Trucking Report – SFN 60781 is also required to be submitted to the Project Engineer each week by the DBE if they are utilizing the 1:1 Ratio. To count non-DBE match trucks, the DBEs own trucks must also be on the job site at the same time as the non-DBE trucks (i.e., a DBE cannot send all non-DBE match trucks to the job site up front and then their own trucks later on)

## **SUPPLIERS/DEALERS**

### **26. What requirements differ for DBE suppliers/regular dealers?**

The following is an excerpt from 49 CFR Part 26 and clearly outlines the requirements:

*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 or leased to the public in the usual course of business.*

*(A) To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.*

*(B) 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 this paragraph (e)(2)(ii) 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 and not on an ad hoc or contract-by-contract basis.*

A DBE supplier's participation (contract amount paid for certified work) is counted at 60%. That means if a DBE supplier has a contract with a Prime for \$10,000 the Prime can count 60% of that total contract towards their DBE participation or \$6,000.

## **BROKER**

### **27. What do I need to know if I want to be certified as a DBE broker?**

A broker essentially acts as a passthrough between one company to another to secure goods or services. Only their brokerage fee can be counted towards the DBE participation. If a DBE broker is securing \$10,000 in materials for a Prime and their fee for those services is \$500, only the \$500 can be counted towards the DBE participation.

## COMMERCIALLY USEFUL FUNCTION

### 28. What is a Commercially Useful Function (CUF) and why is it necessary?

The following from 49 CFR Part 26.55 explains why a CUF is required:

*(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, you must 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.*

*(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 funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, you must 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, you must presume that it is not performing a commercially useful function.*

**If a CUF is not performed the Prime contractor and NDDOT cannot count those funds towards the DBE participation.**

## PROMPT PAY

### 29. When should I expect to be paid by a Prime?

49 CFR Part 26.29 describes the requirement of Prompt Pay on federal aid highway construction projects. This requirement applies to all subcontractors, not just DBEs. CFR states that NDDOT must create a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment you make to the prime contractor. However, NDDOT identifies in their Standard Specifications for Road and Bridge Construction Manual in section 109.04 (D) as the following:

*D. Prompt Payment.*

*Within 20 calendar days of receiving payment from the Department, pay subcontractors their portion of the payment less applicable retainage, not to exceed 2 percent. If the Contractor does not make prompt payment, the subcontractor may notify the Engineer.*

*The Contractor may withhold payment to a subcontractor for just cause. If withholding payment from a subcontractor, immediately provide written notification to the subcontractor and the Engineer with the reasons for withholding the payment. If the*

*Engineer determines the Contractor is withholding payment with just cause, interest will not accrue.*

*If the Engineer determines the Contractor is withholding payment without just cause, beginning on the 21st calendar day after the Contractor's receipt of payment from the Department interest will accrue for the subcontractor at the rate provided by NDCC 13-01.1-02. Additionally, the Department may withhold all payments to the Contractor until the Contractor properly pays the subcontractor and agrees to make all future payments to subcontractors as required by the contract.*

*The Department will apply these prompt payment procedures to all tiers of subcontracts, in accordance with 49 CFR 26.29.*

Civil Rights utilizes the Certification and Compliance System as our means of monitoring Prompt Pay for DBE subcontractors. Primes add their subcontractors to the contract in the online system. Once payments to the Prime from NDDOT start registering in the system, they are required to report their payments to all their subs every month the project is active, even reporting zero in the months the sub(s) did not work. It is the DBEs responsibility to respond to the request from the system to verify what the Prime reported is correct. If it is incorrect, a discrepancy should be opened and the Prime and DBE should try to work it out between themselves. If they cannot come to a resolution the Project Engineer and Civil Rights will get involved.

## **REPLACEMENT APPROVAL REQUESTS**

### **30. Can a DBE that was originally committed to being used at time of award be replaced?**

The Replacement Approval Form – SFN 60595 must be completed any time there is a change to DBE participation committed to at the time of award. It must also be completed if the goal on the project was not met and the Prime intends to subcontract work that wasn't originally committed.

A Prime cannot change the DBE they use from what was originally committed to in their DBE bid documentation and Form Cs without an approved form. Even if they are replacing an original DBE with another DBE for the exact same work, the Replacement Approval Process must be followed and approved prior to any changes.

If a DBE has overcommitted themselves or is unable to complete the work for any reason, they need to inform the Prime right away and send them documentation stating their unavailability so the Prime can attach it to the Replacement Approval Request Form.

Primes are required to provide DBEs working on their projects with a proposed progress chart or schedule. Primes are also required to inform DBEs if any scheduling changes occur. If a Prime does not give adequate notice to a DBE of when they are expected to be on the project to work, they cannot replace the DBE if they are unavailable at that specific time. Documentation that the DBE was adequately informed of project scheduling is encouraged and may be requested to approve the Replacement Approval Request Form.