

# Wisconsin Department of Transportation (WisDOT)

## DBE Trucking Utilization Policy

### PURPOSE

These provisions provide an explanation of the federal law and information regarding compliance with the DBE requirements applicable to Trucking.

### POLICY STATEMENT

It is the policy of the Wisconsin Department of Transportation (WisDOT) that DBEs, as defined in 49 CFR, Part 26, shall have the maximum feasible opportunity to participate in contracts financed in whole or in part with federal funds provided by the U S Department of Transportation (USDOT). Consistent with this policy, WisDOT will not allow any person or business to be excluded from participation in, denied benefits of, or to otherwise be discriminated against in connection with the award and performance of any DOT assisted contracts because of **Sex, Color, Race or National Origin, age, disability, or income status**. WisDOT has established the Disadvantaged Business Enterprise Program in accordance with regulations of the DOT, 49 CFR Part 26.

### CONTRACT ASSURANCE

The contractor, and all subcontractors, shall not discriminate on the basis of **sex, color, race or national origin, age, disability, or income status** in the performance of all contracts. The contractor agrees to act in accordance with applicable requirements of 49 CFR Part 26 in the execution and award of all contracts. Failure by the contractor to comply with these requirements is a material breach of contract, which may result in the termination of contract or other such remedy as WisDOT deems appropriate.

### COUNTING DBE PARTICIPATION & COMMERCIALLY USEFUL FUNCTION

In accordance with 49 CFR Part 26.55 WisDOT will determine the percentage of DBE participation that will be counted toward the overall DBE Goal as Follows:

1. When a DBE participates in a contract, WisDOT will only count the value of work actually performed by the DBE toward DBE Goals.
  - a) The entire amount of the portion of the construction 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).
  - b) The entire amount of fees or commission 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 DOT assisted contract, counts towards DBE Goals, provided that WisDOT determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
  - c) 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

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2. WisDOT will count expenditures of a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on the contract.
  - a) 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 materials, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, WisDOT 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 DBE credit claimed for its performance of the work, and other relevant factors.
  - b) If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own workforce, 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 Trucking, WisDOT must presume that it is not performing a commercially useful function.
  - c) WisDOT decisions on commercially useful functions matters are subject to review by the concerned operating administration, but are not administratively appealable to USDOT.

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### GUIDELINES

The intent of the Wisconsin Department of Transportation's (WisDOT) trucking guidelines is to comply with the Disadvantaged Business Enterprise (DBE) Trucking Regulations as defined in 49 CFR, Part 26.55(d) as amended on June 16, 2003.

This Clarification will better reflect WisDOT's position on allowing DBE credit for trucking firms. It considers the commitment of resources and the financial risks by DBEs who own their own trucks versus those who only lease.

WisDOT will use the following general guidelines when considering a trucking firm to ensure that it falls within the normal concept of trucking and how it is eligible to count credit toward the DBE goal(s) on a project.

1. Each trucking operation will be evaluated on an individual basis.
2. The DBE Trucking firm **will not** be allowed to obtain trucks from the prime to do the work on the project and have the prime receive credit towards the goal(s).
3. All certified DBE Trucking firms are required to submit an annual inventory of all equipment owned and/or leased on a long term basis in order to receive DBE credit toward project goals. They must also update and re-submit their schedules any time a change occurs.
4. The DBE may lease trucks from a subcontractor working on the project, provided the trucks are obtained from the subcontractor prior to the project letting date. The lease agreements for these trucks must be provided to the Office of Business, Outreach and Equity Compliance (OBOEC), Civil Rights & Compliance Programs Section at least one week before the letting as verification in order to receive credit. A bon-a-fide lease must be for a minimum of 6 months.
5. To be considered an eligible DBE trucking operation, the DBE must be responsible for the management and supervision of the entire trucking operation. The trucking operation must be consistent with common industry practice and not merely a contrived arrangement for the purpose of meeting DBE goals. Thus, the DBE firm must perform a commercially useful function.
6. Completed Attachment A forms from the prime contractor showing trucking firms to be used on a project may not be changed, altered or amended without a prior notification sent to and received by the Civil Rights and Compliance Program Section Central Office and DBE Support Services Office.
7. A Hiring Agreement signed by both the, DBE or Non-DBE Trucking Firm (Broker) and its DBE lessees must also be submitted with the Civil Rights and Compliance Program Section for approval of DBE credit on each and every project. (Sample attached).
  - a. If a DBE lessee who has signed onto a project is temporarily unable to work on the project the DBE or Non-DBE Trucking firm is permitted to temporarily replace the DBE Firm with;
    - A DBE Lessee who is also working on the project but able to manage the additional work.
    - A DBE Lessee who is currently not on the project but available to work.
    - A DBE who is not a lessee but available to work
    - A Non-DBE available to work. (No credit will be given during this period worked).

*~ When a DBE Lessee is replaced temporarily on a project, an email notification (containing the DBE Lessee Contact Information, reason for replacement, duration of the replacement, and new start date for the DBE Lessee), is acceptable and must be sent to the Civil Rights & Compliance Section for approval and record purposes.~*

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- b. If the DBE Lessee is being replaced on the project permanently due to the following;
- Refuses to execute the written contract;
  - Voluntarily withdraws from the project and provides written notice;
  - Becomes bankrupt, insolvent, or exhibits credit unworthiness;
  - Ineligible to work because of suspension or debarment proceedings;
  - Firm's owner dies or becomes disabled and is unable to complete its work.
  - Continue work on the project, is terminated or DBE Lessee is disbarred from the project

The Prime Contractor on behalf of the DBE or Non-DBE Trucking Firm (Broker) in addition to (a.) above must submit an amended Attachment (A) form showing the change, and also request WisDOT consent for proposed termination of DBE commitment per the DBE Replacement policy guidelines.

*~Note that a Good Faith Waiver may be granted for the unmet portion of the contract goal if the Prime demonstrates good faith effort to replace DBE.~*

8. When there is a significant change that results in the DBE firm receiving substantially more or less dollars than what the prime was given credit toward meeting the DBE Goal, An amended Attachment (A) form needs to be submitted with the Civil Rights and compliance Program Section.
9. A leased truck is defined as follows:
- a. A truck owned and operated by a firm (Lessee), who has a signed lease agreement with a DBE Trucking firm (Lessor).
  - b. The lease agreement indicates that the DBE Firm (Lessor) has exclusive use and exclusive control over the truck. Exclusive use and control as used here does not preclude the leased truck from working for other firms during the term of the lease, provided the DBE Firm releases the vehicle and driver. However, the lease agreement must give the DBE firm absolute priority for use of the leased truck.
  - c. The lease shall be for a minimum of 6 months.
10. WisDOT Support Services will work with trucking firms and assist them in getting into other fields of work.

**WisDOT DBE Trucking Firm Evaluation**

- Each DBE Firm is responsible for providing lease information to the WisDOT Support services office for evaluation.
- Evaluation factors that will be considered include:
  - ✓ Years of trucking experience by DBE
  - ✓ Time certified with WisDOT
  - ✓ Management expertise/experience
  - ✓ Type of lease agreement
  - ✓ Terms and conditions of lease(s)
  - ✓ Number of vehicles owned
  - ✓ Past performance record
  - ✓ Any other relevant information.

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### DBE Trucking Goal Credit

WisDOT will evaluate each DBE on an individual basis.

#### General Rule:

\*The waiver regarding DBE Trucking regulations as defined in 49 CFR 26.55 on March 11, 2003 as approved by the USDOT has been rescinded\*

As of October 1, 2010, DBE Trucking Firms may no longer lease non-DBE Trucking Firms on a 1 for 1 basis for full credit on DOT Projects where at least one owned truck also works on the project.

- The DBE Trucking firm performs the work with vehicles it owns for 100% DBE Credit.
- The DBE Trucking Firm performs the work with vehicles it owns and/or vehicles it leases that are owned by other certified DBE Trucking Firms for 100% DBE Credit.
- The DBE Trucking Firm performs the work with vehicles it owns and/or vehicles it leases that are owned by non certified DBE Trucking Firms will receive 10% DBE Credit per the industry standard for all non DBE Participation.
- If a non-DBE Trucking Firm performs work with vehicles it owns, it will not receive credit for work done on the project.  
But, If a non-DBE Trucking Firm performs work with vehicles it leases that are owned by certified DBE Trucking Firms, it will receive 100% DBE Credit for all DBE Participation.
- The use of leased vehicles is approved on a seasonal rather than a project-by-project basis. DBE firms are expected to use the same trucks for DBE credit on all projects throughout the season, rather than leasing different trucks for each project.

### Case-by-Case Discretion

The USDOT approved a WisDOT request for a waiver regarding DBE trucking regulations as defined in 49 CFR 26.55 on March 11, 2003. \*This waiver has been rescinded\*.

The discretion on the credit ratio and credit for work performed by DBE and non-DBE trucks are conditionally approved for use by WisDOT on a case-by-case basis.

- WisDOT establishes written guidance and procedures that would govern the exercise at its discretion.
- The FHWA Wisconsin Office must concur in WisDOT's guidance and procedures prior to implementation.
- WisDOT must require a Hiring Agreement be signed between the DBE and its DBE lessees to be submitted with the Civil Rights and Compliance Program Section for approval of DBE credit on each and every project, eliminating the need for placeholders in the Civil Rights and compliance System.
- WisDOT must also require a Hiring Agreement be signed between the non-DBE and its DBE lessees to be submitted with the Civil Rights and Compliance Program Section for approval of DBE credit on each and every project, eliminating the need for placeholders in the Civil Rights and compliance System.
- WisDOT uses this authority selectively on a case-by-case basis, granting this authority as a routine practice.
- WisDOT must obtain the concurrence of the FHWA Wisconsin Division Office before making such a determination in each particular case.

A DBE owned trucking firm may **no longer** apply for a project waiver to receive 100% credit using the 1:1 ratio.

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**Credit for work Performed by non DBE Trucking Firm**

WisDOT will approve a 10% DBE Goal Credit for all non DBE Trucks leased to a DBE trucking firm performing on any project provided at least one of the DBE Trucking Firms vehicles is working on the project. A Hiring Agreement must also be signed between the DBE Firm and its non DBE lessees performing on the project, to be submitted with the Civil Rights and Compliance Program Section for approval of DBE credit on each and every project.

WisDOT will approve a 100% DBE Goal Credit for all DBE Trucks leased to a non-DBE trucking firm performing on any project. A Hiring Agreement must also be signed between the non-DBE Firm and its DBE lessees performing on the project, to be submitted with the Civil Rights and Compliance Program Section for approval of DBE credit on each and every project.

To request additional information contact:

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