



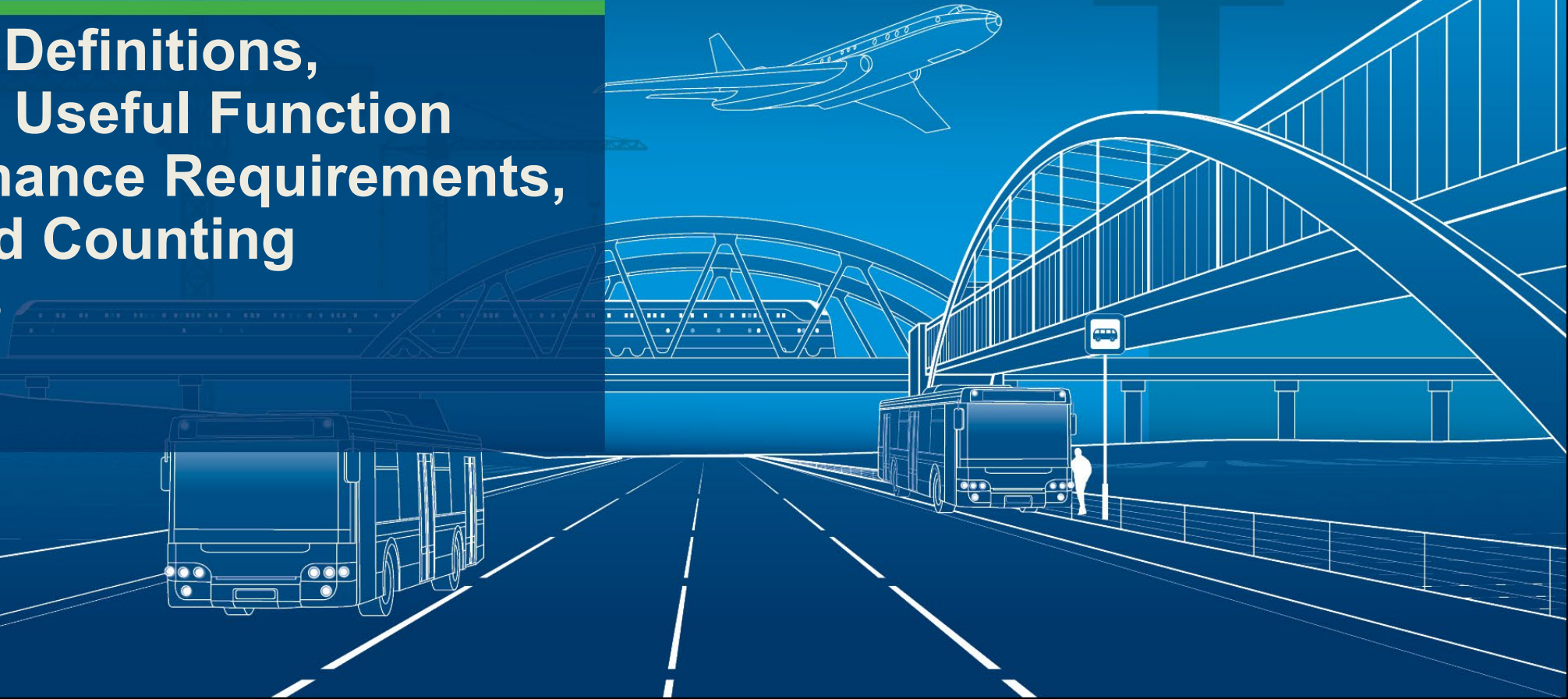
Disadvantaged Business Enterprise Program

Airport Concessions Disadvantaged Business Enterprise Program

**FINAL RULE**

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# DBE Supplier Definitions, Commercially Useful Function (CUF) Performance Requirements, and Pre-Award Counting Requirements



# DBE Supplier Requirements

**DBE Supplier Definitions, Counting, and  
CUF Performance Requirements are  
Covered in  
49 CFR §26.55(e) and §26.53(c)(1)**

# DBE Supplier Definitions

## DBE Supplier Definitions 49 CFR §26.55(e)

# DBE Suppliers (49 CFR §26.55(e)(1),(2), and(3))

 NEW

- Manufacturer (100%)
- Regular Dealer (60%)
- Distributor (40%)
- For a DBE that is neither a manufacturer, regular dealer, nor a distributor (e.g., packagers, brokers, manufacturer's representatives, or others that arrange, facilitate, or expedite transactions) count only the reasonable amount of fees and commissions charged, such as delivery charges; do not count the cost of materials and supplies

# DBE Supplier Definitions

- **Manufacturer (49 CFR §26.55(e)(1):**

*“...a manufacturer is a firm that owns (or leases) and operates 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 by the specifications. Manufacturing includes blending or modifying raw materials or assembling components to create the product to meet contract specifications. When a DBE makes minor modifications to the materials, supplies, articles, or equipment, the DBE is not a manufacturer. Minor modifications are additional changes to a manufactured product that are small in scope and add minimal value to the final product.”*

# DBE Supplier Definitions

## **Manufacturer Example:**

*DBE X is certified as a steel fabricator and leases a facility where it produces its products. At this facility, it cuts, shapes, and assembles raw steel components to create products, such as bearing plates, fasteners, and I-beams.*

*On the contract in question, it uses manufactured sections of steel, but assembles them to form the final product meeting specifications. This work is performed at DBE X's facility.*

- **Is DBE X considered a manufacturer?**

**YES! (Count 100%)**



# DBE Supplier Definitions

## Manufacturer Example:

*DBE X is certified as a steel fabricator and leases a facility where it produces its products. At this facility, it cuts, shapes, and assembles raw steel components to create products, such as bearing plates, fasteners, and I-beams.*

*On the contract in question, DBE X purchases I-beams from another manufacturer, but it applies a protective coating to the beams at its facility. The protective coating adds little value to the final product.*

- Is DBE X considered a manufacturer?  
**NO! (Count fees and commissions only)**

# DBE Supplier Definitions

- **Regular Dealers with establishments (§26.55(e)(2)(ii)):**

*“...a regular dealer is a firm that owns (or leases) and operates 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 sufficient quantities, and regularly sold or leased to the public in the usual course of business.”*



# DBE Supplier Definitions

- The following terms relate to **regular dealers with establishments**:
  - “general character” (49 CFR §26.55(e)(2)(iii)): refers to products that share the same material characteristics and application as those kept in stock per (e)(2)(iv); applies to minor quantities delivered from and by other sources per (e)(2)(iv)(A).
  - “sufficient quantities” Relates to the new requirement found in 49 CFR §26.55(e)(2)(iv) *in terms of “... the ability of the firm [DBE] to effectively supply quantities typically needed on a contract...”*; also discussed in USDOT DBE Program Guidance “Official Questions and Answers (Q & As) Disadvantaged Business Enterprise Program”

# DBE Supplier Definitions

## **General Character** Example:

*A DBE supplier only stocks product A and is usually capable of fulfilling most orders from its inventory. On the purchase order in question, however, it must supply product A, along with minor quantities of product B. Product A will be provided from the DBE's inventory. The DBE does not typically keep and regularly sell product B due to its unique size/shape characteristics that vary based on contract specifications; however, products A and B are similar in application and made of the same material.*

- Is product B “of the general character”?
- **YES!**

# DBE Supplier Definitions

## ***Sufficient Quantities*** Example:

*A DBE supplier has an establishment that it leases and operates. At this location, the DBE maintains an inventory of widgets varying between 50 and 100 in quantity per annual period. The DBE sells widgets from its inventory on a regular basis and restocks them periodically. However, this DBE supplier typically sells to its customers in quantities that exceed 250 widgets.*

- Does this DBE keep *sufficient quantities* of widgets?
  - **NO**

# DBE Supplier Definitions

- **Regular Dealers of Bulk Items (§26.55(e)(2)(iv)(B)):**

*“A DBE may be a regular dealer in such bulk items as petroleum products, steel, concrete or concrete products, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in paragraph (e)(2)(ii) of this section if the firm both owns and operates distribution equipment used to deliver the products. Any supplementing of regular dealers’ distribution equipment must be by a long-term operating lease and not on an ad hoc or contract-by-contract basis.”*

# DBE Supplier Definitions

 NEW

- **Distributor (§26.55(e)(3)):**

*“... neither maintains sufficient inventory or uses its own distribution equipment for the products in question,...*

*A distributor is an established business that engages in the regular sale or lease of the items specified by the contract. A distributor assumes responsibility for the items it purchases once they leave the point of origin (e.g., a manufacturer’s facility), making it liable for any loss of damage not covered by the carrier’s insurance.”*

## Recipient Requirements

**Establish a System to Determine the Capacity  
of each DBE Supplier to Perform a CUF as a  
Regular Dealer Prior to its Participation  
49 CFR §26.55(e)(2)(iv)**

# Recipient Requirements

NEW

- **49 CFR §26.55(e)(2)(iv):**

*“You must establish a system to determine that a DBE regular dealer per paragraph (e)(2)(iv)(A) of this section, over a reasonable period of time, keeps sufficient quantities and regularly sells the items in question. This system must also ensure that a regular dealer of bulk items per (e)(2)(iv)(B) of this section owns/leases and operates distribution equipment for the products it sells. This requirement may be administered through questionnaires, inventory records reviews, or other methods to determine whether each DBE supplier has the demonstrated capacity to perform a commercially useful function (CUF) as a regular dealer prior to its participation. The system you implement must be maintained and used to identify all DBE suppliers with capacity to be eligible for 60 percent credit, contingent upon the performance of a CUF. This requirement is a programmatic safeguard apart from that described in § 26.53(c)(1).*



# Recipient Requirements

 NEW

- 49 CFR §26.55(e)(2)(iv)—Regular Dealers with Establishments:
  - Determines whether each DBE supplier to be eligible for *regular dealer* credit, over a reasonable period of time, keeps sufficient quantities and regularly sells the items in question
  - Determines whether each DBE supplier has the demonstrated capacity to perform a commercially useful function (CUF) as a regular dealer prior to its participation

NEW

- **49 CFR §26.55(e)(2)(iv)—Regular Dealers with Establishments:**
- Suggested Questions to Consider in Making Determinations:
  1. For each product kept in stock, what quantity does the DBE typically sell in a single transaction/contract? (e.g., average quantity sold)
  2. What is the inventory over time for each product kept and regularly sold? (low and peak quantities)
  3. Do inventory records demonstrate that the products described were sold from the DBE's physical inventory?

# Recipient Requirements

 NEW

- **49 CFR §26.55(e)(2)(iv)—Regular Dealers with Establishments: (continued)**
- Suggested Questions to Consider in Making Determinations:
  4. Is there evidence that the products kept and regularly sold were restocked? (Bills of lading, delivery slips)
  5. What products of the general character, other than those that comprise the bulk of its sales, are kept in stock?
  6. Does the DBE own/lease and operate the establishment where products are kept?

# Recipient Requirements

 NEW

## 49 CFR §26.55(e)(2)(iv)—Regular Dealers with Establishments:

### Question

- Without the recipient's determination that the DBE supplier keeps *sufficient quantities* and regularly sells the items in question over a reasonable period of time, can the DBE supplier's participation be counted at 60%?
- **NO**, not without a concurrent determination that supports counting prior to the DBE's participation

# Recipient Requirements

 NEW

## 49 CFR §26.55(e)(2)(iv)—Regular Dealers with Establishments:

### Question

- If the DBE supplier is seeking to participate in an amount that is greater than its demonstrated capacity determined through this requirement, what should the recipient do?
- Count up to its demonstrated capacity; or have the DBE provide more information concerning its participation on the contract at issue, and use that as a basis for counting prior to its participation

# Recipient Requirements

 NEW

## 49 CFR §26.55(e)(2)(iv)—as it Pertains to Regular Dealers of Bulk Items:

- Ensure that regular dealers of bulk items per (e)(2)(iv)(B) own/lease and operate distribution equipment for the product(s) they sell
  - Is the distribution equipment suitable for the products?
  - Is the equipment registered to DBE or under operating lease?
  - Are the DBEs employees licensed to operate the distribution equipment?

# Recipient Requirements

 NEW

## 49 CFR §26.55(e)(2)(iv):

- *The system you implement must be maintained and used to identify all DBE suppliers with capacity to be eligible for 60 percent credit, contingent upon the performance of a CUF. This requirement is a programmatic safeguard apart from that described in § 26.53(c)(1).*



## CUF and Counting Regular Dealers

# CUF Performance Requirements and Counting of Regular Dealer Participation 49 CFR §26.55(e)(2)(iv)(A),(B), and (C)

## CUF and Counting Regular Dealers

- **Regular Dealers with establishments (§26.55(e)(2)(iv)(A)):**

*“A DBE supplier performs a CUF as a regular dealer and receives credit for 60 percent of the cost of materials or supplies (including transportation cost) when all, or at least 51% of, the items under a purchase order or subcontract are provided from the DBE’s inventory, and when necessary, any minor quantities delivered from and by other sources are of the general character as those provided from the DBE’s inventory.”*

# CUF and Counting Regular Dealers

## Example: Regular Dealers with establishments

*A DBE provides 40% of the products that are listed under a purchase order/subcontract from its inventory, the other 60% are shipped by the manufacturer to the job site. How should the DBE's participation be counted?*

- Value of 40% (\$200,000)  $\times .60 = \$150,000$  (countable amount)
- Value of 60% (\$300,000) = Fees and Commissions (e.g., transportation charges, handling fees, but not the cost of materials)

## CUF and Counting Regular Dealers

- **Regular Dealers of Bulk Items (§26.55(e)(2)(iv)(B)):**

*“A DBE may be a regular dealer in such bulk items as petroleum products, steel, concrete or concrete products, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in paragraph (e)(2)(ii) of this section if the firm both owns and operates distribution equipment used to deliver the products. Any supplementing of regular dealers’ own distribution equipment must be by long-term operating lease and not on an ad hoc contract-by-contract basis.”*

# CUF and Counting Regular Dealers

## Example: Bulk Item Regular Dealer

*On the contract in question, the DBE is selling 2,000 gallons of petroleum product X at a cost of \$3/Gallon. The Delivery slips later provided by the DBE, however, show that only 1,000 gallons were provided by the DBE using distribution equipment that it owned and operated. The remaining 1,000 gallons were delivered by another company contracted by the DBE. How should the DBE's participation be counted?*

- $1,000 * \$3 = \$3,000$  + fees and commissions charged for the other company's assistance.*

## CUF and Counting Regular Dealers

 NEW

- **Items not Typically Stocked (§26.55(e)(2)(iv)(C)):**

*“A DBE supplier of items that are not typically stocked due to their unique characteristics (e.g., limited shelf life or items ordered to specification) should be considered in the same manner as a regular dealer of bulk items per paragraph (e)(2)(iv)(B) of this section. If the DBE supplier of these items does not own or lease distribution equipment, as described above, it is not a regular dealer.”*

## CUF and Counting Distributors

# CUF Performance Requirements and Counting of Distributors 49 CFR §26.55(e)(3)



# CUF and Counting Distributors

NEW

## • **Distributor (§26.55(e)(3)):**

*“...A DBE distributor assumes responsibility for the items it purchases once they leave the point of origin ( e.g., a manufacturer's facility), making it liable for any loss or damage not covered by the carrier's insurance. A DBE distributor performs a CUF when it demonstrates ownership of the items in question and assumes all risk for loss or damage during transportation, evidenced by the terms of the purchase order or a bill of lading (BOL) from a third party, indicating Free on Board (FOB) at the point of origin or similar terms that transfer responsibility of the items in question to the DBE distributor. If these conditions are met, DBE distributors may receive 40 percent for drop-shipped items. Terms that transfer liability to the distributor at the delivery destination ( e.g., FOB destination), or deliveries made or arranged by the manufacturer or another seller do not satisfy this requirement.”*

# CUF and Counting Distributors

- **Distributor (§26.55(e)(3)):**
- *...assumes all risk for loss or damage during transportation, evidenced by the terms of the purchase order or a bill of lading (BOL) from a third party, indicating Free on Board (FOB) at the point of origin or similar terms that transfer responsibility ...to the DBE distributor*
- *If these conditions are met, DBE distributors may receive 40 percent for drop-shipped items. Terms that transfer liability to the distributor at the delivery destination ( e.g., FOB destination), or deliveries made or arranged by the manufacturer or another seller do not satisfy this requirement.”*

# CUF and Counting Distributors

## **Example: Distributor (§26.55(e)(3)):**

*A DBE supplier exceeds its capacity as a regular dealer per (e)(2)(iv) and will only provide \$150,000 (30%) of the items it is selling from inventory. The DBE will not be handling the other \$350,000 (70%) of the items. However, it made arrangements with a freight company to pick up the items from the manufacturer. The DBE's purchase order with the manufacturer and the Bill of lading later provided by the freight company are consistent and indicate that ownership was transferred at the manufacturer's facility. Can the recipient count 60% of the value of items sold from the DBE's inventory and 40% of the value of items for which the DBE arranged shipment?*

- Yes, assuming the DBE demonstrated ownership of the materials that were not already in its possession.*

## Pre-award Counting

# **Pre-award Counting Requirements Affirmations for Regular Dealers and Distributors 49 CFR §26.53 (c)(1)**

# Regular Dealer/Distributor Preliminary Counting

NEW

## **49 CFR §26.53 (c)(1):**

*“For each DBE listed as a regular dealer or distributor you must make a preliminary counting determination to assess its eligibility for 60 or 40 percent credit, respectively, of the cost of materials and supplies based on its demonstrated capacity and intent to perform as a regular dealer or distributor, as defined in § 26.55(e)(2)(iv)(A), (B), and (C) and (e)(3) under the contract at issue. Your preliminary determination shall be made based on the DBE's written responses to relevant questions and its affirmation that its subsequent performance of a commercially useful function will be consistent with the preliminary counting of such participation....”*

# Regular Dealer/Distributor Preliminary Counting

 NEW

## **49 CFR §26.53 (c)(1): (Continued)**

*...Where the DBE supplier does not affirm that its participation will meet the specific requirements of either a regular dealer or distributor, you are required to make appropriate adjustments in counting such participation toward the bidder's good faith efforts to meet the contract goal. The bidder is responsible for verifying that the information provided by the DBE supplier is consistent with the counting of such participation toward the contract goal."*

# Regular Dealer/Distributor Preliminary Counting

## *DBE Regular Dealer - Distributor Affirmation Form*





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