

## Recipient Responsibilities for Oversight and Monitoring of DBE Participation

### **What are a recipient's responsibilities for monitoring work performed by DBEs? (Posted 8/22/2018)**

- The DBE program regulation at 49 CFR § 26.37(b) requires that recipients monitor every contract on which DBE participation is claimed, including race-conscious DBE participation in response to a contract goal and race-neutral DBE participation towards a recipient's overall goal.

### **What actions of the recipient constitute sufficient "monitoring" in accordance with 49 CFR § 26.37(b)? (Posted 8/22/2018)**

- A recipient demonstrates that it is sufficiently monitoring every contract on which DBE participation is claimed by implementing the following measures: (1) developing a monitoring process to ensure that program participants are complying with 49 CFR part 26; (2) confirming that the monitoring process ensures that the work committed to a DBE is performed by the DBE to which the work was committed; and (3) confirming that the monitoring process includes a written certification that the recipient has reviewed contracting records and monitored work sites for this purpose.

### **What does a "written certification" mean under 49 CFR § 26.37(b)? (Posted 8/22/2018)**

- Written certification means that a recipient documents, dates, and signs a confirmation of its monitoring efforts. This written certification, whether in hard copy or electronic format, should be made available to the relevant Operating Administration (OA) upon request.

### **May a recipient monitor only a sample or percentage of contracts on which DBEs participate? (Posted 8/22/2018)**

- No. The DBE program regulation at 49 CFR § 26.37(b) requires that recipients monitor work performed by all DBEs on every contract on which DBE participation is claimed. The DBE regulations do not permit the monitoring of only a sample or percentage of contracts on which DBEs participate. This issue was addressed in the preamble to the 2011 DBE rule revision where the Department explained that "[t]his monitoring and the recipient's written certification that it took place must occur with respect to every contract on which DBE participation is claimed, not just a sample or percentage of such contracts, to make sure that the program operates as it is intended. It applies to contracts entered into prior to the effective date of this rule, since the obligation to monitor work performed by DBEs has always been a key feature of the DBE program."

**Must the monitoring consist of a “commercially useful function” review? (Posted 8/22/2018)**

- Yes. Under the DBE program regulation at 49 CFR §26.55(c) recipients may only count expenditures to a DBE contractor toward DBE goals if the DBE is performing a commercially useful function (CUF) on that contract. Consequently, for every contract on which DBE participation is claimed, the recipient must determine if all DBEs are performing a CUF to accurately credit DBE services. A signed and documented CUF review would meet the monitoring requirement.
- In addition to a CUF review, a recipient’s field staff should, as part of their other on-site monitoring duties, (1) review the DBE’s subcontract to identify scope of work; (2) take steps to observe the DBE on the job site to ensure that it is the same DBE that was committed to perform the subcontracted work and it is using its own resources to perform the scope of work; (3) record the observations in a log book or other document; and (4) include a signature or email identification to meet the “written certification” requirement. If conducted as part of other on-site monitoring duties, the recipient should ensure that there is a specific section in the log book or other document dedicated to DBE on-site monitoring.

**Must all monitoring that a recipient performs be documented and signed? (Posted 8/22/2018)**

- Yes. The purpose of the written certification is for the recipient to acknowledge that it has performed the required oversight and stands by its results. Therefore, all monitoring should be documented, dated, and signed by the person who performed the review.

**May a recipient perform the monitoring requirement only at contract close-out? (Posted 8/22/2018)**

- No. While it is important for a recipient to certify that it has provided the required monitoring and oversight of DBE participation during the contract close-out process, a recipient must document its efforts to perform on-site monitoring of a DBE’s performance during the contract performance per 49 CFR § 26.37(b). To provide effective oversight of DBE participation in each contract where DBE credit is claimed, a recipient must ensure that a trained staff person monitors performance while the DBE is active on the jobsite and follow up by creating a written, signed document. The Department recommends monitoring a DBE’s participation in the early stages of contract performance to provide sufficient time for the recipient to respond and correct any identified compliance issues.

**Are recipients required to provide a written certification for all DBEs, even those performing professional services? (Posted 8/22/2018)**

- Yes, recipients must perform on-site monitoring of every contract on which DBE participation is claimed, including contracts for professional services.

**Must a recipient document its monitoring and oversight processes and procedures in its DBE Program Plan? (Posted 8/22/2018)**

- Yes. Each recipient is required to include in its DBE Program Plan details about its monitoring efforts, including contract reviews, on-site reviews, and its CUF process. The Program Plan must include what documents are reviewed, who is responsible for performing the review, and how often reviews are performed. The Plan should also include the process the recipient uses to review the contracts that prime contractors enter with DBE subcontractors to ensure that the terms of the agreement, including the termination (§ 26.53(f)(1)(i)), prompt payment/return of retainage (§26.29), and assurance (§ 26.13(b)) provisions are included and consistent with the recipient's DBE Program Plan and federal regulations.

The recipient's Program Plan must also include the process by which the recipient meets the written certification requirement.

**The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR part 26.**