

**ADDENDUM # 1 – CATA RFP #2013-115
CAPITAL AREA TRANSPORTATION AUTHORITY
DAVIS-BACON & DBE COMPLIANCE MONITORING SERVICES**

Vendor Questions and Answers

Each question received from interested vendors in regard to the above Request for Proposal (RFP) is consecutively numbered below and labeled “Q”. Below each question is CATA’s official corresponding answer labeled “A”.

This Addendum is enclosed within this correspondence, and is also available on the CATA website at www.cata.org, located under the heading “Doing Business With CATA”.

1. Q: The RFP does not indicate the approximate duration of the two construction projects. Can you provide that information, and also the cost estimate for each of the construction projects? The cost estimate will allow us to determine the scope of the project and number of subcontractors involved, which is directly related to the number of certified payroll submittals that will be necessary to review.

A: Anticipated Project Duration:

- *CATA Multi-Modal Demolition Project anticipated duration is four (4) months. The cost estimate for this project is approximately \$350,000.*
- *CATA Multi-Modal Construction Project has not been bid yet, however, the anticipated duration is ten (10) months and the cost estimate for this project is approximately \$5,000,000.*

2. Q: The RFP requires DBE compliance monitoring. Can you provide the “DBE requirements” that were included in the contract between CATA and General Contractors (or Construction Managers) RFP for the two construction projects? This RFP (2013-115) is asking for DBE compliance, but it would be helpful for cost estimating if we as compliance monitors knew the requirements being placed on the contractors or general contractor, such as the DBE goals, etc., either through MDOT or FTA that are being required on the subject projects.

A: DBE goals for these projects are not considered as requirements, but as goals only. The construction project has not been released for bid yet and the demolition project will not have DBE participation.

Pursuant to Federal Regulation 49 CFR Part 26 and also CUF (Commercially Useful Function) information in MDOT’s Program Procedures, CATA’s DBE program must include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently (e.g., as the result of modification to the contract) is actually performed by the DBEs to which the work was committed. This mechanism must include a written certification that you have reviewed contracting records and monitored work sites in your state for this purpose. The monitoring to which this paragraph refers may be conducted in conjunction with monitoring of contract performance for other purposes (e.g., close-out reviews for a contract).

(c) This mechanism must provide for a running tally of actual DBE attainments (e.g., payments actually made to DBE firms), including a means of comparing these attainments to commitments. In your reports of DBE participation to the Department, you must display both commitments and attainments.

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You are strongly encouraged to complete a first person review of both the federal regulation 49 CFR Part 26 including subsections § 26.37, § 26.55 and § 26.87(i), and the MDOT CUF Commercially Useful Function and Third-Party Complaint procedures (excerpts are attached).

§ 26.55 How is DBE participation counted toward goals?

(a) When a DBE participates in a contract, you count only the value of the work actually performed by the DBE toward DBE goals.

(1) Count the entire amount of that portion of a construction contract (or other contract not covered by paragraph (a)(2) of this section) 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).

(2) Count the entire amount of fees or commissions 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, toward DBE goals, provided you determine the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(3) When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted 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 does not count toward DBE goals.

(b) When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.

(c) Count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.

(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.

(4) When a DBE is presumed not to be performing a commercially useful function as provided in paragraph (c)(3) of this section, the DBE may present evidence to rebut this presumption. You may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.

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(5) Your decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to DOT.

...

(f) If a firm is not currently certified as a DBE in accordance with the standards of subpart D of this part at the time of the execution of the contract, do not count the firm's participation toward any DBE goals, except as provided for in § 26.87(i).

(g) Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward your overall goal.

(h) Do not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE.

**Excerpts from MDOT – (Michigan Department of Transportation) Program
Procedures**

D. Commercially Useful Function (CUF)

DBEs are required to perform a commercially useful function (CUF) on US DOT-assisted contracts. CUF requirements are included in 49 CFR § 26.55. Failure to perform a CUF can result in removal of eligibility to participate as a DBE if it is determined that the DBE owner(s) no longer meets certification standards for ownership or control. Prime contractors also are subject to sanction when DBEs do not perform a CUF on their federally funded projects.

A DBE does not perform a CUF 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. Such pass-through arrangements are in violation of federal regulation and may result in removal of eligibility to participate as a DBE.

DBEs working as participants in a joint venture must be responsible for a distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.

In order to do a CUF, DBEs must:

1. Perform a bona fide service, such as professional, technical, consultant, or managerial services, or provide bonds or insurance specifically required for the performance of a US DOT-assisted contract, providing the fees are reasonable and not excessive as compared with fees customarily allowed for similar services.
2. Do all their contracted work items using the DBE's own supervisors/managers, workers, materials and equipment. Use of another contractor's supervisors, managers, foremen, workers, materials, or equipment to do work contracted or subcontracted to the DBE is in violation of CUF requirements.
3. Be paid for their work as agreed upon in their contract.
4. Do their work according to normal industry practice, except where such practices violate DBE regulations outlined in 49 CFR Part 26.

A DBE subcontractor listed in the prime contractor's commitment (as required by §26.53(b)(2)) or an approved substitute DBE can be terminated only with MDOT's prior written consent for good cause.

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MDOT must be notified immediately if a DBE is unwilling or unable to perform its work. **The prime contractor must provide DBEs five days written notice prior to MDOT approving their replacement. A prime contractor must submit MDOT Form 0196**

– Request to Replace a DBE, to the MDOT project manager, with a copy to the MDOT Office of Business Development before substituting DBEs. The MDOT project manager will forward the signed, approved copy to the MDOT Contracts Services Division.

A prime is not required to provide five days written notice in cases where the DBE in question has provided written notice that it is withdrawing from the contract to the prime, with cc's to the MDOT project manager and MDOT DBE Administrator.

The DBE substitute shall perform at least the same amount of work under the contract as the DBE that was terminated. Appropriate administrative remedies will be invoked in the event a prime contractor fails to comply with requirements.

Detail regarding performance of a CUF is provided below:

DBE Management

Management includes scheduling work operations, ordering and paying for equipment and materials necessary to do the contract, preparing and submitting payrolls and all other required reports and forms, and hiring and firing of employees, including supervisory employees.

1. The DBE must supervise the daily operations of the work contracted.
2. The DBE owner may act as superintendent and directly supervise the work, or a skilled and knowledgeable superintendent who is a regular employee of the DBE must directly supervise the work. If the latter is used, the DBE owner must be actively involved in making operational and managerial decisions of the firm.
3. All administrative functions must be done by personnel responsible to or employed by the DBE at facilities or locations under the control of the DBE.

DBE Work Force

The DBE must supervise and perform contract work with workers on its payroll and under the direct supervision of the DBE owner(s) or a superintendent of the DBE who is a regular employee, consistent with normal industry practice.

1. The DBE or his/her superintendent must, on a full-time basis, supervise and control the work of the contract.
2. The majority of the DBE's workforce and his or her superintendent/foreman must be regular employees of the DBE.

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Equipment

DBEs may lease equipment consistent with standard industry practice.

1. It is not acceptable to bid a project based on a “labor and materials only” basis. The DBE must either own or lease equipment used to do its work. The cost of equipment leased from the prime contractor or an affiliate of the prime contractor may not be counted toward DBE participation goals.
2. A DBE must submit lease agreements for all equipment leased. Lease/rental agreements must be separate from the subcontract and must specify the terms of the lease arrangement. Operation of leased/rented equipment should be subject to the full control of the DBE.
 - A. If the equipment is of a specialized nature, the lease may include the operator. If this practice is generally acceptable within the industry, the operator can remain on the lessor’s payroll. Such an arrangement should be for a short term and involve a specialized piece of heavy equipment readily available at the job site.
 - B. For equipment that is not specialized, the DBE is expected to provide the operator and be responsible for all payroll and labor compliance requirements.
3. A DBE may not pay for rented or leased equipment by having the payment deducted from the prime contractor’s payment(s) to the DBE for work done.

A DBE may not use equipment belonging to another contractor without having a formal lease agreement for the equipment.

For additional CUF guidance on DBE trucking operations, please refer to “Doing Business for MDOT Construction Contractors” in Section G.

Materials

The DBE must 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.

1. Invoices for materials used in the DBE’s work should be invoiced to the DBE firm and not to the prime contractor. MDOT will periodically review invoices for materials to ensure compliance.
2. The cost of materials and supplies the DBE subcontractor purchases from the prime contractor or its affiliate may not be counted toward DBE participation goals.

Joint Check

With prior approval, a joint or two-party check between a subcontractor, a prime contractor, and a materials supplier may be used to guarantee payment for materials. The “Application to Use Joint Checks” (MDOT Form 0183) is available on the Web at: <http://mdotwas1.mdot.state.mi.us/public/webforms/index.cfm>.

For additional CUF guidance on DBE liquid asphalt dealers, and for joint check guidance, please refer to “Doing Business for MDOT Construction Contractors” in Section G.

CUF Reviews and Outcomes

MDOT conducts field monitoring of prime contractors to assure that DBE-certified firms working on contracts perform a CUF. Investigations are done on DBE firms suspected of not performing a CUF as a result of field

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monitoring or based on receipt of a third-party complaint. Investigations showing a DBE may not have complied with all CUF requirements on a project(s) will result in the firm being called in for a conference with MDOT to discuss the alleged violation(s).

Non-attendance to a conference may result in the removal of certification for failure to cooperate. Following the CUF conference, the DBE administrator will review information received and make a determination regarding the DBE firm's compliance with federal regulations. Firms are notified in writing of the determination. Determinations include:

1. No violation of federal regulations found.
2. Minor violation(s) of federal regulations will result in the firm being cited and warned that future violations may result in removal of eligibility to participate as a DBE. The cited firm is subject to increased field monitoring of the firm's projects.
3. MDOT may remove work classifications related to CUF violations. Firms do not have the right to appeal removed work classifications.
4. MDOT may remove a firm's eligibility to participate as a DBE if it is determined that violations occurred on more than one project; and that these violations indicate a lack of independence or control of the DBE firm or disadvantaged owner.
5. One major violation showing willful intent to subvert federal regulations may result in removal of firm's eligibility to participate as a DBE.

Further information on removal of a DBE's eligibility may be found in 49 CFR § 26.87.

Prime contractors are responsible for their subcontractors. When DBE-certified firms are determined to have violated federal regulations by failing to perform a CUF, prime contractors are notified in writing and given the opportunity to provide explanation. Prime contractors unable to show compliance with federal regulations are subject to a variety of sanctions. Sanctions are based on the severity of the violation and may include:

1. The prime contractors will be determined to have a deficiency in DBE participation corresponding to the dollar value of the DBE's work that did not meet federal regulations.
2. The FHWA will be notified that MDOT has overstated the reported DBE participation for this project.
3. MDOT's Prequalification Committee will be notified of the prime's DBE participation deficiency on the project.
4. Prime contractors are subject to a wide variety of sanctions, ranging from a written notice of violation, up to and including loss of bidding privileges or criminal charges.

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E. Third-Party Complaints

As provided by 49 CFR § 26.87, any person may file a written complaint alleging that a currently certified firm is in violation of DBE regulations. Information received about a DBE prior to the initial certification decision being made will be considered in the investigation of the application for certification.

MDOT is not required to accept a general allegation that a firm is ineligible or an anonymous complaint. Confidentiality of complainants' identities is protected to the extent provided in 49CFR § 26.109(b).

1. The ineligibility complaint shall be filed with MDOT in writing no later than 180 days after the date of an alleged violation or the dates on which a continuing course of conduct in violation of this part was discovered. MDOT may extend the time for filing or waive the time limit in the interest of justice, specifying in writing, the reason for so doing. The complainant shall include any information or arguments supporting their assertion that the DBE firm against whom the complaint is lodged is ineligible and should not continue to be certified.
 - A. The complainant must sign the complaint and give an address and telephone number where they may be reached during the investigation.
2. While the complaint is pending, the DBE against whom the complaint was lodged will remain eligible to participate in the DBE program.