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SUBJECT: Bureau of Highway Instructional Memorandum 2013-12
         Disadvantaged Business Enterprise (DBE) Commercially Useful Function (CUF) Compliance

This instructional memorandum sets forth the Michigan Department of Transportation’s (MDOT’s) compliance procedure to ensure compliance with 49 CFR Part 26.37(b). The procedures in this Bureau of Highway Instructional Memorandum (BOH IM) are effective immediately and apply to all federally funded MDOT and local agency construction projects that include participation of a DBE certified company. It should be noted that this applies to all projects with work completed by Disadvantaged Business Enterprise (DBE) firms, not just projects with a DBE goal.

General Information

DBE companies are prime and subcontract contracting firms, truckers, material suppliers, consultants, and other service providers who are certified as having met requirements of 49 Code of Federal Regulations Part 26 (49 CFR Part 26). A current list of all DBE companies certified to work in Michigan by work classification and work type is available at: http://www.michigan.gov/mucp.

MDOT’s DBE Program Procedures are MDOT’s federally-approved plan detailing how MDOT will implement its DBE program. The 2013 DBE Program Procedures document contains detailed and helpful information and is available at http://www.michigan.gov/mdotdb under the Resources link.

DBE commitments, subcontracts, and the current DBE goal (when applicable) assigned to a project are also posted on MDOT’s Construction Contract Inquiry website at http://mdotcf.state.mi.us/public/transport/.

The Office of Business Development (OBD) has developed a supplemental guide to assist construction staff in the monitoring of CUF activities. The Michigan Department of Transportation (MDOT) Disadvantaged Business Enterprise (DBE) Program Guide for Commercially Useful Function (CUF) Monitoring on Federal Aid Projects is available on the MDOT DBE web site, http://www.michigan.gov/mdotdb under the Resources link.
Preconstruction Meeting
Contractors should be asked to provide verbal notice of any DBE subcontractors or vendors that will be working on the project. It should be emphasized that any DBE work that will occur off project site must be documented by construction staff and therefore, the prime contractor must provide notice (dates, times, locations, etc.) to the Engineer in advance of this work. This information is to be captured in the meeting minutes and the minutes are provided to all project staff.

Construction Guidance
The following guidance is provided to aid in determining if a CUF has been provided.

DBE companies are required to perform a CUF. This means that each DBE firm must be responsible for execution of a contract or a distinct element of the contract work by actually performing, managing, and supervising the work involved using their own managers, workers, equipment, and materials ordered and paid for by the DBE company. A DBE company does not perform a CUF if their role is limited to that of an extra participant in a transaction through which funds are passed in order to obtain the appearance of a CUF. DBE purchases of materials or supplies from the prime contractor/subcontractors on the project is a CUF violation. DBE credit will not be provided to the prime contractor/subcontractors if this occurs.

Construction staff must monitor and document that work committed to DBE companies is actually performed by said companies. This will be accomplished through the use of form 4109, Commercially Useful Function (CUF) Review. Completion of this form is required for all DBE companies on all federally funded projects including projects with no DBE goal. This includes DBE truckers, suppliers and other vendors where a subcontract is not required. In many cases, construction staff will need to reference the DBE commitment information to ensure that all companies are reviewed. Form 4109 is available at the following website: http://www.michigan.gov/mdot/0,4616,7-151-9625_23109---,00.html

OBD will determine CUF performance for DBE liquid asphalt suppliers. Questions regarding liquid asphalt suppliers are to be directed to the OBD liquid asphalt topic analyst at 517-241-0052. DBE Trucking CUF performance (IDR and form 4109) is to be documented and verified by construction staff.

Purchase orders are to be provided to construction staff for off-site DBE work (suppliers) and for trucking work. If they are not provided, a request should be documented to the prime contractor. Construction staff is to verify that purchase order work was completed by suppliers and truckers. Non-asphalt trucking related questions may be directed to the OBD trucking topic technician at 517-335-6537.

Supplier questions may be directed to the OBD CUF specialist at 313-965-5557 or 313-965-2355.

General performance of DBE companies is to be documented on Inspector Daily Reports (IDR) as would be completed for non-DBE contractors. IDR reporting is to include noting the DBE companies that are on site, the work that they are completing, material and equipment usage, etc.

If any DBE companies are missed during their construction operations or support activities the Construction Engineer must immediately contact the OBD CUF specialist at 313-965-5557 or 313-965-2355 to determine what documentation is available and what actions are to be taken.

To ensure construction staff is fully aware of all DBE participation elements (commitments, subcontractors, truckers, suppliers and service providers) committed to a project with a DBE goal, the construction/project engineer is notified of all commitments by the Contracts Services Division (CSD). The email notification includes all DBE commitment specifics and whenever a commitment is added, changed, or when the goal on the project has been modified. These e-mails are to be shared with
construction staff assigned to the project and are only generated on race-conscious projects. The industry may use form 0178, Disadvantaged Business Enterprise (DBE) Participation, to indicate a DBE is being used on a project that doesn’t have a DBE goal. This can be noted by selecting the appropriate check box on form 0178.

If a DBE fails to perform a CUF (presence of a non-CUF indicator, fails to complete work, etc.) or if a contractor fails to meet its obligations (commitments, percentage requirements, etc.) under the DBE regulations and/or contract provisions, the Construction Engineer must immediately notify the OBD CUF specialist at 313-965-5557 or 313-965-2355. Replacement of a DBE company requires a five (5) day written notice to the DBE firm with a copy to the construction/project engineer and OBD. These performance issues are also to be reflected on the respective contractor performance evaluation. The rating must include descriptive comments and/or narrative in the comments section for both the DBE company and the prime contractor as applicable.

At the completion of the project the construction/project engineer will certify that all DBE companies provided a CUF. This certification will be noted on form 1105, Final Estimate Package Memo. The certification language options will be as follows:

- I certify that to the best of my knowledge the contracting records have been reviewed, the Disadvantaged Business Enterprise (DBE) companies have been monitored on the project site and work committed to DBE companies has been performed by the respective companies.

- I certify that to the best of my knowledge the contracting records have been reviewed, the Disadvantaged Business Enterprise (DBE) companies have been monitored on the project site and work committed to DBE companies has been performed by the respective companies with the exception of the following companies which have been forwarded to the Office of Business Development (OBD) for further investigation.

Companies: ____________________________________________

DBE Performance Indicators
The DBE must be responsible for the performance, management, and supervision of a distinct element of the work in accordance with MDOT’s Standard Specifications for Construction and the current version of MDOT’s DBE Program Procedures. MDOT requires prime contractors to self-perform at least 40 percent of the contract work and subcontractors must self-perform at least 50 percent of their work. Non-trucking DBE work subcontracted to non-DBE companies is not eligible for DBE credit.

DBE and CUF performance issues are to be documented on an IDR, form 4109, and reported to OBD. Performance indicators and factors that require follow up with OBD are noted on the second page of form 4109 as well as the CUF Pocket Card that is available at http://www.michigan.gov/mdotdbe under the Resources link.

DBEs may lease equipment consistent with normal industry practice and, when requested, they must submit their lease agreements for all leased equipment. OBD retains this information. Equipment used by a DBE must be subject to the full control of the DBE. Equipment operators must be employees of the DBE and included on DBE payrolls. If necessary, a DBE may lease both the equipment and the operator, although the DBE must be responsible for all payroll and labor compliance requirements. It should be noted that DBE companies are not permitted to lease equipment from the prime contractor or any other non-DBE contractor/subcontractor working on the same project. However, because of space limitations typically associated with the use of heavy equipment, such as cranes, a DBE may use a crane or other heavy equipment supplied by the prime or another subcontractor on the project. Charges for use of this
equipment cannot be taken out of the amount the DBE is owed. Questions regarding heavy equipment usage and leasing are to be directed to the OBD CUF specialist at 313-965-5557 or 313-965-2355.

Frequently asked questions (FAQs) regarding DBE Performance of a CUF can be found at the following website: [http://www.michigan.gov/mdot/0,4616,7-151-31785---F,00.html](http://www.michigan.gov/mdot/0,4616,7-151-31785---F,00.html)