

DBE Final Rule Changes Affecting Contractors

Topic	Old Rule	Final Rule
Bidders List	<p>Regulation: 49 CFR 26.11 (c)(2) Collect names of subcontractors submitting quotes to prime bidders either before or after the bid due date. MoDOT requires this submittal by the end of the letting month. Annually, MoDOT collects the following data via a survey to the firms listed in these subcontractor reports:</p> <ol style="list-style-type: none"> 1. Firm Address 2. Firm's status as a DBE/non-DBE 3. Age of the firm 4. Annual gross receipts of the firm <p>The rule allowed for acquiring the information in a variety of ways (directly from bidders & via a survey).</p>	<p>Regulation: 49 CFR 26.11(c)(2) Collect the following information about all DBE and non-DBEs who bid as prime contractors and subcontractors:</p> <ol style="list-style-type: none"> 1. Firm Name 2. Firm Address (including zip code) 3. Firm's status as DBE or non-DBE 4. Race/Gender information for firm's majority owner 5. NAICS code applicable to each scope of work the firm sought to perform in its bid 6. Annual gross receipts of the firm <p>This information must be submitted with the bid. There is no mention of acquiring this information via an agency survey.</p>
DBE Directory	<p>Regulation: 49 CFR 26.31 Requires DBE directories to list the following information for each certified firm:</p> <ol style="list-style-type: none"> 1. Firm Name 2. Address 3. Phone Number 4. NAICS Codes <p>MoDOT currently lists the following in addition to the required information:</p> <ol style="list-style-type: none"> 1. Email Address 2. Owner Name 3. Owner Gender 4. Owner Ethnicity 5. MoDOT District Location 6. MoDOT Vendor Number 7. Certifying Agency 	<p>Regulation: 49 CFR 26.31 Requires DBE directories to list the following information for each certified firm:</p> <ol style="list-style-type: none"> 1. Firm Name 2. Address 3. Phone Number 4. Firm Website 5. NAICS Codes <p>The only item MoDOT does not currently list is DBE firm websites. This will be added by the implementation deadline of 180 days after final rule publication: 11/5/2024.</p>
Design Build DBE Commitments	<p>Regulation: 49 CFR 26.53(b)(3)(ii) When DBE goals are established on a Design Build project, the contractor submits a plan for meeting those goals.</p>	<p>Regulation: 49 CFR 26.53(e) Requires the submittal of an Open-Ended DBE Performance Plan (OEPP) with the proposal. The OEPP replaces the</p>

	<p>Currently, MoDOT requires that proposals list DBE participation fulfilling 100% of the Design DBE goal and 50% of the Construction DBE goal. The remaining DBE commitments for construction are submitted 60 days following NTP 2.</p>	<p>requirement of submitting all DBE commitments as in bid-build projects. To be considered responsive, the OEPP must include a commitment to meet the goal and provide details of the types of subcontracting work or services (with projected dollar amount) that the proposer will solicit DBEs to perform. The OEPP must include an estimated time frame in which the actual DBE subcontracts would be executed. Once the project starts, MoDOT would provide ongoing monitoring and oversight to evaluate whether the design-builder is using good faith efforts to comply with the OEPP and schedule. MoDOT and the design-builder may agree to make written revisions to the OEPP throughout the life of the project.</p>
<p>DBE Material Supplier</p>	<p>49 CFR 26.55(e) Includes 3 types of suppliers:</p> <ul style="list-style-type: none"> • Manufacturer – firm that operates or maintains 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. Work by manufacturers is counted at 100%. • Regular dealer – a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business if the person both owns and operates distribution equipment for the products. Any supplementing of 	<p>49 CFR 26.55(e)(3) Adds a 4th type of supplier:</p> <ul style="list-style-type: none"> • Distributor – firm that engages in the regular sale or lease of the items specified by the contract. 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. Work by distributors is counted at 40%.

	<p>regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Work by regular dealers is counted at 60%.</p> <ul style="list-style-type: none"> • Broker – firms that assist in the procurement of the materials and supplies and do not act as a manufacturer or regular dealer. Work by brokers is counted at 100% of fees & commissions. 	
Pre-Award CUF Reviews	No requirement	<p>Regulation: 49 CFR 26.53(c)(1) For DBE's listed as regular dealers or distributors, MoDOT must make preliminary counting determinations to assess the DBE's demonstrated capacity and intent to perform as a regular dealer or distributor. This determination is 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 that participation. The bidder is responsible for verifying that the information provided by the DBE supplier is consistent with the counting of such participation toward the goal. USDOT has provided the following form which may be used and requires the signature of both the DBE and the bidding contractor: https://www.transportation.gov/mission/civil-rights/dbe-regular-dealer-distributor-affirmation</p>
DBE Credit Following DBE Removal of Eligibility	<p>Regulation: 49 CFR 26.87(j) If a DBE firm loses its DBE certification either in whole or in part (one or more NAICS codes), the participation of that firm may be counted for DBE credit for any subcontracts that were signed prior to the determination of ineligibility. Any subcontracts signed after the removal of eligibility may not count towards the contract goal.</p>	<p>Regulation: 49 CFR 26.87(j)(6)(ii) Counting remains the same as previous rule for DBE firms that lose all or part of their DBE certification. The new rule provides an exception that where the reason for loss of DBE certification is due to the DBE's acquisition or merger with a non-DBE, credit for that firm's participation following the decertification cannot count towards DBE goals, regardless of when the subcontract was executed. If eliminating this credit will affect the prime contractor's ability to meet the contract goal, MoDOT must direct the prime contractor to subcontract to an</p>

		eligible DBE to the extent needed to meet the contract goal or demonstrate that it has made good faith efforts to do so.
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