

DATE: November 16, 2009

TO: Region Engineers
Region Delivery Engineers
TSC Managers
Resident/Project Engineers
Region Construction Engineers

FROM: Jacqueline G. Shinn
Chief Deputy Director

Gregory C. Johnson
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SUBJECT: Bureau of Highway Instructional Memorandum 2009-09
Disadvantaged Business Enterprise (DBE) Participation as Regular Dealers of
Liquid Asphalt

Effective immediately, MDOT is implementing a new program to monitor DBE supply and delivery of liquid asphalt to MDOT projects. This program is in response to the Federal Highway Administration's (FHWA) concerns regarding the performance of a Commercially Useful Function (CUF) when using DBE liquid asphalt suppliers. There are three new MDOT forms associated with this program:

- MDOT Form 0192, *Petroleum Company Account(s) Information and Liquid Asphalt Cement Tractors and Trailers Information*
- MDOT Form 0193, *Disadvantaged Business Enterprise (DBE) Regular Dealer Liquid Asphalt Supplier Participation Affidavit – Prime*
- MDOT Form 0194, *Total Quantities of Liquid Asphalt Cement Supplied*

This program is approved by FHWA and will meet all CUF requirements. It involves the participation of contractors who successfully bid on MDOT projects that include the use of liquid asphalt cement, and all DBEs who will keep the work classification TBR (Asphalt and Petroleum Products – Regular Dealer). The program procedures are as follows:

The successful bidder/prime contractor is responsible for compliance with the governing DBE regulations (49 CFR 26.55) included in each MDOT project proposal and on the internet at <http://www.access.gpo.gov/nara/cfr/cfr-table-search.html>. Prime contractors must make every effort to ensure that arrangements and practices on the project are in line with DBE regulations.

To include DBE regular dealer participation toward project goals, the following criteria must be met:

1. The DBE must directly negotiate (i.e., receiving price quotes, agreeing to pricing, and ordering the required grade of liquid asphalt cement) with the petroleum refinery for the grade of liquid asphalt cement they are providing for the project. The prime is not to negotiate on behalf of the DBE with the petroleum refinery. All DBEs who will keep the work classification TBR need to provide information on their accounts with refineries on an annual basis using MDOT Form 0192.
2. The DBE must arrange for the delivery of materials it supplies for the project, and maintain documentation of the delivery of the liquid asphalt cement (i.e. invoices, delivery tickets, bank statements) to submit to MDOT, if requested.
3. The DBE may lease tractors and trailers on a project; however, it must be through a long-term lease agreement, and not on an ad hoc or contract-by-contract basis. This equipment may not be leased from the prime asphalt paving contractor (or any affiliate of the asphalt paving contractor) for whom the DBE is supplying the project's liquid asphalt cement. The DBE must be able to supply all lease agreements upon request by MDOT.
4. DBEs must pay the refineries with their own funds. The prime is not to pay the refineries directly for the materials the DBE is designated to supply. Payments made by DBEs for material they purchase must come from their own independent bank accounts. A DBE may not acquire material using funds from bank accounts belonging to or shared with the prime contractor.
5. No sales between the prime and any of its affiliates via the DBE are to be counted toward the project's DBE goal.
6. Any joint check arrangement must be pre-approved by MDOT before the arrangement or transaction takes place. Use MDOT Form 0183 to request approval. A joint check is a two-party check between a subcontractor, a prime contractor, and a materials supplier. Joint checks are used to guarantee payment to the supplier for materials used by the subcontractor.
7. Verification of Regular Dealer Status: MDOT will obtain information from each certified DBE regular dealer to update its files and ensure continued eligibility in work classification TBR.

On an annual basis, MDOT requires DBE regular dealers to submit MDOT Form 0192 to ensure that:

- The DBE owns delivery equipment and has valid lease agreements in place (if supplementing his/her asphalt cement equipment).
 - The DBE has accounts and lines of credit with the oil refineries from whom it purchases the liquid asphalt cement.
8. Pre-Award Approval: Primes must submit a DBE Regular Dealer Liquid Asphalt Supplier Participation Affidavit (MDOT Form 0193) for approval, along with the DBE Participation

Form, (MDOT Form 0178). The prime affirms in the affidavit that it has reviewed the DBE requirements under 49 CFR 26.55 found in the project proposal, and they believe their proposed arrangement with the DBE liquid asphalt supplier is in compliance with the regulations. MDOT's Contract Services Division will receive and forward the liquid asphalt affidavit to the designated Office of Business Development (OBD) staff for approval. MDOT staff will make every effort to complete the review of the affidavit and make a determination within five working days. This review includes:

- Verifying the prime selected an eligible DBE (Contract Services and OBD both do this).
 - Crosscheck the DBE's file and participation on other projects to determine whether the DBE is over their credit limit.
 - Ensure a purchase order is submitted with each project, post-award and prior to delivery.
 - Ensure there is an anticipated date of transaction with the DBE.
 - The DBE is not allowed to lease equipment from the prime or the prime's subsidiaries/affiliates. OBD staff will review the DBE's record to ensure that the DBE does not lease equipment from the prime specified on the project under review.
9. Follow-up review: DBEs must complete an MDOT questionnaire (MDOT Form 0194) regarding their supplier activities on the project. The OBD staff will contact the DBE within ten days following the date the prime specified on the affidavit to determine if the sale and delivery of material took place. Staff will continue to follow up until the transaction takes place. Once the date of transaction is determined, the questionnaire will be forwarded to the DBE. The questionnaire is to be returned to the OBD within ten days.
10. If MDOT receives information indicating the DBE firm may not be performing a commercially useful function as specified under 49 CFR 26.55, they will request appropriate documentation to reasonably verify the material the DBE supplied. This documentation may include the following:
- Invoices for material.
 - Proofs of payment, such as canceled checks and bank statements.
 - Additional lease agreements for equipment not currently on file.

If it appears the terms specified in the approved MDOT Form 0178 are not being met, the issues will be addressed with the prime, DBE, project office, MDOT administration, FHWA, etc., as appropriate.

11. Finalization: Once all information is obtained, a determination is made as to whether the DBE supplied the volume of material reported on the approved MDOT Form 0178.

If MDOT determines that the DBE did not perform a commercially useful function, or failed to supply the amount of material specified in the MDOT Form 0178, the DBE will be given an opportunity to provide information to rebut the findings, as required in 49 CFR 26.55(c) (3) and (4).

If the approved level of participation is not met, MDOT will inform the prime regarding the amount of liquid asphalt being credited to the project as DBE participation. All MDOT forms listed in this memorandum are fillable and available on MDOT's public Web site at <http://mdotwas1.mdot.state.mi.us/public/webforms/>.

Please share this information with consultants and local agencies within your area. Please direct any questions regarding this program to Reidar Keating, ORB Departmental Technician, at 517-241-0052 or keatingr@michigan.gov.

Chief Deputy Director

Chief Operations Officer

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