



Bob Riley
Governor

**ALABAMA
DEPARTMENT OF TRANSPORTATION**

CONSTRUCTION BUREAU
1409 COLISEUM BOULEVARD
MONTGOMERY, ALABAMA 36110
Telephone: (334) 242-6208
FAX: (334) 264-3727



Joe McInnes
Transportation Director

April 27, 2006

Construction Information Memorandum No. 1-2006

TO: Division Engineers

ATTN: Division Construction and Division County Transportation Engineers

FROM: Terry McDuffie
Construction Engineer

RE: Sublet and DBE Requirements for F.O.B. Hauling and furnishing materials from Borrow Pits

The Department has been requiring a Request to Sublet if a contractor hires a trucking firm (DBE or not) to haul materials within the project limits or to/from the project site. This requirement has applied to all materials including excavation, aggregates, and hot mix asphalt. This requirement has not always been enforced consistently statewide, but regardless, it has been the requirement on our projects until January of this year.

Effective with projects let on or after the January 13, 2006, the sublet requirements for hired truckers that haul materials to project sites were modified. As outlined in Mr. Ronald Baldwin's memorandum dated December 12, 2005, sublets are only required when the prime contractor or subcontractor hires the trucker to haul to or from the project site from a facility that is dedicated exclusively, or nearly so, to the contract work and from a facility that is on or adjacent to the project site. Basically, sublets are required for hauling unclassified excavation on the project site or for unclassified (waste) and borrow excavation materials to or from a pit that is adjacent to the project ROW limits. While these are not the only cases when a sublet is required, these are the most common.

Since this memorandum was distributed, the Department has determined that these requirements would also apply to all active projects. This decision was sent via email on January 23, 2006 by Mr. Skip Powe of this office, and was based on the fact the requirements were a policy and not a specification included in contracts. However, there still seems to be some misunderstanding about certain trucking work such as F.O.B. ("free-on-board") hauling and the sublet requirements for it. Furthermore, there have been two projects where DBE firms have furnished and hauled borrow materials to the site on a F.O.B. basis. This CIM is to clarify the sublet requirements for this type of work, the affect on the DBE credit (if applicable), and the requirements for a DBE firm to be certified to furnish borrow excavation material.

F.O.B. ("free on-board") hauling is basically defined as material hauling in which the delivery price is part of the total material cost. It is the industry practice and ALDOT policy that F.O.B. hauling does not require a sublet or a subcontract, and this is the case whether the project was let before or after January 13, 2006. As you may know, common examples of F.O.B. hauling are delivery of concrete mixes and girders, but there are also some quarries and material suppliers that have contracts or agreements with trucking firms to deliver aggregates. This type of hauling is common in the southern part of the state, and is rare in the remaining parts, at least for ALDOT work. Regardless of the location, a sublet is not required for this type hauling to ALDOT projects.

On two projects in the fall of 2005, a DBE firm furnished borrow excavation material from their borrow pit and hauled it to the prime contractor at the project site. On both projects, the DBE firm was not an approved subcontractor, and the Department had to determine if the requirements of Article 105.11 (revised with the December 3, 2004 letting) applied to the work performed.

On these projects, both DBE firms were certified for general construction work and for hauling. Both firms also own a borrow pit, but neither was certified as a DBE dealer/supplier or manufacturer. On the first project in North Alabama, the DBE was included on the DBE Utilization Plan (U-Plan) for furnishing, loading and hauling. The U-Plan was approved, and the DBE performed the work. Since the credit for the materials was not addressed prior to the work being performed, the Department allowed the furnishing of the materials to count for credit. On the second project in South Alabama, the DBE was included on the U-Plan for hauling the borrow material from their pit to the project site. The U-Plan also indicated the materials were coming from the DBE's borrow pit, but the Department would not approve it for credit because the DBE was not certified for this type of work.

Initially, it was determined that the hauling work by both firms required a Request to Sublet, especially since we were focusing on their work as a DBE trucker and not as a dealer/supplier or manufacturer. Neither firm had an approved sublet, so the work was considered to be unauthorized as outlined in Article 105.11 and subject to nonpayment. (Note: under the new sublet requirements, this would not be an issue because the pits were not dedicated to the project and adjacent to it.)

However, both firms were not operating solely as a trucking firm, and in actuality were serving as a dealer/supplier or manufacturer just like a quarry or concrete company. When the contractor requested the borrow material, the DBE loaded the material and hauled it to the project site. The contractor paid the DBE for the material that was furnished and delivered, which is F.O.B. hauling.

Therefore, the unauthorized work specification does not apply to this type of hauling, and all the work was paid for at contract prices in accordance with the applicable specification. Furthermore, the hauling work was reported on the DBE-10 forms since the trucking firms were certified DBEs.

In order to eliminate possible confusion on any additional projects, the following guidelines outline the requirements for subletting this type of work and the DBE credit, if applicable:

1. Borrow pit owner furnishes the materials:
 - a. No sublet is required.
 - b. The borrow pit owner may be eligible for 100% material credit if the owner is certified as a DBE manufacturer as outlined in the attachment.
2. Borrow pit owner furnishes and hauls materials to the project site:
 - a. No sublet is required.
 - b. The borrow pit owner may be eligible for 100% credit for the materials if the owner is certified as a DBE manufacturer as outlined in the attachment.
 - c. The borrow pit owner is eligible for 100% credit for the haul if the owner is certified as a DBE trucker.
 - d. The borrow pit owner may be eligible for 100% credit for both the materials and haul if the owner is certified as a DBE manufacturer and a DBE trucker.
3. Borrow pit owner furnishes and hauls materials to the project site and performs the required grading work:
 - a. Sublet is required.
 - b. The borrow pit owner is eligible for 100% credit for the subcontract unit price of the borrow excavation item, which includes the materials, hauling, and grading work.

The sublet requirements for these examples are the same whether the firm is a DBE or not.

The attachments outline the requirements for a DBE firm to be certified to furnish borrow excavation material. These requirements are based on 49 CFR Part 26.55 and from guidelines agreed upon by Mr. Alton Treadway, DBE Program Administrator, and this office earlier this year. In order for a DBE to be certified for this work, he must furnish the required documentation listed in the attachment to Mr. John Huffman, DBE Certification & Supportive Services Coordinator, in the DBE Certification Office of ALDOT's Personnel and Compliance Bureau for review and processing.

In order for a prime contractor to receive credit for the borrow excavation material furnished by a certified DBE firm, he shall furnish copies of invoices and pit agreements (and/or contracts) attached to the monthly DBE-10 form as supporting documentation of the unit price and quantity paid to the DBE firm.

Should you have questions concerning this memorandum, please contact this office.

TM/GMB/WJP/wjp
Attachment

pc: Mr. D. W. Vaughn
Mr. G. M. Harper
Mr. Lamar Woodham
Mr. Ronnie Baldwin
Mr. Frank Courson
Ms. Alvena Williams
Mr. Alton Treadway
Mr. John Huffman
Ms. Catherine A. Batey, FHWA
Alabama Roadbuilders Association
Alabama Asphalt Paving Association
Alabama Bridge Construction Association
Alabama DBE Contractors Association
American Concrete Pavement Association
DBE Issues File
File

DBE CERTIFICATION
Borrow Pit Requirements

From 49 CFR Part 26.55:

(e) Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

- (1) (i) If the materials or supplies are obtained from a DBE manufacturer, count 100 percent of the cost of the materials or supplies toward DBE goals.
- (ii) For purposes of this paragraph (e)(1), a manufacturer is a 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.
- (2) (i) If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals.
- (ii) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.
 - (a) 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.
 - (b) 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 as provided in this paragraph (e)(2)(ii) if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.
 - (c) Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph (e)(2).

ALDOT Guidelines:

The intent of a borrow pit is that it be a true "pit" of natural, in-place materials. For ALDOT purposes, a borrow pit owner would qualify as a manufacturer based on the requirements in (e)(1)(ii) for operating an establishment that produces, on the premises, the materials required under the contract and of the general character described by the specifications.

Individuals or firms such as a general contractor or trucker who operate a pit from a stockpile yard will not be subject to certification as either a dealer/supplier or a manufacturer based on the requirements above. Remember, to be a dealer the firm must be an established, regular business that engages, as its principal business, in the purchase and sale of the products in question. A contractor and/or trucker would not fulfill these requirements, nor would they fulfill the requirements for a manufacturer of operating an establishment that produces materials on the premises.

An existing certified DBE dealer might be eligible, and could request to add these materials to the list of those it already supplies.

DBE CERTIFICATION
Borrow Pit Requirements

Required documentation for DBE certification:

1. Property Deed indicating land ownership
2. General Conditions Governing Use of Local Material Sources (per Subarticle 106.01(b) of ALDOT's Standard Specifications):
 - a. ADEM issued Stormwater Permit
 - b. Historical and archaeological clearance from the Alabama Historical Commission Office
 - c. Professional Biologist report (stating no wetlands will be impacted)
 - d. U.S. Fish and Wildlife Service letter (stating no endangered or threatened species will be impacted)
3. Equipment information:
 - a. Ownership/rental paperwork for a loader, backhoe, etc. (Note: this equipment is required by industry practice to operate a pit)
4. Borrow pit agreements for ALDOT projects and/or contracts for private sector work
5. Pictures of pit and pit operations

DBE Certification for a borrow pit owner will be based on the above requirements, and each request will be considered on a case-by-case basis.

All certification requests must be submitted to Mr. John Huffman, DBE Certification & Supportive Services Coordinator in the DBE Certification Office of ALDOT's Personnel and Compliance Bureau.

Section 1 of Act No. 876, as approved by the Alabama Legislature of 1961, shall be applicable and is quoted as follows:

"Section 1. The awarding authority contracting for the construction, repair or maintenance of any public building, bridge, road or other like project of public works to be financed entirely by the State of Alabama, or any political subdivision thereof, shall stipulate or cause to be stipulated in the contract a provision whereby the person, firm, or corporation undertaking the project agrees to use in the execution thereof materials, supplies and products manufactured, mined, processed or otherwise produced in the United States or its territories, if the same are available at reasonable prices. Such contracts shall also contain a stipulation for payment of liquidated damages in an amount not less than \$500 nor more than 20 percent of the gross amount of the contract in the event the contractor breaches his agreement to use domestic products."

The term reasonable prices shall mean that domestic prices shall not exceed foreign prices for the same grade of material by more than 6 percent. Prior to the use of any foreign material the Contractor will be required to submit support documentation to the Engineer for review showing that the price of the foreign material is reasonable (as defined in this paragraph). Unless waived by the Director, a minimum of three quotes from three different suppliers of the American (U.S.) material must be submitted to the Engineer for each material request. Such documentation may be submitted at any time during the life of the contract; however, prior approval for use of the foreign material must be obtained in writing from the Engineer. The use of foreign material under this provision, if approved, will not require price reductions on the bid prices of the affected pay items.

(b) GENERAL CONDITIONS GOVERNING USE OF LOCAL MATERIAL SOURCES AND WASTE AREAS AND ALL STAGING AREAS OUTSIDE OF THE DEPARTMENT OWNED RIGHT-OF-WAY.

The operations of any material pit or waste area shall be so conducted that it will blend into the surrounding landscape. Pit sites and waste areas shall be dressed to obliterate any unsightly appearance and treated in such a manner that erosion will not occur and result in the pollution of the watershed area. In general, sources will not be permitted at locations where resulting scars are visible from any highway. However, when approved, adequate space for conservation of existing natural screenings or to permit the installation of screen planting between the road surface and the disturbed area shall be provided.

The Contractor shall be responsible for obtaining stormwater permits on all material pits, waste areas, haul roads and other off-site areas selected by the Contractor to construct the project. The work within the project right of way and within construction easements will be covered by a Department obtained stormwater permit for the project.

The Contractor shall accept full responsibility for the quality of the materials used. He shall make all necessary arrangements with the owners of the materials; pay the purchase price or royalty directly to the owners and bear all the expense of procuring and delivering the materials complete in place, including cost of ingress and egress, and including the cost of opening, developing, and operating such sources.

If the Contractor submits a written request to the Department asking that the Department run samples or analyses on the materials, the Department may, at its option, run such samples or analyses, but a charge will be made for the tests and the cost deducted from the next monthly estimate due the Contractor.

Where access to a material source or waste area requires removal of fencing, the removal and replacement of fence, together with the protection of any livestock affected, shall be the responsibility of the Contractor without direct compensation.

Use of existing public roads for hauling materials to be used in the work shall be governed by Article 104.07.

All material pits (base, borrow, etc.), all waste areas, and all staging areas off the Department owned right-of-way shall have a historical and archaeological clearance from the Alabama State Historical Preservation Officer. The clearance shall be obtained from the following address:

Alabama Historical Commission Office
725 Monroe Street
Montgomery, AL 36130

In addition to the above, the Contractor shall provide the Department, by copy, a report from a professional biologist stating that no wetlands will be impacted by the proposed material source, waste area and/or staging area outside the Department owned right-of-way.

The Contractor shall also provide the Department, by copy, a letter from the U.S. Fish and Wildlife Service in Daphne, Alabama, stating that no endangered or threatened species or any proposed species protected under the Endangered Species Act will be impacted by the proposed material source, waste area and/or staging area outside the Department owned right-of-way. The address for the Fish and Wildlife Service is as follows:

U.S. Fish and Wildlife Service
P.O. Box 1190
Daphne, AL 36526

The letters from the Alabama State Historical Preservation Officer, professional biologist, and U.S. Fish and Wildlife Service along with the stormwater permit, shall be provided to the Engineer prior to any Contractor initiated disturbance (other than routine surveys) of the material source, waste area, haul road, and/or staging area outside the Department owned right-of-way.

(c) BLANK.

(d) BLANK.

(e) BLANK.

(f) USE OF MATERIALS WITH SPECIAL ACCEPTANCE REQUIREMENTS.

The Alabama Department of Transportation maintains several lists of materials, sources, and devices, which have undergone some form of preliminary evaluation. These lists are established both as reference for Contractors and as methods to eliminate some of the lengthy time delays required in evaluating certain products. Each list is unique in requirements and job control acceptance. Users of these lists should read all requirements carefully before using products on them. When materials or products shown on these lists are used, they shall be selected from the most current applicable list at the time of installation. These lists are published in the Department's manual "MATERIAL, SOURCES, AND DEVICES WITH SPECIAL ACCEPTANCE REQUIREMENTS", which is available for purchase from the Department.

The lists are not a blanket approval and do not relieve the Contractor of the responsibility of furnishing quality materials. The Project Engineer will inspect the material, and if doubt exists, job control samples will be taken. If these job control samples indicate failing test results, one of the following actions will be taken depending on the detrimental effects to the project:

1. Previously installed materials may be ordered replaced with passing materials at no cost to the Department.
2. Previously installed materials, which are of a temporary nature, may be left in place with the Contractor maintaining the failing materials for the duration of their use at his expense.
3. Previously installed materials may remain in place with an agreed price reduction.

After failing job control results are received, no further installation of the failing material will be allowed and a determination will be made by the Department as to the removal of the product from the list.

The lists are established and maintained by the individual sections within the Department of Transportation who are primarily concerned with the products. Lists are divided into five general categories of similar requirements. They are:

1. Qualified Sources of Materials
2. Approved Materials
3. Qualified Materials
4. Approved Traffic Control Devices and Materials
5. Qualified Traffic Control Devices and Materials

The Alabama Department of Transportation Product Evaluation Board has final authority for addition or removal of products from these lists. The Bureau of Materials and Tests duplicates and disseminates these lists.

General information concerning materials, sources, and devices with special acceptance requirements is contained in ALDOT-355. Information concerning items on these lists or how to get an item onto one of these lists may be obtained by contacting: