* *Section 26.55(c)(1); 26.71(b)* 
  + *HOW DOES THE USE OF JOINT CHECKS AFFECT COUNTING OF CREDIT FOR DBE PARTICIPATION AND THE ELIGIBILITY OF DBE FIRMS FOR CERTIFICATION? (Posted - 6/18/08)*

*By a joint check, we mean**a**check issued by a prime contractor to a DBE subcontractor and to a material supplier or another third party for items or services to be incorporated into a project.  (This Q&A does not discuss checks issued by a recipient to two or more parties.)*

*\*  The text of the DBE rule does not mention the use of joint checks.  Consequently, the rule does not prohibit prime contractors and subcontractors from using joint checks.*

*\* The preamble to the Department’s 1999 DBE final rule had the following to say about this subject:*

*A commenter suggested that the use of two-party checks by a DBE and another firm should not automatically preclude there being a CUF. While we do not believe it is necessary to include rule text language on this point, we agree with the commenter. As long as the other party acts solely as a guarantor, and the funds do not come from the other party, we do not object to this practice where it is a commonly-recognized way of doing* ***business.*** *Recipients who accept this practice should monitor its use closely to avoid abuse.  (64 FR 5116, February 2, 1999)*

*\* The Department understands that prime contractors, subcontractors and suppliers may wish to use joint check arrangements for a variety of legitimate reasons, such as assuring that timely payment will be made for the supplier’s items or dealing with situations in which it is difficult for a subcontractor to obtain bonding at a competitive rate. Consequently, recipients and UCPs should not assume that the use of joint checks is illegitimate.*

*\* However, the Department also understands that the use of joint checks can raise questions about whether it is proper to count DBE credit for the items purchased using the joint check and about whether the DBE firm’s relationship with the prime contractor compromises the independence required for certification as a DBE.   Consequently, recipients and UCPs may properly view the use of joint checks as a “red flag” calling for further scrutiny.*

*\* As with other parts of the relationship among prime contractors and DBEs, openness and transparency are keys to using joint checks in an appropriate way.   Historically, what has led to problems is not so much the use of joint checks in itself, but concealment or a lack of honesty concerning their use.*

*COUNTING DBE CREDIT IN JOINT CHECK SITUATIONS*

*\*  To receive DBE credit for performing a commercially useful function with respect to obtaining materials and supplies, a DBE must “be responsible for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself” (emphasis added; 49 CFR 26.55(c)(1)).  Only when a DBE meets all requirements of this provision should DBE credit be counted for the procurement of items by the DBE.*

*\* By paying for the material itself, the regulation means that the DBE’s own funds are used to pay for the material.  As the preamble passage quoted above notes, it is not appropriate for  the funds to come “from the other party” (e.g., the prime contractor).  The use of joint checks can raise the question of whether the DBE’s own funds, as distinct from those of the prime contractor, are really being used to pay for the material.*

*\* To answer this question, a prime contractor and DBE should provide documentation to the recipient showing that the funds used to pay a supplier in fact came from the DBE’s own funds.  Accounts receivable to the DBE from the prime contractor for the costs of items procured by the DBE from the supplier generally may be regarded as representing the DBE’s own funds. If a DBE which has received a joint check from the prime contractor documents that it has been in control of the funds provided in the check and has determined when the supplier or other third party has fulfilled its responsibilities under the contract, the recipient may conclude, absent evidence to the contrary, that the DBE is paying the third party with its own funds. The recipient should review this documentation before deciding whether to give DBE credit for the items in question.*

*\* As part of the recipient’s oversight of contracts on which joint checks are used, it is important to determine whether the requirements of 26.55(c)(1) other than payment from the DBE’s own funds are being met. If the other requirements of 26.55(c)(1) are not met, then it is not appropriate to award DBE credit for the use of the items in question.*

*+ Insistence by a prime contractor that a DBE must use a particular supplier or pay a specific price for an item is likely to be inconsistent with these requirements.*

*+ If there is a significant disparity with respect to quantity or cost of items a DBE procures using a joint check arrangement, compared to the size of the contract and the expected ability of the DBE to obtain the items, the recipient should look carefully to ensure that commercially useful function requirements for counting DBE credit are being met.*

*+ A DBE obtaining items for a construction contract normally should install them as well.  If the DBE obtains the items but the prime contractor or another party installs them, the DBE credit awarded may be limited to the fee or commission obtained by the DBE (see 26.55(e)(3)).*

*DBE INDEPENDENCE IN JOINT CHECK SITUATIONS*

*\* In answering questions about independence, recipients should determine whether or not there is a pattern of close, pervasive ties between a DBE and other firms.  If it appears that, absent its ties to a prime contractor, a DBE firm is not viable, it should not be regarded as independent.*

*\* Ties between DBEs and other firms that may be legitimate aspects of a business relationship, considered individually, can form part of a pattern of pervasive ties that compromises the independence of a DBE firm.  Joint checks are one of the ties between DBEs and other firms that recipients should examine in determining whether such a pattern exists.*

*SAFEGUARDS*

*\* The Department strongly recommends that recipients put into place a series of safeguards to prevent the use of joint checks in ways that would result in the denial of DBE credit for items obtained from suppliers or would compromise the independence of a DBE firm.*

*\* Recommended safeguards include the following steps by recipients:*

*+ Require prime contractors and DBEs wishing to use joint check arrangements to obtain prior approval from the recipient.*

*+ Require a written joint check agreement among the parties (including the suppliers concerned) providing full and prompt disclosure of the expected use of joint checks.  The agreement should contain all information concerning the parties’ obligations and consequences or remedies if the agreement is not fulfilled or a breach occurs.*

*+ Make sure there is a well-established monitoring process having oversight mechanisms such as review of invoices, cancelled checks and/or certification statements of payment.*

*+ Examine related financial transactions in which an alternative to the use of a joint check is used that may indicate a similar relationship between the prime contractor and a DBE subcontractor, such as the use of a cashier’s check or bank check presented to the supplier by the DBE.  In this type of situation, recipients should examine whether it was the prime contractor, and not the DBE subcontractor, that funded the transaction.*

*+ Caution prime contractors and DBE subcontractors to avoid exclusive relationships between one prime contractor and one DBE concerning the use of joint checks.  If a prime contractor makes joint checks available to one (e.g., a DBE) subcontractor, the service should be made available to all subcontractors (DBEs and non-DBEs).*

*+ Emphasize to prime contractors and DBE subcontractors that the use of joint checks should be focused on accomplishing the procurement of materials needed for a particular purpose at a particular time.  Long-term or open-ended joint checking arrangements can suggest a lack of independence for the DBE involved, and are a basis for further scrutiny by the recipient.  Recipients may establish reasonable durational limits on joint checking arrangements that are subject to periodic review and renewal to ensure that the arrangement is not operating in a way that compromises the independence of the DBE.*

*+ Review the relationship between the prime contractor and DBE to ensure the DBE has retained final decision-making responsibility concerning the procurement of materials and supplies, even when joint checks are involved.  That is, the relationship between the DBE and its suppliers should be established independently of and without interference by the prime contractor.  The rights of parties to a joint check arrangement to terminate the arrangement should be consistent:  for example, if the prime contractor has the right to terminate the arrangement unilaterally, so should a DBE subcontractor.*

*+ Ensure that joint checks issued by the prime contractor be delivered or mailed to the DBE for presentment and payment to the DBE’s suppliers.  The prime contractor should not make payment directly to the supplier*