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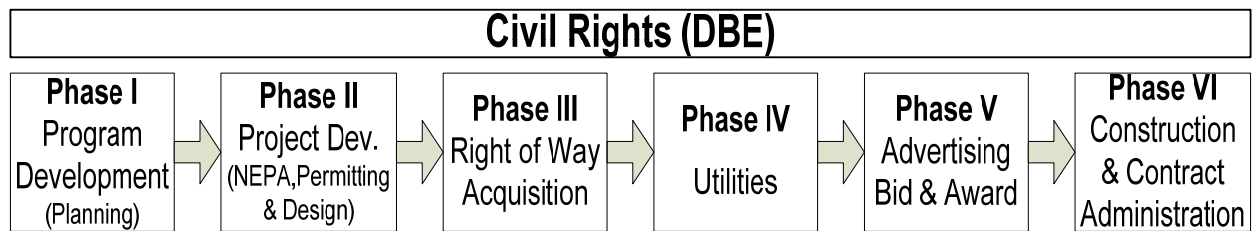
SECTION B

NON-CERTIFIED AGENCY

Chapter 7 Civil Rights and Disadvantaged Business Enterprises

This chapter provides guidance for local agencies in complying with the civil rights and Disadvantaged Business Enterprise (DBE) requirements for federal-aid transportation programs. This chapter outlines civil rights information for non-certified agencies as well as certified agencies.

In the sequence of project development, civil rights and DBE issues arise, after program development, during consultant selection and continue through the contract administration process and project closure.



A. OVERVIEW

It is the policy of ODOT to practice nondiscrimination on the basis of race, color, sex and/or national origin in the award and administration of U.S. Department of Transportation (USDOT) assisted contracts. The intention of ODOT is to create a level playing field on which DBEs can compete fairly for contracts and subcontracts relating to ODOT's highway construction, procurement and professional service activities.

ODOT is committed to a Civil Rights Program for the participation of DBEs through contracting opportunities in accordance with [49 Code of Federal Regulations \(CFR\) Part 26](#).

The DBE program applies to all projects or contracts where federal-aid highway funds are expended and authorized under the following:

- Titles I (other than Part B) and V of the Inter-modal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914.
- Titles I, III and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107 and federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102-240.

- By federal transit laws in [Title 49](#), U.S. Code, or Titles I, III and V of the TEA-21, Pub. L. 105-178.
- Safe Accountable Flexible Efficient Transportation Equity Act – A Legacy for Users ([SAFETEA-LU](#)).

B. DEFINITIONS

Disadvantaged Business Enterprise – A DBE is a for-profit, small business concern that is at least 51 percent owned and controlled by one or more socially and economically disadvantaged individuals. The management and daily business operations of the for-profit and small business concern must also be controlled by one or more such owners. These individuals must be citizens (or lawfully admitted permanent residents) of the United States and who are found to be the following groups which are presumed to be socially and economically disadvantaged:

1. Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and non-minority women, or any other group presumed to be socially and economically disadvantaged by the Small Business Administration ([13 CFR 124.103](#)).
2. Socially and economically disadvantaged on a case-by-case basis.

The presumption of social and economic disadvantage is rebuttable.

Race-conscious measure or program – A race-conscious program is one that uses race or gender to determine eligibility.

Race-neutral measure or program – A race-neutral program is one that offers services or benefits without regard to race or gender. For purposes here, race-neutral includes gender neutrality.

Small Business Concern – With respect to firms seeking to participate as DBEs in USDOT assisted contracts, a small business concern is defined pursuant to Section 3 of the Small Business Act and Small Business Administration Regulations implementing it ([13 CFR part 121](#)) and does not exceed the cap on average annual gross receipts specified [Section 26.65\(b\) of 49 CFR](#), as adjusted annually.

Good Faith Efforts – For all projects that have a DBE goal greater than zero, the bidder is required to submit a listing of eligible DBE participants, the work to be performed and the committed contract amount to meet the goal. If the bidder is unable to commit DBE participation sufficient to meet or exceed the goal, they must provide documentation of outreach and accommodation efforts as outlined in the approved DBE Program Plan to show good faith. Good faith effort means that the contractor must have taken all necessary and reasonable steps to achieve adequate DBE participation. [Appendix A to Part 26 of 49 CFR](#) provides guidance for making good faith efforts.

C. ROLES AND RESPONSIBILITIES

1. FHWA

FHWA administers federal-aid highway funds to recipients including states, counties, cities and other agencies such as transit districts for transportation related projects as defined by the scope of the [ODOT/FHWA Stewardship Agreement](#). FHWA is responsible for monitoring these agencies for compliance with Title VI and other aspects of the Civil Rights Acts of 1964, 1968 and 1973, all concerning nondiscrimination in administration of federal funds. FHWA has ultimate authority over all the Civil Rights Programs (USDOT-assisted recipients). Additional information is available at [FHWA's DBE website](#).

2. ODOT's Office of Civil Rights

The Manager of ODOT's Office of Civil Rights is responsible for the development, implementation and monitoring of the DBE Program for contracts in accordance with ODOT's nondiscrimination policy. The Manager of the Office of Civil Rights will conduct compliance reviews of the local agency's administration of the DBE Plan. A finding of noncompliance will result when a local agency fails to ensure compliance of its contractor with the DBE requirements or fails to take remedial action at ODOT's or FHWA's request. A local agency found to be in noncompliance may lose its federal funds and/or certification status.

The [Regional Local Agency Liaison](#) is the first contact for advice and assistance on civil rights and DBE matters. The Office of Civil Rights assists the [Regional Local Agency Liaison](#) in responding to local agencies' questions or issues related to DBE matters.

Visit ODOT's [Office of Civil Rights](#) website for additional information.

3. Local Agencies

A local agency participating in programs funded in whole or in part with federal dollars made available by ODOT shall comply with ODOT's [DBE Program Document](#), including the Unified Certification Program Agreement (UCP), or develop an approved DBE Program Plan¹. Local agencies will be required to submit semi-annual updates regarding DBE participation to ODOT reflecting program activities for the reporting period, unless their approved DBE Program requires them to report directly to FHWA. The Office of Civil Rights requires this information in order to comply with federal reporting requirements.

Local agencies are also responsible for the following items prior to bidding regarding DBE participation:

¹ The local agency DBE Program Plan shall have the approval of Federal Highway Administration (FHWA) prior to the local agency entering into a contract using federal funds. After approval of the Program Document, local agencies shall submit written requests to FHWA for approval of all proposed amendments.

- At 90% PS&E, send Cost Estimate and Construction Schedule and [Civil Rights Request for Goals \(previously referred to as the Yellow Sheet\) form # 734-0663](#) to Regional Local Agency Liaison and the OCR's Goals Request Mailbox at OCRGOALSREQUEST@odot.state.or.us The OCR's Small Business Program Manager will set the DBE goals.
- Include the contract goals and appropriate [DBE specification\(s\)](#) (special provisions and forms) in the bid documents. OCR's [External Workforce Programs Technician](#) will review bid documents and email approval to the project manager.
- Ensuring contractor compliance in meeting the contract DBE goal with qualified DBEs or making good faith efforts, including review and evaluation of good faith efforts to determine responsiveness to DBE provisions for award of contract and for subcontractor substitutions.
- Appointing a DBE Liaison Officer for ensuring program compliance and monitoring its contractor's DBE activities, including review and verification of all required DBE documents.
- Reviewing and taking action for non-compliance with DBE requirements by local agency contractors and consultants.
- The day of bid, a certified agency must submit to OCR the [DBE Commitment Certification and Utilization form 734-2785](#) and the [Bid Notification for Certified Agency Project form 734-2848](#).

Note: The Bid Notification for Certified Agency Project form 734-2848 is one of two additional form requirements for certified agencies. The second additional requirement is the submittal of the Civil Rights Award for Certified Agency Projects form number 734-2849. Both forms are available on the DBE website under "[Other Useful Forms.](#)"

Note: For additional clarification on OCR forms, submittal requirements, and roles and responsibilities review DBE OJT EEO and Labor Compliance Forms Matrix available on the OCR website.

Local agencies must also send the following information to [OCR's Data and Website Management Coordinator](#) after award but prior to Preconstruction in order to comply with the Civil Rights requirements for Certification. Once this information is received, the OCR's Data and Website Management Coordinator will send out the preconstruction packet.

- Project Name
- Key number
- Contract Number
- County
- DBE, MWESB, OJT commitments

- Publish date
- Bid close date
- List of all bidders and amounts – If certified agency, then this information included in [form 734-2849](#)
- Committed DBE firms and amounts (if the DBE Goal is greater than zero)
- SSUR for all bidders
- Estimated completion date
- Apparent awardee of contract
- Address of apparent awardee (prime)
- Amount of award
- Project manager’s name and address

Additionally, local agencies should not create or alter any Civil Rights forms. All local agencies must use ODOT Civil Rights forms, with no logo changes or alterations. However, a local agency may send a cover letter with their individual letterhead or logo to the contractor indicating that the local agency is working with ODOT for Civil Rights services.

D. PROGRAM ELEMENTS OF DBE PLANS

The following program elements will be included in all local agencies’ DBE procedures.

1. Policy Statement

The local agency must include a policy statement expressing a commitment to encourage the use of DBEs in all aspects of federal-aid contracting.

2. DBE Liaison Officer

The local agency is responsible for ensuring program compliance and monitoring its contractor’s DBE activities. To accomplish this, the local agency must appoint a DBE Liaison Officer. This Liaison Officer must be an administrator responsible to the chief executive of the local agency. This administrator should have the authority to delegate responsibility for the performance of work to ensure contractor compliance and adherence to the DBE Plan. For more information on duties of the DBE Liaison Officer, contact the [Regional Local Agency Liaison](#).

3. Provisions to Ensure Participation

The local agency must establish procedures to ensure that DBEs have an equitable opportunity to compete for contracts and subcontracts.

4. DBE Directory

The Oregon Office of Minority, Women and Emerging Small Business (OMWESB) maintains a [Unified DBE Directory](#) in accordance with [49 CFR 26.81\(g\)](#). The directory identifies all firms eligible to participate as DBEs. The directory lists the firm’s name, address, phone number and

type of work the firm has been certified to perform as a DBE. The information is updated daily and the directory is available electronically. The local agency will utilize this source list to facilitate identifying DBEs with capabilities relevant to specific contract opportunities. To qualify for credit on project specific goals greater than zero the owners must be members of the targeted DBE groups as identified in the current USDOT waiver.²

5. Provisions to Ascertain Eligibility of DBEs and Challenge Procedures

As provided in [49 CFR 26](#), only firms owned and controlled by socially and economically disadvantaged person(s) are to benefit from the DBE Program. ODOT's Office of Civil Rights is responsible for ensuring compliance with the federal regulations in determination of a DBE certification. In compliance with ORS 200 and Federal requirements in 49 CFR part 26, certification authority for the DBE Certification Program component has been delegated to the OMWESB through an agreement between ODOT and the Oregon Business Development Department. OMWESB will determine whether or not a firm meets the DBE criteria to qualify for USDOT funded projects. Their contact information is:

OMWESB
Business Oregon
775 Summer St. NE, Suite 200
Salem, OR 97301-1280

p: 503-986-0123
toll-free: 866-467-3466
f: 503-581-5115

<http://www.oregon4biz.com/Grow-Your-Business/Business-services/Minority-Owned-Business-Certification/>

Only firms that are currently certified as a DBE by OMWESB may be used by prospective bidders to fill a DBE goal established for USDOT funded projects.

6. Provisions to Meet and Enforce Established DBE Goals

The local agency is required to enforce any established goal for DBE participation in USDOT assisted contracts in accordance with [49 CFR 26.45](#). The goal will not be established as a quota system. The goal will be based on demonstrable evidence of the availability of ready, willing and able DBEs committed to participate on USDOT assisted contracts. The local agency will meet established goals to the maximum extent feasible through race neutral measures described in [49 CFR 26.51 \(a\) through \(c\)](#).

² The current waiver expired September 30, 2010. OCR DBE program has requested an extension and if FHWA grants the extension, it will be placed on the DBE program website.

7. Bidders Must Comply With Established DBE Goals or Satisfy the Good Faith Efforts to Meet the Goal

The local agency shall award a contract as required by public contracting laws including but not limited to [ORS 279](#) (See Chapter 12 Consultant Selection, in the Non-Certified Section of this *LAG Manual* for additional details regarding public contracting). Bidders must demonstrate they accomplished one of the following:

- Achieved the contract specific DBE participation goal or
- Made a sufficient good faith effort, without achieving the goal, by submitting appropriate documentation as described in [DBE Program Plan](#).

In the event a bidder is unable to meet the minimum expected participation per the requirements of the program, that bidder shall provide additional information regarding good faith efforts.

This information must be included at the time of bid opening.

Bidders that fail to achieve the established goal and do not demonstrate a good faith effort, shall be deemed non-responsive and therefore, shall be ineligible for award of the contract.

DBEs listed by the bidder for participation in the contract must be certified as eligible DBEs as of the time of bid opening.

Local agency will forward all DBE Commitment forms and Good Faith Effort documentation received as part of the bid packet to the OCR Small Business Programs Manager for evaluation of responsiveness in complying with the DBE goal. The Small Business Programs Manager will review and evaluate the submissions and will send summary report back to the local agency.

Types of actions that should be considered as part of the bidder's good faith efforts to obtain DBE participation are listed in Appendix A to [49 CFR 26](#). This Appendix is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

In determining whether a bidder has made good faith efforts, the performance of other bidders in meeting the contract goal can be considered. For example, when the apparent successful bidder fails to meet the contract goal, but others do meet it, it may be reasonable to raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, this may be viewed, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts in accordance with [49 CFR 26, Appendix A](#).

If it is determined that the apparent successful bidder has failed to meet the requirements of this section, the local agency, before awarding the contract, will notify the bidder in writing within four working days of the bid opening. The notification will include the reason for the determination and provide the bidder an opportunity for administrative reconsideration in accordance with [49 CFR 26.53\(d\)](#).

8. Counting DBE Participation Toward Meeting Goals

The local agency shall count toward meeting its race-conscious DBE goal only those expenditures originally committed to DBEs prior to contract award and those on which committed DBEs perform a [Commercially Useful Function](#) (CUF) on the project.

When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward the DBE goal only if the DBE subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

Credit shall be authorized for DBE subcontractor participation under a DBE contract provided a CUF review is performed, and documented. Race-conscious participation must have been part of the DBE contractor's original commitment prior to contract award. Race-neutral participation credit should be reported for any DBE contract work outside project-specific, race-conscious DBE goals.

The local agency must collect and review the "Summary Report of Subcontractors Paid" from each Prime Contractor on a monthly basis and forward a copy to the ODOT Civil Rights Field Coordinator for entry into the CRCT database.

If a DBE is no longer eligible for consideration, the dollar value for work performed under the contract after the date of ineligibility will not be counted toward the overall goal.

NOTE: The participation of a DBE subcontractor will not be credited toward the prime contractor's DBE achievements, or the overall goal, until the amount being counted toward the goal and any retainage held by the prime contractor has been paid to the DBE.

9. Maintenance of Records and Reports

It is the local agency's responsibility to maintain records and documents for six years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of ODOT or the USDOT. This reporting requirement is also extended for any certified DBE subcontractor.

The local agency will create and maintain a bidders list, consisting of all firms bidding on prime contracts and bidding or quoting subcontracts on USDOT assisted projects. The bidders list must have all bidders including successful and unsuccessful bidders and subcontractors. For race-neutral participation, the local agency must track and document uncommitted DBEs. Local agencies must also review CUF reports as well as monthly paid summary reports. The following DBE information must be included at the time of bid opening per [49 CFR 26](#):

- Firm name
- Firm address
- Length of time the DBE firm has been in business
- Firm's status as a DBE or Non-DBE

- DBE Certification Number (as applicable)

E. CONTRACT ADMINISTRATION

1. General

The local agency has the responsibility to perform the following activities:

a. Pre-Construction Conferences:

Conduct pre-construction conferences, during which DBE special provisions for federal-aid contracts are discussed with the contractor. The prime contractor will submit ODOT's form [734-2165A \(3-95\) \(Disadvantaged Business Enterprise Work Plan Form 3A\)](#) for each committed DBE at this time. This form will become a part of the contract records.

NOTE: If the goal is zero, then the DBE Work Plan Form 3A is NOT required. However, if the contractor voluntarily chooses to include DBE subcontractors, then the Form 3A may be submitted to the [Regional Local Agency Liaison](#) with a copy to ODOT's Office of Civil Rights.

b. CUF Reviews:

Monitor on-site compliance with the DBE special provisions of federal-aid contracts, including [CUF](#) reviews for committed and uncommitted DBEs.

c. Prompt Payment:

Ensure prompt payment/prompt return of retainage requirements. The participation of a DBE firm will not be credited toward the local agency's DBE achievements, or the overall goal, until the amount being counted toward the goal and any retainage held by the contractor has been paid to the DBE.

d. Reporting DBE Participation:

The local agency will report DBE participation to ODOT's Regional Civil Rights Field Coordinator as directed. ODOT's Regional Civil Rights Field Coordinator will coordinate with ODOT's Office of Civil Rights to ensure that the appropriate DBE statistical data will be maintained and reported on a quarterly basis. The local agency will report the following DBE participation information to the Regional Civil Rights Field Coordinator:

- Race- and gender- neutral contracts.
- Race- and gender- conscious contracts.
- Payments to all subcontractors - satisfied through completion and submission of the Monthly Subcontractor Paid Summary Report Form # 734-2722.
- Combined DBE participation on all federally assisted procurement activities.
- Copies of all [CUF](#) review reports.

2. Monitoring Compliance of DBE's During Construction

The local agency will monitor compliance of its contracts on federally assisted contracts and will impose such contract remedies as are available under federal, state and local law and regulations for non-compliance.

Project diary documentation of the DBEs' activities on the project must be performed in the same manner as is done on the prime contractor and any other subcontractor's activities.

In addition to the project diary, ODOT Form [734-2165B \(3-95\) \(Disadvantaged Business Enterprise Commercially Useful Function Form 3B\)](#) will be completed for each committed and uncommitted DBE:

- At the start of work.
- At the peak period of work.
- Whenever changes in the performance or scope of work warrants its completion.

The review will be completed per on-site observations, documentation review and interviews of contractor's personnel. The completed form will become a part of the local agency's project records.

In order to satisfy the contract goal, a DBE shall perform a Commercially Useful Function. [49 CFR 26.55\(c\)\(1\)](#) defines CUF as:

A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved.

The documentation in the project diary and on ODOT's [Form 734-2165B \(3-95\)](#) (Disadvantaged Business Enterprise Commercially Useful Function Form 3B) is information that the local agency will use to determine whether a DBE is performing a CUF. When a DBE is presumed not to be performing a CUF as defined above, the DBE may present evidence to rebut the presumption. The local agency will determine that the firm is performing a CUF given the type of work involved and normal industry practices. ODOT's [Civil Rights Field Coordinator](#) will also be available to provide assistance. The local agency should also be comparing the work performed by the DBE firm to the work described in the Certified Firm Directory to verify that the OMWESB has reviewed the DBE and determined that they have the resources, staff and expertise required to control the daily operations of the firm.

3. Contract Completion

When the contract work is completed, the local agency will verify the actual amount paid to the DBE firms and return of retainage held by the contractor for the contract work.

Upon request from ODOT's Office of Civil Rights, or USDOT, the local agency shall submit only records deemed necessary for inspection, auditing and review purposes.

F. INFORMATION

For additional information contact:

- ODOT's Office of Civil Rights at (503) 986-4350 or at <http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/index.shtml> for the required DBE forms.
- DBE OJT EEO and Labor Compliance Form Matrix on the OCR website.
- FHWA, Frequently Asked Questions Regarding DBE at: <http://www.fhwa.dot.gov/civilrights/faq.htm>