

# DBE Program Plan

2016 Update

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49 CFR Part 26

Disadvantaged Business Enterprise: Program  
Implementation Modifications; Final Rule

**Oregon Department of Transportation**  
**Policy Statement**  
**Disadvantaged Business Enterprise (DBE) Program**

The Oregon Department of Transportation (ODOT) is committed to a Civil Rights Program that includes participation of Disadvantaged Business Enterprises (DBEs) in ODOT contracting opportunities. ODOT has established a DBE program in accordance with U.S. Department of Transportation (USDOT) regulations 49 CFR Part 26, as revised January 28, 2011.

It is ODOT's policy never to exclude any person from participation in, deny any person the benefits of, or otherwise discriminate on the basis of race, color, sex, or national origin in the award and administration of USDOT-assisted contracts. It is ODOT's policy to ensure DBEs, as defined in Part 26, have an equal opportunity to receive and participate in USDOT-assisted contracts. It is also our policy to:

1. Ensure nondiscrimination in the award and administration of USDOT-assisted contracts;
2. Create a level playing field on which DBEs can compete fairly for USDOT-assisted contracts;
3. Ensure the DBE program is narrowly tailored in accordance with applicable law;
4. Ensure only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
5. Help remove barriers to the participation of DBEs in USDOT-assisted contracts;
6. Promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients;
7. Assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
8. Provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

The Director of ODOT establishes the DBE policy for the department. The Manager of the Office of Civil Rights (OCR) is delegated as the DBE Liaison Officer. In that capacity, the Manager of OCR, in coordination with all ODOT personnel, is responsible for implementing all aspects of the DBE program. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by ODOT in its financial assistance agreements with the USDOT. It is the expectation of the Director that all ODOT personnel shall adhere to the intent as well as the provisions and procedures of the DBE Program.

ODOT circulates this policy to the following in accordance with the DBE program: (1) The Oregon Transportation Commission, (2) ODOT personnel involved with USDOT-assisted work, and (3) Members of the DBE and non-DBE business community that perform or are interested in performing work on ODOT contracts. The complete DBE Program and the overall goal calculation reports are available for review at:

ODOT Office of Civil Rights  
355 Capitol Street NE, MS 31  
Salem, Oregon 97301- 3871

or

ODOT Office of Civil Rights web page at:  
<http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/index.shtml>

If you have any questions or would like further information regarding this program, please contact the Office of Civil Rights Manager, Angela M. Ramos, by telephone at (503) 986-4350, by fax at (503) 986-6382, or by e-mail at [Angela.M.Ramos@odot.state.or.us](mailto:Angela.M.Ramos@odot.state.or.us).

  
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Matthew Garrett  
Director, Oregon Department of Transportation

  
\_\_\_\_\_  
Date

# ODOT Disadvantaged Business Enterprises (DBE) Program

## Subpart A - GENERAL REQUIREMENTS

### §26.1 - §26-13(a)

References in this section:

- Oregon Department of Aviation<sup>i</sup>
- US Federal Reserve<sup>ii</sup>
- 49 CFR 26<sup>iii</sup>

### § 26.1 Objectives

The objectives are found in the policy statement on the first page of this program and are also listed here.

The Oregon Department of Transportation (ODOT) has established a Disadvantaged Business Enterprise (DBE) Program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26. ODOT has received Federal financial assistance from the Federal Highway Administration and the Federal Transit Administration of the Department of Transportation, and as a condition of receiving this assistance, ODOT has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy of ODOT to ensure that DBEs are defined in part 26, have an equal opportunity to receive and participate in DOT – assisted contracts. It is also our policy:

- 1) To ensure nondiscrimination in the award and administration of DOT– assisted contracts;
- 2) Create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- 3) Ensure the DBE program is narrowly tailored in accordance with applicable law;
- 4) Ensure only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs.
- 5) Help remove barriers to the participation of DBEs in USDOT-assisted contracts.
- 6) Assist the development of firms that can compete successfully in the market place outside the DBE Program; an
- 7) Promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients

- 8) Provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

### **§26.3 Applicability**

Federal-aid highway funds authorized under Titles I and V of the Intermodal 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 Titles I, III, and V of the Safe, Accountable, Flexible, Efficient, Transportation Equity Act: Legacy for Users (SAFETEA LU),

Federal transit funds authorized under Titles I, III, V, and VI of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, the Safe, Accountable, Flexible, Efficient, Transportation Equity Act (SAFETEA-LU), Titles I, III, V, and VI, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, II, and V of the TEA-21, Pub. L. 105-178,

Federal-aid highway and Federal transit funds authorized under Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21), Pub. L. 112-141.

Federal-aid highway and Federal transit funds authorized under Fixing America's Surface Transportation Act (FAST Act), Pub. L. 114-94.

Projects funded by Federal Aviation Administration are administered by Oregon Department of Aviation (ODA). For more information on ODA's DBE Program, see:

<http://www.oregon.gov/aviation/Pages/Affirmative-Action-.aspx>

### **§ 26.5 Definitions**

ODOT adopts the definitions contained in 49 CFR 26.5 for this program including new or amended definitions as they are provided by USDOT and will not include any definitions for terms not included in the definitions found in Section 26.5 of Part 26.

**Affiliation** has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121.

(1) Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:

- (i) One concern controls or has the power to control the other; or
  - (ii) A third party or parties controls or has the power to control both; or
  - (iii) An identity of interest between or among parties exists such that affiliation may be found.
- (2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

***Alaska Native*** means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

***Alaska Native Corporation (ANC)*** means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended

***Assets*** mean all the property of a person available for paying debts or for distribution, including one's respective share of jointly held assets. This includes, but is not limited to, cash on hand and in banks, savings accounts, IRA or other retirement accounts, accounts receivable, life insurance, stocks and bonds, real estate, and personal property.

***Business, business concern or business enterprise*** means an entity organized for profit with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the United States economy through payment of taxes or use of American products, materials, or labor.

***Compliance*** means that a recipient has correctly implemented the requirements of this part.



**Contingent Liability** means a liability that depends on the occurrence of a future and uncertain event. This includes, but is not limited to, guaranty for debts owed by the applicant concern, legal claims and judgments, and provisions for federal income tax.

**Contract** means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. For purposes of this part, a lease is considered to be a contract.

**Contractor** means one who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway, transit, or airport program.

**Days** mean calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where the recipient's offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

**Department or DOT** means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

**Disadvantaged business enterprise or DBE** means a for-profit small business concern -

(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

**DOT-assisted contract** means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

**Good faith efforts** means efforts to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

**Home state** means the state in which a DBE firm or applicant for DBE certification maintains its principal place of business.

**Immediate family member** means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, father-in-law, mother-in-law, sister-in-law, brother-in-law, and domestic partner and civil unions recognized under State law.

**Indian tribe** means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of “tribally-owned concern” in this section.

**Joint venture** means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

**Liabilities** mean financial or pecuniary obligations. This includes, but is not limited to, accounts payable, notes payable to bank or others, installment accounts, mortgages on real estate, and unpaid taxes.

**Native Hawaiian** means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

**Native Hawaiian Organization** means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

**Noncompliance** means that a recipient has not correctly implemented the requirements of this part.

**Operating Administration or OA** means any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The “Administrator” of an operating administration includes his or her designees.

**Personal net worth** means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in an applicant or participating DBE firm; or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

**Primary industry classification** means the most current North American Industry Classification system (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is available on the Internet at the U.S. Census Bureau Web site: <http://www.census.gov/eos/www/naics/>.

**Primary recipient** means a recipient which receives DOT financial assistance and passes some or all of it on to another recipient

**Principal place of business** means the business location where the individuals who manage the firm’s day-to-day operations spend most working hours. If the offices from which management is directed and where the business records are kept are in different locations, the recipient will determine the principal place of business.

**Program** means any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.

**Race-conscious** measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

**Race-neutral** measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, *race-neutral* includes gender-neutrality.



**Recipient** is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

**Secretary** means the Secretary of Transportation or his/her designee.

**Set-aside** means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

**Small Business Administration or SBA** means the United States Small Business Administration.

**SBA certified firm** refers to firms that have a current, valid certification from or recognized by the SBA under the 8(a) BD or SDB programs.

**Small business concern** means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in §26.65(b).

**Socially and economically disadvantaged individual** means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a members of groups and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.

(1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group if you require it.

(2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

(i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(ii) “Hispanic Americans,” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) “Native Americans,” which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;

(iv) “Asian-Pacific Americans,” which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kirbati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v) “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

(3) Being born in a particular country does not, standing alone, mean that a person is necessarily a member of one of the groups listed in this definition.

**Spouse** means a married person, including a person in a domestic partnership or a civil union recognized under State law.

**Transit vehicle manufacturer** means any manufacturer whose primary business purpose is to manufacture vehicles specifically built for public mass transportation. Such vehicles include, but are not limited to: Buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Producers of vehicles that receive post-production alterations or retrofitting to be used for public transportation purposes (e.g., so-called cutaway vehicles, vans customized for service to people with disabilities) are also considered transit vehicle manufacturers. Businesses that manufacture or mass-produce, or distribute vehicles solely for personal use and for sale “off the lot” are not considered transit vehicle manufacturers.

***Tribally-owned concern*** means any concern at least 51 percent owned by an Indian tribe as defined in this section.

**You** refers to a recipient, unless a statement in the text of this part or the context requires otherwise (i.e., ‘You must do XYZ’ means that recipients must do XYZ).

## **§ 26.7 Non-discrimination Requirements**

ODOT will never exclude any person or firm from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR 26 on the basis of race, color, sex, or national origin.

In administering its DBE Program, ODOT will not directly, or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of this program with respect to individuals of a particular race, color, sex, or national origin.

## **§ 26.11 Record Keeping Requirements**

Reporting to DOT: 26.11(b)

We will report DBE participation to DOT as follows:

- To FTA – We will report DBE participation, using the DOT “Uniform Report of DBE Commitments/Awards and Payments” form, on a semi-annual basis. These reports will reflect payments actually made to DBEs on DOT-assisted contracts.
- To FHWA – We will report DBE participation, using the DOT “Uniform Report of DBE Commitments/Awards and Payments” form, on a semi-annual basis.
- Reports covering Oct 1 – Mar 31 are due June 1<sup>st</sup> of each FFY.
- Reports covering Mar 31 – Sep 30 are due Dec 1<sup>st</sup> of each FFY.

## § 26.11(c) Bidders List

References in this section:

- [Subcontractor Solicitation and Utilization Report \(SSUR Form\)](#)
- [Summary Report of Subcontractors Paid](#)
- ODOT DBE Program - Resource Documents

ODOT will create a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on DOT-assisted contracts. The bidder list will include the name, address, DBE non-DBE status, age, and annual gross receipts of firms.

We collect this information through our Civil Rights Compliance Tracking System (CRCT).

The Civil Rights Compliance Tracking System (CRCT) is database systems built in-house to store and organize data and track compliance. This system provides tracking and reporting capabilities on companies who bid on or respond to projects and the tracking of actual utilization. It also captures amounts paid to all contractors and tracks Equal Employment Opportunity (EEO) and On-the-Job Training (OJT) information. CRCT data is used to generate state and federal reports on small business utilization, including the Uniform Report of DBE Awards and/or Commitments and Payments.

ODOT gathers the following information from prime bidders and proposers on the [Subcontractor Solicitation and Utilization Report \(SSUR Form\)](#): firm name, DBE certification status, and whether the identified firm was utilized in the prime's submitted bid or proposal. Bidders and proposers are required to submit the SSUR form within 10 days of the bid opening or contractor selection.

ODOT has gathered and will continue to gather additional bidder's list information including annual gross receipts and firm addresses through the disparity study update processes. The 2016 ODOT Disparity Study process also included a survey (by phone or email) of business in the Oregon highway construction and engineering related fields.

## §26.11(d) Retention of Records

ODOT maintains records documenting a firm's compliance with requirements indefinitely. These records include the complete application package for each certified firm and all affidavits of no-change, change notices, and on-site reviews.

### **§26.11(e) COBID Reporting**

ODOT commits to providing the Department of Transportation Office of Civil Rights (DOCR), by January 15, 2015 and each year following, a report citing the percentage and location within Oregon of the certified DBE firms in COBID's directory controlled by the following:

- 1) Women;
- 2) Socially and economically disadvantaged individuals (other than women);  
and
- 3) Individuals who are women and are otherwise socially and economically disadvantaged individuals.

### **Monitoring Payments to DBEs**

It is the contractor's responsibility to maintain records and documents for three (3) years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of ODOT or USDOT. This reporting requirement is also extended to any certified DBE subcontractor.

ODOT will maintain a running tally of payments actually made to DBE firms and require prime contractors and DBE subcontractors and suppliers to provide appropriate documentation to verify such payments. Credit toward overall or contract goals will only be given upon satisfactory evidence that payments were actually made to DBEs.

Prime contractor payment information is imported into CRCT from ODOT's Contract Payment System (CPS) database. Subcontract payment data, provided by the controlling contractor (could be either a prime or a subcontractor) in the [Summary Report of Subcontractors Paid](#), is entered by OCR staff into CRCT.

ODOT may perform interim audits of contract payments to DBEs. The audit will review payments to DBE subcontractors to verify that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the report of proposed DBE participation. The audit will also verify whether a CUF report has been completed for DBE subcontractors.

### **Increased Efforts to Collect A & E Payment Data**

System upgrades to CRCT allow CRCT to receive A&E contract data from the ODOT Procurement Office (OPO) database. Additionally, OCR continues to work with OPO toward developing a comprehensive system to collect input and report

accurate bid, contract, award (prime and sub), payment, and CUF review data for A&E contracting. ODOT OCR and OPO also continue to communicate with agency contract administrators through training materials on the importance of collecting paid summary report forms and recommend that they withhold payment from contractors that continue to be non-compliant.

### **§ 26.13 Federal Financial Assistance Agreement**

ODOT has signed the following assurances, applicable to all DOT-assisted contracts and their administration:

#### **Assurance: 26.13(a)**

ODOT shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT assisted contract or in the administration of its DBE Program or the requirements of 49 CFR part 26. ODOT shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT assisted contracts. ODOT's DBE Program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to ODOT of its failure to carry out its approved program, the DOT may impose sanction as provided for under part 26 and may, in appropriate cases refer the matter for enforcement under 18 U.S.C. 1001 and/or the program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

This language will appear in financial assistance agreements with sub-recipients.

[Note: This language is to be used verbatim, as it is stated in 26.13(a).]

#### **Contract Assurance: 26.13(b)**

ODOT will ensure that the following clause is placed in every DOT-assisted contract and subcontract:

The contractor, subrecipient, or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out the applicable requirements of 49 CFR part 26 in the award and administration of DOT assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

[Note: This language is to be used verbatim, as it is stated in 26.13(a)]



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<sup>i</sup> Oregon Department of Aviation: <http://www.oregon.gov/aviation/Pages/Affirmative-Action-.aspx>

<sup>ii</sup> US Federal Reserve: <http://www.federalreserve.gov/releases/mob/>

<sup>iii</sup> <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=0a1039d7867a4db341fb615e7f812571&rgn=div8&view=text&node=49:1.0.1.1.20.1.18.3&idno=49>

# ODOT Disadvantaged Business Enterprises (DBE) Program

## Subpart B – Administrative Requirements

### ***§26.21 through §26.39***

#### References in this section:

- ODOT's DBE Policy<sup>1</sup>
- ORS 200<sup>2</sup>
- ODOT Construction Manual - Chapter 18<sup>3</sup>
- ODOT OCR: DBE Forms<sup>4</sup>
- Statewide Programs Unit – Certification Program<sup>5</sup>
- Local Agency Guidance (LAG) Manual<sup>6</sup>

### **§26.21 DBE Program Updates**

As a recipient of US Department of Transportation (USDOT) financial assistance, the Oregon Department of Transportation (ODOT) is required to implement a Disadvantaged Business Enterprise (DBE) program according to the requirements explained in 49 CFR 26. ODOT will continue to carry out this program until all funds from DOT financial assistance have been expended.

Updates to the Program will be submitted to FHWA and FTA for approval; ODOT's DBE Program applies to all subrecipients, local public agencies, etc. who award federally-assisted contracts.

### **§26.23 Policy Statement**

The Policy Statement is elaborated on the first page of this program.

The Director of ODOT is responsible for issuing a policy statement [http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/sbe/dbe/docs/program\\_plan/DBE%20Policy%20Statement%2012215%20signed.pdf](http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/sbe/dbe/docs/program_plan/DBE%20Policy%20Statement%2012215%20signed.pdf)

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<sup>1</sup> [http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/Pages/dbe\\_prog\\_plan.aspx](http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/Pages/dbe_prog_plan.aspx)

<sup>2</sup> [https://www.oregonlegislature.gov/bills\\_laws/ors/ors200.html](https://www.oregonlegislature.gov/bills_laws/ors/ors200.html)

<sup>3</sup> <http://www.oregon.gov/odot/hwy/construction/constructionmanual/cm18.pdf>

<sup>4</sup> <http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/Pages/forms.aspx>

<sup>5</sup> <http://www.oregon.gov/ODOT/HWY/LGS/Pages/Certification.aspx>

<sup>6</sup> [http://www.oregon.gov/ODOT/HWY/LGS/lag\\_manual.shtml](http://www.oregon.gov/ODOT/HWY/LGS/lag_manual.shtml)

## **§26.25 DBE Liaison Officer (DBELO)**

The following individual is the designated DBE Liaison Officer:

Angela M. Ramos

Office of Civil Rights Manager

Phone: (503) 986-4353

Fax: (503) 986-6382

[Angela.M.Ramos@odot.state.or.us](mailto:Angela.M.Ramos@odot.state.or.us)

In this capacity, the DBELO is responsible for implementing all aspects of the DBE program and ensuring that ODOT complies with all provisions of 49 CFR Part 26. The DBELO has direct, independent access to the Director of ODOT concerning DBE program matters, and has responsibility for the day-to-day operation and oversight of the DBE Program as it applies to meeting Federal Highway (FHWA), Federal Transit Administration (FTA), and Federal Rail Administration (FRA) requirements for USDOT-assisted contracts and activities. An organizational chart displaying the DBELO's position in the organization is found in Exhibit C of this program.

The DBELO is responsible for developing, implementing and monitoring the DBE program, in coordination with other appropriate officials. The DEBELO has a staff of 2 to assist in the administration of the FTA and the FHWA programs.

### **Personnel**

#### **DBE Program Manager**

The DBE Program Manager develops and implements program functions based on federal rules, regulations and market conditions to provide opportunities for DBEs. The position establishes the overall ODOT goal, identifies ODOT contracts for DBE goal evaluation, establishes goals on identified contracts, monitors and evaluates contractual progress of DBE contractors, gathers and reports statistical data, and other information as required by FHWA.

Additionally, this position provides technical assistance and advice to ODOT personnel, outside contractors and consultants, and other agencies that perform contract administration and compliance in accordance with 49 CFR 26. This position assists in the design, monitoring, training, evaluation, and reporting of the DBE program consistent with current federal law. The program manager will recommend actions to be taken by staff in conducting reviews and investigations to assure contractor compliance with

DBE contract requirements. This position reports directly to the Manager of the Office of Civil Rights and has direct, independent access to the ODOT Director on DBE Program related matters.

### **Intermodal DBE Manager**

The Intermodal Civil Rights Manager (IMCR) develops and implements DBE program functions based on FTA rules and regulations and Federal Rail Administration (FRA) guidance to provide federally-funded (FTA and FRA) opportunities for DBEs and other small businesses. This position uses data from project grant awards to identify projects and contracts, monitors and evaluates contractual progress. This position establishes a race- neutral, triennial DBE goal,, monitors and evaluates DBE compliance by sub-recipients, and gathers and reports statistical data and other information as required by FTA and Federal Rail Administration (FRA).

Additionally, this position provides technical assistance and advice to subrecipients of Federal Transit Administration (FTA) funding. Organizes events aimed to provide a forum for transit providers, DBEs and other small businesses to collaborate on project opportunities. This position plans, designs and implements DBE training in collaboration with the Rail and Public Transit Division. This position reports directly to the Manager of the Office of Civil Rights and has direct, independent access to the ODOT Director on FTA and FRA DBE Program related matters.

### **Civil Rights Field Coordinators**

Civil Rights Field Coordinators provide technical assistance and advice to the project management and field personnel who perform contract administration and compliance in accordance with 49 CFR 26. These positions assist in the design, monitoring, training, evaluation and reporting of the DBE program consistent with current federal and state laws. Field Coordinators will recommend action to be taken by field personnel in conducting reviews and investigations to assure contractor compliance with DBE contract requirements. Field Coordinators are responsible to ensure that DBE related forms are filled and entered correctly in the OCR tracking database, including the DBE Work Plan Proposal (Form 3A), Commercial Useful Function (Form 3B), and the Paid Summary Report (PSR). They also provide regional DBE program outreach to contractors and small businesses. These positions report directly to the Field and Business Support Manager.

### **Regional Transit Coordinators (RTC)**

The Rail and Public Transit Division (RPTD) has appointed a Regional Transit Coordinator (RTC) to each ODOT Transportation Region. These RTCs work closely with each region's transit agencies, providing technical assistance, grant training and monitoring of compliance with the many rules and regulations associated with FTA funding. RTCs visit each transit system to assure proper postings of FTA Civil Rights and other materials. They attend triennial site reviews conducted by a consultant under contract to RPTD. Civil Rights deficiencies are reported to IMCR for technical assistance and correction. The IMCR provides DBE information and training. The RTCs are direct reports to the RPTD Transit Manager.

### **Field and Business Support Manager**

The Field and Business Support Manager will supervise and coordinate the work of the staff in the Field Coordination Unit and the Business Support Unit. This position manages the ongoing development and design of the Civil Rights Compliance Tracking system database to support operations and strategies of the Small Business programs for the state of Oregon internal and external customers.

### **Small Business Programs Manager**

The Small Business Programs Manager oversees the Supportive Services Programs such as the Small Contracting Program, ESB/DBE Mentor-Protégé program, and, in concert with the DBE Program Manager, acts as the DBE Program liaison to the small business community at industry and partner organizations' meetings.

### **Certification Office for Business Inclusion and Diversity (COBID)**

In accordance with an Interagency Agreement signed between OCR and COBID, COBID is responsible for carrying out the DBE certification and maintaining a database of currently certified DBEs (as well as of women-owned, minority-owned, service-disabled veteran-owned, and emerging small businesses). COBID certifies DBEs in accordance with Code of Federal Regulations and Oregon Statutes.

### **Other Support Personnel**

Personnel from other offices within ODOT share responsibility for ensuring the effective implementation of the DBE Program. They will give full cooperation and active support to the OCR and designees in this effort.

**Project Delivery and Procurement Staff (FTA included)**

- (1) Provide OCR with draft scopes of work/specifications for projects and Requests for Proposals (RFPs) with federal funding to enable goal setting. Outreach to DBEs and, where applicable, development of appropriate DBE language.
- (2) Provide OCR with copies of all final Invitation to Bids (ITBs), RFPs, mailing lists, and advance notices.
- (3) Incorporate DBE goal and appropriate DBE language into ITBs and RFPs
- (4) Inform the OCR of any changes to ITBs or RFPs that are subject to DBE goals.
- (5) Provide copies of bids to the OCR for evaluation of compliance with DBE requirements.
- (6) Allocate appropriate resources when needed, upon mutual agreement, to participate with OCR staff at major trade fairs and outreach events targeting DBEs and other small businesses.
- (7) Incorporate all applicable DBE provisions for procurements with goals. This information can be obtained from the DBE Program Manager and the Intermodal Civil Rights Manager for FTA funded projects.
- (8) Ensure that ITBs and RFPs do not contain unnecessary requirements that could unduly restrict or eliminate small businesses from competition.

**Project Management Staff**

- 1) Monitor and enforce DBE program requirements included in contracts, giving DBE Program compliance the same priority as compliance with all other legal obligations incurred by ODOT under its financial assistance agreements with USDOT. Enforce DBE contract goal commitments, payment and reporting obligations, DBE termination and substitution limitations, good faith efforts requirements, and commercially useful function and crediting requirements.
- 2) Ensure Paid Summary Reports (available on the [DBE Forms page](#)) and other DBE compliance-required documents are sent to the OCR Field Coordinator for each project on a monthly basis.



- 3) Ensure DBE contract goal commitments are met, Commercially Useful Function (CUF) reviews are performed on all DBEs performing work on a project, and OCR concurrence is secured on DBE subcontract matters in accordance with this DBE Program Plan, the DBE contract provisions, and the [ODOT Construction Manual, Chapter 18](#). Perform Commercially Useful Function (CUF) reviews on DBEs performing work on a project.

Alert OCR to potential problems concerning DBE utilization during contract administration and document such efforts. Secure OCR technical assistance and concurrence on DBE contract and subcontract matters in accordance with this DBE Program Plan, the DBE contract provisions, regulations, and ODOT Construction Manual - Chapter 18, as appropriate.

- 4) **Project management staff of the Rail and Public Transit Division** will monitor and enforce DBE program requirements included in contracts, giving DBE compliance the same priority as compliance with all other legal requirements incurred by ODOT under its financial assistance agreements with the Federal Transit Administration and Federal Rail Administration.

#### **Office of the Attorney General**

- 1) Address legal matters relating to DBE program implementation.
- 2) Render legal opinions regarding the interpretation of DBE bid specifications and contract provisions.
- 3) Advise OCR regarding matters dealing with the imposition of administrative sanctions against contractors who violate DBE provisions.
- 4) Represent ODOT in all legal actions involving DBE issues.
- 5) Provide OCR and COBID with legal opinions concerning DBE certification involving complex issues of ownership and control.

#### ***§ 26.27 DBE Financial Institutions***

It is ODOT policy to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to

use these institutions, and to encourage prime contractors on USDOT-assisted contracts to make use of these institutions. OCR has reviewed the Federal Reserve Board's statistical release on minority-owned financial institutions at the following the Federal Reserve website:

<http://www.federalreserve.gov/releases/mob/>

The Federal Reserve Board releases this information quarterly. The current release at the time of this program update showed there were no minority-owned financial institutions in Oregon. OCR will annually re-evaluate the availability of DBE financial institutions.

## **§26.29 Prompt Payment Mechanism**

- a) **Prompt Payment:** In accordance with 49 CFR 26.29(a). ODOT ensures that a prompt payment provision is included in every contract. ODOT also requires prime contractors to include such provision in all subcontracts. This requirement applies to all subcontractors, including DBEs and all tiers of subcontracting and contracts in any form (leases; task orders, etc.).
- b) **Return of Retention:** ODOT requires prompt and full payment of retainage from the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. A contract clause obligating the prime contractor to make prompt and full payment to subcontractors out of any retainage the prime has kept is required. Payment to the subcontractor must be made within 30 days after the subcontractor's work is satisfactorily completed.
- c) **Work is Accepted When:** A subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished, accepted and documented as required by ODOT.
- d) **Monitoring and Enforcement:** The prime contractor and its subcontractors are required to regularly submit project-specific subcontractor *Paid Summary Report* forms and to maintain records of supporting documents on file.

[http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/sbe/dbe/docs/program\\_plan/Exhibit\\_L.pdf](http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/sbe/dbe/docs/program_plan/Exhibit_L.pdf)

**Additional Mechanisms:** Failure by the prime contractor, subcontractor, or subrecipient to carry out the requirements for prompt payment is a material breach of contract which may result in the termination of the contract/agreement or other such remedy as ODOT deems appropriate, which may include, but is not limited to:

- 1) Withholding monthly progress payments;
- 2) Assessing sanctions;
- 3) Liquidated damages; and/or
- 4) Disqualifying the contractor from future bidding as non-responsive.

**§26.31 DBE Directory Information**

<https://oregon4biz.diversitysoftware.com/FrontEnd/VendorSearchPublic.asp?XID=6787&TN=oregon4biz>

- a) The Certification Office for Inclusion and Diversity (COBID) is the sole certification authority for the state of Oregon. COBID keeps a directory of certified firms that includes all firms certified as DBE and the NAICS codes indicating the types of work the firm has been certified to perform. Information also includes address and phone numbers and owner contact info.

**§26.33 Addressing Overconcentration**

Currently, ODOT is unaware of any types of work that have over-concentration of DBE participation, however, it will continue to monitor for indications of over-concentration. If reporting data indicates over-concentration in a certain work type, ODOT will consult with FHWA or FTA to develop appropriate measures to address the issue.

**§26.35 Business Development and Mentor-Protégé Business Development Program (BDI)**

ODOT strongly encourages, and is committed to, the participation of Emerging Small Businesses (ESB's) in contracting opportunities. ODOT also offers a Small Contracting Program where small businesses can register in ODOT's internal 'phone book'. The Workforce Development Program's (WDP) goal is to find, train and employ a diverse, skilled work force that is prepared to meet upcoming highway construction demands.

[http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/Pages/sbe/esb/esb\\_program.aspx](http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/Pages/sbe/esb/esb_program.aspx)

The Office of Civil Rights has developed a project-specific mentor-protégé program to assist firms in expanding their capacity to perform on larger and more challenging OFOT contracts.

[http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/Pages/sb\\_mntr prtg qlfy.aspx](http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/Pages/sb_mntr prtg qlfy.aspx)

## **§26.37 Monitoring Performance of Other Program Participants**

ODOT is required to implement appropriate mechanisms to ensure compliance with this part's requirements by all program participants (e.g., applying legal and contract remedies available under Federal, State and Local law). ODOT must set forth these mechanisms in its DBE program.

### **a) Project Management and Contract Administration Staff (including Procurement)**

ODOT project management and contract administration personnel, in consultation with the Office of Civil Rights, are responsible for monitoring compliance with the DBE program requirements of the contract, including the CUF provision of the contract.

The field project manager or contract administrator is responsible for all final actions in the field, including recommendations to the Highway Division Administrator for the suspension of a contractor's and/or subcontractor's right to bid.

Procedures such as those described below pertaining to highway construction projects will be followed in monitoring compliance on all USDOT funded contracts. DBE program compliance is to be given the same priority as compliance with all legal obligations incurred by ODOT under its financial agreements with USDOT.

### **b) Monitoring and Enforcement Mechanisms**

ODOT Project Management Staff, Contract Administration Staff, and Procurement Staff in consultation with the Office of Civil Rights, are responsible for monitoring compliance with the CUF provision of the contract. The field project manager or contract administrator will monitor both race-neutral and race-conscious methods of DBE utilization.

#### **1) Race-conscious Methods**

- Race-conscious methods generally apply to contracts on which a goal is set as a condition of award. Regional OCR Field Coordinators or, as needed, the DBE Program Manager, are responsible for providing technical assistance, training, and direction, consistent with 49 CFR 26, to Project Managers and their staff.
- When a DBE goal is set on a contract, an OCR representative will attend the pre-bid or pre-proposal meeting if scheduled. At this meeting the OCR representative will provide information as to the Internet web site address for the DBE certified firm directory to prime bidders or proposers.
- Once the contract is awarded, the ODOT Project Manager or Contract Administer will monitor the amount actually paid to all DBE firms. The Project Manager or Contract Administrator will require updates from the prime contractor/vendor on the amount paid to the DBE each month in the Summary Report of Subcontractors Paid.
- The amount awarded the DBE, the amount paid to the DBE as stated by the prime, and the amount paid to the DBE as verified by the DBE will be tracked through CRCT. The actual amount paid will be reported to FHWA or FTA. The OCR Field Coordinator or the DBE Program manager provides technical assistance and direction consistent with 49 CFR 26.
- For Architecture and Engineering (A&E) and related contracts, the Procurement Office or Local Public Agency notifies the DBE Program Manager or, depending on type of funding, the Intermodal Civil Rights Manager, when a solicitation has been developed. OCR determines whether or not a DBE goal is applicable. If applicable, OCR sets the goal to be included in the solicitation documents (the RFP, or mini-RFP for a Work Order Contract (WOC) solicitation under existing Price Agreements).
- For contracts awarded without solicitation (for example, a direct appointment, a sole source contract, or a major amendment to a contract), the Procurement Office or Local

Agency notifies the DBE Program Manager, who may set a goal to be included in the contract or amendment. After the contract is awarded, the Contractor is responsible for achievement of the DBE commitment.

- The **Summary Report of Subcontractors Paid** is to be turned in to the Project Manager (PM) or Contract Administrator (CA) on a monthly basis. The PM or CA will reconcile all payments and verify prompt payment. Copies are the submitted to the Civil Rights Field Coordinator, who will enter the amounts into CRCT and track compliance. In the event a DBE is not used after commitment, documentation of the reasons for the shortfall or Good Faith Efforts in finding a substitute DBE firm will apply.

**c) Race-neutral Methods**

Race-neutral methods are generally contracts on which no goal is assigned. The **Summary Report of Subcontractors Paid** is also required to be submitted to the Project Manager or Contract Administrator on a monthly basis. Copies are then submitted to the Civil Rights Field Coordinator who will enter the amounts into CRCT and track compliance.

**§26.39 Fostering Small Business Participation Resources**

[http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/Pages/small\\_business\\_resources.aspx](http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/Pages/small_business_resources.aspx)

ODOT offers a variety of supportive services for ESB and DBE certified businesses. Supportive Services are defined as professional training, tutoring or consulting services identified to help develop a small firm at the technical or business level to improve the firm's ability to perform successfully on ODOT contracts and projects.



## **Subpart C – Goals, Good Faith Efforts, and Counting**

### ***§26.41 through §26.55***

#### **§26.41 Statutory 10 Percent Goal**

The national 10 percent goal does not authorize or require ODOT to set overall or contract goal at the 10 percent level. The 10 percent goal is an aspirational goal at the national level and is used as a tool by USDOT in evaluating and monitoring DBEs' opportunities to participate in USDOT-assisted contracts.

#### **§26.43 Set-asides or Quotas**

ODOT does not use quotas or set-asides for DBEs on USDOT-assisted contracts.

#### **§26.45 Setting Overall Goals**

- a) (1) As a recipient of USDOT (FTA and FHWA) financial assistance, ODOT is required to set an overall goal for DBE participation in USDOT-assisted contracts (transit vehicles are excluded). Unless indicated by a valid disparity study and a USDOT-approved waiver, the overall goal will not be subdivided into group specific goals, or be established as a quota system.
- (2) ODOT, as a recipient of FTA funding, expects to award (excluding transit vehicle purchases) more than \$250,000 in a Federal fiscal year. This DBE program applies to FTA as well as FHWA contracts.
- b) Based on demonstrable evidence of ready, willing and able DBEs, ODOT OCR will establish an overall goal on a triennial basis for the participation of DBEs in contracts utilizing Federal-aid highway funds.
- (3) OCR will establish a separate overall annual goal on a triennial basis for the participation in all budgeted contracts utilizing Federal Transit Administration (FTA) funds.
- (4) Overall goals will be expressed as a percentage of the total amount of Federal-aid funds ODOT anticipates spending in the fiscal year.

On August 1, 2016, ODOT submitted to the Federal Highway Administration a proposed overall DBE goal of 11.6% for its FHWA-funded contracting for FFYs 2017 through 2019. The next triennial goal is due to FHWA by August 1, 2018 and will be applicable to FFYs 2019-2021.

On August 1, 2014, ODOT submitted to the Federal Transit Administration, an overall DBE goal of 8% for FTA-funded contracting for FFYs 2015 through 2017. The next triennial goal is due to FTA by August 1, 2017 and will be applicable to FFYs 2018-2020.

#### **§26.47 (c) Shortfall Analysis**

Per §26.47 (c), if the awards and commitments shown on ODOT's Uniform Report at the end of each fiscal year (Federal) are less than the overall goal applicable to that fiscal year, ODOT will do the following:

- 1) In detail, ODOT will analyze the reasons for the difference between the overall goal and the awards and commitments in that fiscal year;
- 2) Establish specific steps and milestones to correct the problems identified in the analysis that will enable meeting our goal for the new fiscal year;
- 3) Submit our analysis and corrective actions within 90 days of the end of the fiscal year to the appropriate Operating Administration (OA) – FHWA or FTA.

ODOT is aware that FHWA or FTA may impose conditions as part of its approval of the analysis and corrective actions that may include, but are not limited to, modifications to our overall goal methodology, changes in our race-conscious/race neutral split (FHWA projects only), or introducing additional race-neutral or race-conscious measures.

#### **§26.49 Transit Vehicle Manufacturers**

- a) ODOT requires that each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, provide certification (TVM) of FTA approval that it has complied with the requirements of §26.49.

- b) ODOT does not include FTA assistance used in transit vehicle procurements in the base amount when calculating the overall goal.
- 1) Only those vehicle manufacturers listed on FTA's certified list of Transit Vehicle Manufacturers are eligible to bid.
- 2) ODOT submits a monthly report to FTA indicating name of vendor, number of vehicles purchased, and total FTA assistance used.

*The U.S. Court of Appeals for the Ninth Circuit rendered a decision in 2005 that significantly impacted the ability in the 9<sup>th</sup> Circuit, to set race-conscious measures in implementing their DBE programs. As a result, USDOT issued guidance to suspend the use of race-conscious contract goals unless, through a disparity study, they could be supported by sufficient evidence of discrimination.*

*ODOT has conducted disparity studies since 2007; the latest study was conducted for 2016 and was used to assist ODOT in setting its annual overall goal in contracts funded by FHWA for FFYs 2017 through 2019.*

*The disparity studies have not included FTA-funded contracts.*

*DBE participation goals may be assigned on Federal-aid highway (construction and professional services) projects that have subcontracting possibilities. Unless prohibited, contract goals will be established to meet any portion of the overall goal not met by using race-neutral means (48 CFR §26.51(d)).*

## **§26.51 Meeting Overall Goals**

- a) To the maximum extent possible, ODOT intends to meet the established goals through race-neutral means. Where it is determined by the Office of Civil Rights (OCR) that race-neutral means are inadequate to meet the overall goal, OCR will establish contract-specific goals for particular projects with subcontracting opportunities.
- b) ODOT/OCR uses public participation, outreach, technical assistance, notification of contracting opportunities, the website, public meetings, attends many small business events and has created many small business

programs to assist small businesses in their efforts to secure ODOT contracts.

- c) ODOT/OCR will submit to FHWA its overall goal (along with its projection of the portion expected to be met through race-neutral means).

### **Contract Goals – Architectural, Engineering and Professional Services**

(d) Based on the results of the most current Disparity Study, ODOT will set contract goals (requiring DBE participation) to meet the portion of the overall goal not projected to be met using race-neutral means.

(e) ODOT uses the following provisions in setting A&E and professional service contract goals:

- 1) Contract goals are only set on contracts with subcontracting opportunities.
- 2) Contracts that do not exceed \$100,000 and require a single discipline will be set at zero percent.
- 3) Contracts that exceed \$100,000 and require 2-4 disciplines are set at 3%.
- 4) Contracts that exceed \$100,000 and require 5 or more disciplines are set at 8.5%.
- 5) FHWA approval is not required of each goal; however, FHWA may review and approve or disapprove any contract goal ODOT establishes.
- 6) Participation by all certified DBEs is assured.

f) ODOT ensures that its DBE program is narrowly tailored to overcome the effects of discrimination but may adjust the use of contract goals as appropriate.

g) In any year which ODOT projects meeting part of the overall goal through race-neutral means, and the remainder through contract goals, the data will be maintained separately.

### **Contract Goals – Construction**

Based on the results of the most current Disparity Study, ODOT will set contract goals (requiring DBE participation) to meet the portion of the overall goal not projected to be met using race-neutral means.

ODOT uses the following provisions in setting Construction contract goals:

- 1) Contract goals are set on most contracts with subcontracting opportunities.

- 2) Contract goals are set depending upon the value of the work items available to subcontract, the number of DBE firms available to participate, the number of non-certified firms available to participate, the duration of the construction schedule, the location and the complexity of the project.
- 3) Operating administration (OA) approval is not required of each goal; however, the OA may review and approve or disapprove any contract goal ODOT establishes.
- 4) Participation by all certified DBEs is assured.

ODOT ensures that its DBE program is narrowly tailored to overcome the effects of discrimination but may adjust the use of contract goals as appropriate. The Office of Civil Rights assigns the goal and forwards it to the appropriate unit (construction specifications or procurement office) for inclusion in project plans and specifications.

In any year which ODOT projects meeting part of the overall goal through race-neutral means, the remainder through contract goals, the data will be maintained separately on DBE achievements in those contracts with and without contract goals, respectively. This data will be reported to the operating administration.

#### **§26.53 (a) (b) Good Faith Efforts (GFE)**

- a) It is the intent of ODOT that all Bidders meet the assigned DBE contract goal for DBE participation. To determine whether the contract should be awarded to a Bidder that has failed to meet the assigned contract goal, ODOT OCR must decide whether the efforts made to obtain DBE participation constituted good faith efforts. OCR will review the efforts made to meet the assigned DBE contract goal.

All Bidders (including DBE bidders), must complete and sign the Subcontractor Solicitation and Utilization Report. The report must be completed and signed by the Bidder's authorized representative.

- 1) Subcontractor Solicitation and Utilization Report shall be submitted with the bid. Should the Bidder fail to completely fill out, sign, and submit the report with the bid, the Bidder will be considered non-responsive. If the project-specific goal is zero, all Bidders on federal-aid funded projects must submit the signed form with business and project information, even if there are no committed DBE firms listed.

## 2) Good Faith Efforts

In the event a bidder is unable to meet the minimum expected participation per the requirements of the DBE Commitment, the bidder will provide additional information regarding good faith efforts. This information must be included at the time of bid opening.

- b) In determining whether a bidder has made good faith efforts, OCR may take into account the performance of other bidders in meeting the contract goal. OCR/ODOT may view this, in conjunction with other factors, as evidence that the bidder made good faith efforts in accordance with 49 CFR 26.

If the contract goal is not met, documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quotes. Other types of actions that could be considered as part of the bidders good faith efforts are listed in 49 CFR 26, Appendix A.

- c) Committed DBE Breakdown and Certification Report:

<http://www.odot.state.or.us/forms/odot/highway734/2531.pdf>

This report must be completed by the contractor and submitted within five calendar days of the notification of award, and prior to contract execution. Electronic submission is preferred:

E-mail to [OCRInfoRequest@odot.state.or.us](mailto:OCRInfoRequest@odot.state.or.us) – *or* – Fax to (503) 986-6382

- d) Completed and signed forms should be emailed to [OCRInfoRequest@idot.state.or.us](mailto:OCRInfoRequest@idot.state.or.us). Failure to provide detailed DBE information to OCR within five calendar days of notification of award shall be cause for cancellation of the award, withdrawal of the contract and may be cause for forfeiture of the proposal guaranty.
- e) The contractor shall indemnify the name(s) of the DBE(s) to be awarded work on the project, along with a detailed description of the bid items, including bid item numbers, descriptions and amounts, and dollar amounts to be subcontracted.



- f) The amount(s) entered on the Committed DBE Breakdown and Certification Form must be equal to or greater than the value of work indicated on the Subcontractor Solicitation and Utilization Report as submitted with the bid proposal, and must be equal to or greater than the value of the assigned minimum DBE participation goal unless it has been determined that a good faith effort was made.
- g) The authorized signature of the prime contractor and the authorized signature of the committed DBE owner shall be affixed to the Committed DBE Breakdown and Certification Form as required by 49 CFR Part 26.53(b)(2)(v). Failure of these signatures to appear on the form may cause the contract award to be canceled and the contract to be withdrawn.
- h) Committed DBE Breakdown and Certification Form

Upon award of the contract, subsequent to DBE goals being met or satisfactory demonstration of good faith efforts, the Office of Procurement transmits a letter to the contractor requesting completion of the Committed DBE Breakdown and Certification Form ("Form 2") for the project.

Each Alternative Contracting project will be analyzed separately to insure maximum DBE participation.

Good Faith Effort (GFE) determinations are made as close to the time of bid as possible, by the DBE Program Manager. Upon the decision of the DBE Program Manager, the Office of Procurement will provide the bidder with the official written determination.

#### **§26.53 (d) Administrative Reconsideration**

If it is determined that the bidder has failed to meet the requirements of parts 1 and 2 of this section, ODOT, before awarding the contract, will notify the bidder in writing within 15 (fifteen) calendar days of the bid opening. The notification will include the reasons for the determination and provide the bidder an opportunity for administrative re-consideration.

Administrative Reconsideration includes:

1. The bidder will have the opportunity to provide written documentation or argument to the Review Committee, consisting of ODOT personnel, and personnel from other State of Oregon agencies, knowledgeable of DBE Program requirements, concerning the issue of whether it met the goal or made adequate good faith efforts to do so, within 3 working days of the receipt of notification.
2. The decision on reconsideration will be made by an official who did not take part in the original determination that the bidder failed to meet the goal or make adequate good faith efforts to do so.
3. Upon request, the bidder will have the opportunity to meet in person with the Review Committee, to discuss the issue of whether it met the goal or made adequate good faith efforts to do so.
4. The Review Committee will make a decision on reconsideration within 3 working days after reviewing the evidence provided by the apparent successful bidder/offeror.
5. The bidder/offeror will be notified in writing by the Review Committee regarding the decision of reconsideration within 4 working days of the decision. This notice will explain the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.
6. The result of the reconsideration process is not administratively appealable to the US DOT.

When projects are let using the Design Build (D-B) method, the original RFQ and RFP will specify that there will be a DBE goal. ODOT lets a master contract to a contractor, who in turn lets subsequent subcontracts for the work of the project. The master contractor in conjunction with OCR establishes contract goals, as appropriate, for the subcontracts it lets. ODOT maintains oversight of the master contractor's activities. The design and construction phases of the project will be evaluated separately.

## **§26.53 (f) Termination, Substitution of DBEs (before & after contract award)**

(f)(1)(i) The bidder/offeror/contractor must notify and obtain the written approval of ODOT project management personnel prior to replacing a DBE or making any other change in the participation indicated in the commitment forms. These requirements apply to both pre and post-award terminations, or deletions of, or substitutions for DBE firms put forward by offerors in negotiated procurements.

- A. As stated in the contract provisions, the contractor shall use the specific DBEs listed to perform the work and/or supply the materials for which each is listed unless the contractor obtains written consent from ODOT.
- B. Without ODOT's consent, the contractor is not entitled to any payment for work or material unless it was performed or supplied by the listed DBE.

(2) Written consent will be provided only if ODOT agrees that the prime contractor has good cause to terminate the DBE firm.

(3) Good cause includes the following circumstances:

- i. The DBE subcontractor fails or refuses to execute a written contract;
- ii. The DBE fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE to perform its work on the subcontract results from bad faith or discriminatory action of the prime contractor;
- iii. The DBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements.
- iv. The DBE becomes bankrupt, insolvent, or exhibits credit unworthiness;
- v. The DBE is ineligible to work on public projects because of a suspension and debarment proceeding pursuant to 2 CFR Parts 180, 215 and 1,200 or applicable state law;

- vi. The DBE voluntarily withdraws from the project and provides written notice of its withdrawal to ODOT;
- vii. ODOT has determined that the DBE is not a responsible contractor and is not eligible to receive DBE credit for the type of work required;
- viii. The DBE owner dies or becomes disabled with the result that the DBE is unable to complete its work on the contract;
- ix. Other documented good cause that ODOT determines compels the termination of the DBE subcontractor. However, the good cause does not exist if the prime contractor seeks to terminate a DBE it relied on to obtain the contract so that the prime can self-perform the work or so the prime can substitute another DBE or non-DBE contractor after contract award.

(4) Before transmitting its request to ODOT, the prime contractor must give written notice to the DBE subcontractor, with a copy to ODOT, of its intent to request to terminate and/or substitute, and the reason for the request.

(5) The prime contractor must give the DBE five (5) days to respond to the notice. The DBE will advise ODOT and the prime contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why it should not be approved. If required in a particular case as a matter of public necessity (e.g., safety), ODOT may provide a response period shorter than five days.

(6) In addition to post-award terminations, the provisions of this section apply to pre-award deletions of or substitutions for DBE firms put forward by offerors in negotiated procurements.

### **§26.53(g) Good Faith Efforts to Replace**

When a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, ODOT requires the prime contractor to make good faith efforts to find another DBE subcontractor. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal established for the procurement.

ODOT requires the contractor to document its good faith efforts and submit the documentation OCR and the Project Manager within 7 days. At the contractors request and if necessary, an additional 7 days may be granted. OCR will provide written determination to the contractor stating whether or not good faith efforts have been demonstrated.

### **Contract Change Orders**

ODOT will consider the impact on DBE participation in instances where ODOT changes, reduces, or deletes work committed to a DBE at the time of contract award. In such instances, the contractor is not required to replace the work but is encouraged to do so.

In cases where normal changes in the scope of a project as an outcome of work adjustments resulting from a recalculation of the amount of work required, causes a reduction in the work committed to a DBE firm, the contractor shall notify the Project Manager and the affected DBE of any proposed change. The contractor shall enable the affected DBE to participate in the change order work when possible. If the final amount paid to the DBE is less than the commitment amount, the contractor will not be penalized for failing to meet the original commitment.

The contractor will not be allowed to reduce the work committed to a DBE so that the contractor can perform the work. Terminating a DBE for convenience is not allowed.

### **§26.53 (i) Applying GFE When DBE is Prime Contractor**

ODOT applies the same requirements of this section to DBE bidders/offerors for prime contracts. In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, ODOT counts the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.

### **§26.53 (j) GFE – All Contracts/Subcontracts Must Comply**

ODOT requires the prime contractor to make available upon request a copy of all DBE subcontracts. The subcontractor shall ensure that all subcontracts or an agreement with DBEs to supply labor or materials require that the subcontractor and all lower tier subcontractors be performed in accordance with §26.53 provisions.

### **§26.55 (a) DBE Credit**

When a DBE participates in a contract, ODOT only counts the value of the work performed by the DBE towards the DBE goal.

- 1) This counting includes the entire amount of that portion of a construction contract that is performed by the DBE's own forces, the cost of supplies and materials obtained by the DBE for the work of the contract; supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate.).
- 2) ODOT also counts the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals provided ODOT determine the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
- 3) When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

### **§26.55 (b) Joint Ventures**

When a DBE performs as a participant in a joint venture, ODOT counts that portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward the DBE goal.

### **§26.55 (c) Commercially Useful Function (CUF)**

ODOT counts expenditures to a DBE contractor toward the DBE goal only if the DBE is performing a commercially useful function on that contract.

- 1) The contractor or vendor is responsible for ensuring that DBEs working on the project perform a Commercially Useful Function (CUF). The contractor or vendor shall receive credit toward meeting the assigned DBE goal and payment for DBE-performed work only if the DBE-performed work has met the CUF requirements.

Commercially Useful Function is defined in 49 CFR 26.55 (c), in part, as follows:  
*A DBE is considered to perform 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.*

### **CUF Review - Construction**

The actual CUF review will be performed by personnel assigned the task by the Project Manager per the ODOT Construction Manual, or the Contract Administrator for non-construction contracts. The CUF report will be maintained as part of the project file. The results of the CUF report are entered into OCR's CRCT database. The PM or designee must perform at least one CUF review for each DBE on a project depending on the following milestones during the project:

- Early in the DBE's Work, at or near the DBE's peak of operations (when it is performing one or more of its subcontracted items of work).
- Whenever a significant change in the operation of the DBE occurs (when new equipment is used or work crews change).
- Whenever a replacement or substitution of a DBE occurs.
- Whenever a significant Change Order changes or affects the Work to be accomplished by the DBE (when a new type of work is added).
- At least one for each twelve month period, for Projects where the DBE's Work lasts longer than twelve months.

### **CUF Review – Architectural, Engineering and Professional Services Contracts**

The CUF review for A&E and Professional Services includes the verification of the DBE firm's professional licensing, review of the DBE firms subcontract agreement, monitoring of payments made to the DBE firm, and whenever possible, an electronic copy of the deliverable for which the DBE firm was hired. The CUF review is performed by personnel assigned the task by the OCR or its assign. CUF reports will be maintained as part of the project file. The results of the CUF report are entered into OCR's CRCT database. The PM or designee must perform at least one CUF review for each DBE on a project depending on the following milestones during the project:

- Early in the DBE's Work, at or near the DBE's peak of operations.



- Whenever a significant change in the operation of the DBE occurs.
- Whenever a replacement or substitution of a DBE occurs.
- Whenever a significant Change Order changes or affects the Work to be accomplished by the DBE.
- 

### **Determination**

When a DBE is initially determined not to be performing a CUF as defined above, the DBE may present evidence to rebut this determination. The PM or CA, in consultation with OCR, will determine if the DBE is performing a CUF given the type of work involved and normal industry practices.

Decisions on CUF matters are subject to review by the concerned operating administration (FHWA or FTA), but are not administratively appealable to USDOT.

### **DBE Management**

The DBE majority owner(s) must manage the work contracted. The management shall include:

- Scheduling work operations;
- Ordering equipment and materials;
- Preparing and submitting payrolls and all other required reports and forms, and;
- Hiring and firing employees, including supervisory employees.

Daily work operations must be under the direct supervision of the DBE majority owner(s) or a superintendent or foreman (on a full-time basis) that is in the employ and under the direct control of the DBE majority owner(s) only. If the owner(s) of the firm who are not minorities or women are disproportionately responsible for the operation of the firm, then the firm is not controlled by minorities or women and shall not be considered a DBE and constitutes a failure to perform a commercially useful function.

The supervision of the work by personnel normally employed by another contractor or by personnel not under the control of the DBE constitutes a failure to perform a commercially useful function.

### **DBE Workforce**

DBE subcontractors shall be responsible for the continuous management, direction, and control of their sub-subcontractors.

The DBE must:

- Solicit;
- Hire;
- Place on its payroll;
- Direct, and control all workers performing work under its contract.

The DBE owner or its superintendent must, on a full-time basis, supervise and control the work of the contract.

The DBE may, with the prior written consent of the Project Manager, augment its work force with personnel of another firm. The Project Manager shall approve the request only when:

- a) Specialized skills are required, and
- b) The use of such personnel is for a limited time period.

### **DBE Equipment**

The DBE is expected to perform the work with equipment that is owned, being purchased or leased by the DBE under a written lease agreement that has been consented to by the Project Manager prior to the DBE starting work.

Emergency use of equipment owned by the Prime contractor or another subcontractor, where the equipment normally used by the DBE is unavailable, will not be considered a CUF violation if the use is of short duration and in a situation where not using the equipment would cause physical harm to a person or would have such a negative impact on the project work that it would create a significant hardship. ODOT project management staff should be made aware of the situation as soon as possible.

No credit will be given, nor payment made, for the cost of equipment leased or rented and used in the DBE firm's work when payment for those costs is made by a deduction from the prime contractor's payment(s) to the DBE firm.

### **Equipment Leased From the Prime**

The DBE may lease equipment from the prime contractor provided a written rental agreement, separate from the subcontract specifying the terms of the lease

arrangement, is consented to by the Project Manager prior to the DBE starting work.

The DBE must:

- Hire;
- Direct;
- Supervise;
- Control and carry the operator of the equipment on its payroll.

Specialized equipment and operator leased from the prime contractor:

- The DBE may lease specialized equipment, through a written rental agreement, separate from the subcontract specifying the terms of the lease arrangement, and consented to by the Project Manager prior to the DBE starting work.

The Project Manager shall consent to the lease agreement only when:

- a) The equipment is of a specialized nature,
- b) The equipment is readily available at the job site,
- c) The operation of the equipment is under the full control of the DBE,
- d) The lease arrangement is for a short term, and
- e) The lease arrangement is a normal industry practice.

#### **§26.55 (d) DBE Trucking Firms**

The following factors will be used to determine if a DBE Trucking firm is performing a CUF:

- a) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
- b) The DBE must itself own and operate at least one fully licensed, insured and operational truck used on the contract.

- c) The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
- d) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
- e) The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE lessees, but it cannot exceed the value of transportation services provided by DBE-owned trucks on the contract. Any additional participation by non-DBE lessees receives credit only for the fee or commission they receive as a result of the lease arrangement.
- f) For the purposes of DBE Trucking Firms, a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

#### **§26.55 Non-certified Firms**

- f) ODOT will not count its participation towards any DBE goals if the firm was not certified prior to bidding their scope of work for the project.
- g) ODOT does not count the dollar value of work performed with a firm after it has ceased to be certified.
- h) ODOT does not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on its contract until the amount being counted has actually been paid.

# **ODOT Disadvantaged Business Enterprises (DBE) Program**

## **Subpart D – DBE Certification Standard**

### ***§26.61 through §26.73***

*The Oregon Department of Transportation (ODOT) has participated in a Unified Certification Program (UCP) since January 1988 through Oregon Revised Statute (ORS) Chapter 200 and Oregon Administrative Rule (OAR) Chapter 123 Division 200. The sole certification agency for the State of Oregon is the Certification Office for Business Inclusion and Diversity (COBID) housed within the Oregon Business Development Department (OBDD).*

### **§26.61      Burdens of Proof**

- a) The firm seeking certification has the burden of demonstrating to the Certification Office for Business Inclusion and Diversity (COBID), by a preponderance of the evidence, that it meets the requirements concerning group membership or individual disadvantage, business size, ownership, and control.
- b) COBID requires, with the application, a signed, dated and notarized Affidavit of Certification from each owner upon which disadvantaged status is relied.
- c) Application available in Appendix F of 49 CFR Part 26. Includes a complete checklist of required supporting documentation.
- d) Individuals not presumed to be socially and economically disadvantaged, and individuals concerning whom the presumption of disadvantage has been rebutted, have the burden of proving, by the preponderance of evidence, that they are socially and economically disadvantaged.
- e) COBID will make determinations concerning whether individuals have met their burden of proof of group membership, ownership, control, and social and economic disadvantage by considering all the facts in the record, viewed as a whole.

### **§26.63      Group Membership Rules**

Individuals who are United States citizens (or lawfully admitted residents) and who are members of the following designated groups, as defined in 49 CFR 26.5, are considered socially and economically disadvantaged:

- Black Americans
  - Hispanic Americans
  - Asian-Pacific Americans
  - Native Americans
  - Subcontinent Americans
  - Women
  - Any additional groups whose members are designated as socially and economically disadvantaged by the SBA in 13 CFR 124.103(b).
- a) These individuals do not have the burden to prove they are socially and economically disadvantaged. However, if COBID has a well-founded reason to question whether an individual is a member of such a group, COBID will require the individual to produce appropriate documentation.
  - b) COBID will take special care to insure that it does not impose a disproportionate burden on members of any designated group.
  - c) COBID will provide the individual a written explanation of the reason(s) for questioning his or her group membership and a written request for additional evidence as outlined below.
  - d) In making such a group membership determination, COBID will consider:
    - 1) Whether or not the person has held himself/herself out to be a member of the group over an extended period of time prior to application for certification, and;
    - 2) Whether the relevant community regards the individual as a member of the group.
    - 3) If COBID determines an individual is not a member of a designated group, the individual must demonstrate social and economic disadvantage on an individual basis using the guidelines in 49 CFR 26, Appendix E.
    - 4) This includes completing a social and economic disadvantaged questionnaire.
    - 5) COBID's decision concerning membership in a designated group will be subject to certification appeals procedures.

## **§26.65 Rules Governing Business Size**

- a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business as defined by the Small Business Administration (SBA) standards. COBID will apply current SBA business size standards found in 23 CFR Part 121 appropriate to the types of work the firm seeks to perform in USDOT-assisted contracts.
- b) Even if the firm meets the SBA requirements, a firm is not an eligible DBE if in any federal fiscal year the firm (including affiliates) has had average annual gross receipts over the firm's previous three (3) fiscal years, in excess of \$23.98 Million.
- c) USDOT adjusts this number annually using the Department of Commerce price deflators for purchases by State and local governments as the basis for this adjustment.

## **§26.67 Rules Determining Social and Economic Disadvantage**

### **i. *Presumption of Social Disadvantage***

- 1) Individuals who are citizens (or lawfully admitted permanent residents) of the United States who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are presumed socially and economically disadvantaged individuals.

Applicants are required to submit a signed, notarized certification that each presumptive owner is, in fact, socially and economically disadvantaged.

### **2) (i) **Economic Disadvantage****

COBID requires that each individual owner of a firm applying to participate as a DBE, whose ownership and control are relied upon for DBE certification, to certify that he or she has a personal net worth that does not exceed \$1.32 million.



- ii. This certification must be supported by a signed, notarized statement of personal worth, with appropriate supporting documentation. COBID must use the DOT personal net worth form located in Appendix G of 49 CFR 26 without change or revision. Additional financial information, on a case by case basis, may be required.

Requests for additional information will not be unduly burdensome or intrusive but may include, for example, information concerning the assets of the owner's spouse, where needed to clarify whether assets have been transferred to the spouse or when the owner's spouse is involved in the operation of the company.

- iii. In determining an individual's net worth, COBID must observe the following requirements:

- 1) Exclude an individual's ownership interest in the applicant firm;
- 2) Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). The equity is the market value of the residence less any mortgages and home equity loan balances.

COBID must ensure that home equity loan balances are included in the equity calculation and not as a separate liability on the individual's personal net worth.

Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes.

- 3) Do not use a contingent liability to reduce an individual's net worth.
  - 4) With respect to assets held in vested pension plans, IRAs, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.
- iv. Notwithstanding any provision of Federal or State law, COBID must not release an individual's personal net worth statement or any documents pertaining to it to any third party without the written consent of the submitter.

This information must be submitted to USDOT in any certification appeal proceeding under §26.89 or to any other state to which the individual's firm has applied for certification under §26.85.

*b) Rebuttal of presumption of disadvantage.* (1) An individual's presumption of economic disadvantage may be rebutted in two ways.

- i. If the statement of personal net worth and supporting documentation shows that the individual's net worth exceeds \$1.32 million, the individual's presumption of economic disadvantage is rebutted. No proceeding is required in this case; or

An individual with very high assets and significant liabilities may, in accounting terms, have a PNW of less than \$1.32 million.

*Example to paragraph (b)(1)(i)* The person's assets collectively (e.g., high income level, a very expensive house, a yacht, extensive real or personal property holdings) may lead a reasonable person to conclude that he or she is not economically disadvantaged.

- ii. If the statement of personal net worth and supporting documentation that is submitted demonstrates the individual is able to accumulate substantial wealth, the presumption of economic disadvantage is rebutted. In making this determination, COBID may consider the factors that include, but are not limited to the following:
  - 1) Whether the average adjusted gross income over the most recent three year period exceeds \$350,000;
  - 2) Whether the income was unusual and not likely to occur in the future;
  - 3) Whether the earnings were offset by losses;
  - 4) Whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm;

5) Other evidence that income is not indicative of economic disadvantage; and

6) Whether the fair market value of the owner's assets exceed \$6 million.

(B) In this case, COBID must have a proceeding under section b) 2) in order to rebut the presumption of economic disadvantage.

2) With a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially or economically disadvantaged, COBID may, at any time, start a proceeding to determine whether the presumption should be regarded rebutted with respect to that individual. The proceeding must follow the procedures of §26.87.

3) In such a proceeding, COBID has the burden of demonstrating, by a preponderance of evidence, that the individual is not socially and/or economically disadvantaged. The individual may be required to produce information relevant to the determination of his or her disadvantage.

4) When an individual's presumption of disadvantage has been rebutted, his or her ownership and control of the firm cannot be used for purposes of DBE eligibility unless and until he or she makes an individual showing of disadvantage.

If the basis for the rebuttal is a determination that the individual's net worth exceeds \$1.32 million, the individual is no longer eligible.

*c) Transfers within two years.*

1) Except as set forth in paragraph (c)(2) of this section, COBID must attribute to the individual any assets which have been transferred to an immediate family member, to a trust whose beneficiary is an immediate family member, or to the applicant firm for less than fair market value within two years prior to application for DBE participation or within two years of COBID's review of the firm's annual affidavit, unless the individual claiming disadvantage can demonstrate that the transfer is to or on behalf of an immediate family member for

that individuals education, medical expenses, or some other form of essential support.

- 2) COBID must not attribute any assets transferred by that individual to an immediate family member that are consistent with customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

d) *Individual determinations of social and economic disadvantage.*

Firms owned and controlled by individuals who are presumed to be socially and economically disadvantaged (including those whose presumed disadvantage has been rebutted)) may apply for DBE certification.

A case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged must be made.

In such a proceeding, the applicant firm has the burden of demonstrating, by preponderance of evidence, that the individuals who own and control it are socially and economically disadvantaged.

A person whose personal net worth exceeds \$1.32 million shall not be deemed economically disadvantaged.

In making these determinations, Appendix E of CFR 49.26 is the appropriate guide.

## **§26.69 Determining Ownership**

a) In determining whether the socially and economically disadvantaged individual(s) own the firm, all the facts in the record must be viewed as a whole, including the origin of assets and how and when they were used in obtaining the firm.

b) A firm must be at least 51 percent owned by socially and economically disadvantaged individuals.

1) In the case of a corporation, such individuals must own at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.

2) In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged

individuals. The firm's partnership agreement must reflect the ownership structure.

3) In the case of a limited liability company, socially and economically disadvantaged individuals must own at least 51 percent of each class of member interest.

(c) (1) The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership of the firm and must be reflected in the ownership documents. Proof of capital should be submitted at the time of application. When the capital is through a loan, there must be documentation of the value of the assets used as collateral.

(2) Insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual - participation in a firm's activities as an employee, or capitalization not equal to the value of the firm.

(3) Disadvantaged owners must enjoy the customary incidents of ownership and share in the risk and profits commensurate with their ownership interest, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits are grounds for denial of certification.

(4) Debt instruments from financial institutions do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

(d) All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if-

(1) The beneficial owner of the securities or assets is a disadvantaged individual, and the trustee is the same or another such individual; or

(2) The beneficial owner of a trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy making, and daily operational activities of the firm.

(e) Contributions of capital or expertise by disadvantaged owners to acquire their ownership interests must be real and substantial.

(f) The owner's expertise must be-

(i) In a specialized field;

- (ii) Of outstanding quality;
- (iii) In areas critical to the firm's operations;
- (iv) Indispensable to the firm's potential success;
- (v) Specific to the type of work the firm performs; and
- (vi) Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.

(2) The individual whose expertise is relied upon must have a significant financial investment in the firm.

(g) COBID must always deem as held by a disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual –

(1) As the result of final property settlement, court order, divorce or legal separation; or

(2) Through inheritance

(h) (1) A presumption of not being held by a disadvantaged individual, for purposes of determining ownership, all interests, assets obtained by the individual as the result of a gift, or transfer from any non-disadvantaged individual or on-DBE firm who is –

(i) Involved in the same firm the individual is seeking certification, or an affiliate of that firm;

(ii) Involved in the same or similar line of business; or

(iii) Engaged in an ongoing business relationship with the firm, or an affiliate of the firm for which the individual is seeking certification.

To overcome this presumption, the disadvantaged individual must demonstrate to COBID, clear and convincing evidence, that -

- The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
- The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.

- (1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, COBID must deem ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provide that the other spouse irrevocably renounces and transfers all rights in the ownership interest of the firm.
- (2) A copy of the document legally transferring and renouncing the other spouse's rights must be included as part of the application.
  - (j) COBID may consider the following factors in determining ownership of a firm. However, COBID must not regard a contribution of capital as failing to be real and substantial, or find a firm ineligible, solely because –
    - (1) A disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration.
    - (2) There is a provision for the co-signature of a spouse who is not a disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or
    - (3) Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a disadvantaged individual to a spouse who is such an individual. COBID must give particularly close and careful scrutiny to the ownership and control of the firm.

### **§26.71 Determining Control**

Only an independent business qualifies for DBE certification. An independent business is one the viability of which does not depend on its relationship with another firm or firms. In determining whether a potential DBE is an independent business, COBID will scrutinize relationships with non-DBE firms in such areas as:

- Personnel
- Facilities
- Equipment
- Financial and bonding support
- Other resources



- Present or recent employer/employee relationships
- Relationship with prime contractors
- Other factors related to the independence of a potential DBE firm

Further, COBID will consider the consistency of relationships between the potential DBE and non-DBE firms within normal industry practice.

A DBE firm must not be subject to any formal or informal restrictions that limit the discretion of the socially and economically disadvantaged owners. The owners must possess the power to direct or cause the direction of the management and policies of the firm and make day-to-day as well as long-term decisions on management, policy and operations.

COBID will consider factors such as the applicant's position, managerial role, time commitment, and competency in the types of work the firm conducts.

COBID will also consider the delegation of authority to non-disadvantaged individuals, owner licensing, the firm's capacity to perform, and whether any non-disadvantaged owner or individual is disproportionately responsible for directing the daily operations of the firm.

Individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm or be disproportionately responsible for the operation of the firm.

A disadvantaged owner must hold the highest officer position in the company.

The state of Oregon doesn't require a general business license; however, many occupations and business activities require special licenses, permits or certifications.

The state of Oregon offers a searchable online license directory located at:  
<https://apps.oregon.gov/sos/licensedirectory>

## **§26.71(n) NAICS Codes**

- 1) COBID requires the qualifying individual to review the North American Industry Classification System (NAICS) code list which is attached to the application form. (This list is updated regularly.)
- 2) The applying individual is asked to select the NAICS code(s) numbers and descriptions that apply to their primary business. Appropriate to the particular code chosen, the individual must clearly identify the products or services in which the firm has expertise and control.
- 3) If the firm believes that there is not a NAICS code that fully or clearly describes the type(s) of work in which it is seeking DBE certification, it may request COBID supplement the assigned NAICS code(s) with a clear, specific, and detailed narrative description of the type of work the firm is certified to do. This information will be documented in the certification.

## **§26.73 Certification—Other Rules**

- a. When making certification decisions, COBID evaluates the eligibility of the firm on the basis of present circumstances.
- b. Commercially useful function issues are not considered in any way in making certification decisions.
- c. COBID may consider, however, whether a firm has exhibited a pattern of conduct attempting to evade or subvert the intent or requirements of the DBE program.
- d. COBID does not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past.

- e. COBID does not refuse to certify solely because a firm is newly formed, has not completed projects or contracts, not yet realized profits or demonstrated a potential for success.
- f. Firms seeking certification must cooperate with requests for information relevant to the process. Failure or refusal to provide the information is grounds for a denial or removal of certification.
- g. Only for-profit firms may be eligible DBEs. Not-for-profit organizations are not eligible for certification.
- h. An eligible firm must be owned by individuals who are socially and economically disadvantaged.
- i. A firm that is not owned by individuals that are disadvantaged, but is owned by another firm – even a DBE – cannot be an eligible DBE.

However, if socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, COBID may certify the subsidiary if it otherwise meets all the requirements. In this situation, the individual owners and controller of the parent or holding company are deemed to control the subsidiary through the parent or holding company.

Such a subsidiary may be certified only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals. See §26.73 for examples.

j) Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by socially and economically disadvantaged individuals.

k) There is no requirement that a DBE firm be prequalified as a condition for certification.

l) A firm that is owned by an Indian tribe or Native Hawaiian organization, rather than by Indians or Native Hawaiians as individuals, may be eligible for certification. Must meet size standards and be controlled by socially and economically disadvantaged individuals.

m) Special rules apply to the certification of firms related to Alaska Native Corporations (ANCs). Please see §26.73 for special rules

- 1) A direct or indirect subsidiary corporation, joint venture, or partnership entity of an ANC is eligible for DBE certification if it meets all of the following requirements:
  - a) Natives and their descendants represent a majority of both the total equity and the total voting power of the entity for the purpose of electing directors, the general partner, or principal officers; and
  - b) The subsidiary, joint venture, or partnership entity has been certified by the Small Business Administration under the 8(a) or small disadvantaged business program.
  - c) COBID does not use the USDOT uniform application form. It must obtain documentation sufficient to demonstrate that the entity meets the requirements. The information obtained must not inhibit correct administration of the DBE program.
  - d) If an ANC-related firm does not meet all the conditions allowed, then it must meet the size standards and be controlled by socially and economically disadvantaged individuals in order to be certified on the same basis as firms owned by Indian Tribes or Native Hawaiian Organizations.

# **ODOT Disadvantaged Business Enterprises (DBE) Program**

## **Subpart E – Certification Procedures**

### ***§26.81 through §26.91***

#### **§26.81 Unified Certification Program Requirements**

- a) The Oregon Department of Transportation (ODOT) and other DOT recipients in the state of Oregon participate in a Unified Participation Program (UCP).
  - 1) Since January 1988, through Oregon Revised Statute (ORS) Chapter 200 and Oregon Administrative Rule (OAR) Chapter 123 Division 200, ODOT and other recipients of DOT funding have participated in a UCP
  - 2) Per an interagency agreement with the Oregon Business Development Partner (OBDD), the Certification Office for Business Inclusion and Diversity (COBID) is the sole certification agency for the State of Oregon. COBID is housed within OBDD. ODOT provides funding to COBID to support the DBE certification process.
  - 3) ODOT retains responsibility to the United States Department of Transportation (USDOT) for assuring that COBID performs DBE certification consistent with 49 CFR 26 standards.
  - 4) Signatures are required from all recipients attesting to their recognition of COBID as the UCP for the State of Oregon and that COBID's certification decisions are binding on all recipients in the state with respect to participation in the DOT DBE program.
  - 5) COBID provides staff to conduct DBE certification, certification review, denials, de-certification, appeals and challenges, investigations of third party allegations, and public awareness and outreach activities pertaining to certification programs. This office became the certification authority for state programs under Oregon Revised Statutes (ORS) Chapter 200 in January 1988.
  - 6) COBID provides “one-stop shopping” to applicants for certification. An applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.
  - 7) An approved Unified Certification Program (UCP) Unified Certification Function Agreement has been in effect since 2000. ODOT and other USDOT federal aid recipients have signed the agreement.

- 8) The Oregon Department of Justice provides legal counsel for COBID.

### **Directory of Certified DBE Firms**

- 9) COBID maintains a DBE Directory in accordance with 49 CFR 26.81(g). The directory identifies all firms eligible to participate as DBEs in Oregon. The directory lists the firm's name, address, phone number, e-mail address (if available), contact name, owner's gender and ethnicity, ownership interest, North American Industry Classification System (NAICS) code(s), and a description of the type of work the firm is certified to perform. COBID revises the information and the directory is updated with current certification information on a nightly basis. The directory is available online.<sup>i</sup>

*The agreement must provide for the establishment of a UCP meeting all the requirements of this section. The agreement must specify that the UCP will follow all certification procedures and standards of this part, on the same basis as recipients; that the UCP shall cooperate fully with oversight, review, and monitoring activities of DOT and its operating administrations; and that the UCP shall implement DOT directives and guidance concerning certification matters. The agreement shall also commit recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of this part. The agreement shall include an implementation schedule ensuring that the UCP is fully operational no later than 18 months following the approval of the agreement by the Secretary.*

### **§26.83 Certification Decision Procedures**

- a) Only firms certified as eligible can participate as DBEs in ODOT's DBE program.
- b) The process for determining the eligibility of firms as DBEs must be consistent with Subpart D of 49 CFR Part 26. COBID must meet all the requirements of Subpart D in its certification process.
- c) 1) All the following steps must be taken in determining whether a DBE firm meets the standards:
  - i. Perform an on-site visit to the firm's principal place of business and if appropriate, its job sites. Interview the principal officers and review their resumes and/or their work history. Interview other key personal if necessary.

- ii. Analyze documentation related to the legal structure, ownership, and control of the applicant firm. This includes but is not limited to, Articles of Incorporation/Organization; corporate by-laws or operating agreements; organizational, annual and board/member meeting records; stock ledgers and certificates; and State-issued Certificates of Good Standing.
  - iii. Analyze the bonding and financial capacity of the firm, lease and loan agreements; bank account signature cards;
  - iv. Determine the work history of the firm, including contracts it has received, work it has completed; and payroll records;
  - v. Obtain a statement from the firm of the type of work it prefers to do as part of the DBE program and its preferred locations for doing this work, if any.
  - vi. Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and key personnel possess to perform the work.
  - vii. Obtain complete Federal income tax returns (or extension requests) filed by the firm, its affiliates, and the socially and economically disadvantaged owners for last three years.
  - viii. Require potential DBEs to complete and submit an appropriate application form.
- 2) COBID must use the application form provided in Appendix F of CFR 49 Part 26 without change or revision. However, with written approval from ODOT OCR, additional, relevant information may be requested from the applicant.
  - 3) The applicant must attest to the accuracy and truthfulness of the information on the application form by signing an affidavit before a Notary Public or in the form of an un-sworn declaration executed under penalty of perjury of the laws of the United States.
  - 4) All information must be reviewed prior to making a decision about eligibility. COBID may request clarification of information at any time during the application process.
- d) When another recipient of USDOT, in connection with its consideration of the eligibility of a firm, makes a written request for



certification information COBID has obtained about that firm (e.g., including application materials or the report of a site visit, (if one has been made) the information must be promptly made available to the other recipient.

- e) *Reserved*
- f) COBID will not impose an application fee on firms for their participation in the DBE certification process.
- g) COBID will not disclose proprietary information to unauthorized persons.
- h) (1) Once certified, a DBE will remain certified until and unless COBID removes the certification, in whole or in part.  
(2) COBID may not require DBEs to reapply for certification or undergo a recertification process. However, COBID may conduct a certification review, including a new on-site review, if appropriate in light of changed circumstances.
- i) A DBE must inform ODOT and COBID in writing of any change in circumstances affecting its ability to meet size, disadvantaged status, ownership, control requirements or any material change in the information provided in the application.
  - 1) Changes in management responsibility among members of a limited liability company are covered by this requirement.
  - 2) Supporting documentation describing in detail the changes must be attached.
  - 3) The notice must take the form of an affidavit sworn to by the applicant before a Notary Public. Written notice must be provided within 30 days of the change. Failure to make timely notification will be deemed a failure to cooperate under §26.109(c).
- j) DBEs must provide to ODOT/COBID, every year on the anniversary of their certification date, an affidavit sworn before a Notary Public, affirming that there have been no changes in the firm's circumstances affecting its ability to meet:
  - Size;
  - Disadvantaged status;

- Ownership;
- Control requirements; or
- Material changes.

This affidavit shall specifically affirm that the DBE firm continues to meet SBA business size criteria and the overall gross receipts cap, documenting this affirmation with supporting documentation of the firm's size and gross receipts (e.g., submission of Federal tax returns). Failure to submit this affidavit in a timely manner will be deemed a failure to cooperate under §26.109(c).

- k) Decisions on applications for certification must be made within 90 days of receiving all information required. A one-time extension, for no more than 60 days, may be granted. This request must be made in writing and fully explain the specific reasons for the extension. Failure to make a decision by the applicable deadline is deemed a constructive denial of the application – the applicant will have the basis to appeal to DOT under §26.89.
- l) COBID must advise each applicant within 30 days of receipt, whether the application is complete and suitable for evaluation, and if not, what additional information or action is required.
- m) If an applicant for DBE certification withdraws its application before a decision has been issued, the applicant can resubmit at any time. COBID may not apply the waiting period before allowing the applicant to resubmit its application.

#### **§26.85 Interstate Certification**

- a) When an out-of-state firm, currently certified in its home state, applies for DBE certification in Oregon, COBID may accept the out-of-state's certification and certify within 60 days, without further procedures.
  - 1) To obtain certification in this manner, the firm must provide a copy of its certification notice.
  - 2) Before certifying the firm, COBID must confirm that the firm has a current valid certification. COBID can do so by reviewing the other state's electronic directory or by obtaining written confirmation.

- b) If COBID chooses not to accept the home-state's certification of a firm, the applicant firm must submit a complete application in Oregon.

#### **§26.86 Denial of Initial Request for Certification**

- a) When COBID denies certification it will provide a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports the reason for the denial. All documents and other information must be made available to the applicant, on request.
- b) *[Reserved]*
- c) The firm will be required to wait at least 12 months before reapplying for DBE certification. The time period for reapplication begins on the date the explanation for denial is received by the applicant firm.
- d) The firm may appeal the denial to DOT under §26.89.

#### **§26.87 Removal Procedures**

A DBE firm that no longer meets the eligibility standards set in 49 CFR 26 Subpart D and OAR 445-050-0020 will be removed from the DBE program by having its certification removed.

##### ***a) Ineligibility complaints.***

- 1) Any person may file a written complaint that alleges a currently certified firm is ineligible. A written complaint must specify the reasons for the allegation and include any information or arguments supporting the allegation. COBID will not accept general allegations or anonymous complaints. The Certification Manager of COBID will review the complaint, all certification records and other available information in order to determine whether there is reasonable cause to believe that the firm is ineligible. Confidentiality of complainants' identities must be protected as provided in §26.109(b).
- 2) The Certification Manager of COBID will review all records concerning the firm, any material provided by the firm and the complainant, and other available information. Additional information may be requested from the firm. The COBID manager may conduct any other investigation deemed necessary.
- 3) If, based on this review, it is determined that there is reasonable cause to believe that the firm is ineligible, COBID must provide a Notice of Intent to

Decertify the DBE 21 days prior to the date of de-certification to the firm and to the ODOT DBE Program Manager, that it proposes to find the firm ineligible. Reasons for the proposed determination must be included. The notice will also include notification that the firm has the right to a hearing.

If it is determined that reasonable cause does not exist, COBID must notify the complainant, the firm and the ODOT DBE Program Manager in writing of this determination and the reasons for it.

- b) *Recipient-initiated proceedings.* If, based on notification by a firm of a change in circumstances, ODOT/COBID determines reasonable cause to believe the firm is ineligible, it will provide written notice to the firm that it is proposing to find the firm ineligible. The notice will include the reasons for the proposed determination.
- c) *USDOT directive to initiate proceedings.* (1) If FHWA or FTA determines that information in our certification records provides reasonable cause to believe the certified firm does not meet eligibility criteria, USDOT may direct ODOT/COBID to initiate proceedings to remove the firm's certification.
- (2) USDOT must provide ODOT/COBID and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.
- (3) ODOT/COBID must immediately commence a proceeding to remove eligibility.
- d) **Hearing.** The firm must have an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments why it should remain certified. The hearing will be conducted in accordance with ORS 183.310 to 183.550 and OAR 445-050-0000. If no written request for a hearing is received by COBID within the 21-day period, the de-certification/denial will be final.
- 1) In such a proceeding, ODOT/COBID bears the burden of proving by a preponderance of evidence, that the firm does not meet certification standards.

- 2) A complete, verbatim record of the hearing must be kept. If there is an appeal to DOT under §26.89, a transcript must be provided to DOT and, on request, to the firm.
  - 3) The firm may choose to present their information and arguments in writing, without going to the hearing. ODOT/COBID still bear the burden of proving that the firm does not meet the certification standards.
- e) *Separation of functions.* The decision in a proceeding must be made by an office and personnel that did not take part in actions leading to the proposal to remove the firm's eligibility and are not subject to direction from the office or personnel who did take part in these actions.
- 1) The method of implementing this requirement will be part of our DBE program.
  - 2) The decision maker must be an individual who is knowledgeable about the certification requirements of our DBE program.
- f) *Grounds for decision.* A decision to remove a firm's eligibility may only be based on one or more of the following grounds:
- (1) Changes in the firm's circumstances since the certification of the firm that render the firm unable to meet the eligibility standards;
  - (2) Information not available to COBID when the firm was certified;
  - (3) Information relevant to eligibility that has been concealed or misrepresented by the firm;
  - (4) A change in the certification standards or requirements of the DOT since the firm was certified;
  - (5) The decision to certify the firm was clearly erroneous;
  - (6) The firm has failed to cooperate;
  - (7) The firm has exhibited a pattern of conduct indicating attempts to subvert the intent or requirements of the DBE program; or

(8) The firm has been suspended or debarred for conduct related to the DBE program.

g) *Notice of decision.* Once a decision has been made, the firm must be provided written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision.

The notice must inform the firm of the consequences of the decision and of the availability of an appeal to the United States Department of Transportation.

h) A firm that has been denied certification or whose eligibility has been removed may make an administrative appeal to the USDOT. A complainant in an eligibility complaint to COBID may appeal to USDOT if COBID does not find reasonable cause to propose removing the firm's DBE eligibility. *USDOT decisions are administratively final, and are not subject to petitions for reconsideration.*

i) *Status of firm during proceeding.* (1) A firm remains an eligible DBE during the proceeding to remove its eligibility.

(2) The firm does not become ineligible until notice is issued.

j) *Effects of removal of eligibility.* The following actions must be taken when a firm's eligibility is removed:

(1) When a prime contractor has made a commitment to using the ineligible firm or ODOT has made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before the decertification notice has been issued the ineligible firm does not count toward the contract goal or overall goal. ODOT will direct the prime to meet the contract goal with an eligible DBE firm or demonstrate that it has made a good faith effort to do so.

- (2) If a prime contractor has executed a subcontract with the firm before the firm has been notified of its ineligibility, the prime contractor may continue to use the firm on the contract and continue to receive credit toward its DBE goal for the firm's work.

In this case, or in a case where ODOT has let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after the notice of ineligibility was issued will not count toward the overall goal, but may count toward the contract goal.

- (3) *Exception:* If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, ODOT will continue to count its participation on that contract toward overall and contract goals.

(k) *Availability of appeal.* When administratively a final removal of a firm's eligibility is made, the firm may appeal the removal to the USDOT.

## **§26.88 Summary Suspension of Certification**

- (a) COBID shall immediately suspend a DBE's certification without adhering to the requirements for a hearing under §27.87(d) when an individual owner whose ownership and control of the firm are necessary to its certification dies or is incarcerated.
- (b) (1) COBID may immediately suspend a DBE's certification when there is adequate evidence to believe there has been a material change in circumstances that may affect the firm's eligibility, or when the DBE fails to notify COBID in writing of any material change in circumstances or fails to timely file an affidavit of no change. No hearing per §26.87(d) is required.
- (2) COBID shall consider all relevant factors, including how much information is available, the credibility of the information and allegations given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result.
- (c) USDOT may direct ODOT to take action if it determines that information available to it is sufficient to warrant immediate suspension.

- (d) When a firm is suspended, COBID shall immediately notify the DBE of the suspension by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE.
- (e) Suspension is a temporary status of ineligibility pending an expedited show cause hearing/proceeding under §26.87 to determine whether the DBE is eligible to participate in the program and consequently should be removed. The suspension takes effect when the DBE receives, or is deemed to have received, the Notice of Suspension.
- (f) While suspended, the DBE may not be considered to meet a contract goal on a new contract, and any work it does on a contract received during the suspension shall not be counted toward ODOT's overall goal. The DBE may continue to perform under an existing contract executed before the DBE received a Notice of Suspension and may be counted toward the contract goal during the period of suspension as long as the DBE is performing a commercially useful function under the existing contract.
- (g) Following receipt of a Notice of Suspension if the DBE believes it is no longer eligible; it may voluntarily withdraw from the program. No further action is required. If the DBE believes it should be reinstated, it must provide to ODOT/COBID information demonstrating that the firm is eligible notwithstanding its changed circumstances. Within 30 days of receiving this information, ODOT/COBID must either lift the suspension and reinstate the firm or start a decertification proceeding. The suspension remains in effect during the proceeding.
- (h) The decision to immediately suspend a DBE is not appealable to the U.S. Department of Transportation. The failure to lift the suspension and reinstate the firm or commence a decertification proceeding, as required, is appealable to the USDOT, as a constructive decertification.

## **§26.89 The Appeals Process**



(a) (1) A firm denied certification or whose eligibility is removed by COBID, including SBA-certified firms, may make an administrative appeal to the USDOT.

(2) A complainant in an ineligibility complaint to COBID may appeal to USDOT if COBID does not find reasonable cause to propose removing the firm's eligibility or, following a removal of eligibility proceeding, determines the firm is eligible.

Send appeals to the following address: U.S. Department of Transportation, Departmental Office of Civil Rights, 1200 New Jersey Avenue SE, Washington, DC 20590-0001.

(b) Pending the Department's decision in the matter, COBID's decision remains in effect. USDOT does not stay the effect of COBID's decision while it is considering an appeal.

(c) The firm or the complainant must send a letter to USDOT within 90 days of the date of COBID's final decision, including information and setting forth a full and specific statement as to why the decision is erroneous, what significant fact COBID failed to consider, or what provisions COBID did not properly apply.

(d) When it receives an appeal, USDOT requests a copy of COBID's complete, well organized, administrative record in the matter, including a hearing transcript, within 20 days of the request. USDOT may extend this time period if COBID can show good cause.

(e) USDOT makes its decision based solely on the entire administrative record as supplemented by the appeal and does not conduct a hearing.

(f) When COBID provides supplementary information to USDOT, it must make this information available to the firm and any complainant involved.

1) USDOT will affirm COBID's decision unless it determines, based on its review of the entire administrative record, that COBID's decision is unsupported by substantial evidence or inconsistent with substantive or procedural provisions.

- 2) If USDOT determines that COBID's decision was unsupported, it will reverse the decision and direct COBID to certify the firm or remove its eligibility, as appropriate. COBID will take the action immediately upon receiving written notice of it.
- 8) USDOT's policy is to make its decision within 180 days of receiving the complete administrative record. If USDOT does not make its decision within this period, written notice will be provided to all parties concerned, including a statement of the reason for the delay and a date the appeal decision will be made.
- 9) All decisions are administratively final, and not subject to reconsiderations.

### **§26.91 COBID Actions Following Appeal Decisions**

- a) USDOT's decision is binding and the following actions must be taken:
  - If the USDOT determines a firm was erroneously certified we must remove the firm's eligibility on receipt of the determination, without further proceedings.
  - If the USDOT determines that we erroneously declined to certify or removed eligibility of a firm, we must certify the firm, effective on the date of receipt of the determination.
  - If the USDOT determines that we erroneously determined the presumption of social and economic disadvantage either should or should not be deemed rebutted, we must take appropriate corrective action as determined by USDOT.
  - If USDOT affirms our determination, no further action is necessary.

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#### References:

<sup>i</sup> The COBID directory: <https://oregon4biz.diversitysoftware.com/FrontEnd/VendorSearchPublic.asp>

# **ODOT Disadvantaged Business Enterprises (DBE) Program**

## **Subpart F – Compliance and Enforcement**

### ***§26.101-§26.109***

#### **§26.101 Compliance Procedures**

- a) If ODOT fails to comply with any requirement of this part, it may be subject to formal enforcement action, or appropriate program sanctions by the concerned operating administration, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include:
- In the case of the FHWA program, actions provided for under 23 CFR 1.36;
  - In case of the FAA program, actions consistent with 49 U.S.C. 47106(d), 47111(d), and 47122; and,
  - In the case of the FTA program, any actions permitted under 49 U.S.C. chapter 53 or applicable FTA program requirements.
- b) As provided in statute, ODOT will not be subject to compliance actions or sanctions for failing to carry out any requirement of this part because it has been prevented from complying because a Federal court has issued a final order finding that the requirement is unconstitutional.

#### **§26.103 Enforcement Action in FHWA and FTA**

- a) *Noncompliance complaints.* Any person who believes that ODOT has failed to comply with its obligations may file a written complaint with the concerned operating administration's (FHWA or FTA) Office of Civil Rights. The complaint must be filed no later than 180 days after the date of the alleged violation. The complainant's identity will remain confidential.
- b) *Compliance reviews.* FHWA or FTA may review ODOT's compliance with this part at any time, including reviews of paperwork and on-site reviews, as appropriate.
- c) *Reasonable cause notice.* If it appears, from the investigation of a complaint or the results of a compliance review, that ODOT, as a recipient, is in

noncompliance, the appropriate USDOT office promptly sends, return receipt requested, a written notice of probable cause to find ODOT in noncompliance. The notice will include the reasons for this finding and directs ODOT to reply within 30 days concerning whether we wish to begin conciliation.

- d) Conciliation.** (1) If ODOT request conciliation, the appropriate USDOT office will pursue conciliation for at least 30, but not more than 120 days from the date of ODOT's request.
- 2)** If ODOT and the appropriate USDOT office sign a conciliation agreement, the matter is regarded as closed and ODOT is regarded as being in compliance. While a conciliation agreement is in effect, ODOT remains eligible for FHWA and FTA financial assistance.
- 3)** The concerned operating administration will monitor ODOT's implementation of the conciliation agreement and ensure that its terms are complied with. If ODOT fails to carry out the terms of the conciliation agreement, it is in noncompliance.
- 4)** If ODOT does not request conciliation, or a conciliation agreement is not signed within the time provided, then enforcement proceedings are binding on all USDOT offices.

## **§26.105 Enforcement Actions in FAA**

## **§26.107 Enforcement Actions Applicable to Firms**

- a) If a firm that does not meet the eligibility criteria of Subpart D and attempts to participate in a USDOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the USDOT may initiate suspension or debarment proceedings under 2 CFR parts 180 and 1200.
- b) If a firm, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a

serious lack of business integrity, another firm that does not meet eligibility criteria, USDOT may initiate suspension or debarment proceedings.

- c) In a suspension or debarment proceeding, the USDOT may consider the fact that the purported DBE has been certified by COBID. Such certification does not preclude USDOT from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended or debarred.
- d) USDOT may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action.
- e) USDOT may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any USDOT-assisted program or otherwise violates applicable Federal statutes.

#### **§26.109 Rules Governing Information, Confidentiality, Cooperation, and Intimidation or Retaliation**

- a) *Availability of records.*
- (2) Notwithstanding
- b) *Confidentiality of information on complainants.*
- c) *Cooperation.*
- d) *Intimidation and retaliation.*