

5. MONITORING CONTRACT COMPLIANCE

5.1 Notification and Reporting Responsibilities

ODOT will monitor both race-conscious and race-neutral DBE participation on projects. Race-conscious participation occurs on projects that have an assigned contract goal, the meeting of which is as a condition of award. Race-neutral DBE participation occurs on contracts on which the assigned goal is 0%, or on projects with goals greater than 0% when the DBE participation percentage achieved exceeds the assigned goal, as evidenced by contract or subcontract awards on the project. The procedures such as those described below pertaining to highway construction projects will be followed in monitoring compliance on all USDOT funded contracts.

A. Project Management and Contract Administration

ODOT Project Managers and their designated contract administration and field personnel (hereafter, the PM) are responsible for monitoring and ensuring compliance with the DBE program requirements of the contract. (See also, Section 2, Program Responsibilities, and the [ODOT Construction Manual - Chapter 18, Workforce and Small Business Equity Programs](#).) DBE Program compliance is to be given the same priority as compliance with all other legal obligations incurred by ODOT under its financial assistance agreements with USDOT.

The PM is responsible for the following:

- All final actions in the field, including recommendations to the Highway Division Administrator for the suspension of a contractor's or subcontractor's right to bid. Once a contract is awarded,
- Assuring that work is actually being performed by committed or awarded DBEs through subcontract review processes, project site visits, and commercially useful function review (including DBE truck monitoring) processes.
- Copying the OCR Field Coordinator on all civil rights-related communications. The OCR Field Coordinator may provide guidance on the content.
- Submitting copies of subcontract, payment, and compliance review documents to the OCR Field Coordinator for review, data entry, and reporting purposes.
- Notifying the OCR Field Coordinator is when a significant contract change or amendment is made and advising how the change may affect committed DBE subcontracting (by either adding or subtracting work done by DBEs).
- Enforcing and monitoring the contractor's compliance with the DBE program provisions of the contract, including the continuing good faith efforts requirements for contracts with assigned goals.
- Addressing how well the Contractor fulfilled its Workforce and Small Business Equity Program requirements when completing the required Contractor Performance Evaluation.

B. Office of Civil Rights

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. (See also, Section 2, Program Responsibilities, and the [ODOT Construction Manual - Chapter 18, Workforce and Small Business Equity Programs](#).)

OCR Field Coordinators are responsible for collecting and entering copies of project subcontract, payment, and compliance review documents from the PM for review, data entry, and reporting purposes. OCR will enter the subcontracts, payment, and compliance review reports into the OCR Civil Rights Compliance Tracking (CRCT) database for compliance tracking purposes. Based on the data collected, OCR provides the PM with project-specific monthly tracking and periodic audit reports on missing civil rights program documentation. (For more information on CRCT, see Section 7, Monitoring and Record Keeping.)

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.

For Architecture and Engineering (A&E) and related contracts, the Procurement Office or Local Public Agency notifies OCR when a solicitation has been developed. OCR determines whether a DBE goal should apply and 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 Public Agency notifies OCR, who may set a goal to be included in the contract or amendment. After the contract is awarded, the Contractor will be responsible for achievement of the DBE commitment.

C. Prime Contractor

(1) Contractor's DBE Liaison Officer

Section 08.00 of the [DBE Supplemental Required Contract Provisions](#) requires the contractor to designate, by the pre-construction conference, a DBE Liaison Officer to administer the contractor's DBE Program.

(2) Submission of Subcontracts

The contractor must enter into subcontracts with the DBEs identified in the Contractor's Committed DBE Breakdown and Certification Form for the bid items and amounts specified therein. These agreements must be submitted for consent prior to the start of work under the subcontract in accordance with Section 00180.21 of the Standard Specifications for Highway Construction. All Federal and State provisions must be included in the subcontracts in their entirety, and not by reference.

(3) Prompt Payment Documentation

The prime contractor is required to promptly pay all subcontractors and suppliers within 10 days of receipt of payment from the agency according contract provisions, as per state law requirements. The prime contractor and their subcontractors are required to regularly submit project-specific subcontractor Paid Summary Report forms and to maintain records of supporting documents on file. (See Section 4, Ensuring DBE Participation, for additional information regarding prompt pay and return of retainage requirements.)

5.2 Compliance Review and Evaluation Procedures

A. Internal Pre-Construction Meetings

The OCR Field Coordinator will schedule an internal pre-construction meeting with the PM office to review civil rights program requirements and assure that program expectations are clear. These meetings are intended to be project- specific and identify

the focus of reviews and oversight to ensure compliance with civil rights programs. The PM and appropriate staff are required to be available for these meetings. The PM is required to copy the OCR Field Coordinator on all Civil Rights related communications. The OCR Field Coordinator may provide guidance on the content.

B. Pre-Construction Conferences

Prior to the Pre-Construction Conference, the PM will send OCR Pre-Construction Requirements letters. The OCR Pre-Construction Requirements letters will be emailed to each PM according to process set out in Chapter 18 of the ODOT Construction Manual. The report generated letter will auto-fill the PM's name on the template letter. The corresponding OCR Field Coordinator will be copied.

At the Pre-Construction Conference with the Contractor, the PM will address each requirement for the Workforce and Small Business Equity Programs identified in Chapter 18 of the Construction Manual. The PM will notify the OCR Field Coordinator of when the Pre-Construction meeting will occur and may request assistance from the OCR Field Coordinator. (See also, [ODOT Construction Manual](#), Chapter 11 - Before On-Site Work Can Begin and Exhibit 11B.)

The contractor is required to deliver the following information to the PM at the pre-construction conference:

- (1) DBE Liaison Officer – The name of the contractor's DBE Liaison Officer who will administer the contractor's DBE program. Said officer or the officer's designee shall attend the conference.
- (2) Project Schedule – Contractor's project schedule showing the work commencement date and estimated completion date for each DBE that will perform work on the project.
- (3) DBE Work Plan Proposal (3A) – Disadvantaged Business Enterprise Work Plan Proposal Form (3A) for each DBE at any tier that is committed on the project.
- (4) Subcontracts – Copies of subcontracts for all DBE firms at all tiers, with Requests for Subcontract Approval.

C. DBE Activity Reporting Forms

- (1) DBE Work Plan Proposal - Form 3A

The prime contractor is responsible for collecting and submitting the [DBE Work Plan Proposal Form 3A](#) (see Exhibit M), which must be completed by all committed DBEs and all DBEs participating as subcontractors. The purpose of the Form 3A is to preview whether the proposed activities and type of work identified will comply with DBE program regulations, particularly with respect to commercially useful function and crediting rule. The Form 3A is noted in the contractor's pre-construction conference packets, and is available on the OCR webpage.

The DBE Work Plan Proposal specifically solicits the following information regarding how the DBE intends to perform the work of its subcontract. ,

- (a) Personnel
- (b) Equipment (including Trucks for DBE Trucking Subcontracts)
- (c) Supplies and materials
- (d) Prime contractor resources

- (e) Additional information, including comments or explanation of any of the information provided on the form.

Supporting documents, such as personnel lists, truck registrations, and copies of rental or lease agreements for equipment and trucks must also be submitted as attachments to the Form 3A.

The PM will review the proposals and provide written comments as to whether the activities identified in the proposals comply with program regulations. In those instances where proposed activity violates applicable regulations, written comments shall be offered as to corrective action required in order to comply with the regulations. OCR Field Coordinators will provide the PM staff with technical assistance and may also offer comments, as needed, in reviewing and approving the Form 3A.

(2) DBE Commercially Useful Function (CUF) Reviews

For all committed and non-committed DBE contractors and subcontractors and all committed DBE suppliers participating on the project, the PM or designee must complete at least one [DBE Commercially Useful Function Review Form 3B](#) (Exhibit N) as follows:

- For each twelve month period, for Projects where the DBE's Work lasts longer than twelve months.
- 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, (for the new DBE).
- Whenever a significant Change Order changes or affects the Work to be accomplished by the DBE (when a new type of work is added).

(3) DBE Truck Monitoring

The PM will require that whenever a DBE trucking firm is being used to meet an assigned contract goal, the DBE subcontractor must individually identify all trucks intended for use on the Project on its DBE Work Plan Proposal Form 3A or an attached list. The DBE must provide detailed information about each driver, each truck and any required supporting documentation.

The PM will ensure the contractor submits a [DBE Daily Trucking Log Form](#) (734-2916) or an approved equivalent that include the same information on a weekly basis for any weeks in which DBE trucking was performed on the project. The DBE Daily Trucking Log must identify the trucks used by either license plate number or some other specific identification system, truck owner, and the number of hours it was used for each day.

In addition to the CUF review, the PM is also responsible for performing an independent verification of all trucks used on the Project for a full work shift. The PM must, without prior notice to any Contractor or Subcontractors, independently verify at least 10% of the total value of DBE trucking services being provided on the Project.

The PM will generate the shift verification listing of trucks from one of the following methods below:

- Use truck tickets for weighed Material delivery, where appropriate.
- Use an Inspector to maintain a log or photograph of all trucks entering the Project for the selected Day.
- For Projects where it is not practical to identify every truck on the Project for a given Day, the PM will develop and document an alternate Plan in cooperation with the OCR Field Coordinator.

The PM is responsible for determining the crediting for the DBE Trucking firm. To determining the crediting, the PM will:

- Compare the dollar value of the DBE trucks to the non-DBE trucks that Work for the DBE trucking firm.
- Determine the credit by evaluating to the total value of the DBE trucks the DBE Trucking firm provides, plus the equal value of the non-DBE trucks that performed Work on the Project.

For instance, a DBE Trucking firm has both DBE trucks and non-DBE trucks performing Work on a Project. If the dollar value of the DBE trucking Work performed is determined to be \$50,000 and the non-DBE trucking Work performed is determined to be \$72,000. The total DBE credit for the trucking services will be limited to \$100,000 and not \$122,000.

(4) Prompt Payment/Release of Retention Verification

The PM must ensure the contractor and their subcontractors submit signed subcontractor [Paid Summary Report](#) forms to the PM's office, on which the applicable contractor or subcontractor certifies that the payments shown on the report have been made to the named subcontractors and suppliers. All progress payments and return of retainage payments must be reported on the form. A final, certified Paid Summary Report recapping total amounts paid must be submitted upon project completion. The reports must be regularly submitted according to the time frame required in the contract.

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

D. On-Site Reviews

As part of the Commercially Useful Function (CUF) report, an on-site review is intended to determine whether the DBE is actively performing, managing and supervising the work. It must employ a labor force which is separate and apart from that employed by the prime or other subcontractors, and which is independently recruited by the DBE in accordance with standard industry practice. The DBE must supervise and manage the work or independently hire a supervisor, who may not be a supervisor employed by the prime or any other subcontractor on the project.

Equipment required to accomplish the work may be rented or leased, consistent with standard industry practice and at competitive rates. Lease or rental agreements must be furnished to project management personnel for review. The DBE must independently

arrange for delivery of, and payment for, materials and supplies. Records of such transactions must be available for review.

Any arrangements which deviate from these generally accepted practices must be agreed to in writing by the parties involved and must receive prior written approval of ODOT project management personnel.

The review form, accompanied by copies of invoices, agreements, daily reports or other documentation, is forwarded by field personnel to Project Management staff for further evaluation. Additional information may be requested, or field visits may be scheduled to meet with the prime contractor and the DBE.

With regard to the Federal-aid share, if an investigation reveals that there has been a violation of the CUF provisions, that portion of the work found to be in violation will not be counted toward goal achievement for either the contractor or ODOT. When a DBE is initially determined not to be performing a CUF as described in this section, the DBE may present evidence through the contractor to ODOT to rebut that determination. If the ODOT investigation ultimately reveals that DBE CUF fraud took place, appropriate contract action will be taken, or sanctions will be imposed as described in Section 5.5 of this document.

Decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to USDOT.

5.3 Changes in Work Committed to a DBE

ODOT will consider the impact on DBE participation in instances where ODOT changes, reduces, or deletes work committed to the DBE at the time of contract award. In such instances, the contractor shall not be 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, reduction, or deletion of any work committed at the time of contract award, prior to executing the change order. 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 shall not be required to submit any documentation of good faith effort to replace the work and 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.

5.4 Termination and Substitution of a DBE

The contractor is required to notify ODOT in writing and obtain written consent before terminating and/or replacing a DBE that was committed as a condition of contract award or is otherwise being used or represented to fulfill DBE contract obligations during the contract performance period.

Written consent for terminating the performance of any DBE will be granted only where the contractor can demonstrate the termination is for cause - that the DBE is unable, unwilling, or ineligible to perform, or poses a significant health or safety risk. The PM's written consent to terminate any DBE will concurrently constitute written consent to substitute or replace the terminated DBE. Termination or replacement of a DBE will not be consented to based solely on a contractor's ability to negotiate a more advantageous contract with another subcontractor.

A. Contractor Written Request to Terminate DBE

All contractor requests to terminate, substitute or replace a DBE shall be in writing and shall include the following information:

- (1) Date the contractor determined the DBE to be unwilling, unable or ineligible to perform.
- (2) Projected date contractor will require substitution or replacement DBE to commence work if consent is granted to the request.
- (3) Brief statement of facts describing and citing specific actions or inaction by the DBE giving rise to the contractor's assertion that the DBE is unwilling, unable, or ineligible to perform.
- (4) Brief statement of the affected DBE's capacity and ability to perform the work as determined by contractor.
- (5) Brief statement of facts regarding actions taken by contractor that are believed to constitute good faith efforts toward enabling the DBE to perform.
- (6) To date percentage of work completed on each bid item by the DBE.
- (7) The total dollar amount paid, per bid item, to date for work performed by the DBE.
- (8) The total dollar amount, per bid item, remaining to be paid to the committed DBE for work completed, but for which the DBE has not received payment and with which the contractor has no dispute.
- (9) The total dollar amount, per bid item, remaining to be paid to the DBE for work completed, but for which the DBE has not received payment and over which the contractor and/or the DBE have dispute.
- (10) A written, signed statement from the DBE, provided the DBE concurs with request to terminate, indicating its unwillingness or inability to perform.

B. Contractor Written Notice to DBE of Pending Request to Terminate

The contractor shall send a copy of the request to terminate and substitute letter to the affected committed DBE firm, in conjunction to submitting the request to the Project Manager. The affected DBE firm may submit a response letter to the Project Manager within five (5) calendar days of receiving the notice from the contractor. The affected DBE firm may explain its position concerning performance on the committed work. The Project Manager will consider both the contractor's request and DBE's response and explanation before granting approval of the contractor's termination and substitution request.

If the contractor is unsuccessful in notifying the affected DBE firm, after trying its best to deliver a copy of its request letter, ODOT may determine that the affected (committed) DBE firm is unable or unwilling to continue the contract and a substitution will be immediately approved by the Project Manager.

C. Proposed Substitution of Another Certified DBE

When a DBE substitution is requested, the contractor may propose another certified DBE firm to replace the original committed firm in writing. The contractor shall submit the name of the DBE firm, the proposed work to be performed, and the dollar amount of the work. The contractor shall include pertinent information including bid item, item description, bid quantity & unit, unit price, and total price. In addition, the contractor shall

submit a written proposed DBE Work Plan for the requested substitute DBE as described in Section 5.2.2 of this document.

The dollar value of work to be performed by the substitute DBE shall be in an amount not less than the dollar value of the terminated DBE minus the value of work performed to date by the original DBE prior to the request for substitution.

Should the contractor be unable to commit the required dollar value to the substitute DBE, the contractor shall provide written evidence of good faith efforts made to obtain the substitute value requirement. ODOT shall review the quality and intensity of those efforts. Efforts that are merely superficial are not good faith efforts to meet the goal. The contractor must document the steps taken to obtain participation which demonstrate the good faith efforts outlined below:

- (1) Evidence that the contractor identified and selected specific economically feasible units of the project to be performed by DBEs in order to increase the likelihood of participation by DBEs;
- (2) Evidence that the contractor advertised in general circulation, trade association, minority and trade oriented, women-focus publications, concerning the subcontracting or supply opportunities;
- (3) Evidence that the contractor provided written notice to a reasonable number of specific DBEs, identified from the DBE Directory of Certified Firms for the selected subcontracting or material supply work, in sufficient time to allow the enterprises to participate effectively;
- (4) Evidence that the contractor followed-up on initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested. This may include the information outlined below:
 - (a) The names, addresses, and telephone numbers of DBEs who were contacted, the dates of initial contact and whether initial solicitations of interest were followed up by contacting the DBEs to determine with certainty whether the DBEs were interested;
 - (b) A description of the information provided to the DBEs regarding the plans and specifications and estimated quantities for portions of the work to be performed;
 - (c) Documentation of each DBE contacted but rejected and the reasons for the rejection.
- (5) Evidence that the contractor provided interested DBEs with adequate information about the plans, specifications and requirements for the selected subcontracting or material supply work;
- (6) Evidence that the contractor negotiated in good faith with the enterprises, and did not without justifiable reason reject as unsatisfactory bids prepared by any DBE;
- (7) Evidence that the contractor advised and made efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance required by ODOT or contractor;
- (8) Evidence that the contractor's efforts to obtain DBE participation were reasonably expected to produce a level of participation sufficient to meet the goal or requirements of ODOT;

- (9) Evidence that the contractor used the services of minority community organizations, minority organizations identified by the Advocate for Minority and Women Business that provide assistance in the recruitment and placement of disadvantaged, minority, or women business enterprises; and
- (10) Evidence that the contractor used the services of ODOT's supportive services contractor(s) when available.

5.5 Administrative Sanctions

Failure of any contractor to meet the DBE Supplemental Required Contract Provisions and program authorities cited in Section 1.4 of this Program Plan constitutes a breach of contract for which the imposition of the following sanctions could occur:

- A. Temporarily withholding progress payments until the contractor complies with these contract provisions through future performance.
- B. Permanently withholding payment for work already performed in a manner that constitutes a breach of contract.
- C. Suspension of work for cause as provided under the current Standard Specifications for Highway Construction, in sections 00150.00 and 00180.70.

Any bidder or contractor or subcontractor on a public contract that violates the provisions of ORS 200.075 is subject to having its right to bid on or participate in any public contract suspended for up to 90 days for a first violation, up to one year for a second violation and up to five years for a third violation. Each violation shall remain on record for five years. After five years, the violation shall no longer be considered in reviewing future violations.

Failure of a bidder, contractor, or subcontractor to comply with the DBE Supplemental Required Contract Provisions and other authorities cited in Section 01.00 (b) of these provisions wherein there appears to be evidence of criminal conduct shall be referred to the Oregon Department of Justice and/or the FHWA Inspector General for criminal investigation, and if warranted, prosecution.

Decisions regarding administrative sanctions for non-compliance with DBE Program regulations and requirements are made by the Highway Division Administrator, who has sole authority in these matters.