

Oregon Department of Aviation

DBE Program



Oregon Department of Aviation
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Prepared in consultation with:



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POLICY STATEMENT

Section 26.1, 26.23 Objectives/Policy Statement

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

It is the policy of the *Oregon Department of Aviation* to ensure that DBEs as 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. To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
3. To ensure that the DBE Program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
5. To help remove barriers to the participation of DBEs in DOT assisted contracts;
6. To promote the use of DBEs in all types of federally-assisted contracts and procurement activities;
7. To assist the development of firms that can compete successfully in the market place outside the DBE Program; and
8. To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

Heather Peck, Planning & Project Manager has been delegated as the DBE Liaison Officer. In that capacity, *Heather Peck, Planning & Project Manager* 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 the *Oregon Department of Aviation*.

The *Oregon Department of Aviation* has disseminated this policy statement and all of the components throughout our organization and stakeholders. We have distributed this statement to DBE and non-DBE business communities that perform work for us on DOT-assisted contracts. The distribution was accomplished by posting a link on the *Oregon Department of Aviation's* website. The *Oregon Department of Aviation* also includes specific goal information specific to each individual solicitation through the State of Oregon's procurement website ORPIN (orpin.oregon.gov) when soliciting any and all qualifying services.



8/8/18

Date

SUBPART A – GENERAL REQUIREMENTS

Section 26.1 Objectives

The objectives are found in the policy statement on the first page of this program.

Section 26.3 Applicability

The Oregon Department of Aviation is the recipient of Federal airport funds authorized by 49 U.S.C. 47101, *et seq.*

Section 26.5 Definitions

The Oregon Department of Aviation will use terms in this program that have the meaning defined in Section 26.5.

Section 26.7 Non-discrimination Requirements

The Oregon Department of Aviation will never exclude any person 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 Part 26 on the basis of race, color, sex, or national origin.

In administering its DBE program, the *Oregon Department of Aviation* 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 the DBE program with respect to individuals of a particular race, color, sex, or national origin. In addition to the Federal requirements of administering a DBE program, the Department of Aviation also complies with all state requirements and actively encourages and promotes participation from Minority, Women Owned, and Emerging Small Businesses to participate in any and all contract opportunities with the *Oregon Department of Aviation*.

Section 26.11 Record Keeping Requirements

Section 26.11 - Reporting to DOT

We will report DBE participation to DOT/FAA as follows:

We will transmit to FAA annually on December 1 the “Uniform Report of DBE Awards or Commitments and Payments” form found in DOT 26.11. We will also report the DBE contractor firm information either on the FAA DBE Contractor’s Form or other similar format. The ODA uses the revised Uniform Report of DBE

Awards or Commitments and Payments through FAA Civil Rights Connect, <https://faa.civilrightsconnect.com> .

Section 26.11(c) - Bidders List

The *Oregon Department of Aviation* will create and maintain a bidders list. The purpose of the list is to provide as accurate data as possible about the universe of DBE and non-DBE contractors and subcontractors who seek to work on our DOT-assisted contracts for use in helping to set our overall goals. The bidders list will include the name, address, DBE and non-DBE status, age of firm, and annual gross receipts of firms.

We will collect this information as follows: *Inclusion of a Bidder's List in the project bidding documents. A copy of the proposed list is included in **Attachment 3**.*

Section 26.13 Federal Financial Assistance Agreement

The Oregon Department of Aviation has signed the following assurances, applicable to all DOT-assisted contracts and their administration:

Section 26.13(1) - Assurance - Each financial assistance agreement the *Oregon Department of Aviation* signs with a DOT operating administration (or a primary recipient) will include the following assurance:

The *Oregon Department of Aviation* 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 §26. The *Oregon Department of Aviation* shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The *Oregon Department of Aviation's* DBE program, as required by 49 CFR §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 the *Oregon Department of Aviation* of its failure to carry out its approved program, the Department may impose sanctions as provided for under 49 CFR 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.*).

Section 26.13b - Contract Assurance –*The Oregon Department of Aviation* will ensure that the following clause is included in each contract we sign with a contractor and each subcontract the prime contractor signs with a subcontractor:

The contractor, sub recipient 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 applicable requirements of 49 CFR §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 *Oregon Department of Aviation* 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-responsible.

SUBPART B - ADMINISTRATIVE REQUIREMENTS

Section 26.21 DBE Program Updates

The *Oregon Department of Aviation* is required to have a DBE program meeting the requirements of this part as it will receive grants for airport planning or development and will award prime contracts, cumulative total value of which exceeds \$250,000 in FAA funds in a federal fiscal year. We are not eligible to receive DOT financial assistance unless DOT has approved our DBE program and we are in compliance with it and this part. We will continue to carry out our program until all funds from DOT financial assistance have been expended. We do not have to submit regular updates of our program, as long as we remain in compliance. However, we will submit significant changes in the program for approval.

Section 26.23 Policy Statement

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

Section 26.25 DBE Liaison Officer (DBELO)

We have designated the following individual as our DBE Liaison Officer:

Heather Peck
Planning & Projects Manager
503-378-3168
Heather.Peck@aviation.state.or.us

In that capacity, the DBELO is responsible for implementing all aspects of the DBE program and ensuring that the *Oregon Department of Aviation* complies with all provisions of 49 CFR §26. The DBELO has direct, independent access to the Agency Director and State Aviation Board concerning DBE program matters. An organization chart displaying the DBELO's position in the organization is found in **Attachment 2** of this program.

The DBELO is responsible for developing, implementing and monitoring the DBE program, in coordination with other appropriate officials. The DBELO has a staff to assist in the administration of the program. The duties and responsibilities include the following:

1. Gathers and reports statistical data and other information as required by FAA and or DOT.
2. Reviews third party contracts and purchase requisitions for compliance with this program.
3. Sets overall annual goals.
4. Ensures that bid notices and requests for proposals are available to DBEs in a timely manner.
5. Identifies contracts and procurements so that DBE goals are included in solicitations (both race-neutral methods and contract specific goals) and monitors results.
6. Analyzes the *Oregon Department of Aviation's* progress toward attainment and identifies ways to improve progress.
7. Participates in pre-bid meetings.
8. Advises the CEO/governing body on DBE matters and achievement.
9. Chairs the DBE Advisory Committee.
10. Determines contractor compliance with good faith efforts as required.
11. Provides DBEs with information and assistance in preparing bids, obtaining bonding and insurance.
12. Plans and participates in DBE training seminars.
13. Acts as liaison to the Uniform Certification Process.
14. Provides outreach to DBEs and community organizations to advise them of opportunities.
15. Maintains the agency's updated directory on certified DBEs.

Section 26.27 DBE Financial Institutions

It is the policy of the *Oregon Department of Aviation* 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 DOT-assisted contracts to make use of these institutions.

An effort to identify DBE financial institutions is included in the goal calculation included in **Attachment 5**. No DBE financial institutions were identified in the *Oregon State Disadvantaged Business Enterprises* directory. Similar efforts will be made whenever a new goal is set.

Section 26.29

Prompt Payment Mechanisms

Oregon Department of Aviation requires that all subcontractors performing work on DOT-assisted contracts shall be promptly paid for work performed pursuant to their agreements, in accordance with all relevant federal, state, and local law.

In accordance with 49 CFR §26.29, Oregon Department of Aviation established a contract clause implementing this requirement and requires prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from the prime contractor's receipt of each payment from the Oregon Department of Aviation. This clause has been developed by the Oregon Department of Justice in compliance with ORS 279C.570 Prompt Payment Policy (2017).

Oregon Department of Aviation ensures prompt and full payment of retainage from the prime contractor to the subcontractor within thirty (30) days after the subcontractor's work is satisfactorily completed. Pursuant to 49CFR§26.29, Oregon Department of Aviation has selected the following method to comply with this requirement:

Oregon Department of Aviation may hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after Oregon Department of Aviation payment to the prime contractor.

To implement this measure, Oregon Department of Aviation includes the following clause from FAA Advisory Circular 150/5370-10G in each DOT-assisted prime contract:

The Contractor is required to pay all subcontractors for satisfactory performance of their contracts no later than 30 days after the Contractor has received a partial payment. The Owner must ensure 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 subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented, as required by the Owner. When the Owner has made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed.

From the total of the amount determined to be payable on a partial payment, ten(10) percent of such total amount will be deducted and retained by the Owner until the final payment is made, except as may be provided (at the Contractor's option) in the subsection 90-08 titled PAYMENT OF WITHHELD FUNDS of this section. The balance [insert balance] of the amount payable, less all previous payments, shall be certified for payment. Should the Contractor exercise his or her option, as provided in the subsection 90-08 titled PAYMENT OF WITHHELD FUNDS of this section, no such percentage retainage shall be deducted.

When at least 95% of the work has been completed, the Engineer shall, at the Owner's discretion and with the consent of the surety, prepare estimates of both the contract value and the cost of the remaining work to be done.

The Owner may retain an amount not less than twice the contract value or estimated cost, whichever is greater, of the work remaining to be done. The remainder, less all previous payments and deductions, will then be certified for payment to the Contractor.

Section 26.31 Directory

The *Oregon Department of Aviation* uses the State of Oregon DBE directory, maintained by the State.

The directory lists the firm's name, address, phone number, and the type of work the firm has been certified to perform as a DBE. In addition, the directory lists each type of work for which a firm is eligible to be certified by using the most specific NAICS code available to describe each type of work.

The State of Oregon revises the Directory *daily*. The link to the Directory is on the Oregon Department of Aviation website; it is also included in **Attachment 4** of this Program.

Section 26.33 Over-concentration

The *Oregon Department of Aviation* has not identified that over-concentration exists in the types of work that DBEs perform.

Section 26.35 Business Development Programs

The *Oregon Department of Aviation* has not established its own business development program. We collaborate with Business Oregon, the state agency that provides business development programs and services including COBID, which is the state MWESB/DBE certification program and directory.

Section 26.37 Monitoring and Enforcement Mechanisms

Oregon Department of Aviation implements and carries out appropriate mechanisms to ensure compliance with 49 CFR §26 program requirements, including prompt payment, by all program participants and describes and sets forth these mechanisms in the DBE program. These mechanisms have been established through the Oregon Department of Justice processes that comply with ORS 279C.570 Prompt Payment Policy (2017). **See Attachment 7.**

Monitoring Payments to DBEs and Non-DBEs

Oregon Department of Aviation monitors prime payments to subcontractors over the course of any covered contract. Such payment monitoring is accomplished through written certification

that Oregon Department of Aviation has reviewed contracting records, invoices and other proof of charges and payments, and summary of subcontractors paid. The prime contractor(s) also submit statements of final amounts paid to subcontractors at contract closeout to ensure subcontractors have been paid promptly and according to contractual terms (see Contract Closeout Compliance Checklist K.3).

Oregon Department of Aviation requires prime contractors to maintain records and documents of payments to all subcontractors, DBE and non-DBE, for a minimum of three (3) years, unless otherwise provided by applicable record retention requirements for the Oregon Department of Aviation's financial assistance agreement, whichever is longer. These records shall be made available for inspection upon request by any authorized representative of Oregon Department of Aviation or DOT.

Prompt Payment Dispute Resolution

Oregon Department of Aviation will take the following steps to resolve disputes as to whether work has been satisfactorily completed for purposes of §26.29.

- Oregon Department of Aviation Project Manager strives to resolve disputes at the lowest level. The Project Manager will review project status, which may include project documentation, invoices, and on-site inspection. The Project Manager will work with the Prime and the Sub contractors to facilitate resolution.
- The Project Manager will make the final determination regarding the status of work as being satisfactorily completed. If needed, the Project Manager will develop a plan for the contractors to undertake in a timely manner to bring the work to the status of satisfactorily completed.
- Once the work has been deemed satisfactorily completed, the prime is required to remit payment to the subcontractor within 30 days. If needed, the Project Manager will seek the assistance of the Oregon Department of Justice to enforce prompt payment contractual obligations.

Prompt Payment Complaints

Complaints by subcontractors regarding the prompt payment requirements are handled according to the following procedure. Documentation shall be submitted in writing at all steps.

- Subcontractor is encouraged to follow up in writing with the Prime for late payment(s)
- Subcontractor is encouraged to contact the Oregon Department of Aviation DBELO in the event of delayed or no response; ORS 279C.570(5) requires a response within ten (10) days.
- If there is an issue around work being 'deemed satisfactorily completed,' DBELO will work with the Prime and Sub contractors to determine that the work has been deemed satisfactorily completed and that payments are made in a timely fashion
- The DBELO will contact the Department of Justice for further guidance in the event of a failure of a Prime to render payment to Subcontractor(s) develops into a material breach of contract

Enforcement Actions for Noncompliance of Participants

Oregon Department of Aviation uses appropriate means as per authority in conjunction with the Oregon Department of Justice to enforce contractual terms for prompt payment as per the requirements of §26.29. These means include:

- In accordance with the contract, assessing liquidated damages against the prime contractor for each day beyond the required time period the prime contractor fails to pay the subcontractor
- Advise subcontractors of the availability of the payment and performance bond to assure payment for labor and materials in the execution of the work provided for in the contract
- Pay subcontractors directly and deduct this amount from the retainage owed to the prime
- Issue a stop-work order until payments are released to subcontractors, specifying in the contract that such orders constitute unauthorized delays for the purposes of calculating liquidated damages if milestones are not met
- Other penalties for failure to comply, up to and including contract termination, to be determined after consultation with Oregon Department of Justice.

Monitoring Contracts and Work Sites

Oregon Department of Aviation reviews contracting records and engages in active monitoring of work sites to ensure that work committed to DBEs at contract award or subsequently (eg., as the result of modification to the contract) is actually performed by the DBEs to which the work was committed. Work site monitoring is performed by subcontractor verification through onsite construction observation. Contracting records are reviewed by DBELO and the Finance Director for accuracy and timeliness. Oregon Department of Aviation will maintain written certification that contracting records have been reviewed and work sites have been monitored for this purpose.

Section 26.39 Fostering small business participation.

The *Oregon Department of Aviation* has created a Small Business element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.

The *Oregon Department of Aviation* small business element is incorporated as **Attachment 10** to this DBE Program. Steps have been actively implemented to foster small business participation; doing so is a requirement of good faith implementation of our DBE program.

SUBPART C – GOALS, GOOD FAITH EFFORTS, AND COUNTING

Section 26.43 Set-asides or Quotas

The *Oregon Department of Aviation* does not use quotas in any way in the administration of this DBE program.

Section 26.45 Overall Goals

The *Oregon Department of Aviation* will establish an overall DBE goal covering a three-year federal fiscal year period if we anticipate awarding DOT/FAA funded prime contracts the cumulative total value of which exceeds \$250,000 during any one or more of the reporting fiscal years within the three-year goal period. In accordance with Section 26.45(f) the *Oregon Department of Aviation* will submit its Overall Three-year DBE Goal to FAA by August 1, as required by the established schedule below.

Airport Type	Region	Date Due (Goal Period)	Next Goal Due (Goal Period)
Non-Primary (GAs, Relievers and State DOTs)	New England, Northwest Mountain, & Southern	August 1, 2017 (2017/2019/2020)	August 1, 2020 (2021/2022/2023)

The DBE goals will be established in accordance with the 2-step process as specified in 49 CFR §26.45. If the *Oregon Department of Aviation* does not anticipate awarding DOT/FAA funded prime contracts the cumulative total value of which exceeds \$250,000 during any of the years within the three-year reporting period, we will not develop an overall goal; however, this DBE Program will remain in effect and the *Oregon Department of Aviation* will seek to fulfill the objectives outlined in 49 CFR §26.1.

(c) Step 1. (1)The first step is to determine the relative availability of DBEs in the market area, “base figure”. We will use *DBE Directories and Census Bureau Data* as a method to determine our base figure. (2)The second step is to adjust the “base figure” percentage from Step 1 so that it reflects as accurately as possible the DBE participation the recipient would expect in the absence of discrimination based on past participation, a disparity study and/or information about barriers to entry to past competitiveness of DBEs on Contracts.

If we use a bidders list, we will do the following: Determine the number of DBEs that have bid or quoted (successful and unsuccessful) on our DOT-assisted prime contracts or subcontracts in the past three years. Determine the number of all businesses that have bid or quoted (successful and unsuccessful) on prime or subcontracts in the same time period. Divide the number of DBE bidders and quotes by

the number of all businesses to derive a base figure for the relative availability of DBEs in our market. When using this approach, we will establish a mechanism (documented in our goal submission) to directly capture data on DBE and non-DBE prime and subcontractors that submitted bids or quotes on our DOT-assisted contracts.

Any methodology we choose will be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in our market. We understand that the exclusive use of a list of prequalified contractors or plan holders, or a bidders list that does not comply with the requirements of paragraph (c)(2) of this section (above), is not an acceptable alternative means of determining the availability of DBEs.

(d) *Step 2.* Once we have calculated a base figure, we will examine all of the evidence available in our jurisdiction to determine what adjustment, if any, is needed to the base figure to arrive at our overall goal. If the evidence does not suggest an adjustment is necessary, then no adjustment shall be made.

Section 26.45 (g)(1) - Consultation and Publication

In establishing the overall goal, the *Oregon Department of Aviation* provided for consultation and publication. This included consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and the *Oregon Department of Aviation* efforts to establish a level playing field for the participation of DBEs. The consultation included a scheduled, direct, interactive exchange, e.g. a face-to-face meeting, video conference, teleconference) with as many interested stakeholders as possible focused on obtaining information relevant to the *Oregon Department of Aviation's* goal setting process, and it occurred before we were required to submit our goal methodology to the operating administration for review pursuant to paragraph (f) of this section. We documented in our goal submission the consultation process that we engaged in. Notwithstanding paragraph (f)(4) of this section (see next page), we did not implement our proposed goal prior to complying with this requirement.

In addition, the *Oregon Department of Aviation* published a notice announcing our proposed overall goal before submission to the operating administration on August 1. The notice was posted on our official ODA web site. If the proposed goal changes following review by the operating administration, the revised goal will be posted on our official ODA web site. We informed the public that the proposed overall goal and its rationale were available for inspection during normal business hours at our principal office and that the *Oregon Department of Aviation* and DOT/FAA will accept comments on the goals for 30 days from the date of the notice. Notice of the comment period included the addresses to which comments may be sent (including offices and websites) and where the proposal may be reviewed. **The public comment period will not extend the August 1st deadline.**

Our Overall Three-Year DBE Goal submission to DOT/FAA will include a summary of information and comments received during this public participation process, if any, and our responses.

We will begin using our overall goal on October 1 of the reporting period, unless we have received other instructions from DOT.

Section 26.45 (e) - Project Goals

If permitted or required by the FAA Administrator we will express our overall goals as a percentage of funds for a particular grant or project or group of grants and/or projects, including entire projects. Like other overall goals, a project goal may be adjusted to reflect changed circumstances, with the concurrence of the appropriate operating administration. A project goal is an overall goal, and must meet all the substantive and procedural requirements of this section pertaining to overall goals. A project goal covers the entire length of the project to which it applies. The project goal should include a projection of the DBE participation anticipated to be obtained during each fiscal year covered by the project goal. The funds for the project to which the project goal pertains are separated from the base from which your regular overall goal, applicable to contracts not part of the project covered by a project goal, is calculated.

If we establish a goal on a project basis, we will begin using our goal by the time of the first solicitation for a DOT-assisted contract for the project.

Section 26.45(f) - Prior Operating Administration Concurrent

The *Oregon Department of Aviation* understands that we are not required to obtain prior operating administration concurrence with our overall goal. However, if the operating administration's review suggests that our overall goal has not been correctly calculated or that our method for calculating goals is inadequate, the operating administration may, after consulting with us, adjust our overall goal or require that we do so. The adjusted overall goal is binding. In evaluating the adequacy or soundness of the methodology used to derive the overall goal, the U.S. DOT operating administration will be guided by the goal setting principles and best practices identified by the Department in guidance issued pursuant to § 26.9.

A description of the methodology to calculate the overall goal and the goal calculations can be found in **Attachment 5** to this program.

Section 26.47 Failure to meet overall goals.

The *Oregon Department of Aviation* will maintain an approved DBE Program and overall DBE goal, if applicable as well as administer our DBE Program in good faith to be considered to be in compliance with this part.

If the *Oregon Department of Aviation* awards and commitments shown on our Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, we will do the following in order to be regarded by the Department as implementing your DBE Program in good faith:

- (1) Analyze in detail the reasons for the difference between the overall goal and our awards and commitments in that fiscal year;
- (2) Establish specific steps and milestones to correct the problems we have identified in our analysis and to enable us to meet fully our goal for the new fiscal year;
- (3) The *Oregon Department of Aviation* will prepare, within 90 days of the end of the fiscal year, the analysis and corrective actions developed under paragraph (c)(1) and (2) of this section. We will retain copy of analysis and corrective actions in records for a minimum of three years, and will make it available to FAA upon request.

Section 26.51(a-c) Breakout of Estimated Race-Neutral & Race-Conscious Participation

(a) The *Oregon Department of Aviation* will meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating race-neutral DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal.

Race-neutral DBE participation includes, but is not limited to the following:

- (1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under §26.39 of this part;
- (2) Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing);

- (3) Providing technical assistance and other services;
- (4) Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);
- (5) Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;
- (6) Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;
- (7) Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;
- (8) Ensuring distribution of our DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and
- (9) Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

The breakout of estimated race-neutral and race-conscious participation can be found in **Attachment 5** to this program.

Section 26.51(d-g) Contract Goals

The *Oregon Department of Aviation* will arrange solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under § 26.39.

If our approved projection under paragraph (c) of this section estimates that we can meet our entire overall goal for a given year through race-neutral means, we will implement our program without setting contract goals during that year, unless it becomes necessary in order meet our overall goal.

We will establish contract goals only on those DOT-assisted contracts that have subcontracting possibilities. We need not establish a contract goal on every such contract, and the size of contract goals will be adapted to the circumstances of each

such contract (e.g., type and location of work, availability of DBEs to perform the particular type of work).

We will express our contract goals as a percentage of *the total amount of a DOT-assisted contract*.

Section 26.53 Good Faith Efforts Procedures

Sections 26.53(a) & (c) - Demonstration of good faith efforts (pre-award)

The obligation of the bidder/offeror is to make good faith efforts. The bidder/offeror can demonstrate that it has done so either by meeting the contract goal or documenting good faith efforts. Examples of good faith efforts are found in Appendix A to Part 26.

Heather Peck, Planning & Projects Manager is responsible for determining whether a bidder/offeror who has not met the contract goal has documented sufficient good faith efforts to be regarded as *Responsive*.

We will ensure that all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before we commit to the performance of the contract by the bidder/offeror.

Section 26.53(b) - Information to be submitted

In our solicitations for DOT/FAA-assisted contracts for which a contract goal has been established, we will require the following (forms are in **Attachment 6**):

- (1) Award of the contract will be conditioned on meeting the requirements of this section;
- (2) All bidders or offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:
 - (i) The names and addresses of DBE firms that will participate in the contract;
 - (ii) A description of the work that each DBE will perform. To count toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;
 - (iii) The dollar amount of the participation of each DBE firm participating;
 - (iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal; and
 - (v) Written confirmation from each listed DBE firm that it is participating in the contract in the kind and amount of work provided in the prime contractor's commitment.
 - (vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part). The documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted to

- the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract; and
- (3) We will require that the bidder/offeror present the information required by paragraph (b)(2) of this section, under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures, provided that, in a negotiated procurement, including a design-build procurement, the bidder/offeror may make a contractually binding commitment to meet the goal at the time of bid submission or the presentation of initial proposals but provide the information required by paragraph (2) of this section before the final selection for the contract is made by the recipient.

Section 26.53(d) - Administrative reconsideration

Within 5 business days of being informed by the *Oregon Department of Aviation* that it is not *responsive* because it has not documented sufficient good faith efforts, a bidder/offeror may request administrative reconsideration. Bidder/offerors should make this request in writing to the following reconsideration official:

Director, Oregon Department of Aviation
3040 25th St. SE
Salem, OR 97302
503-378-2340

The reconsideration official will not have played any role in the original determination that the bidder/offeror did not document sufficient good faith efforts.

As part of this reconsideration, the bidder/offeror will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The bidder/offeror will have the opportunity to meet in person with our reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do. We will send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

Section 26.53(f)(g) - Good Faith Efforts procedural requirement (post-solicitation) when there are contract goals

Oregon Department of Aviation includes a provision in each prime contract stating:

The contractor shall utilize the specific DBEs listed to perform the work and supply the materials for which each is listed unless the contractor obtains our written consent as provided in this paragraph 26.53(f); and

That, unless our consent is provided under this paragraph 26.53(f), the contractor shall not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE.

We will require the contractor that is awarded the contract 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 subcontract and all lower tier subcontractors be performed in accordance with the provisions of Part 26.

A prime contractor is prohibited from terminating a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) without our prior written consent. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or another DBE firm.

We will provide such written consent only if we agree, for reasons stated in our concurrence document, that the prime contractor has good cause to terminate the DBE firm. For purposes of this paragraph, good cause includes the following circumstances:

- (1) The listed DBE subcontractor fails or refuses to execute a written contract;
- (2) The listed DBE subcontractor 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 subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor;
- (3) The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable, non-discriminatory bond requirements.
- (4) The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;
- (5) The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to 2 CFR Parts 180, 215, and 1,200 or applicable state law;
- (6) We have determined that the listed DBE subcontractor is not a responsible contractor;
- (7) The listed DBE subcontractor voluntarily withdraws from the project and provides to us written notice of its withdrawal;
- (8) The listed DBE is ineligible to receive DBE credit for the type of work required;
- (9) A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract;
- (10) Other documented good cause that we have determined compels the termination of the DBE subcontractor, provided that good cause does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award.

Before transmitting to us its request to terminate and/or substitute a DBE subcontractor, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to us, of its intent to request to terminate and/or substitute, and the reason for the request.

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

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.

The *Oregon Department of Aviation* will require a contractor to make good faith efforts to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE. 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 that we established for the procurement. The good faith efforts shall be documented by the contractor. If we request documentation from the contractor under this provision, the contractor shall submit the documentation to us within 7 calendar days, which may be extended for an additional 7 calendar days if necessary at the request of the contractor, and the recipient shall provide a written determination to the contractor stating whether or not good faith efforts have been demonstrated.

We will include in each prime contract the contract clause required by § 26.13(b) stating that failure by the contractor to carry out the requirements of this part is a material breach of the contract and may result in the termination of the contract or such other remedies set forth in that section that we deem appropriate if the prime contractor fails to comply with the requirements of this section.

If the contractor fails or refuses to comply in the time specified, our contracting office will issue an order stopping all or part of payment/work until satisfactory action has been taken. If the contractor still fails to comply, the contracting officer may issue a termination for default proceeding.

Section 26.55 Counting DBE Participation

We will count DBE participation toward overall and contract goals as provided in 49 CFR§26.55. We will not count the participation of a DBE subcontract toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE.

If the firm is not currently certified as a DBE in accordance with the standards of subpart D of this part at the time of the execution of the contract, we will not count the firm's participation toward any DBE goals, except as provided for in §26.87(j).

SUBPART D - CERTIFICATION STANDARDS

Section 26.61 – 26.73 Certification Process

The Oregon Department of Aviation uses the certification standards of Subpart D of Part 26 to determine the eligibility of firms to participate as DBEs in DOT-assisted contracts. In Oregon, certification is done by Business Oregon through their COBID program (Certification Office for Business Inclusion and Diversity)

For information or to get certification, go to <https://oregon4biz.diversitysoftware.com/>.

This information is also included in **Attachment 8**.

SUBPART E – CERTIFICATION PROCEDURES

Section 26.81 Unified Certification Programs

The *Oregon Department of Aviation* is the member of a Unified Certification Program (UCP) administered by *Oregon State*. The UCP will meet all of the requirements of this section. *A copy of the application is included in **Attachment 8**. The link to the agreement is included in **Attachment 9**.*

SUBPART F – COMPLIANCE AND ENFORCEMENT

Section 26.109 Information, Confidentiality, Cooperation and Intimidation or Retaliation

We will safeguard from disclosure to third parties information that may reasonably be regarded as confidential business information, consistent with Federal, state, and local law.

Notwithstanding any provision of Federal or state law, we will not release any information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting information. However, we will transmit this information to DOT in any certification appeal proceeding under § 26.89 of this part or to any other state to which the individual's firm has applied for certification under § 26.85 of this part.

All participants in the *Oregon Department of Aviation's* DBE program (including, but not limited to, recipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to recipients, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).

The *Oregon Department of Aviation*, contractor, or any other participant in the program shall not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this part or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. If we violate this prohibition, we are in noncompliance with this Part.

ATTACHMENTS

- Attachment 1 Regulations: 49 CFR Part 26 or website link
- Attachment 2 Organizational Chart
- Attachment 3 Bidder's List Collection Form
- Attachment 4 DBE Directory or link to DBE Directory
- Attachment 5 Overall Goal Calculations
- Attachment 6 Demonstration of Good Faith Efforts or Good Faith Effort Plan - Forms 1 & 2
- Attachment 7 DBE Monitoring and Enforcement Mechanisms
- Attachment 8 DBE Certification Application Form
- Attachment 9 State's UCP Agreement
- Attachment 10 Small Business Element Program

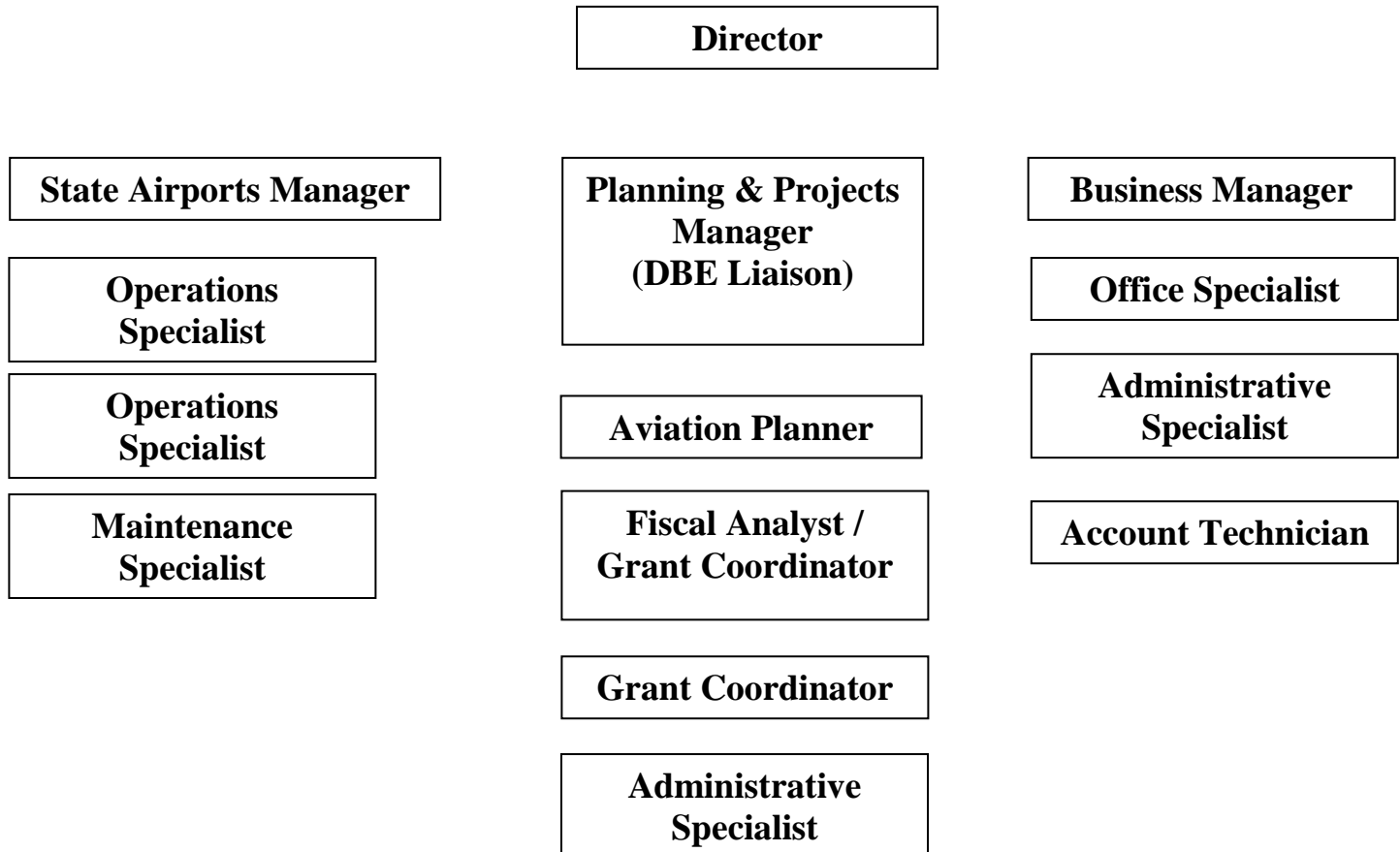
ATTACHMENT 1

Regulations: 49 CFR Part 26, or link to website

http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26_main_02.tpl

ATTACHMENT 2

**Oregon Department of Aviation (ODA)
Organizational Chart**



ATTACHMENT 3
Bidder's List Collection Form

Firm Name	Firm Address/ Phone #	DBE or Non-DBE Status (verify via State's UCP Directory)	Age of Firm	Annual Gross Receipts
			<input type="checkbox"/> Less than 1 year <input type="checkbox"/> 1- 3 years <input type="checkbox"/> 4-7 years <input type="checkbox"/> 8-10 years <input type="checkbox"/> More than 10 years	<input type="checkbox"/> Less than \$500K <input type="checkbox"/> \$500K - \$1 million <input type="checkbox"/> \$1-2 million <input type="checkbox"/> \$2-5 million <input type="checkbox"/> Greater than \$5 million
			<input type="checkbox"/> Less than 1 year <input type="checkbox"/> 1- 3 years <input type="checkbox"/> 4-7 years <input type="checkbox"/> 8-10 years <input type="checkbox"/> More than 10 years	<input type="checkbox"/> Less than \$500K <input type="checkbox"/> \$500K - \$1 million <input type="checkbox"/> \$1-2 million <input type="checkbox"/> \$2-5 million <input type="checkbox"/> Greater than \$5 million
			<input type="checkbox"/> Less than 1 year <input type="checkbox"/> 1- 3 years <input type="checkbox"/> 4-7 years <input type="checkbox"/> 8-10 years <input type="checkbox"/> More than 10 years	<input type="checkbox"/> Less than \$500K <input type="checkbox"/> \$500K - \$1 million <input type="checkbox"/> \$1-2 million <input type="checkbox"/> \$2-5 million <input type="checkbox"/> Greater than \$5 million
			<input type="checkbox"/> Less than 1 year <input type="checkbox"/> 1- 3 years <input type="checkbox"/> 4-7 years <input type="checkbox"/> 8-10 years <input type="checkbox"/> More than 10 years	<input type="checkbox"/> Less than \$500K <input type="checkbox"/> \$500K - \$1 million <input type="checkbox"/> \$1-2 million <input type="checkbox"/> \$2-5 million <input type="checkbox"/> Greater than \$5 million
			<input type="checkbox"/> Less than 1 year <input type="checkbox"/> 1- 3 years <input type="checkbox"/> 4-7 years <input type="checkbox"/> 8-10 years <input type="checkbox"/> More than 10 years	<input type="checkbox"/> Less than \$500K <input type="checkbox"/> \$500K - \$1 million <input type="checkbox"/> \$1-2 million <input type="checkbox"/> \$2-5 million <input type="checkbox"/> Greater than \$5 million
			<input type="checkbox"/> Less than 1 year <input type="checkbox"/> 1- 3 years <input type="checkbox"/> 4-7 years <input type="checkbox"/> 8-10 years <input type="checkbox"/> More than 10 years	<input type="checkbox"/> Less than \$500K <input type="checkbox"/> \$500K - \$1 million <input type="checkbox"/> \$1-2 million <input type="checkbox"/> \$2-5 million <input type="checkbox"/> Greater than \$5 million

ATTACHMENT 4

Oregon DBE Directory or web link to DBE directory

<https://oregon4biz.diversitysoftware.com/FrontEnd/VendorSearchPublic.asp>

ATTACHMENT 6

Demonstration of Good Faith Efforts - Forms 1 & 2

FORM 1: DISADVANTAGED BUSINESS ENTERPRISE (DBE) UTILIZATION

The undersigned bidder/offeror has satisfied the requirements of the bid specification in the following manner (please check the appropriate space):

_____ The bidder/offeror is committed to a minimum of _____ % DBE utilization on this contract.

_____ The bidder/offeror (if unable to meet the DBE goal of _____%) is committed to a minimum of _____% DBE utilization on this contract and should submit documentation demonstrating good faith efforts.

Name of bidder/offeror's firm: _____

State Registration No. _____

By: _____
(Signature) Title

FORM 2: LETTER OF INTENT

Name of bidder/offeror's firm: _____

Address: _____

City: _____ State: _____ Zip: _____

Name of DBE firm: _____

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____

Description of work to be performed by DBE firm:

The bidder/offeror is committed to utilizing the above-named DBE firm for the work described above. The estimated dollar value of this work is \$ _____.

Affirmation

The above-named DBE firm affirms that it will perform the portion of the contract for the estimated dollar value as stated above and that the firm is DBE certified to perform the specific trades.

By: _____

Date: _____

(Signature)

(Title)

If the bidder/offeror does not receive award of the prime contract, any and all representations in this Letter of Intent and Affirmation shall be null and void.

Submit this page for each DBE subcontractor.

ATTACHMENT 7

DBE Monitoring and Enforcement Mechanisms

The Oregon Department of Aviation has available several remedies to enforce the DBE requirements contained in its contracts, including, but not limited to, the following:

1. Breach of contract action, pursuant to the terms of the contract;
2. Breach of contract action, pursuant to 2017 ORS 279A.110 *Discrimination in subcontracting prohibited *remedies*

In addition, the Federal government has available several enforcement mechanisms that it may apply to firms participating in the DBE program, including, but not limited to, the following:

1. Suspension or debarment proceedings pursuant to 49 CFR §26
2. Enforcement action pursuant to 49 CFR §31
3. Prosecution pursuant to 18 USC 1001.

ATTACHMENT 8
DBE Certification Application Form

How to Become Certified as a DBE

In order to compete as a Disadvantaged Business Enterprise (DBE) for airport projects that are funded with Federal dollars, or for an airport concession opportunity, you must first be certified as a DBE under the U.S. Department of Transportation (DOT) regulations 49 CFR Part 26 and/or 49 CFR Part 23.

The Federal Government does not certify firms as DBEs. You must contact your home state's Unified Certification Program (UCP) to become certified. Your home state is the state where your firm's corporate headquarters is physically located, and is licensed to conduct business in that locality. There are a few states that do not have a UCP. In those cases, contact the airport that you are interested in doing business with.

In Oregon, DBE certification is through COBID Certification Management System at Business Oregon. Certification applications and program information are located at : <https://oregon4biz.diversitysoftware.com/> .

ATTACHMENT 9
State's UCP Agreement

<http://www.oregon4biz.com/How-We-Can-Help/COBID/DBE/>

ATTACHMENT 10

Small Business Element

1. Objective/Strategies

The Oregon Department of Aviation has the following objectives and strategies:

- (1) Establishing a race-neutral small business set-aside for prime contracts under a stated amount (\$1 million).
- (2) In multi-year design-build contracts, or other large contracts, requiring bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform.
- (3) On prime contracts not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved.
- (4) Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts.
- (5) To meet the portion of Oregon Department of Aviation's overall goal projected to be met through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform.

2. Definition of Small Business

For purposes of this program, "small business" or "small business concern" will be defined as set forth in 49 CFR 26.5, which as of March 2012 is:

"... 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)."

3. Verification

The Oregon Department of Aviation will diligently attempt to minimize fraud and abuse in the Small Business Element of its DBE program by verifying program eligibility of firms. Business Oregon's COBID certification includes race neutral DBE as well as race conscious certification.

4. Monitoring/Record Keeping

The Oregon Department of Aviation will maintain and monitor the records for the Small Business Element and be able to provide those records if requested.

5. Assurance

The Oregon Department of Aviation will provide the following assurances:

1. assurance that the program is authorized under state law;

2. assurance that certified DBEs that meet the size criteria established under the program are presumptively eligible to participate in the program;
3. assurance that there are no limits on the number of contracts awarded to firms participating in the program but that every effort will be made to avoid creating barriers to the use of new, emerging, or untried businesses;
4. assurance that aggressive steps will be taken to encourage those minority and women owned firms that are eligible for DBE certification to become certified.
5. assurance that the program is open to small businesses regardless of their location (i.e., that there is no local or other geographic preference).