

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

In the Matter of Adopting the Oregon Department
of Transportation Disadvantaged Business
Enterprises (DBE) Policy and Program

ORDER NO. 50-2016

WHEREAS, the United States Department of Transportation (USDOT) adopted Disadvantaged Business Enterprises (DBE) regulations (49 CFR Part 26) that require recipients receiving certain funds through the Federal Transit Administration (FTA) to adopt a DBE program upon receipt of specific levels of funding in a federal fiscal year and to continue to carry out the program until all FTA funds have been expended; and

WHEREAS, Columbia County's Transit Department received an FTA grant for the construction of the St. Helens Transit Facility, and as a condition of funding, the County adopted its own DBE policy and program through Board Order No. 23-2011; and

WHEREAS, because all funds from that FTA grant have been expended, the County is no longer required to administer its own DBE program. However, as a recipient of federal funds through the State of Oregon, the County must still comply with federal DBE regulations; and

WHEREAS, the State of Oregon Department of Transportation (ODOT) has adopted a DBE policy and program that complies with federal regulations; and

WHEREAS, ODOT's Unified Certification Program (UCP) also establishes a DBE certification program for Oregon and designates ODOT's Office of Civil Rights as the agency responsible for ensuring compliance with federal DBE certification regulations. Columbia County participates in the UCP through Intergovernmental Agreement No. 28966 with ODOT; and

WHEREAS, because ODOT's DBE program is fully compliant with federal regulations and the County is no longer required to administer its own DBE program, which duplicates the State's efforts, the County can more efficiently and effectively maintain compliance with federal DBE regulations by adopting the State of Oregon's DBE program;

NOW, THEREFORE, IT IS HEREBY ORDERED, as follows:

1. The ODOT DBE Policy and Program Plan, as amended, which is attached hereto as Exhibit A and incorporated herein by this reference, is hereby adopted.
2. Board Order No. 23-2011, "In the Matter of Adopting a Disadvantaged Business Enterprises Policy Statement and Program," is hereby repealed.

DATED this 14th day of September, 2016.

Approved as to form

By: 

Office of County Counsel

BOARD OF COUNTY COMMISSIONERS FOR
COLUMBIA COUNTY

By: 

Anthony Hyde, Chair

By: 

Henry Heimuller, Commissioner

By: 

Earl Fisher, Commissioner

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.



 Matthew Garrett
 Director, Oregon Department of Transportation



 Date

1. DBE PROGRAM GENERAL REQUIREMENTS

1.1 Objectives (§§ 26.1, 26.23)

The Disadvantaged Business Enterprise (DBE) Program objectives are found in the DBE Policy statement on the first page of this program.

To achieve the objectives of the Oregon Department of Transportation (ODOT) DBE policy, ODOT will circulate the DBE policy as follows:

To The Oregon Transportation Commission (OTC) – The Office of Civil Rights (OCR) provides annual updates to the OTC and as required. OCR will include the DBE policy with each annual update.

To the Business Community – OCR will circulate the DBE Policy statement at key stakeholder events. Examples of key events include, the annual ODOT-AGC (Association of General Contractors) meeting, and “Doing Business with ODOT” small business workshops. Additionally, when the DBE Program plan update is posted to the OCR webpage, OCR will announce the plan update to the OCR list-serve and include the DBE Policy statement in the announcement. The policy will also be sent electronically to all sub-recipients of Federal Transit Authority (FTA) funded grants and included in the FTA required State Management Plan (SMP). Also, OCR will work with the Office of Procurement (OPO) and Office of Project Letting (OPL) to include the policy statement with project and proposal DBE provisions.

To ODOT Personnel – OCR will coordinate an annual update on Inside ODOT (the agency’s internal newsletter) and periodic updates in the agency’s internal Diversity Newsletter. OCR will also circulate the DBE Policy statement at internal OCR and DBE-related training sessions.

1.2 Applicability (§ 26.3)

This program applies to all US Department of Transportation (USDOT) financial assistance where ODOT expends federal funds as the recipient of:

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 by Titles I, III, V, and VI of ISTEA, Pub. L. 102-240, 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 Teas-21, Pub. L. 105-178,

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

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>

1.3 Definitions (§ 26.5)

ODOT adopts the definitions contained in 49 CFR 26.5 for this program (see Exhibit A for Part 26).

1.4 Non-discrimination Requirements (§ 26.7)

ODOT will not 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 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 purpose of this program with respect to individuals of a particular race, color, sex, or national origin.

1.5 Assurances (§ 26.13)

A. Federal Financial Assistance Agreement Assurance (§ 26.13(a))

ODOT has received federal financial assistance from USDOT, and as a condition of receiving this assistance, has signed the following assurance that it will comply with 49 CFR 26:

[Recipient] 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. The recipient 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 recipient'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 the [Recipient] of its failure to carry out its approved program, the Department 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 verbatim in financial assistance agreements between ODOT and sub-recipients.

B. Contract Assurance (§ 26.13(b))

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

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 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.

ODOT physically incorporates FHWA Form 1273 into each highway construction contract that is partly or completely funded under Title 23 and requires that contractors physically incorporate the form into each subcontract.

1.6 Authority and Applicable Law (§ 26.3)

The USDOT Regulations (49 CFR 26) published in the Federal Register, as amended January 28, 2011, established a requirement that all recipients of USDOT funds establish a Disadvantaged Business Enterprise Program. The regulations are applicable both to ODOT's Federal-aid construction and to its non-construction activities including transit and personal service contracts.

The USDOT's legal authority for its DBE regulations includes Executive Order 11625 (October 13, 1971), which required that federal executive agencies develop comprehensive plans and programs to encourage minority business participation. USDOT requires ODOT to establish a DBE Program as a condition for receiving USDOT federal funds.

The Title VI, Civil Rights Act of 1964 requires non-discrimination in federally assisted programs or activities on the grounds of race, color, sex, or national origin.

The Program is also subject to the following laws: Section 30 of the Airport and Airway Development Act of 1970 and Section 520 of the Airport and Airway Improvement Act of 1982, as amended by the Airport and Airway Safety Capacity Expansion Act of 1987; Section 905 of the Railroad Act of 1978 (45 USC 903); and Section 19 of the Urban Mass Transportation Act of 1964, as amended (Public Law 95-599).

1.7 DBE Financial Institutions (§ 26.27)

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 (see Exhibit B). OCR will annually re-evaluate the availability of DBE financial institutions.

2. PROGRAM RESPONSIBILITIES

2.1 Oregon Department of Transportation (ODOT)

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. As provided under 49 CFR 26, only firms owned and controlled by socially and economically disadvantaged persons are to benefit from the DBE Program.

The Director of ODOT is responsible for establishing the DBE policy for the Department and is responsible to ensure adherence to this policy. The Manager of the Office of Civil Rights (OCR), in coordination with all ODOT Officers, Division Managers, District Managers, and Procurement Office staff, is responsible for the development, implementation and monitoring of the DBE Program for contracts in accordance with the Department's nondiscrimination policy.

2.2 ODOT Office of Civil Rights

ODOT's OCR is responsible for ensuring compliance with federal regulations in determining the eligibility of applicant firms seeking participation in the program. OCR is also responsible for establishing a minimum expected participation goal on a triennial basis and determining credit towards meeting the assigned DBE participation goal on federally assisted contracts the department awards.

Roles and Responsibilities: Overview

A. DBE Liaison Officer

The following individual is the designated DBE Liaison Officer:

Tiffany Hamilton
Disadvantaged Business Enterprise Program Manager
Phone: (503) 986-4355
Fax: (503) 986-6382
Tiffany.Hamilton@odot.state.or.us

The DBE Liaison Officer is delegated by the Director the responsibility of developing and implementing policy and directing the DBE Program. The DBE Program Manager, who has direct independent access to the Director concerning DBE program matters, has responsibility for the day-to-day operation and oversight of the DBE Program as it applies to meeting Federal Highway (FHWA) and Federal Transit Authority (FTA) requirements for USDOT-assisted contracts and activities. The DBE Liaison Officer is responsible for implementing all aspects of the DBE program. The agency must have adequate staff to administer the program in compliance with 49 CFR 26. OCR reporting policy and the ODOT organization chart are attached as Exhibit C.

B. DBE Program Manager

The DBE Program Manager develops and implements program functions based on federal rules and regulations 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. This position also provides support and guidance in developing the overall ODOT goal calculations and program outreach for transit-related activities as required by FTA.

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.

C. Intermodal Civil Rights Manager

The Intermodal Civil Rights Manager establishes the overall ODOT 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), as required.

D. 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. They also provide regional DBE program outreach to contractors and small businesses. These positions report directly to the Field and Business Support Manager.

E. Field and Support Business Manager

Field and Support Business Manager supervises and coordinates 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.

F. Emerging Small Business Program Manager

Emerging Small Business 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.

G. Office of Minority, Women and Emerging Small Business (OMWESB)

In accordance with an Interagency Agreement signed between OCR and OMWESB, OMWESB is responsible for carrying out the DBE certification and maintaining a database of currently certified DBEs (as well as of women- and minority-owned and emerging small businesses). OMWESB certifies DBEs in accordance with Code of Federal Regulations and Oregon Statutes. Section 6 of this document details the certification process as well as requirements for the DBE certification.

2.3 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.

A. Project Delivery and Procurement Staff

- (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) Forward 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.
- (8) Ensure that ITBs and RFPs do not contain unnecessary requirements which could unduly restrict or eliminate small businesses from competition.

B. 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. (See also, Section 5, Monitoring Performance and Contractor Compliance, and ODOT Construction Manual - Chapter 18, Workforce and Small Business Equity Programs.)
- (2) 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.
- (3) 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.
- (4) Perform Commercially Useful Function (CUF) reviews on DBEs performing work on a project.
- (5) 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.

C. Oregon Department of Justice - 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 imposition of administrative sanctions against contractors who violate DBE provisions.

- (4) Represent ODOT in all legal actions involving DBE issues.
- (5) Provide OCR and the Office of Minority, Women, and Emerging Small Business (OMWESB) with legal opinions concerning DBE certification involving complex issues of ownership and control.

2.4 Sub-recipients (including Local Public Agencies)

A sub-recipient is defined for the purposes of this DBE Program Plan as any entity, public or private, who receives USDOT financial assistance through ODOT. All sub-recipients that let USDOT assisted contracts must follow the requirements of 49 CFR 26, (including insertion of DBE clauses in grant agreements and contracts).

Sub-recipients will develop a DBE Program where required by federal law, or endorse and abide by ODOT's DBE Program Plan. ODOT will make an effort to ensure the sub-recipients comply with all requirements. An agreement will be executed with sub-recipients which will bind sub-recipients to place appropriate DBE clauses in federally assisted contracts and to devise an appropriate DBE Program covering those contracts where required.

Upon FHWA approval, and as required, FTA approval, of the ODOT DBE Program Plan, or upon modifications to the Plan, all sub-recipients shall be notified in writing by ODOT that they must adopt the revised plan. Any ODOT sub-recipients who will award more than \$250,000 in FTA funds to primes (excluding transit vehicle purchases) per annum must prepare their own DBE Program Plan and submit it to ODOT for approval within a reasonable time period.

A. Sub-recipient Adoption of FHWA Approved ODOT DBE Program Plan

Sub-recipients adopting the ODOT Program Plan shall submit to ODOT written confirmation of such action signed by the appropriate executive officer having legal authority to obligate the sub-recipient. ODOT will notify sub-recipients of all Plan amendments.

B. Sub-recipient Submission of Program Document to ODOT for Approval

Sub-recipients that prepare their own DBE program plan shall submit the plan (signed by the appropriate executive officer) to ODOT Office of Civil Rights for review and approval. ODOT will provide written notice to sub-recipients of any document deficiencies to be corrected prior to approval. Once approved by ODOT, the sub-recipient's document will be forwarded to the appropriate federal operating authority for concurrence.

ODOT will conduct an annual review of all sub-recipients having their own program plan to ensure program compliance prior to submitting annual updates to the appropriate federal operating authority. ODOT's annual updates will include a status statement regarding sub-recipients' performance and compliance with their program documents.

After approval of the plan by ODOT, sub-recipients shall submit written requests to ODOT for approval of all proposed amendments. Sub-recipients shall be required to submit annual updates to ODOT reflecting program activities for the reporting period.

C. Local Public Agency Certification

Currently, local public agencies (LPAs) certified to manage FHWA-funded projects contract back to ODOT all civil rights-related work, including DBE program requirements. More information on Local Public Agency Certification

can be found at the Statewide Programs Unit – Certification Program Website of ODOT.

The civil rights section of the Local Agency Guidance (LAG) Manual tells LPAs how to request contract goal assignments from ODOT OCR, when to include DBE and other civil rights provisions in LPA contracts, what project compliance monitoring and documentation is required, and how to cooperate with OCR Field Coordinators on FHWA-funded projects.

3. DBE GOAL DEVELOPMENT

3.1 Overall Annual DBE Goal

As a recipient of US Department of Transportation (USDOT) financial assistance, and per 49 CFR Part 26, the Oregon Department of Transportation (ODOT) is required to set an overall goal for Disadvantaged DBE participation in USDOT assisted contracts. Unless indicated by a valid disparity study and USDOT-approved waiver, the overall goal will not be subdivided into group specific goals, or be established as a quota system.

ODOT OCR will establish an overall annual goal on a triennial basis for the participation of DBEs in all budgeted contracts utilizing Federal-aid highway funds. ODOT OCR will establish a separate overall annual goal on a triennial basis for the participation of DBEs in all budgeted contracts utilizing Federal Transit Authority (FTA) funds. The overall annual goals will be expressed as a percentage of the total amount of Federal-aid funds the Department anticipates spending in the fiscal year.

ODOT's overall goal is based on demonstrable evidence of ready, willing and able DBEs available to participate on USDOT assisted contracts. To the maximum extent feasible, ODOT intends to meet the established goals through the race- and gender-neutral measures described in Section 4.3 of ODOT's DBE Program Plan. Where race- and gender-neutral measures are inadequate to meet an overall goal, ODOT will establish contract-specific goals for particular projects with subcontracting opportunities (race- and gender-conscious method) as provided under a current, valid waiver from USDOT.

In setting the overall annual goal for ODOT, the USDOT requires that the goal setting process begin with a base figure for the relative availability of DBEs. The overall goal must be based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate on USDOT-assisted contracts. In particular, recipients must follow the USDOT's two-step methodology for goal setting to determine the level of DBE participation they expect absent the effects of discrimination:

Step 1 – Compute the base figure using data from one of the of the following options set out in 49 CFR 26.45(c) to determine relative availability: (1) DBE directories and census reports, (2) bidders list, (3) disparity study, (4) the goal of another DOT, or (5) other alternatives.

Step 2 – Adjust the base figure to make it as precise as possible utilizing the guidelines established in 49 CFR Part 26.45 and the goal-setting tips published by the USDOT's Office of Small and Disadvantaged Business Utilization.

In establishing this goal, ODOT is also required to do the following:

- Provide for public participation in the establishment of the overall goal;
- Specify the relevant market area used for the calculation;
- Project the portions of the overall goal it expects to be met through race- neutral and race-conscious measures, respectively (see 49 CFR Part 26.51).

See, USDOT publication [Tips for Goal-Setting in the DBE Program](http://www.dot.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise) at:

<http://www.dot.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>

A. Establishing Base Figure - Determining Relative DBE Availability

For FHWA-funded contracts and grants, ODOT will use a percentage figure derived from a valid, applicable disparity study to determine the base figure of DBE relative availability in accordance with option (3) under 49 CFR 26.45(c) to determine DBE relative availability.

Beginning in 2007, and again in 2011 and 2013 ODOT hired a consultant to conduct a disparity study, a disparity study update, and DBE availability update respectively to analyze data on DBE, minority-owned, and women-owned business availability, utilization, and disparity in FHWA-assisted contracting data.. See each study on the OCR [DBE Program – Disparity Studies](#) webpage for a detailed description of the data collection and management processes.

For FTA-funded contracts and grants, ODOT will use the OMWESB DBE Directory and census reports.

B. Adjustment to Base Figure

ODOT will consider any reasonable adjustment to the base figure based on demonstrable evidence indicating that the availability of DBEs for USDOT assisted contracts for the fiscal year may be higher or lower than the base figure indicates, past performance, verifiable barriers to success, adjustments indicated by studies (including disparity and availability studies), and any other relevant factors which can be supported with data. At a minimum, the OCR will analyze the results of ODOT's efforts to contract with DBEs for the most recent five federal fiscal years, any available and relevant disparity studies (to the extent that they are not accounted for in the base figure), and any available and relevant results of efforts by other DOTs or similar agencies to contract with DBEs.

C. Race-neutral Analysis

Once the overall annual goal is proposed, the OCR will analyze and project the maximum feasible portion of that goal that can be achieved by using race-neutral methods. Where the projected portion of the goal using race-neutral methods is less than the overall annual goal, the remaining portion will be achieved by establishing contract goals for particular projects that have subcontracting opportunities. This analysis is a review of past contracting history with information including, but not limited to:

- (1) DBE participation as prime contractors on USDOT assisted contracts;
- (2) DBE participation on projects where no DBE goals have been established;
- (3) DBE Participation on prime contracts exceeding contract goals;
- (4) DBE participation on projects as non-committed DBE subcontractors.

OCR will monitor and adjust the use of contract-specific goals in accordance with 49 CFR Part 26.51 (f). When projecting the percentage of the overall annual goal to be achieved through establishing contract-specific goals, OCR will analyze the actual achievement of the overall annual goal through race-neutral methods in the current and previous five years. When establishing contract-specific goals during the current fiscal year, the OCR shall analyze the progress towards achieving the overall annual goal and increase or reduce the use of contract-specific goals accordingly. ODOT will adjust the ratio of race- and gender-conscious and race- and gender-neutral methods to comply with court

decisions, legal challenges and guidance from USDOT, FHWA, or FTA as applicable.

In cases where an Availability and Disparity Study has provided evidence that some, but not all, presumptive groups should be included in race- and gender-conscious goals, ODOT will request a waiver from USDOT to allow the goals to be applied only to those groups identified as having a substantial or significant disparity in contracting.

D. Public Participation and Outreach Efforts

In establishing overall DBE goals, ODOT will provide for public participation. This will include: Public Notices published in trade and minority circulars; notices posted on the ODOT OCR website; public meetings; and, announcements and discussion at organizational and industry meetings.

Prior to finalizing the Overall Goals Analysis Report, ODOT will notify USDOT recipients, and other USDOT grantees, minority, women, and general contractors groups, community organizations, or 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 ODOT's efforts to establish a level playing field for the participation of DBEs, of the proposed goal.

ODOT will publish a notice announcing its proposed overall goal and the race-neutral/race-conscious breakout, informing the public that ODOT's Overall Goals Analysis Report is available for inspection during normal business hours at the Office of Civil Rights for a period of thirty (30) days, and that ODOT and the USDOT will accept comments on the proposed goals for forty-five (45) days from the date of the notice. The notice will be distributed in general circulation media, local minority-focused media, and trade association publications.

In conjunction with ODOT's activities to meet its overall DBE goals, ODOT conducts various public participation and outreach activities designed to broaden awareness of ODOT's Office of Civil Rights Program for Contracts. The measures described in 49 CFR 26.51, focusing on race-neutral means will be actively pursued; ODOT also encourages its contractors to make similar outreach efforts to include DBE participation in subcontracting opportunities. ODOT will continue to organize and offer training programs for to help businesses meet DBE eligibility requirements, to familiarize potential contractors with procurement procedures and requirements, and to otherwise develop effective programs to further DBE participation in ODOT's contracting activities.

E. Goal Submissions

- (1) The three-year overall goal report will be submitted to the appropriate operating authority (FHWA or FTA), for review on August 1 of the relevant year. The goal is published on the [ODOT Civil Rights DBE Resource Documents](#) page.
- (2) A description of the methodology used to establish the goal, including the Base Figure, and the supporting data from which it was calculated, with any adjustment, will be included.
- (3) A projection of the portions of the overall goal which will be met by race- and gender-neutral means and basis for that projection will be included.
- (4) The overall goal for ODOT Transit activities will be submitted to FTA every three years by August 1. This goal is based on non-vehicle monies

only and is specific to agencies which receive greater than \$250,000 from ODOT Transit.

F. Transit Vehicle Manufacturers Certification

The Department shall require any transit vehicle manufacturers to certify that they have established an overall annual DBE participation goal that has been approved by FTA before they can bid on any Authority contracts. Expenditures for FTA-assisted transit vehicle procurements are not included in the funding base to which the overall goal for other FTA-assisted contract expenditures apply.

3.2 Contract-Specific Goals

A. Contract Goal Setting

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 (49 CFR §26.51(d)). Contract goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals, unless verified data (for example, through a disparity study) supports the need to more narrowly tailor the goals for specific groups, and a waiver has been approved by USDOT.

In May 2005, the U.S. Ninth Circuit Court ruled that a state department of transportation could not establish a race- and gender-conscious DBE program without evidence showing that discrimination and inequity in contracting opportunities in that state's transportation industry had occurred. Consequently, ODOT hired a consultant to conduct a disparity study in 2007 and an update in 2011. Based on the results of these studies, ODOT sought and obtained a waiver from the requirement of 49 CFR §26.51(d) from the USDOT to allow ODOT to assign contract goals only for those DBE groups shown to have experienced substantial disparities in contracting with ODOT. For current information, see the ODOT Office of Civil Rights [DBE Program Waiver](#) page.

For ODOT's FHWA-funded construction contracts and architecture and engineering and related services (A&E) contracts, prior to solicitation of bids, all proposed projects are reviewed by the OCR to identify work that could be performed by DBEs. The procedure and criteria used in assigning project goals include:

- (1) Project location, size, duration, and dollar value.
- (2) The nature of project, (type of work and potential scheduling and coordination work).
- (3) Availability of certified DBE firms within a reasonable distance from the project location that perform items identified capable of being subcontracted.
- (4) Any other relevant criteria, including court decisions and DBE Program Waivers or directives from USDOT.

OCR assigns the goal and forwards it to the appropriate unit (construction specifications or procurement office) or local public agency for inclusion in the project plans and specifications as applicable.

For FTA-funded grants and contracts, ODOT has an entirely race- and gender-neutral DBE program. No contract goals will be assigned.

B. Aspirational Targets

DBE Aspirational Target participation evaluations have been performed in the past, but will no longer be included for federal-aid projects. No other race- or gender conscious aspirational targets will be set for small business participation on projects with federal funding.

C. Design-Build

When projects are let using the Design-Build method and when federal monies are utilized, the original RFQ and RFP will specify that there will be a DBE goal. The exact goal will be determined in the final stage of the selection process as the scope of work becomes clearer. The design and construction phases of the project will be evaluated separately.

D. Construction Management General Contractor (CM/GC)

CM/GC projects will be evaluated in the same manner as Design-Build.

3.3 Counting DBE Participation towards Meeting Annual Goals

DBE participation is credited using the following procedures (see Section 7.2, Reporting to USDOT for information on DBE participation reporting):

A. Work Actually Performed

Only the work actually performed by a DBE, (according to section 4.1.C.) will be counted toward the DBE goal. Only the type of work in which the DBE is certified, will be counted as long as the DBE performs a Commercially Useful Function (CUF). The cost of supplies and materials obtained by the DBE, or equipment leased (except from prime contractor or its affiliate), may also be counted.

B. DBE Subcontracts to non-DBE

Work that a DBE subcontracts to a non-DBE firm does not count towards the DBE goal, with the exception of trucking firms leasing additional trucks in compliance with the one-for-one rule. Expenditures may only be counted if the DBE is performing a CUF. A DBE shall perform at least thirty percent of the total cost of its contract with its own work force.

C. Materials & Supplies

If materials or supplies are obtained from a DBE manufacturer, one hundred percent of the cost will be counted. If the materials and supplies are purchased from a DBE regular dealer, sixty percent of the cost will be counted. If services are brokered, or materials or supplies are purchased from a broker, only the brokerage fee will be credited.

D. Achievement

DBE achievement will not be counted toward the overall goal until the DBE has been paid. OCR will track race-conscious DBE participation separately from race-neutral DBE participation. All DBE participation achieved on projects with no contract-specific goal and all participation over the amount required to meet contract-specific goals will be considered race-neutral participation. Additionally, OCR will not count the portion of DBE participation that is achieved after a DBE has been decertified during the performance of a contract.

3.4 Counting DBE Participation to Meet Annual Goals of Sub-recipients

A. Sub-recipients Adopting the ODOT Program Plan

Credit shall be authorized or deducted per the requirements of Section 3.3 regardless of whether or not the ODOT or the Sub-recipient is the contracting agency. Certified Local Public Agency sub-recipients of Federal-aid highway program funds are required to submit bid, award, payment, and compliance reports to ODOT OCR in accordance with the civil rights section of the Local Agency Guidelines (LAG) Manual. ODOT shall include in its semi-annual reports to FHWA the status of sub-recipient DBE participation activities falling within this category (see Section 7.2, Reporting to USDOT).

FTA recipients shall be required to report semiannually demonstrating their goal attainment to-date in a manner consistent with the requirements of 49 CFR 26 reporting requirements.

B. Sub-recipients with an ODOT Approved Program Plan

As per FHWA guidance, no sub-recipients of Federal-aid highway funds fall into this category. Recipients of FTA funds shall be required to report semiannually demonstrating their goal attainment to-date in a manner consistent with the requirements of 49 CFR 26 reporting requirements. Sub-recipients shall authorize or deduct credit for work performed by DBEs per the requirements of 3.3 above regardless of whether they or ODOT is the contracting agency.

4. ENSURING DBE PARTICIPATION

4.1 Procedures to Ensure Participation (§ 26.53)

A. Pre-Bid Procedures

- (1) Disadvantaged Business Enterprise (DBE) Contractor Notification
 - (a) Oregon Department of Transportation's (ODOT's) [Contracting with ODOT](#) portal is designed to provide links to the most commonly needed contracting information for current and potential contractors, including DBE contractors and subcontractors. The portal provides links to the schedule of upcoming construction projects and the Small Contracting Program (SCP) opportunities. Additionally, the Office of Civil Rights (OCR) provides a [Search Page for Upcoming Projects](#) for the next 6 months, which allows the contractor to search by component, bid let date, county, region, estimated project size, or keywords. If there are contracted DBE supportive services, bid documents will be available at the offices of the DBE Supportive Services Contractor(s).
 - (b) Plans and detailed project information may be secured from ODOT Office of Procurement, Salem, Oregon, and the Region Engineer's office in the region in which a project is located, and on [ODOT e-BIDS](#) for highway construction projects. Designated plan centers also provide project information.
- (2) Prime Contractor Notification
 - (a) All highway construction bidding opportunities are posted on the ODOT Procurement Office website as soon as they are advertised. All Bid Documents, including Plans, Specifications, Requests for Qualifications and Requests for Proposals are available for inspection by DBE contractors at ODOT's Office of Procurement in Salem, Oregon, on [ODOT e-BIDS](#), and at plan centers. Non-construction contracting opportunities are published on the Oregon Procurement Information Network (ORPIN).
 - (b) Solicitation Documents for Projects with assigned DBE goals contain written notice of the goal for Highway

Construction, non-construction contracting, and for Transit contracts, and the Special Provisions and Supplemental Standard Specifications for Highway Construction.

- (c) The Disadvantaged Business Enterprise Supplemental Required Contract Provisions are included in the Special Provisions and Supplemental Standard Specifications for Highway Construction on all federal-aid projects, as well as Required Contract Provisions Federal-Aid Construction Contracts Form FHWA 1273 (see Exhibit G).

(3) DBE Directory

The DBE Directory is available on the Internet site: <http://www4.cbs.state.or.us/ex/dir/omwesb/>

Hard copies can still be requested by contacting the Office of Minority, Women and Emerging Small Business at:

OMWESB
775 Summer Street NE, Suite 200
Salem, OR 97301-1280
Phone: (503) 986-0075
Fax: (503) 581-5115

B. Bid Opening and Contract Award

ODOT will award construction contracts to the lowest responsive, responsible bidder as required by Oregon Revised Statute (ORS) 279A, 279B, and 279C, unless an alternative contracting process is approved by FHWA or FTA. For these contracts, as well as contracts awarded pursuant to a Request for Proposal procedure (where the low bid is not the only determining factor in award, but where the Bidder must still be a responsive and responsible bidder), any bidder that fails to demonstrate that it achieved the contract-specific DBE participation goal and, upon such failure to achieve the goal, also fails to demonstrate that it made sufficient good faith efforts to do so, shall be deemed non-responsive and therefore shall be ineligible for award of the contract.

ODOT requires that any DBEs listed by the bidder for participation in the contract be certified as eligible DBEs as of the date of bid opening. The OCR shall review the bidder's submittal to confirm each DBE firm's certification status.

(1) DBE Commitment and Utilization Form Part I (see Exhibit I)

All bidders (including DBE bidders), must submit with their sealed bid proposal the DBE Commitment Certification and Utilization Form Part I listing the name, type and value of work committed to each

DBE subcontractor whose work will be used to fulfill a project-specific goal. 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.

Credit toward meeting the contract goal varies with the type of DBE firm:

- (a) Construction firms: supply labor and materials to perform a discrete element of the work - 100% credit. The DBE firm must have an active role in purchasing supplies and materials to perform its specific element of work. To receive credit towards the project goal, the DBE firm shall negotiate price, arrange for delivery, and pay for the supplies and materials required for the work to be performed
- (b) Manufacturers: firms that operate or maintain a factory or establishment that produces on the premises the materials or supplies obtained by the contractor - 100% credit.
- (c) Equipment rental firms: equipment must be owned by and registered to the DBE - 100% credit.
- (d) Regular Dealers/Suppliers: must assume actual and contractual responsibility for materials - 60% credit.
- (e) Brokers, packagers, ad hoc suppliers, manufacturers' representatives: no credit for materials, transportation, or other costs - Net Fee credit
- (f) Joint Venture: The contractor may count toward its DBE goal only that portion of the work that the eligible DBE firm actually does with its own forces. For DBE Joint Venture Application, see Exhibit J.

Should the joint venture be comprised of eligible DBEs only, the entire contract award amount shall be counted toward meeting the DBE project goal.

Joint ventures bidding as primes must also meet the assigned project goal for providing subcontracting opportunities for DBEs.

In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, count the work the eligible DBE has committed to performing with its own forces as well as the work that it has committed to be performed by eligible DBE subcontractors and eligible DBE suppliers.

A review of the committed DBE firm's work areas (bid items) as listed on the DBE Commitment Certification and Utilization Form is

then completed. If the review by the Office of Civil Rights indicates that the committed DBE firm may not be able to perform the bid items for which the firm has contracted, or that the DBE firm is not certified in the specific types of work, the prime contractor and the DBE firm will be informed and given an opportunity to provide reasonable documentation that the work the DBE firm performs is eligible for DBE credit on the project.

The signature of the Bidder shall be affixed to the DBE Commitment Certification and Utilization Form, or, in the case of an electronic bid, the authority of the person submitting the bid shall be verified. Failure of the Bidder's signature to appear on the form shall render the bid proposal non-responsive.

(2) DBE Commitment and Utilization Form Part II (Good Faith Efforts)

In the event a bidder is unable to meet the minimum expected participation per the requirements of DBE Commitment Certification and Utilization Form, Part I, that bidder shall provide additional information regarding good faith efforts per the requirements of Part II. This information must be included at the time of bid opening.

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

In determining whether a bidder has made good faith efforts, ODOT may take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, ODOT may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, ODOT may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts in accordance with 49 CFR 26 Appendix A.

(3) Administrative Reconsideration

If it is determined that the apparent successful bidder/offeror has failed to meet the goal or demonstrate adequate good faiths efforts, ODOT, before awarding the contract, will notify the bidder/offeror in writing within 15 (fifteen) calendar days of the bid opening. The notification will include the reason for the determination and provide the bidder/offeror an opportunity for administrative reconsideration.

Administrative Reconsideration includes:

- (a) The bidder/offeror will have the opportunity to provide written documentation or argument to the Review Committee, consisting of ODOT personnel, 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.
 - (b) Upon request, the bidder/offeror 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.
 - (c) The Review Committee will make a decision on reconsideration within 3 working days after reviewing the evidence provided by the apparent successful bidder/offeror.
 - (d) 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.
 - (e) The result of the reconsideration process is not administratively appealable to the U.S. Department of Transportation.
- (4) Committed DBE Breakdown and Certification Form (See Exhibit K)

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 each DBE committed to meet the goal on the project.

The Form 2 must be completed and submitted within ten calendar days of notification of award, and prior to contract execution. Completed forms may be submitted by email, fax, or mail to:

Email: OCRInfoRequest@odot.state.or.us

Fax: (503) 986-6382

Mail: ODOT Office of Civil Rights,

355 Capitol Street NE, MS 31
Salem, OR
97301-3871

Failure to provide detailed DBE information to ODOT within ten calendar days after receiving award notification shall be cause for cancellation of the award and withdrawal of the contract and may be cause for forfeiture of the proposal guaranty.

The contractor must identify 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. 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 DBE Commitment Certification and Utilization Form 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. If the value of work indicated on the Committed DBE Breakdown and Certification Form is less than that indicated on the DBE Commitment Certification and Utilization Form, the contract award will be canceled and the contract withdrawn.

Authorized representative of both the prime contractor and the committed DBE must sign 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 will cause the contract award to be canceled and the contract withdrawn.

C. Counting DBE Participation Towards Contract-Specific Goals

(1) Crediting

The contractor shall count toward meeting its DBE goal only those expenditures originally committed to eligible DBEs prior to contract award, and those on which committed DBEs perform a Commercially Useful Function (CUF) on the project.

When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward the DBE goal only if the DBEs subcontractor is itself an eligible DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals, with the exception of trucking where specific conditions apply. (See Section 3.3, Counting DBE Participation Towards Meeting Annual Goals).

Credit shall be authorized for DBE subcontractor participation under a DBE contractor provided a CUF is performed and such participation was part of the DBE contractor's original commitment prior to contract award.

If a DBE is no longer certified, the dollar value for work performed under the contract after the date of decertification will not be counted towards the overall goal.

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.

(2) Good Faith Efforts

If a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, the prime contractor will make good faith efforts to find another DBE subcontractor to substitute for the original 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 established for the project. Good Faith Efforts shall include steps as outlined in 49 CFR 26, Appendix A.

(3) Crediting for DBE Prime Contractors

The requirements of Section 4.0 will apply to DBE bidders/offers for prime contracts. In determining whether a DBE bidder/offers for a prime contract has met a contract goal, only the work the DBE has committed with its own forces as well as the work that it has committed to be performed by DBE subcontractors or suppliers will be counted.

(4) Over-concentration Considerations

If OCR determines that DBE participation is so over-concentrated in certain types of work or contracting opportunities that it unduly burdens the opportunity of non-DBEs to participate in that type of work, OCR will develop appropriate measures to address the over-concentration. The OCR will seek approval of such measures from the appropriate operating administrations and, at that time, the measures will become a part of this Program. Currently, ODOT is unaware of any types of work that have a burdensome over-concentration of DBE participation, however, OCR will continue to monitor for indications of over-concentration.

D. Civil Rights Compliance Tracking System (CRCT)

See Section 7, Monitoring and Record Keeping for information on DBE program data collection, tracking, and reporting activities.

4.2 Contract Performance

The ODOT Construction Manual provides procedures and guidance for administration of construction contract performance after award of the

contract, and delegates the authority for all DBE Program compliance to the Project Manager assigned to the project. All communication with the Prime Contractor will be through the Project Manager, and all decisions regarding contract compliance will be made by the Project Manager and the Office of Contract Administration.

A. Contractor's DBE Liaison Officer

Section 08.00 of the Disadvantaged Business Enterprise Supplemental Required Contract Provisions requires the contractor/vendor to designate a DBE Liaison Officer to administer the contractor's DBE program. The name of this individual must be provided to ODOT project management personnel at the pre-construction conference.

B. Submission of Committed DBE Subcontracts

The contractor must enter into subcontracts with the DBEs identified in the Committed DBE Breakdown and Certification Form for the bid items and amounts specified therein or more. These agreements must be submitted for approval to the Project Manager prior to the start of work under the subcontract in accordance with ODOT's Construction Manual. It shall be the responsibility of the Project Manager or Contract Administrator to assure that all required Federal and State provisions are included in all contracts and subcontracts.

C. Commercially Useful Function (§ 26.55(c))

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.

(1) DBE Work Plan Proposal - Form 3A

The prime contractor is responsible for collecting and submitting the DBE Work Plan Proposal Form 3A (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.

(2) DBE Commercially Useful Function Review – Form 3B

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 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).

D. CUF 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.

(1) DBE Management

The DBE majority owner(s) must manage the work contracted. The management shall include scheduling work operations, ordering equipment and materials (if materials are part of the contract), 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) who 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 subcontractors shall be responsible for the continuous management, direction, and control of their sub-subcontractors.

(2) DBE Workforce

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.

(3) 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 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 as to 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.

(4) Equipment Leased From the Prime Contractor

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, 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 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.

(5) DBE Trucking Firms

When a DBE trucking firm is being used to meet an assigned contract goal, the DBE subcontractor will be required to 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.

ODOT will require submission of 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.

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.

E. Sub-Tier Contracting

Sub-tier DBE subcontracts may be counted toward the prime contractor's DBE goal provided it was listed in the original DBE commitment prior to bid award.

F. Termination and Substitution

The 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-award and post-award terminations or deletions of, or substitutions for, DBE firms put forward by offerors in negotiated procurements.

Approval for DBE termination or replacement will be granted only if the following has been demonstrated:

- The committed DBE is unable, unwilling or ineligible to perform, poses a health or safety risk, or for other documented good cause as set out in 49 CFR 26.53(f) that the agency determines compels the termination of the DBE subcontractor;
- The contractor exercised good faith efforts to enable the DBE to perform; and,

- The work/amount is being replaced by another certified DBE, or the contractor has submitted written documentation of good faith efforts to obtain a substitute DBE.

Before transmitting 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 ODOT, of its intent to request to terminate and/or substitute, and the reason for the request. The prime contractor must give the DBE five days to respond to the prime contractor's notice and advise ODOT and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why ODOT should not approve the prime contractor's action. 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.

The contractor's ability to negotiate a more advantageous contract with another subcontractor will not be considered a valid basis for replacement. Requests to substitute committed DBEs will be scrutinized closely. The contractor must document efforts made at the time of commitment to determine that the DBE was capable of performing the work and subsequent efforts made to enable the DBE to perform. The evidence must show that the contractor investigated the DBE's capacity and capability of performing at the time of the commitment. The DBE must have possessed or have had access to adequate resources and workforce. The evidence must also show that the contractor assisted the DBE with supportive actions to enable the DBE to perform.

The notice from the contractor requesting replacement must include the following:

- (1) Documentation as to the contractor's investigation, at the time of the commitment, of the DBE's capacity to perform work;
- (2) Documentation as to the contractor's good faith efforts to enable the DBE to perform as outlined in Appendix A of 49 CFR part 26;
- (3) All documentation describing and citing specifications or inaction of the DBE which constitute their unwillingness or inability to perform;
- (4) Identification of the DBE proposed for replacement with the bid items and amounts to be performed by the replacement; and
- (5) The total dollar amount, per bid item, paid to date to the DBE to be replaced.

G. Prompt Payment

In accordance with ORS 279C.850, the agency includes provisions in each contract that require the contractor to promptly pay each subcontractor, including a materials supplier, for satisfactory performance of their

subcontracts, within 10 days out of amounts paid to the contractor by the agency under the contract. If the contractor fails to make payment to the subcontractor within 30 days, the contractor owes the amount due, plus interest charges that begin at the end of the 10 day period within which payment was due.

These prompt payment provisions are included in the [Oregon Standard Specifications for Highway Construction](#), Section 00170.0 Required Payments by Contractors. Section 00195.50(d) Reduction of Retainage provides a process for the return of any retainage held after a subcontractor's work is satisfactorily completed.

The contractor must maintain records of all subcontracts entered into with DBEs and records of materials purchased from DBE suppliers. Such records shall show the name and business address of each DBE subcontractor or vendor and the total dollar amount actually paid to each DBE subcontractor or vendor.

(1) Summary Report of Subcontractors Paid:

The contractor must also submit a signed [Summary Report of Subcontractors Paid](#) to the Project Manager's office, which certifies that the contractor has made payments to the subcontractor as indicated on the report and has supporting documentation. All progress payments and payments made when any retainage held is returned to a subcontractor must be indicated on the report.

A [Summary Report of Subcontractors Paid](#) must be submitted monthly and at the completion of the project. The report must be submitted by the fifth of the month following the contractor's receipt of payment from the agency. (Example: Work performed in January will be paid by the agency in February; the Summary Report showing work performed in January and the related payments made in February must be submitted to the Project Manager by March 5.)

(2) Crediting Payments

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.

H. DBE Supplemental Required Contract Provisions

Failure of any contractor to meet the DBE Supplemental Required Contract Provisions and the DBE program authorities cited in provisions, may constitute a breach of contract for which the imposition of the following sanctions, at the discretion of the ODOT Highway Division Administrator, may occur:

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

Any bidder, contractor, or subcontractor on a public contract (State or Federal) that violates the provisions of ORS 200.075 may have 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 will 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 will be referred to the Oregon Department of Justice and/or the USDOT Office of Inspector General for criminal investigation, and if warranted, prosecution.

4.3 Race Neutral Remedies and Other Good Faith Efforts

A. Fostering Small Business Participation (§ 26.39)

ODOT is actively committed to fostering race- and gender-neutral small business growth and participation in ODOT contracting. The agency demonstrates this commitment through the development of both internal and external initiatives aimed toward small firms and the agency's stakeholders. These strategies to foster small business participation in ODOT contracting include: (1) ODOT Small Contracting Program, (2) Small Business Supportive Services, and (3) Non-Bundling Contract Practices.

Small businesses are welcome to meet with ODOT's DBE Program Manager and learn about ODOT's contracting opportunities and how to do business with ODOT. ODOT staff will have an opportunity to become acquainted with qualified business owners who are interested in supplying services and products to ODOT. In addition, the OCR will provide information on DBE certification and DBE program requirements and procedures.

While sub-recipient agencies are not eligible to participate in ODOT's Small Contracting Program, ODOT encourages sub-recipients to consider how contract bundling practices impact small business participation and to foster small business participation by offering supportive services or by encouraging these businesses to participate in ODOT supportive services programs. Each year the OCR is involved in at least two small business

events, which may be coordinated with other USDOT recipients and open to all small businesses. These events as well as others that might be of interest to the small businesses are regularly updated and available on the [OCR Events page](#).

(1) ODOT Small Contracting Program

All ODOT business lines are encouraged to identify and develop small-sized contracts through the ODOT Small Contracting Program (SCP). SCP is a race and gender-neutral program designed to provide small businesses with opportunities to develop a prime contracting relationship with ODOT while increasing knowledge of contracting with a state agency. Although any company or contractor may register and participate in the program regardless of company size or location, the program is focused on, fostering small business participation on ODOT contracts.

The nature of the selection criteria (limiting invitations to bid on individual contracts to bidders who do not currently have a prime contract with ODOT) facilitates selection of small businesses for award of contracts.

The Small Contracting Program is made up of three divisions:

- (a) Small Contracting Program for Architectural, Engineering (SCPAE): This program registers companies to provide architectural, engineering, land surveying, and related services on ODOT projects. Contracts awarded under this program will have a value not to exceed \$150,000. This type of procurement is defined in ORS 279C.100.
- (b) Small Contracting Program for Construction (SCPC): This program registers contractors to provide Public Improvement and Public Works construction on ODOT projects. Contracts awarded under this program will have a value not to exceed \$100,000. This type of procurement is defined in ORS 279A.010(1)(cc) for Public Improvement and ORS 279C.800(6) for Public Works.
- (c) Small Contracting Program for Other Services (SCPOS): This program registers companies to provide non-architectural and engineering (Non-A&E) Professional Services and Trade Services. Contracts awarded under this program will have a value not to exceed \$150,000. The scope of services under the SCPOS is based upon the procurement authority outlined in ORS 279A.050(2), 279A.050(3), and OAR 125-246-0170(2)(c).

See the [SCP Frequently Asked Questions document](#) for additional information about ODOT SCP.

(2) Small Business Supportive Services & Outreach

Through the use of state funds, ODOT provides training and a host of supportive services to small businesses through the initiatives below:

- (a) Business Management classes through the Small Business Development Center (SBDC) Network: ODOT offers scholarships to DBE, MBE, WBE or ESB certified firms to pay all but \$200 of the fee for these classes. The Agency works with the SBDC Network to create the class plan and participates in classes by presenting on pertinent ODOT operations.
- (b) Quarterly Small Business Workshops: These are events hosted in Portland on a quarterly basis and in other regions. The workshops provide free training and information on a variety of topics common to small businesses, ranging from bonding to panel discussions on how to do business with ODOT. The workshops provide networking opportunities with prime contractors and other agencies to assist with certification questions.
- (c) Mentor-Protégé Program: ODOT sponsors several Mentor-Protégé partnerships managed through the Port of Portland's program.
- (d) Small Business Resource Guide: ODOT contracted with a consultant to survey a wide range of training and business services providers and compile a guide to be used as a resource directory by small businesses. The Guide has been distributed in hard copy and is available on the Office of Civil Rights' website.
- (e) Turner School of Construction Management: ODOT supports the annual classes provided by the Turner School and participates in presenting information to the attendees. Classes offered cover business essentials such as estimating, developing a business plan, and blueprint and CAD drawing reading.
- (f) Tradeshows and Marketplaces: Outreach is critical to the success of ODOT programs. Therefore, ODOT contributes to and participates in minority chamber of commerce events and the annual Oregon Association

of Minority Entrepreneurs (OAME) Tradeshow, the annual Minority Enterprise Development Week Tradeshow, and various other race- and gender-neutral small business events hosted by ODOT stakeholders.

(3) Contract Non-Bundling Practices

It is part of the agency's standard approach to business to consider how contract bundling practices during project development impact contracting opportunities for small businesses on ODOT projects. Throughout the agency consideration is given to portions of a prime contract that could be extracted to create a smaller contract for small business. The focus has been on minimizing the size of contract packages to attract participation of small businesses. Through the Office of Procurement and ODOT region staff, there are ongoing efforts to identify prime contracts that might have been bundled to determine how they might be unbundled to provide opportunities that smaller businesses could reasonably perform.

B. Business Development Program(s) (BDP)

ODOT has developed race- and gender-neutral small business programs including the Emerging Small Business (ESB) Program, which was established in response to Oregon Revised Statute (ORS) 200. The ESB Program has strict limits on average gross receipts, number of employees and participation time. In 2007 all certified DBE, MBE and WBE firms which met the eligibility criteria were granted ESB certification status to increase the contracting opportunities available to them.

C. Mentor-Protégé Program

In order to further the development of DBEs to move into non-traditional areas of work and to compete in the marketplace outside the DBE program by receiving training and assistance from other firms, the Mentor-Protégé Program as outlined in 49 CFR 26.35 is available. ODOT has partnered with the Port of Portland to participate in their established Mentor-Protégé Program. DBEs involved in this program are independent business entities that meet the requirements of section 6.3 of this document. Firms are Oregon state certified DBEs before they begin participation in the Mentor-Protégé program.

D. DBE Supportive Services Program

Contingent upon availability of Federal Highway Administration supportive services funds, ODOT will provide supportive services through consultant contractors to DBEs who are interested in participating in highway construction projects. The purpose of supportive services is to increase the number of socially and economically disadvantaged firms participating in highway construction projects and to contribute to the growth and eventual self-sufficiency of the DBE firms. ODOT will provide resource

referral information and will support business support services provided by other organizations to the greatest extent possible.

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.

6. GUIDELINES FOR DBE CERTIFICATION

6.1 Unified Certification Program (UCP)

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 Office of Minority, Women and Emerging Small Business (OMWESB) which is housed within the Oregon Business Development Department (OBDD). See Section 6.2 below.

A. Civil Rights Compliance Tracking System (CRCT)

See Section 7.0

B. Directory of Certified Firms

OMWESB maintains a Unified DBE Directory in accordance with 49 CFR 26.81(g). The directory identifies all firms eligible to participate as DBEs. The directory lists the firm's name, address, phone number, e-mail address (if available), contact name, owner(s) gender and ethnicity with ownership interest percentage, NAICS code(s) and a description of the type of work the firm has been certified to perform as a DBE. The information is revised daily and the directory is available electronically at:

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

6.2 UCP Responsibilities

A. ODOT Office of Civil Rights

As provided under 49 CFR 26, only firms owned and controlled by socially and economically disadvantaged person(s) are to benefit from the DBE Program. ODOT Office of Civil Rights is responsible for ensuring compliance with the federal regulations in the determination of a DBE certification. ODOT provides funding to OMWESB to support the DBE Certification processing.

B. Office of Minority, Women, and Emerging Small Business (OMWESB)

Certification authority for the ODOT DBE Certification Program Component has been delegated to OMWESB through an interagency agreement with the Oregon Business Development Department (See Exhibit P). ODOT retains responsibility to USDOT for assuring that certification of DBEs is performed consistent with 49 CFR 26 standards.

OMWESB provides staff to conduct DBE certification, certification review, denials, de-certification, appeals, 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.

An approved Unified Certification Program Partnership Agreement has been in effect since 2000. ODOT and other USDOT federal aid recipients have signed the agreement.

The Oregon Department of Justice provides legal counsel for OMWESB.

6.3 Certification Eligibility Requirements

The standards in 49 CFR 26, Subpart D, are used by OMWESB in determining whether a firm is owned and controlled by one or more disadvantaged individuals and whether such firm is eligible to be certified as a DBE. Certification procedures are outlined in OAR 123 Division 200 (See Exhibit O).

A. Burdens of Proof (§ 26.61)

The firm seeking certification has the burden of demonstrating to OMWESB, by a preponderance of the evidence, that it meets the requirements concerning group membership or individual disadvantage, business size, ownership, and control. OMWESB will make determinations concerning whether individuals and firms have met the burden of demonstrating group membership, ownership, control, and social and economic disadvantage by considering all the facts in the record, viewed as a whole. A record is defined as all material submitted to OMWESB by the firm seeking certification and any other information available to OMWESB in performing its investigation. For a DBE Certification Application see Exhibit Q.

B. Business Size (§ 26.65)

The firm's size (including its affiliates), currently cannot exceed the following limits:

Type of Firm	Average Annual Gross Receipt for three preceding years
General Construction Contractor	\$22.41 Million
Special Trade Contractor	\$14.0 Million
Architectural	\$7.0 Million
Engineering,	\$14.0 Million

General Construction Contractors standards are established by Section 106(c) of the STURAA and reviewed by the US Department of Transportation. All other standards are those established by the Small Business Administration (SBA) and apply to all government subcontractors. See 13 CFR, Part 121. A firm that exceeds these gross receipts levels or employee numbers is not eligible for certification, even if minorities or women hold controlling interest. The overall DBE size cap is adjusted annually.

C. Disadvantaged Group Membership (§ 26.63)

For the purposes of certification, OMWESB will presume that members of the groups identified herein are socially and economically disadvantaged unless the presumption is rebutted. These individuals do not have the burden to prove they are socially and economically disadvantaged. However, if OMWESB has reason to question whether an individual is a member of such a group, OMWESB will require the individual to produce appropriate documentation of group membership. In making a group membership determination, OMWESB will consider: 1) whether or not the person has held himself/herself out to be a member of the group over a long period of time prior to application for certification; and 2) whether the person is regarded as a member of the group by the relevant community. If OMWESB 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 part 26, Appendix E. OMWESB's decision concerning membership in a designated group will be subject to certification appeals procedures.

Individuals who are United States citizens (or lawfully admitted residents) who are also members of the following designated groups as defined in 13 CFR 124.103(b) will be presumed to be socially and economically disadvantaged:

Black Americans	Origins in any black racial groups of Africa.
Hispanic Americans	Mexican, Puerto Rican, Cuban, Central or South American, Portuguese or other Spanish culture or origin regardless of race.
Asian-Pacific Americans	Origins in Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the US Trust Territories of the Pacific, and the Northern Marianas.
Native Americans	American Indians, Eskimos, Aleuts or Native Hawaiians.
Subcontinent Asian Americans	Origins in India, Pakistan, Sri Lanka, Bhutan, the Maldives Islands, Nepal or Bangladesh.
Women	

D. Small Business Administration 8(a) Program

There is currently no agreement in effect to accept 8(a) certification for the DBE Program. Businesses certified in any of the Small Business Administration programs (8(a), SDB, HubZone, etc.) must apply for DBE certification by submitting the uniform application and all requested supporting documents.

E. Individual Determination of Social and Economic Disadvantage (§ 26.67)

If an individual is not a member of a designated group, s/he must demonstrate that s/he is socially and economically disadvantaged in accordance with 49 CFR Part 26, Appendix E.

(1) Social Disadvantage

Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. OMWESB will consider any relevant evidence in its assessment of this element, and in every case OMWESB will consider education, employment, and business history to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

(2) Economic Disadvantage

Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or a similar line of business who are not socially disadvantaged. In considering diminished capital and credit opportunities, OMWESB will examine all factors relating to personal financial condition including personal income for the past two years, personal net worth, and the fair market value of all assets applicable. OMWESB will also consider the financial condition of applicants compared to financial profiles of small businesses in the same primary industry classification(s) or similar lines of business.

F. Independence (§ 26.71)

49 CFR 26.71 (b) states, in part:

Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.

G. Ownership (§ 26.69)

To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals. 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. In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals and must be reflected in the firm's partnership agreement. In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.

The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in the ownership documents. The 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. OMWESB will consider factors such as whether the disadvantaged individual made contributions of capital and or expertise that were substantial, and that the disadvantaged individual's business interests were not gifted or transferred from a non-DBE firm or non-disadvantaged individual related to the applicant DBE, or acquired through the improper counting of marital assets.

The specific considerations for determining ownership by socially and economically disadvantaged individuals are outlined in the regulations as may be supplemented by written procedures issued by USDOT from time to time.

H. Control (§ 26.71)

Only an independent business may be certified as a DBE. 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, OMWESB will scrutinize relationships with non-DBE firms in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources. OMWESB will consider present or recent employer/employee relationships, the firm's relationship with prime contractors, and factors related to the independence of a potential DBE firm. Further, OMWESB will consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.

A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. The socially or economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations. OMWESB will consider factors such as the position, managerial role, time commitment and competence in the types of work the firm conducts of the disadvantaged individual owners, the delegation of authority to non-disadvantaged individuals, licensing, and the firm's capacity to do the work.

OMWESB will consider whether any non-disadvantaged owner or individual is disproportionately responsible for directing the daily operations of the firm.

The specific considerations for determining control by socially and economically disadvantaged individuals are outlined in the regulations as may be supplemented by written procedures issued by OMWESB from time-to-time.

I. Other Considerations

(1) Commercially Useful Function

OMWESB will not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE. Consideration of whether a firm performs a commercially useful function pertains solely to counting toward DBE goals any participation of firms which have already been certified as DBEs.

(2) Pattern of Conduct

In making certification decisions, OMWESB will consider whether a firm has exhibited a pattern indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program.

(3) Present Circumstances

OMWESB will evaluate the eligibility of a firm on the basis of present circumstances and will not refuse to certify a firm based solely on historical information indicating lack of ownership or control by socially and economically disadvantaged individuals at some time in the past. If the firm currently meets ownership and control standards OMWESB will not refuse to certify a firm solely on the basis that it is a newly formed entity.

(4) DBE Cooperation

OMWESB expects DBE firms and firms seeking DBE certification to cooperate fully with requests for information relevant to the certification process. Failure or refusal to provide such information is a ground for denial or removal of certification.

(5) For-Profit Firms

Only firms organized for profit may be eligible DBEs. Not-for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.

(6) Subsidiaries and Affiliates

An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided by this policy, a firm that is not owned by such individuals, but instead is owned by another firm, even a DBE firm, cannot be an eligible DBE.

(7) Pre-qualification

OMWESB will not require a DBE firm to be pre-qualified as a condition for certification unless ODOT requires all firms that participate in its contracts and subcontracts to be pre-qualified.

(8) Tribal Organizations

OMWESB recognizes that a firm owned by an Indian tribe, Alaska Native Corporation, or Native Hawaiian organization as an entity, rather than by Indians, Alaska Natives, or Native Hawaiians as individuals, may be eligible for certification as long as such firm meets the size standards and is controlled by socially and economically disadvantaged individuals.

J. Statement of Personal Net Worth (PNW)

Each socially and economically disadvantaged individual owner must demonstrate that s/he does not have a personal net worth exceeding \$1.32 million. In determining net worth, OMWESB will exclude an individual's ownership interest in the applicant firm and the individual's equity in his/her primary residence. If the individual's personal net worth exceeds \$1.32 million, the individual's presumption of economic disadvantage based on group membership or the individual's demonstration of economic disadvantage will be conclusively rebutted without any further formal proceedings.

When an individual's presumption of social and/or economic disadvantage has been rebutted, his/her ownership and control of the firm cannot be used for the purpose of DBE eligibility unless and until s/he makes an individual showing of social and or economic disadvantage in the future. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$1.32 million, the individual will no longer be eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.

A verification of Personal Net Worth will be included with the application form submitted to OMWESB for consideration. Personal financial information shall be considered confidential and shall not be disclosed without the express written consent of the applicant.

K. Joint Venture

A joint venture is eligible if the DBE partner of the joint venture is a state certified DBE and the DBE partner is responsible for a clearly defined portion of the work to be performed and shares accordingly in the ownership, control, management responsibilities, risks, and profits of the joint venture.

Joint venture applications are certified by the ODOT on a project by project basis. Applications shall be submitted to the ODOT Procurement Office and the Office of Civil Rights will evaluate and determine compliance in accordance with established procedures.

6.4 Application Procedure

ODOT will ensure that only firms certified as eligible DBEs participate as DBEs in the DBE program. All firms seeking certification with ODOT are required to submit a notarized application to the OMWESB.

ODOT will require potential DBEs to complete and submit to OMWESB the appropriate application form included in 49 CFR part 26, and any supporting documents necessary to verify eligibility. OMWESB will ensure that the applicant attests to the accuracy and truthfulness of the information on the application form. This shall be done either in the form of an affidavit sworn to by the applicant before a person authorized by state law to administer oaths or in the form of an un-sworn declaration executed under penalty of perjury of the laws of the United States. OMWESB will review all information in the form prior to making a decision about the DBE eligibility of the firm.

The applicant will also be required to submit the following:

- A. A signed, notarized certification of disadvantage (including a narrative if the individual is demonstrating disadvantage on an individual basis); and
- B. A signed, notarized statement of personal net worth with supporting documentation.

OMWESB will not impose an application fee for firms to participate in the DBE certification process.

OMWESB will safeguard from disclosure, to unauthorized persons, all information gathered as part of the certification process that may be regarded as proprietary or their confidential business information, consistent with applicable federal, state and local laws.

Failure of the applicant to provide all necessary information and documentation as required shall constitute the basis for denying certification.

A. Supplemental Application Verification Documents

(1) Sole Proprietor

- (a) Individual federal tax returns for the last three- (3) years (Schedule C, Profit and Loss Statement).
- (b) Resumes of majority owner(s) and key employees. Please include previous work experience with dates and specific duties within this business.
- (c) Rental/lease agreements, and professional service agreements (for office space, equipment, related to the business).
- (d) Proof of ethnicity/gender (birth certificate, tribal enrollment documents, passport, driver's license, etc.)
- (e) Company profile including a brief description of the firm's product or services.
- (f) Necessary licenses to conduct the business, e.g., contractor's license (construction, landscaping, electrical, plumbing, welding, engineering), city business license (if required), Department of Environmental Quality license, ARC authorization for travel service, professional license, etc.
- (g) Certification letter from the individual's home state, if the business is not located in Oregon.
- (h) Assumed Business Name registration, if applicable.

(2) Limited Liability Company (LLC)

- (a) Federal tax returns for the last three- (3) years.
- (b) Resumes of majority owner(s) and key employees. Please include previous work experience with dates and specific duties within this business.
- (c) Rental/lease agreements and professional service agreements (for office space, equipment, etc.)
- (d) Proof of ethnicity/gender (birth certificate, tribal enrollment, passport, driver's license, etc.).
- (e) Company profile including a brief description of the firm's product or services.
- (f) Necessary licenses to conduct the business, e.g., contractor's license (construction, landscaping, electrical, plumbing, welding, engineering), city business license (if required), Department of Environmental Quality license, ARC authorization for travel service, professional license, etc.

- (g) Articles of Organization.
 - (h) Operating Agreement.
 - (i) Minutes of the most recent company meetings affecting ownership, management, and control.
 - (j) Certification letter from the state of incorporation, if the business is not located in Oregon.
- (3) Corporations
- (a) Corporate federal tax returns for the last three- (3) years (first two pages).
 - (b) Resumes of majority owner(s) and key employees if any. Please include previous work experience with dates and specific duties within this business.
 - (c) Rental/lease agreements and professional service agreements (for office space, equipment, etc.)
 - (d) Proof of ethnicity/gender (birth certificate, tribal enrollment, passport, driver's license, etc.).
 - (e) Company profile including a brief description of your firm's product or services.
 - (f) Necessary licenses to conduct your business, e.g., contractor's license (construction, landscaping, electrical, plumbing, welding, engineering), PUC authority, city business license (if required), Department of Environmental Quality license, ARC authorization for travel service, professional license, etc.
 - (g) Articles of Incorporation AND amendments, including date approved by State.
 - (h) Minutes of the most recent corporate meetings affecting ownership, management, and control.
 - (i) Corporation by-laws.
 - (j) Copy of stock certificates issued (not specimen copy, both sides).
 - (k) Stock transfer ledger.
 - (l) Certification letter from your home state, if your business is not located in Oregon.
- (4) Partnerships
- (a) Federal, partnership tax returns for the last three- (3) years (first two pages).
 - (b) Resumes of majority owner(s) and key employees. Please include previous work experience with dates and specific duties within this business.
 - (c) Rental/lease agreements and professional service agreements (for office space, equipment, etc.) related to your business.
 - (d) Proof of ethnicity/gender (birth certificate, tribal enrollment, passport, driver's license, etc.).
 - (e) Company profile including a brief description of your firm's product or services.
 - (f) Necessary licenses to conduct your business, e.g., contractor's license (construction, landscaping, electrical, plumbing, welding, engineering), PUC authority, city business license (if required), Department of Environmental Quality license, ARC authorization for travel service, professional license, etc.

- (g) Partnership agreement including buy-out rights and profit sharing agreement (signed and dated).
 - (h) Certification letter from your home state, if your business is not located in Oregon.
- (5) New Business (less than one year)
- (a) Canceled checks relating to the business; OR
 - (b) An invoice with paid receipt or canceled checks relating to the business.
 - (c) One reference for whom work has been performed or to whom goods or materials have been sold during the prior year.
 - (d) One reference from whom goods or materials have been purchased for the business or from whom major equipment has been purchased or leased.
 - (e) Copies of office space and equipment lease agreements.

As a new business, the firm may not have federal tax information available at this time. Ensure that the firm has indicated that they are a new business on the application.

B. On-site Reviews

OMWESB schedules an on-site review when it is satisfied that applications and supporting documentation have been received and are complete. In addition, whenever possible, the Certification Specialist will visit an active jobsite and interview the DBE owner and employees to determine independence and control.

- (1) The Certification Specialist assigned the DBE file will schedule an on-site interview with each DBE applicant firm requesting to bid on FHWA, FAA and FTA projects.
- (2) The OMWESB Certification Specialist will review the application prior to the on-site interview to assist in developing any additional questions that will help clarify the applicant's status.
- (3) The OMWESB Certification Specialist normally contacts the DBE applicant firm, by phone, to advise of and arrange for, the review. If the DBE applicant is unable to be contacted by phone or mail, or delays the date of the review without good reason, or fails to appear for the scheduled review, efforts are made to reschedule the on-site review. Continued failure of the applicant to schedule and attend an on-site and jobsite interview may be deemed a failure to cooperate, and can lead to certification denial.
- (4) The OMWESB Certification Specialist conducts on-site reviews by inquiring of and obtaining information as follows:
 - (a) Firm name.
 - (b) Directions to firm's location.
 - (c) Principal contact and phone number.
 - (d) Organizational structure.
 - (e) Persons interviewed and position with firm.
 - (f) Firm's primary line of business.
 - (g) Identities of the firm's board of directors.
 - (h) Frequency that board meets.
 - (i) Firm's bonding/insurance company.

- (j) Current bonding limitation
- (k) Determine:
 - (i) Firm's bond/insurance agent
 - (ii) Firm's attorney
 - (iii) Firm's CPA
 - (iv) Firm's banker(s)
- (l) Number of permanent employees.
- (m) Who approves:
 - (i) Hiring and dismissal of employees
 - (ii) In this person's absence
- (n) Employee recruiting.
- (o) Supervisors employed.
- (p) Explanation of supervisor's duties and responsibilities.
- (q) Determine how the disadvantaged owner acquired interest in the firm.
- (r) Who contributes capital, equipment, real estate, inventory, etc.
- (s) Technical assistance provided by others.
- (t) Total hours per day and days per week DBE owner actively engaged in firm's business.
- (u) DBE owner's daily duties.
- (v) Is DBE owner employed elsewhere - if yes, where?
- (w) Who makes major business decisions (i.e. expansion, diversifying)?
- (x) Marketing of the firm, (how and who's responsible).
- (y) Dispersal of funds, (how and under whose approval).
- (z) Signatures on payroll and other checks, (who signs).
- (aa) Any loan negotiation/arrangement information (who does this).
- (bb) Firm's line of credit and it's limits.
- (cc) Contracts currently active.
- (dd) Business tax return information (who prepares, who signs).
- (ee) Description of firm's bidding/estimating process.
- (ff) Description of firm's process of monitoring job costs.
- (gg) Description of methods used to resolve field problems.
- (hh) Who negotiates contract disputes.
- (ii) Explanation of relationships with other firms who might provide;
 - (i) Manpower/personnel
 - (ii) Equipment
 - (iii) Office space
 - (iv) Yard or warehouse space
- (jj) Information which might show the DBE owner was employed by any board member or officer of this firm.
- (kk) Average length of time firm's products are stored/inventoried.
- (ll) Salaries paid to management personnel.
- (mm) Explanation of spouse's relationship to firm - other firms.
- (nn) Review firm's business plan (goals for future growth, etc.).

C. On-Site Review Observations and Special Considerations

- (1) Upon request of OMWESB, the ODOT DBE Program Manager may assist in the on-site review. When conducting on-site reviews, Certification Specialists actively observe various activities and items to

aid in determining certification eligibility. In addition to visiting the business office, the Certification Specialist will accompany the applicant to a job site, if one is available, and observe the work in progress. If the applicant firm is out-of-state, OMWESB requests a copy of the on-site review document from the state in which the applicant's principal place of business is located. Activities and items include:

- (a) Signing.
 - (b) Vehicles: Number, Company Logo.
 - (c) Office arrangements.
 - (d) Nearby businesses.
 - (e) Workers present.
 - (f) Who dominates conversation.
 - (g) Availability of firm to clients.
 - (h) Who appears to have expertise and control.
 - (i) Photos of business and principal.
 - (j) Other relevant items and activities.
- (2) Certification Specialists also observe closely those situations where:
- (a) The disadvantaged business enterprise in which the woman's male relative (husband, brother, father) has extensive experience in the same line of work and may also be actively involved in the applicant's firm.
 - (b) The disadvantaged business enterprise in which a minority owner has close ties with a prime contractor, e.g. previously worked only for that contractor, or a prime contractor is 49 percent owner of the DBE firm.
- (3) The on-site review form is signed and dated by the Certification Specialist conducting the review.

D. Criteria for Evaluating an Applicant's Eligibility

(1) Business Size

To be an eligible DBE, a firm (including its affiliates) must be an existing small business as defined by SBA standards. OMWESB 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. Even if the firm meets the SBA requirements, a firm is not an eligible DBE in any federal fiscal year if the firm (including affiliates) has had average annual gross receipts as defined by SBA regulations over the firm's previous three (3) fiscal years in excess of \$22.41 Million, as adjusted for inflation from time to time by USDOT.

(2) Social and Economic Disadvantage Status

Once an applicant firm is determined to be a small business, social and economic disadvantage is to be reviewed if the firm is applying for disadvantaged business status. Guidance for determining social and economic disadvantage is provided under Appendix E to 49 CFR 26. Social and Economic disadvantaged status may be conferred upon applicant firms in instances where the firm:

- (a) Has been granted 8(a) certification by the Small Business Administration.

- (b) Is owned and controlled by one or more women or a member(s) of one of the minority groups designated in 49 CFR 26.67.
- (c) Is owned and controlled by an individual(s) who, although not a woman or member of one of the minority groups designated in 49 CFR 26, establishes social and economic disadvantage based on identification with another group.

(3) Minority Group Membership

In cases where the applicant claims social and economic disadvantage based on membership in one of the designated minority groups, the state shall ensure that the applicant's minority status is clearly established. Once minority status is established, the applicant shall be rebuttably presumed to be socially and economically disadvantaged. This means that the applicant's social and economic disadvantage status is established as a fact until the presumption is effectively rebutted. However, the state is expected to require even members of the designated minority groups to prove their disadvantaged status if reasonable evidence to rebut the presumption is available to the state.

(4) Individual Determinations

Finally, persons who are not members of one of the designated minority groups may request the state to make an individual determination that they are socially and economically disadvantaged. The state may, at its discretion, make these individual determinations consistent with the guidance in 49 CFR 23, Subpart D Appendix C, or refer such cases to the SBA where they may apply for 8(a) status. For example:

- (a) Does the individual have a chronic physical handicap, which has restricted and still restricts professional acceptance, employment or business mobility? If so, explain fully.
- (b) Has the individual's cultural or social background resulted in chronic underemployment, limited educational opportunities or personal deprivation? If so, explain fully.
- (c) Has the individual experienced low-income status because of apparent discriminatory practices? If so, explain precisely how such discriminatory practices led to your having limited access to needed technical, financial, or management resources and equal opportunity in obtaining contracts.

Outline other specific and pertinent examples of chronic social and economic disadvantage not covered above.

(5) Rebuttable Presumption of Disadvantage Status

The presumption of social and economic disadvantage operating in favor of the designated minority groups may be rebutted at any time before or after certification.

If the state comes into possession of credible information that would lead a reasonable person to believe that a minority individual is not socially or economically disadvantaged, the presumption is no longer operative and the burden of proof shifts back to the applicant. The existence of the presumption does not mean that the certifying agency must ignore obvious evidence that any applicant for certification is not socially or economically disadvantaged unless a third party brings a challenge. It means, rather, that in the absence of such evidence, it must presume

that a minority or woman applicant is socially and economically disadvantaged, and cannot require the applicant to prove it.

Practically speaking, the existence of clear evidence that an otherwise qualified minority applicant is not disadvantaged puts such applicant in a position similar to a challenged minority or an individual claiming disadvantaged who is not a member of a designated group. If the state tentatively determines, on its own initiative based on such clear evidence, that the owner of the firm is not socially and economically disadvantaged, the state should ensure that the owner(s) are afforded procedural safeguards equivalent to that provided in the case of third party challenges.

(6) Ownership and Control

Once business size and social and economic disadvantage status has been determined, ownership and control must be evaluated to ensure that firms applying for DBE certification are in fact independent firms, owned and controlled by one or more socially and economically disadvantaged individuals. Similarly, firms applying for DBE certification on the basis of female ownership must be evaluated to ensure that they are independent and are owned and controlled by women. An independent firm is one the viability of which does not depend on its relationship with another firm or firms.

Under operational control, the applicant must have an overall understanding of and managerial and technical competence and experience directly related to the business operations.

To determine managerial control, the applicant must demonstrate that they possess the power to direct or cause the direction of the management and policies of the firm.

Applicant firms jointly owned by husband and wife will be treated the same irrespective of whether the state has a community property law. The OMWESB will determine eligibility by ensuring that the firm is in fact at least 51 percent owned by the woman and the firm's management and daily business operations are controlled by the woman who owns it. In reaching that conclusion, the OMWESB will determine whether the firm meets the eligibility standards contained in 49 CFR 26.

(7) Personal Net Worth

An individual, whose personal net worth exceeds \$1,320,000, excluding personal residence and interest in the business, shall not be deemed to be economically disadvantaged.

The OMWESB will obtain a signed and notarized statement of personal net worth from all persons who claim to own and control a firm applying for DBE certification and whose ownership and control are relied upon for DBE certification. These statements will be accompanied by appropriate supporting documentation.

E. Out-of-State Applications submitted to OMWESB

When an out-of-state firm currently certified in its home state applies for DBE certification in Oregon, the Office of Minority, Women & Emerging Small Business (OMWESB), will accept the out-of-state's certification and certify the firm providing the firm submits the following information:

- (1) Completed Uniform DBE Application (or copy from home state UCP if recent - within six months)
- (2) Current DBE certification letter from your home state (must include NAICS codes in which you are certified);
- (3) Home state UCP contact information (phone, email) for requesting additional DBE documentation as necessary;
- (4) Business federal tax returns for previous three years, all schedules;
- (5) Current Personal Financial Statement (signed/dated);
- (6) Individual federal tax returns for each owner claiming disadvantaged status for previous three years, all schedules;
- (7) Licenses/registrations to do business in Oregon (Construction Contractor's Board, Engineering, Electrical, Plumbing, Trucking, Foreign Business Registration with the Oregon Secretary of State, etc.)
- (8) Driver's license for all disadvantaged owners
- (9) OMWESB will:
 - (a) Administrative Specialist will enter the out-of-state DBE application as received on dbase and assign to Cert. Specialist for review
 - (b) Certification Specialist will contact the home state within seven days of receipt of the DBE application to request a copy of the onsite report and verification of current DBE certification status
 - (c) Certification Specialist will provide notice to the applicant regarding certification no later than thirty days from the date on which all information listed above is received
 - (d) Upon receiving new out-of-state DBE applications or certification review forms, OMWESB Certification Specialists will check the Ineligibility Determination Online Database (DOCR) to see if the business has been included on the list.
 - (e) OMWESB staff will regularly check the DOCR regarding DBE decertifications. If OMWESB receives information regarding the decertification of a currently certified out-of-state DBE (from DOCR), Admin. Specialist will pull the certified file and assign to a Cert. Specialist who will contact the home state for copies of their decertification determination report and decertification notice.
 - (f) When decertification information is received from the home state UCP, OMWESB will notify the applicant in writing and initiate decertification in Oregon based on the home state's determination.
 - (g) OUT-OF-STATE REQUESTS FOR DBE INFORMATION:
 - (h) OMWESB staff will email copies of the onsite visit reports, any updates to site visit review and any evaluation of a certified DBE based on the site visit to the out-of-state UCP within seven days of receiving the written request.

F. Certification Duration

Once OMWESB certifies a firm as an eligible DBE, it shall remain certified unless and until its certification is removed. OMWESB will not require DBEs to reapply

for certification as a condition of continuing to participate in the program, but may conduct periodic certification reviews. The DBEs will have to reapply and be re-certified if their certification is removed. OMWESB will update the DBE Database regularly with new certification actions.

(1) Notification of Change in Circumstances

During a DBE firm's certification period, it must inform OMWESB, in writing, of any changes in circumstances affecting the firm's ability to meet disadvantaged status, business size, ownership, control requirements, or any material change in the information provided in the certification application process, and attach supporting documentation describing in detail the nature of such changes. Such notice of change from the DBE firm must take the form of an unsworn declaration executed under penalty of perjury. The written notification shall be provided by the DBE within thirty (30) days of occurrence of the change(s). If the DBE fails to make timely notification of such changes, it will be deemed to have failed to cooperate under the regulations.

(2) Annual Affidavit of Continuing Eligibility

Every firm certified by OMWESB as a DBE must provide to OMWESB every year on the anniversary of the date of its initial certification, an affidavit sworn to by the firm's owner(s) before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of the Regulations or any material changes to the information provided in its original application, or the last notification of a change circumstance. The affidavit shall specifically affirm that the DBE continues to meet SBA size criteria and the overall gross receipt cap, documenting this affirmation with supporting documentation of the DBE size and gross receipts. If the DBE fails to provide this information in a timely manner, it will be deemed to have failed to cooperate with the requirements of the regulations.

G. Denials and Reapplication Procedures

If a firm is denied certification, it will be required to wait at least twelve (12) months before it may reapply for DBE certification with OMWESB. The time period for reapplication begins to run on the date the explanation for denial of certification is received by the applicant firm. The firm may file an appeal for any denial of certification to USDOT in accordance with section 6.4.9 of this document.

H. Removal Procedures (De-certification/Denial)

A DBE firm which no longer meets the eligibility standards (or misrepresented information during the certification process) will be removed from the DBE program by having its certification removed. A firm shall remain certified during the removal process.

(1) Initiating Removal

(a) Any person may file a written complaint that alleges a currently certified firm is ineligible. A written complaint must specify reasons for the allegation and include any information or

arguments supporting the allegation. A general allegation or anonymous complaint will not be accepted. The Manager of OMWESB 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.

- (b) Authority-Initiated Proceedings - The Manager of OMWESB will review all notifications of change in circumstance or other information that comes to OMWESB's attention, including notification of removal actions of other USDOT recipients, to determine whether there is reasonable cause to believe a currently certified firm is ineligible. When the OMWESB determines that a firm is not eligible for certification, the OMWESB will provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based will be made available to the applicant firm upon request.
- (c) USDOT Directive to Initiate Proceeding - A USDOT agency may direct ODOT to initiate removal proceedings, because it has determined the information in the certification records or other information available provides reasonable cause to believe that a firm is ineligible. The USDOT agency must provide ODOT and the firm a notice setting forth reasons for the directive, including relevant documentation.
- (d) Reasonable Cause to Believe a Firm is Ineligible - If the Manager of OMWESB determines that there is not reasonable cause to believe the that firm fails to meet eligibility requirements, s/he shall provide a written notice to the firm and the complainant stating the reasons therefore in such cases where a complaint was filed with OMWESB.
- (e) A DBE may be decertified at any time if the Manager of OMWESB determines that there is reasonable cause to believe the firm no longer meets the eligibility standards set out in 49 CFR 26 Subpart D and OAR 445-050-0020. The OMWESB may also deny certification to any DBE applicant that does not meet eligibility standards set out in 49 CFR 26 Subpart D and OAR 445-050-0020. The following steps shall be taken:
 - (i) Written Notice - In the case of de-certification, the OMWESB shall issue a Notice of Intent to Decertify the DBE 21 days prior to the date of the de-certification, and indicate the specific reasons for the de-certification. In the case of denial of initial certification or re-certification, the DBE or applicant will be notified in writing of the denial and the reasons therefore. The notice shall also include notification that the firm has the right to a contested case hearing.
 - (ii) (b) Contested Case Hearing - In either a de-certification or denial of initial certification or re-certification of a DBE, the DBE or applicant has 21 calendar days from the date of the Notice of Intent to Decertify or the letter of denial in which to submit a written request for contested case hearing. If the DBE or applicant requests a contested case hearing, the de-certification or denial of re-certification will

be stayed pending the issuance of a final order. Contested case hearings will be conducted in accordance with ORS 183.310 to 183.550 and OAR 445-050-0000. If no written request for a contested case hearing is received by the OMWESB within the 21-day period, the de-certification/denial will be final.

- (iii) Decision - Following the contested case hearing, the proposed order issued by the hearings officer will be forwarded to the manager of the OMWESB for issuance of the final order.
- (iv) Notice of Decision - The OMWESB will provide the firm written notice of the final decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. Any applicant or DBE that believes it has been wrongly de-certified or denied certification or re-certification by the OMWESB may also file an appeal in writing, signed and dated, with the USDOT in accordance with section 6.4.9 of this document. OMWESB will send copies of the notice to the complainant in an ineligibility complaint or the concerned USDOT agency that directed ODOT to initiate the proceeding.
- (v) Effects of Removal of Eligibility. - The OMWESB and ODOT OCR will take the following actions upon the removal of a firm's certification:
 1. OMWESB will update the DBE Database and notify ODOT OCR of the removal.
 2. ODOT OCR will determine whether the decertified firm is currently participating in an ODOT contract or has been included in a recent bid;
 3. If a contract that has not been executed before the removal notice involves a commitment by the prime contractor to use the ineligible firm or by ODOT to use the ineligible firm as a DBE prime contractor, the ineligible firm cannot be counted toward the contract goal or the overall annual goal. The Regulations require that ODOT direct a prime contractor to meet the contract goal with another eligible DBE subcontractor or to demonstrate that it has made sufficient good faith efforts to do so;
 4. If a subcontract has been executed by a prime contractor or a prime contract has been executed by ODOT with the ineligible firm before the removal notice, the prime contractor or ODOT may continue to use the firm on the contract and may continue to count the firm's participation toward the contract goal. ODOT shall not count that portion of the ineligible firm's performance remaining on the contract or subcontract after the removal notice toward the overall annual goals; and
 5. 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.

I. Certification Appeal to USDOT

A firm that has been denied certification or whose eligibility is removed may make an administrative appeal to the USDOT. A complainant in an ineligibility complaint to the OMWESB may appeal to USDOT if OMWESB does not find reasonable cause to propose removing the firm's eligibility. Pending the USDOT appeal decision, OMWESB's decision shall remain in effect. All Appeals shall be sent to:

U.S. Department of Transportation
Office of Civil Rights
400 Seventh Street, SW
Room 2401
Washington, D.C. 20590

All requests for an appeal must be sent, in writing, within ninety (90) days of OMWESB's final decision on the matter. The USDOT may accept an appeal filed later than 90 days after the date of the decision if it determines that there was good cause for the late filing of the appeal. The appeal request shall include information and arguments regarding why the decision should be reversed. If the appeal is from a firm, the request must include information regarding certification with other USDOT recipients. If the appeal is from a third party, the party will be requested to provide the same information.

The manager shall provide a copy of a complete, well-organized administrative record within twenty (20) days of a request from USDOT. USDOT will make its decision based solely on the entire administrative record without conducting a hearing. The firm and complainants shall have access to any information reviewed by USDOT in accordance with public records and privacy laws.

USDOT will affirm OMWESB's decision if it determines based on the entire administrative record, that the decision is supported by substantial evidence or is consistent with the substantive or procedural provisions concerning certification. USDOT shall send written notification of its decision including the reasons therefore to OMWESB, the firm and any complainant. If OMWESB's decision is reversed, the manager will take all appropriate actions to conform with the USDOT's decision immediately upon receiving the written notice. USDOT decisions are administratively final, and are not subject to petitions for reconsideration.

J. ODOT Commodity Code/North American Industry Codes (NAICS)

During the certification process for firms indicating a desire to participate in federal aid highway or FTA-funded contracts, a DBE will be assigned a commodity/NAICS code by OMWESB which is indicative of the type of work the firm has shown that it can perform at the time the certification is requested. ODOT uses the commodity/NAICS codes in its process of evaluating projects to identify work which may be accomplished by DBEs.

7. MONITORING AND RECORD KEEPING

7.1 Civil Rights Compliance Tracking System (CRCT)

The Civil Rights Compliance Tracking system (CRCT) is a database system built in-house to store and organize data and track compliance. This system provides tracking and reporting capabilities on companies who bid or respond on projects and the tracking of actual utilization. It also captures amounts paid to all contractors, generates the Federal semi annual report and tracks Equal Employment Opportunity (EEO) and On-the-Job Training (OJT) information as well.

A. Bidders List

ODOT must create and maintain a bidder's list, consisting of all firms bidding on prime contracts and bidding or quoting subcontracts on USDOT assisted projects. ODOT uses the Subcontractor Solicitation and Utilization Report (SSUR form) to gather the bidders list information, including firm name, status as DBE or non-DBE and whether the identified firm was utilized in the bidder's submitted bid. All bidders or proposers are required to submit the SSUR form is within 10 days of the bid opening or contractor selection. ODOT will conduct periodic surveys or studies to gather bidders list information on annual gross receipts and firm addresses.

Contract/Vendor information is validated with the Subcontractor Solicitation and Utilization Report provided by all bidders within 10 calendar days of the bid opening. If contractor or vendor information provided is not contained in the CRCT system, a profile sheet may be forwarded to the firm in question and the tracking system will be updated when the information is received.

B. 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 prime contractors in the Summary Report of Subcontractors Paid, is entered by the OCR Field Coordinators 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.

C. Increased Efforts to Collect A&E Payment Data

ODOT has fairly consistently received subcontract payment data for construction contracts, but has less consistently received subcontract payment data for

Architecture and Engineering and related services contracts (A&E contracts). Historically, the CRCT database was not set up to track A&E contracts, as these contracts were exclusively housed in the Procurement Contract Management System (PCMS) database, which does not track subcontract data. Thus, ODOT conducted a special survey in 2011 to gather A&E subcontract payment information from the prime contractors for analysis in ODOT's 2011 Disparity Study Update.

System upgrades to PCMS and CRCT now allow CRCT to receive and track both A&E prime and subcontract payment data. Throughout 2012, OCR staff, with the cooperation of and support from some American Consulting Engineers Council (ACEC) and other A&E contractors, attended industry committee meetings to communicate that increased compliance with the requirement to submit the Summary Report of Subcontractors Paid forms is contractually required. OCR has and will continue to communicate with agency contract administrators on the importance of collecting these forms and ask that they withhold payment from contractors who continue to be non-compliant. In the latter part of 2012, ODOT saw an increase in form submission compliance by A&E prime contractors. By March 2013, OCR will have established data entry and tracking procedures in place to allow OCR to monitor the receipt of A&E subcontract payment data.

7.2 Reporting to USDOT

As required by 49 CFR 26.11(a) ODOT will submit the DBE Uniform Report of DBE Awards or Commitments and Payments on a semiannual basis to FHWA and FTA. The report to FTA will be submitted through TEAM-Web.

ODOT will continue to maintain and report DBE participation, overall annual goal setting methods, and other requested information to USDOT as directed by FHWA and FTA. Statistical data will be maintained and reported on a semi-annual basis to USDOT agencies reflecting the DBE participation on ODOT's federally-assisted procurement activities. These reports will provide DBE participation information on ODOT's race-neutral and gender-neutral contracts; race-conscious contracts; and the combined DBE participation on all federally assisted procurement activities.

7.3 Contract Remedies

ODOT will monitor compliance on federally assisted contracts with the requirements of the regulations and the DBE Program. ODOT may impose such contract remedies as are available under federal, state and local law and regulations for non-compliance. Such remedies may include, but are not limited to, withholding of progress payments and contract retention, imposition of liquidated damages, and termination of the contract in whole or in part.

For further information, see section 5.5 of this document.