



# DBE PROGRAM PLAN

**2018 Edition**

Oregon Department of  
Transportation

Office of Civil Rights



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## 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 amended in 2014 and effective as of November 3, 2014.

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, national origin, or disability in the award and administration of USDOT-assisted contracts. It is ODOT's policy to ensure DBEs, as defined in 49 CFR 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, (3) Members of the DBE and non-DBE business communities 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  
3930 Fairview Industrial Drive, MS-23  
Salem, OR 97302  
<http://www.oregon.gov/ODOT/Business/OCR/Pages/Non-Discrimination.aspx>

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6-29-17

Date

# ODOT Disadvantaged Business Enterprises (DBE) Program

## Subpart A - GENERAL REQUIREMENTS

### § 26.1 Objectives

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

It is the policy of ODOT to ensure that DBEs 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 that 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 market place outside the DBE Program; and
- 8) Provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

### §26.3 Applicability

As a recipient of federal funds, ODOT is required to administer a DBE program in compliance with all laws, regulations, Executive Orders, and guidance. ODOT's DBE program applies to ODOT and all its Subrecipients that directly or indirectly receive the following:

- 1) 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),
- 2) Federal transit funds authorized under Titles I, III, V, and VI of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, the Safe, Accountable, Flexible, Efficient, Transportation Equity Act (SAFETEA-LU), Titles I, III, V, and VI, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, II, and V of the TEA-21, Pub. L. 105-178,
- 3) Federal-aid highway and Federal transit funds authorized under Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21), Pub. L. 112-141.
- 4) Federal-aid highway and Federal transit funds authorized under Fixing America's Surface Transportation Act (FAST Act), Pub. L. 114-94.
- 5) Federal Aviation funds authorized by 49 U.S.C. 47101, et seq. 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>

The program covers all USDOT-assisted programs. ODOT distributes federal transportation funds to Certification Acceptance Agencies, Self-Administration Agencies and other Subrecipients throughout the state of Oregon. As a condition of receipt of funding, these Subrecipients and LPAs must adopt ODOT DBE Program Plan and follow the same guidelines and procedures developed by ODOT to implement its DBE program. Subrecipients of FTA funds who receive a more funds directly from the FTA than from ODOT are required to establish their own DBE Program and report directly to the FTA.

The DBE program does not apply to non-USDOT assisted projects.

## **§ 26.5 Definitions**

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



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

- 1) Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:
  - a. One concern controls or has the power to control the other; or
  - b. A third party or parties controls or has the power to control both; or
  - c. An identity of interest between or among parties exists such that affiliation may be found.
- 2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

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

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

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

**Business, business concern or business enterprise** means an entity organized for profit with a place of business located in the United States, and which operates primarily within the United States or which makes a

significant contribution to the United States economy through payment of taxes or use of American products, materials, or labor.

***Certification Office for Business Inclusion and Diversity (COBID) Certification*** means the process whereby an Oregon Unified Certification Program (UCP) member agency determines if an applicant firm meets the disadvantaged business enterprise criteria set forth in 49 CFR 26.

***Commercially Useful Function*** means a DBE performs a “Commercially Useful Function” when it is responsible for the execution of the work of a contract and is carrying out its responsibility by actually performing, managing and supervising the work involved. With respect to furnishing materials and supplies as part of the DBE contract, the DBE also performs a "Commercially Useful Function" when the DBE is responsible for negotiating price, determining quality and quantity, ordering materials and installing (where applicable) and paying for the material itself. A DBE does not perform a "commercially useful function" if its role is limited to that of an extra participant in a transaction, contract or project through which funds are passed in order to obtain the appearance of DBE participation. See also 49 CFR 26.55.

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

***Consultant*** means the legal or commercial entity with whom ODOT enters a Contract.

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

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

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

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

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

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

- That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
- Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

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

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

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

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

recognized under State law.

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

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

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

**Local Public Agency** means any city, county, township, municipality, or other political subdivision that may be empowered to cooperate with the State transportation department in highway matters (23 CFR 635.102).

**NAICS Code** means the North American Industry Classification System (NAICS), the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the US business economy.

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

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

**Noncompliance** means that a recipient, DBE, non-DBE or contractor has not correctly implemented the requirements of this part.

**Non-DBE** means any firm that is not certified as DBE.

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

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

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

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

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

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

**Race-conscious** means a measure or program is one that is focused

specifically on assisting only DBEs, including women-owned DBEs.

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

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

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

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

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

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

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

***Socially and economically disadvantaged individual*** means:

- Any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of groups and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.
- Any individual that ODOT finds to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out, as a member

of a designated group if ODOT requires it.

- Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
  - “Black Americans,” which includes persons having origins in any of the Black racial groups of Africa;
  - “Hispanic Americans,” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
  - “Native Americans,” which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;
  - “Asian-Pacific Americans,” which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;
  - “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
  - Women;
  - Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

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

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

**Subcontractor** means an individual firm, or corporation who, with the written consent of ADOT or its Subrecipient, subcontracts any part of the contract (including, but not limited to, construction and professional

services, engineering design, planning etc.). First tier subcontractors are those to whom a contractor subcontracts a portion of the work. Second tier subcontractors are those to whom a first tier subcontractor subcontracts a portion of the work.

**Subrecipient:** Any legal entity to which a sub-award of federal financial assistance is made and which is accountable to ODOT for the use of the funds provided (49 CFR 19.2), such as Local Public Agencies (LPAs) or Public Transit Providers (Providers).

**Transit Award Management System (TrAMS)** is the FTA's web-based platform to award and manage federal grants, compliance, and other programmatic information.

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

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

## § 26.7 Non-discrimination Requirements

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

In administering its DBE Program, ODOT will not directly, or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment



of the objectives of this program with respect to individuals of a particular race, color, sex, or national origin.

## **§ 26.11 Record Keeping Requirements**

### **§26.11(a) Reporting to USDOT**

ODOT will report DBE participation to appropriate USDOT operating administration as follows:

- ODOT will report DBE participation, using the USDOT “Uniform Report of DBE Commitments/Awards and Payments” form, on a semi- annual basis. These reports will reflect:
  - Awards and commitments made during the reporting period
  - Breakdown by Ethnicity and Gender of Contracts Awarded to DBEs during the period
  - Payments on Ongoing Contracts
  - Actual Payments on Contracts Completed during the reporting period
  - FHWA and FTA- DBE Activity from Oct 1st – Mar 31st will be submitted by June 1st of each FFY.
  - FHWA and FTA-DBE Activity from Mar 31st – Sep 30th will be submitted by Dec 1st of each FFY.
  - ODOT will submit data to the FHWA Civil Rights Connect System.
  - ODOT will submit data to the FTA Transit Award Management System (TrAMS)

### **§26.11 (c) Bidders List**

ODOT will create and maintain a bidders list, consisting of information about all DBE and non- DBE firms that bid or quote on USDOT-assisted contracts. The bidder list will includes the name, address, DBE, non-DBE and status of firms. ODOT collects this information through the Office of Civil Rights Compliance Tracking System (CRCT).

CRCT is an in-house database system built to store and organize data and track compliance on FHWA funded contracts. This system provides tracking and reporting capabilities on companies who bid on or respond to projects and the tracking of actual utilization. It also captures amounts paid to all contractors and tracks Equal Employment Opportunity (EEO) and On-the-Job

Training (OJT) information. CRCT data is used to generate reports on small business utilization, including the Uniform Report of DBE Awards and/or Commitments and Payments.

Data entered into the CRCT system for the purpose of creating and maintaining a bidders list is provided by bidders and subrecipients on the [Subcontractor Solicitation and Utilization Report Form 734-2721 \(SSUR Form\)](#) which bidders submit to the Office of Civil Rights at OCRINFOREQUEST@odot.state.or.us within 10 days of the bid opening or contractor selection. Information collected on the SSUR Form contain: firm name, firm address, firm's status as a DBE or non-DBE, age of the firm and the annual gross receipts of the firm.

For each USDOT-assisted contract, all Bidders (including DBE bidders), must submit electronically with their sealed bid proposal the [DBE Commitment Certification and Utilization 734-2785 \(Form 1\)](#) listing the firm name, types and value of work committed to each DBE subcontractor whose work will be used on bid items to fulfill a project-specific goal. If the project specific goal is zero, all Bidders on federal-aid funded projects must submit the form with business and project information, even if there are no committed DBE firms listed.

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 734-2531 \(Form 2\)](#) for the project.

This report must be completed by the contractor and submitted within five calendar days of the notification of award, and prior to contract execution. Completed and signed forms should be emailed to: [OCRInfoRequest@odot.state.or.us](mailto:OCRInfoRequest@odot.state.or.us). Failure to provide detailed DBE information to OCR within five calendar days of notification of award shall be cause for cancellation of the award, withdrawal of the contract and may be cause for forfeiture of the proposal guaranty.

The contractor shall 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 734-2785 \(Form 1\)](#)

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.

The authorized signature of the prime contractor and the authorized signature of the committed DBE owner shall be affixed to the Committed DBE Breakdown and Certification Form as required by 49 CFR Part 26.53(b)(2)(v). Failure of these signatures to appear on the form may cause the contract award to be canceled and the contract to be withdrawn.

For each USDOT- assisted architectural and engineering (A&E) contract with an assigned goal greater than zero, Consultant must complete a [Committed DBE Breakdown and Certification Form A&E](#) (prior to Contract execution) for each DBE subcontractor. Form includes the contractor name, committed DBE Firm name description of work committed to DBE firm and estimated dollar amount committed to the DBE firm.

The above-mentioned forms are reviewed and entered into CRCT by OCR staff. This information is used to compile bidder list information.

ODOT has gathered and will continue to gather additional bidder's list information including annual gross receipts and firm addresses through the disparity study update processes. The 2016 ODOT Disparity Study process also included a survey of businesses in the Oregon highway construction and engineering related fields that helped supplement ODOTs bidder list.

#### [§26.11\(d\) Retention of Records](#)

ODOT and COBID maintain records documenting a firm's compliance with Oregon State Archives rules that records are retained for 6 years after FHWA acceptance on federally-funded projects or after final note on state-funded projects. These records include the complete application package for each certified firm and all affidavits of no-change, change notices, and on-site reviews. They are maintained in a in a secure and confidential online system. Only authorized certified staff have access to review or view certification records.

#### [§26.11\(e\) COBID Reporting](#)

ODOT commits to providing the Department of Transportation Office of Civil Rights (DOCR), by January 1st of each year the DBE UCP information requested

under the “FAST ACT”. The report will cite the percentage and location within Oregon of the certified DBE firms in COBID’s directory controlled by the following:

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

COBID uses [B2Gnow](#) software to maintain their certification records.

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

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

#### **§26.13(a) Assurance**

The following language will appear in financial assistance agreements with subrecipients:

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

#### **§26.13(b) Contract Assurance**

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

*The contractor, subrecipient, or subcontractor shall not discriminate on the*

*basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out the applicable requirements of 49 CFR part 26 in the award and administration of DOT assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.*

## Subpart B – Administrative Requirements

### **§26.21 DBE Program Updates**

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

Furthermore, as rules pertaining to 49 CFR Part 26 are changed or significant procedures within ODOT changes that affect implementation of this DBE Program Plan as written, ODOT will update its Plan and secure approval from USDOT pertaining to any changes to the Plan. ODOT's DBE Program applies to all DBEs, contractors, subrecipients, local public agencies and other affected stakeholders who award federally-assisted contracts.

### **§26.23 Policy Statement**

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

The Director of ODOT is responsible for issuing a policy statement <http://www.oregon.gov/ODOT/Business/OCR/Documents/20170703092724718.pdf>. This policy statement will also be made available to consultants, contractors, DBE and non-DBE companies that perform on DOT-assisted contracts via the ODOT website.

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

The following individual is the designated DBE Liaison Officer:

Codi Trudell

Office of Civil Rights DBE/Small Business Programs Manager

Phone: (503) 986-4355

Fax: (503) 986-6382

[codi.a.trudell@odot.state.or.us](mailto:codi.a.trudell@odot.state.or.us)

In this capacity, the DBELO is responsible for implementing all aspects of the DBE program and ensuring that ODOT complies with all provisions of 49

CFR Part 26. The DBELO has direct, independent access to the Director of ODOT concerning DBE program matters, and has responsibility for the day-to-day operation and oversight of the DBE Program as it applies to meeting Federal Highway (FHWA), Federal Transit Administration (FTA), and Federal Rail Administration (FRA) requirements for USDOT-assisted contracts and activities. An organizational chart displaying the DBELO's position in the organization is found in Attachment B of this program.

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

## **Personnel**

### **DBE Program Manager**

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

Additionally, this position provides technical assistance and advice to ODOT personnel, outside contractors and consultants, and other agencies that perform contract administration and compliance in accordance with 49 CFR 26

This position assists in the design, monitoring, training, evaluation, and reporting of the DBE program consistent with current federal law. The program manager will recommend actions to be taken by staff in conducting reviews and investigations to assure contractor compliance with DBE contract requirements. This position reports directly to the Manager of the Office of Civil Rights and has direct, independent access to the ODOT Director on DBE Program related matters.

### **Intermodal Civil Rights Manager**

The Intermodal Civil Rights Manager develops and implements DBE program functions based on FTA rules and regulations and Federal Rail Administration (FRA) guidance to provide federally-funded (FTA and FRA) opportunities for DBEs and other small businesses. This position uses data

from project grant awards to identify projects and contracts, monitors and evaluates contractual progress. This position establishes a race-neutral, triennial DBE goal, monitors and evaluates DBE compliance by sub-recipients, and gathers and reports statistical data and other information as required by FTA and Federal Rail Administration (FRA).

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

#### Civil Rights Field Coordinators

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

#### Regional Transit Coordinators (RTC)

The Rail and Public Transit Division (RPTD) has appointed a Regional Transit Coordinator (RTC) to each ODOT Transportation Region. These RTCs work closely with each region's transit agencies, providing technical assistance, grant training and monitoring of compliance with the many rules and regulations associated with FTA funding. RTCs visit each transit system to assure proper postings of FTA Civil Rights and other materials. They attend



triennial site reviews conducted by a consultant under contract to RPTD. Civil Rights deficiencies are reported to the Office of Civil Rights for technical assistance and correction. The Intermodal Civil Rights Manager provides DBE information and training. The RTCs are direct reports to the RPTD Transit Manager.

### [Workforce Development/Program & Business Support Manager](#)

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

### [Small Business Programs Manager](#)

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

### [Civil Rights Programs Support Specialist](#)

This position provides day-to-day administrative support to OCR programs, Compliance Tracking database and to the OCR staff and managers as required. The Civil Rights Programs Support Specialist ensures a smooth flow of services to ODOT Regional Field Coordinators regarding the OCR programs. This position is responsible for compiling, tracking and preparing data to provide information for required OCR reports for submission to FHWA and internal/external stakeholders.

### [Civil Rights Data and Website Management Coordinator](#)

This position collects, compiles, and analyzes qualitative and quantitative information and statistical data and prepares this information in reporting to a wide range of ODOT stakeholders. The position also assists in planning, developing, and organizing projects for researching alternate means of reporting and data presentation.

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

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

### Other Support Personnel

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

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

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

### Project Management Staff

- 1) Monitor and enforce DBE program requirements included in contracts,

giving DBE Program compliance the same priority as compliance with all other legal obligations incurred by ODOT under its financial assistance agreements with USDOT. Enforce DBE contract goal commitments, payment and reporting obligations, DBE termination and substitution limitations, good faith efforts requirements, and commercially useful function and crediting requirements.

- 2) Ensure [Paid Summary Reports](#) and other DBE compliance-required documents are sent to the OCR Field Coordinator for each project on a monthly basis.
- 3) Ensure DBE contract goal commitments are met, Commercially Useful Function (CUF) reviews are performed on all DBEs performing work on a project, and documented OCR concurrence is secured on DBE subcontract matters in accordance with this DBE Program Plan, the DBE contract provisions, and the 2017 [ODOT Construction Manual, Chapter 18](#). Perform Commercially Useful Function (CUF) reviews on DBEs performing work on a project.
- 4) 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 2017 [ODOT Construction Manual, Chapter 18](#), as appropriate.
- 5) Project management staff of the Rail and Public Transit Division will monitor and enforce DBE program requirements included in contracts, giving DBE compliance the same priority as compliance with all other legal requirements incurred by ODOT under its financial assistance agreements with the Federal Transit Administration and Federal Rail Administration.
- 6) OCR provides formal and informal trainings throughout the year for Project Managers and staff on various DBE program topics.

#### Office of the Attorney General

- 1) Address legal matters relating to DBE program implementation.
- 2) Render legal opinions regarding the interpretation of DBE bid specifications and contract provisions.

- 3) Advise OCR regarding matters dealing with the imposition of administrative sanctions against contractors who violate DBE provisions.
- 4) Represent ODOT in all legal actions involving DBE issues.
- 5) Provide OCR and COBID with legal opinions concerning DBE certification involving complex issues of ownership and control.

### **Subrecipients (including Local Public Agencies)**

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

Subrecipients 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 subrecipients comply with all requirements. An agreement will be executed with subrecipients which will bind subrecipients 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 subrecipients shall be notified in writing by ODOT that they must adopt the revised plan. Any ODOT subrecipients 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.

### **Subrecipient Adoption of FHWA Approved ODOT DBE Program Plan**

Subrecipients 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 subrecipient. ODOT will notify subrecipients of all Plan amendments.

### **Subrecipient Submission of Program Document to ODOT for Approval**

Subrecipients 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 subrecipients of any

document deficiencies to be corrected prior to approval. Once approved by ODOT, the subrecipient's document will be forwarded to the appropriate federal operating authority for concurrence.

ODOT will conduct an annual review of all subrecipients 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 subrecipients' performance and compliance with their program documents.

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

#### **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.

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

It is ODOT policy to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions, and to encourage prime contractors on USDOT- assisted contracts to make use of these institutions. OCR has reviewed the Federal Reserve Board's statistical release on minority-owned financial institutions at the following Federal Reserve website:

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

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

## **§26.29 Prompt Payment Mechanism**

### **Prompt Payment**

In accordance with 49 CFR 26.29(a) ODOT ensures that a prompt payment provision is included in every contract. ODOT also requires prime contractors to include such provision in all subcontracts. This requirement applies to all subcontractors, including DBEs and all tiers of subcontracting and contracts in any form (leases, task orders, etc.). The provision language is as follows:

*The Contractor shall pay each subcontractor for satisfactory performance of its contract no later than ten Calendar Days from receipt of each payment the Contractor receives from the ODOT.*

*This policy applies to both DBE and non-DBE contractors. This policy applies to both DBE and non-DBE contractors.*

### **Return of Retention**

ODOT ensures that a prompt and full payment of retainage from the prime contractor to the subcontractor provision is in every contract. ODOT also requires prime contractors to include such provision in all subcontracts. This requirement applies to all subcontractors, including DBEs and all tiers of subcontracting and contracts in any form (leases, task orders, etc.). The provision language is as follows:

*The Contractor shall also return retainage payments to each subcontractor within ten Calendar Days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the Engineer.*

*This policy applies to both DBE and non-DBE contractors.*

Work is accepted when a subcontractor's work is satisfactorily completed, when all the tasks called for in the subcontract have been accomplished, accepted and documented as required by ODOT.

## **§26.29 DBE Payment Reporting and Sanctions**

### **Monitoring and Enforcement**

The prime contractor and its subcontractors are required to regularly submit project-specific subcontractor Paid Summary Report forms and to maintain records of supporting documents on file. As referenced in the [2017 ODOT Construction Manual](#) in Chapter 18-11 (g), ORS 279C.580 requires Contractor to pay each of its Subcontractors within 10 days of receiving payment from the Agency. The Contractor shall submit a [Paid Summary Report \(Form 734-2882\)](#) to the Engineer certifying payments made to all of the following:

- All subcontractors
- Committed DBE suppliers
- Non-Committed DBE suppliers and service providers with estimated total payments for the Project over \$10,000.

The Contractor shall submit the completed and signed [Paid Summary Report 734-2882](#) to the Engineer within 20 days of receipt of payment from the Agency for each month in which payments were made to each subcontractor, each Committed DBE supplier, and each non-Committed DBE supplier or service provider with estimated total payments for the Project over \$10,000. At the completion of the project, contractor shall submit [Paid Summary Report Form 734-2882](#) recapping the total amounts paid to each subcontractor, and each Committed DBE supplier, and each non-Committed DBE supplier or service provider with estimated total payments for the Project over \$10,000. The Contractor shall require each subcontractor at every tier to comply with the requirement to submit [Paid Summary Report Form 734-2882](#) within 20 days of receipt of payment from its controlling contractor and provide a recap of the total amounts paid at the completion of the project or completion of their Work. Forms shall be submitted to the email address provided by the project manager at the Preconstruction conference. ODOT will conduct quarterly audits in each region to verify 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.

### Prompt Pay Sanctions

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

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

### §26.31 DBE Directory Information

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

Interested persons can obtain access to a current, searchable directory at the following address:

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

For additional support or questions, users may contact COBID via email at [cobid@oregon.gov](mailto:cobid@oregon.gov) or phone at (971) 301-1271.

### §26.33 Addressing Overconcentration

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



## **§26.35 Business Development & Mentor Protégé Programs**

ODOT DBE Supportive Services Program provides outreach and education programs regarding the benefits of DBE certification for minority and women-owned businesses. The purpose of the program is to provide education, access, and visibility for the DBE community to aid in business development and eventual self-sufficiency. Training, conferences, and workshops are open to any interested party. Business technical assistance is provided by a case-by-case basis with priority given to DBEs working directly on federal-aid highway projects. Components of the current Supportive Services Program are as follows:

### **Business Development Program**

Business Management classes through the Small Business Development Center (SBDC) Network: ODOT offers scholarships to DBE certified firms to pay \$500 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. More information on the program can be located here: <https://www.oregon.gov/ODOT/Business/OCR/Pages/Small-Business-Resources.aspx>

### **Outreach and Networking**

Tradeshows and Marketplaces: Outreach is critical to the success of ODOT programs. Therefore, ODOT contributes to and participates in minority and diversity centered events including: annual Oregon Association of Minority Entrepreneurs (OAME) Tradeshow, the annual Minority Enterprise Development Week, Governor's Marketplace and various other race- and gender-neutral small business events hosted by ODOT stakeholders.

### **Mentor Protégé**

The Office of Civil Rights has developed a project-specific mentor-protégé program to assist firms in expanding their capacity to perform on larger and more challenging ODOT contracts. More information on the program can be located here:

<http://www.oregon.gov/ODOT/Business/OCR/Pages/Mentor-Prot%c3%a9g%c3%a9-Program-.aspx>

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

ODOT will implement appropriate mechanisms, including sanctions, suspension, debarment, and application of legal and contractual remedies available under Federal, state, and local laws, as deemed appropriate and necessary, to ensure compliance with the requirements by all program participants. Such monitoring and enforcement mechanisms also apply to subrecipients, Certification Acceptance Agencies and LPAs. ODOT works collaboratively with subrecipients, Certification Acceptance Agencies and LPAs to ensure monitoring and enforcement mechanisms take place on each federal-aid project.

Specifically, ODOT takes the following monitoring and enforcement steps to ensure compliance with 49 CFR Part 26:

- Implement enforcement and monitoring processes/procedures outlined in [DBE Supplemental Required Contract Provisions](#) contained in all engineering design/professional services, construction, transit and aviation DOT-assisted contracts and this DBE Program Plan. This includes processes for Good Faith Efforts review and approval, counting DBE participation, monitoring and enforcing prompt payment, review and approval of substitutions and termination of DBEs on projects, requiring payment certifications from DBEs and Prime contractors attesting to total amounts paid to DBE firms, and contract closeout procedures that evaluate whether DBE goals have been met on each contract.
- Implement procedures to verify that work committed to DBEs at contract award is actually performed by the DBEs through Commercially Useful Function (CUF) reviews. These reviews are accomplished via document reviews of contracting records, project onsite visits and interviews conducted by ODOT staff and construction inspectors. CUF data for construction contracts is captured via a paper form [Commercially Useful Function Report \(CUF\) – Form 3 B 734-2165](#). ODOT Staff utilizes that data and other contract/subcontract records to make written determination of CUF.

- Field coordinators and OCR staff will monitor Subrecipients to ensure compliance with DBE requirement
- Notify FTA's Office of Civil Rights of any FTA-funded transit vehicle procurements, submitting the notification with 30 days of the award via FTA's online vehicle award report.
- Compile and maintain in the CRCT database a monthly report of awards/commitments and attainment, which is reported monthly to the ODOT Director's Office and FHWA, as necessary at various transportation industry meetings and reported semi-annually to FHWA and FTA and annually to FAA.
- Keep a running tally in the CRCT database of DBE utilization/attainment, including race-neutral DBE participation, as well as payments to DBE firms for work committed to them at the time of contract award. Crosschecks of DBE System reports with contracting department's databases are conducted regularly to ensure data integrity.
- Track and delineate state/federal funding split to ensure that only the federal share is reported on Uniform Reports to USDOT. This information is tracked in CRCT.
- Examining the data maintained in CRCT from the DBE commitment forms submitted at the beginning of each project with DBE Certification of Final Payment forms at the end of the project to determine if DBE goal was met.
- Bring to the attention of USDOT any false, fraudulent, or dishonest conduct in connection with the program, so that USDOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 26.109. Consider similar action under its own legal authorities, including responsibility determinations in future contracts.

### **§26.39 Fostering Small Business Participation Resources**

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. More information on business requirements including qualifications for becoming certified as a small business can be located here: <https://www.oregon.gov/ODOT/Business/OCR/Pages/Small-Business-Resources.aspx>

The OCR office also provides information on DBE certification and DBE program requirements and procedures.

While subrecipient agencies are not eligible to participate in ODOT's Small Contracting Program, ODOT encourages subrecipients 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.

### **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.

Additional information, including how to access SCP opportunities can be located here:

<http://www.oregon.gov/ODOT/Business/OCR/Pages/Small-Business-Resources.aspx>

### 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.

### Small Business Supportive Services & Outreach

Through the use of state funds, ODOT provides training and a host of supportive services to small businesses including, Mentor-Protégé Program, workshops, trainings and participation of ODOT staff at tradeshow and marketplaces.

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

### §26.41 through §26.55

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

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

#### **§26.43 Set-asides or Quotas**

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

#### **§26.45 Setting Overall Goals**

As a recipient of USDOT (FTA and FHWA) financial assistance, ODOT is required to set an overall goal for DBE participation in USDOT-assisted contracts (transit vehicles are excluded). Unless indicated by a valid disparity study and a USDOT-approved waiver, the overall goal will not be subdivided into group specific goals, or be established as a quota system. The overall goal set in accordance with 49 CFR 26.51 applies only to contractor payments, and not all Federal aid funds expended.

ODOT, as a recipient of FTA funding, expects to award (excluding transit vehicle purchases) more than \$250,000 in a Federal fiscal year. This DBE program applies to FTA as well as FHWA contracts.

Based on demonstrable evidence of ready, willing and able DBEs, ODOT OCR will establish an overall goal on a triennial basis for the participation of DBEs in contracts utilizing Federal-aid highway funds. Details on the methodology for establishing FHWA overall goals are located in Attachment D.

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

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

and will be applicable to FFYs 2020-2022.

On August 1, 2017, ODOT submitted to the Federal Transit Administration, an overall DBE goal of 6% for FTA-funded contracting for FFYs 2018 through 2020. The next triennial goal is due to FTA by August 1, 2020 and will be applicable to FFYs 2021- 2023. Goal is published and can be found on ODOT's website at the following link:

[http://www.oregon.gov/ODOT/Business/OCR/Documents/FTA\\_Triennial\\_Goal\\_18\\_20.pdf](http://www.oregon.gov/ODOT/Business/OCR/Documents/FTA_Triennial_Goal_18_20.pdf)

### **§26.47 (c) Shortfall Analysis**

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

- 1) In detail, ODOT will analyze the reasons for the difference between the overall goal and the awards and commitments in that fiscal year;
- 2) Establish specific steps and milestones to correct the problems identified in the analysis that will enable meeting our goal for the new fiscal year;
- 3) On FHWA projects, ODOT will submit analysis and corrective actions within 90 days of the end of the fiscal year. On FTA projects, OCR will prepare the analysis and hold until requested by an Operating Administration (OA).

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

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

- 1) ODOT requires that each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, provide certification (TVM) of FTA approval that it has complied with the requirements of §26.49.
- 2) ODOT does not include FTA assistance used in transit vehicle procurements in the base amount when calculating the overall goal.

- 3) Only those vehicle manufacturers listed on FTA's certified list of Transit Vehicle Manufactures are eligible to bid.
- 4) ODOT submits a report to FTA indicating name of vendor, number of vehicles purchased, and total FTA assistance used within 30 days of any transit vehicle awards.

### **§26.51(a-c) Breakout of Estimated Race-Neutral and Race-Conscious Participation**

- 1) To the maximum extent possible, ODOT intends to meet the established goals through race-neutral means. Where it is determined by the Office of Civil Rights (OCR) that race-neutral means are inadequate to meet the overall goal, OCR will establish contract-specific goals for particular projects with subcontracting opportunities. The breakout of estimated race-neutral and race-conscious participation can be found in Attachment D to this program. This section of the program will be updated triennially when the goal calculation is updated.
- 2) ODOT/OCR uses public participation, outreach, technical assistance, notification of contracting opportunities, the website, public meetings, attends many DBE and/or small business events and has created many DBE and/or small business programs to assist certified businesses in their efforts to secure ODOT contracts.
- 3) ODOT/OCR will submit to FHWA its overall goal (along with its projection of the portion expected to be met through race-neutral means).

### **§26.51 (d-g) Contract Goals**

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

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

- 1) Contract goals are only set on contracts with subcontracting opportunities.
- 2) Contracts that do not exceed \$100,000 and require a single discipline will be set at zero percent. Emergency Repair (ER) contracts that are necessary to immediately restore essential travel, minimize the extent of damage, or protect the remaining facilities will also be set at zero percent.



- 3) Contracts that exceed \$100,000 and require 2-4 disciplines are set at 3%.
- 4) Contracts that exceed \$100,000 and require 5 or more disciplines are set at 8.5%.
- 5) Goal exception request—should a project or regional manager believe a goal should be different from the assigned categories, they may contact the DBE Program Manager to request the project be reviewed and evaluated for a different goal.
- 6) FHWA approval is not required of each goal; however, FHWA may review and approve or disapprove any contract goal ODOT establishes.
- 7) Participation by all certified DBEs is assured.

ODOT uses the following provisions in setting Construction contract goals:

- 1) Contract goals are set on most contracts with subcontracting opportunities. Contract goals are set depending upon the value of the work items available to subcontract, the number of DBE firms available to participate, the number of non-certified firms available to participate, the duration of the construction schedule, the location and the complexity of the project. Goal setting guidelines are followed and a worksheet (see Attachment C) assists in setting contract goals.
- 2) Participation by all certified DBEs is assured.

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

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

For FTA-funded grants and contracts, ODOT has an entirely race- and gender-neutral DBE program. No contract goals will be assigned. Each Alternative Contracting project will be analyzed separately to ensure maximum DBE participation.

## **§26.53 Demonstration of Good Faith Efforts (GFE)**

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

### **Information to be submitted - At the time of Bid**

ODOT treats bidder/offerors' compliance with good faith efforts' requirements as a matter of responsibility. All Bidders (including DBE bidders), must complete and sign the [DBE Commitment Certification and Utilization Form 734-2785 \(Form 1\)](#). This form shall be submitted with the bid and must be completed and signed by the Bidder's authorized representative. Should the Bidder fail to completely fill out, sign, and submit the report timely, the Bidder will be considered non-responsive. If the project- specific goal is zero, all Bidders on federal-aid funded projects must submit the form with business and project information, even if there are no committed DBE firms listed.

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

In determining whether a bidder has made good faith efforts, OCR may take into account the performance of other bidders in meeting the contract goal. OCR/ODOT may view this, in conjunction with other factors, as evidence that the bidder made good faith efforts in accordance with 49 CFR 26. Good Faith Effort (GFE) determinations are made as close to the time of bid as possible, by the DBE Program Manager. Upon the decision of the DBE Program Manager, the Office of Procurement will provide the bidder with the official written determination. Bidders receive the [DBE Commitment Requirements](#) in Bid Booklets which outline the requirements of 49 CFR 26.

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

section 11.00 of the [DBE Supplemental Required Contract Provisions](#).

#### [At time of award](#)

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 734-2531 \(Form 2\)](#) for the project.

This report must be completed by the contractor and submitted within five calendar days of the notification of award, and prior to contract execution. Completed and signed forms should be emailed to: [OCRInfoRequest@odot.state.or.us](mailto:OCRInfoRequest@odot.state.or.us). Failure to provide detailed DBE information to OCR within five calendar days of notification of award shall be cause for cancellation of the award, withdrawal of the contract and may be cause for forfeiture of the proposal guaranty.

The contractor shall 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 734-2785 \(Form 1\)](#) 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.

The authorized signature of the prime contractor and the authorized signature of the committed DBE owner shall be affixed to the Committed DBE Breakdown and Certification Form as required by 49 CFR Part 26.53(b)(2)(v). Failure of these signatures to appear on the form may cause the contract award to be canceled and the contract to be withdrawn.

#### **§26.53 (b) Design-bid-build**

When projects are let using the design-bid-build (d-b-b) method, the original Request for Qualifications (RFQ) and Request for Proposal (RFP) will specify that there will be a DBE goal. ODOT requires that bidders/offerors submit DBE subcontractor information either at the time of bid (responsiveness) or within 5 days of bid (responsibility).

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

If it is determined by the DBE Program Manager that the bidder has failed to meet the aforementioned requirements of 26.53 (b), ODOT, before awarding the contract, will notify the bidder in writing within 15 (fifteen) calendar days of the bid opening. The notification will include the reasons for the determination and provide the bidder an opportunity for administrative reconsideration. Administrative Reconsideration includes:

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

The result of the reconsideration process is not administratively appealable to the US DOT.

### **§26.53 (e) Design Build**

When projects are let using the Design Build (D-B) method, the original Request

for Qualifications (RFQ) and Request for Proposal (RFP) will specify that there will be a DBE goal. ODOT lets a master contract to a contractor, who in turn lets subsequent subcontracts for the work of the project. The master contractor in conjunction with OCR establishes contract goals, as appropriate, for the subcontracts it lets. ODOT maintains oversight of the master contractor's activities. The design and construction phases of the project will be evaluated separately.

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

The bidder/offeror/contractor must notify and obtain the written approval of ODOT project management personnel prior to replacing a DBE or making any other change in the participation indicated in the commitment forms. OCR will conduct review and provide evaluation to project management based upon criteria listed below. These requirements apply to both pre and post-award terminations, or deletions of, or substitutions for DBE firms put forward by offerors in negotiated procurements.

- a. As stated in the contract provisions, the contractor shall use the specific DBEs listed to perform the work and/or supply the materials for which each is listed unless the contractor obtains written consent from ODOT.
- b. Without ODOT's consent, the contractor is not entitled to any payment for work or material unless it was performed or supplied by the listed DBE.
  - 1) Written consent will be provided only if ODOT agrees that the prime contractor has good cause to terminate the DBE firm.
  - 2) Good cause includes the following circumstances:
    - i. The DBE subcontractor fails or refuses to execute a written contract;
    - ii. The DBE fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE to perform its work on the subcontract results from bad faith or discriminatory action of the prime contractor;
    - iii. The DBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements;
    - iv. The DBE becomes bankrupt, insolvent, or exhibits credit unworthiness;
    - v. The DBE is ineligible to work on public projects because of a suspension

- and debarment proceeding pursuant to 2 CFR Parts 180, 215 and 1,200 or applicable state law; i. The DBE voluntarily withdraws from the project and provides written notice of its withdrawal to ODOT;
- vi. ODOT has determined that the DBE is not a responsible contractor and is not eligible to receive DBE credit for the type of work required;
  - vii. The DBE owner dies or becomes disabled with the result that the DBE is unable to complete its work on the contract;
  - viii. Other documented good cause that ODOT determines compels the termination of the DBE subcontractor. Provided, that good cause does not exist the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged or so that the prime contractor can substitute another DBE or non-DBE contractor and contract award.
- 3) Good cause does not exist if the prime contractor seeks to terminate a DBE it relied on to obtain the contract so that the prime can self-perform the work or so the prime can substitute another DBE or non-DBE contractor after contract award.
  - 4) Before transmitting its request to ODOT, the prime contractor must give written notice to the DBE subcontractor, with a copy to ODOT, of its intent to request to terminate and/or substitute, and the reason for the request.
  - 5) The prime contractor must give the DBE five (5) days to respond to the notice. The DBE will advise ODOT and the prime contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why it should not be approved. If required in a particular case as a matter of public necessity (e.g., safety), ODOT may provide a response period shorter than five days.
  - 6) In addition to post-award terminations, the provisions of this section apply to pre-award deletions of or substitutions for DBE firms put forward by offerors in negotiated procurements.

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

When a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, ODOT requires the prime contractor to make good faith efforts to find another DBE subcontractor based on the same good faith efforts

outlined above. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal established for the procurement.

ODOT requires the contractor to document its good faith efforts and submit the documentation to OCR and the Project Manager within 7 days. All contractor requests to terminate, substitute or replace a DBE shall be in writing and shall include the following information:

- Date the contractor determined the DBE to be unwilling, unable or ineligible to perform.
- Projected date contractor will require substitution or replacement DBE to commence work if consent is granted to the request.
- 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.
- Brief statement of the affected DBE's capacity and ability to perform the work as determined by contractor.
- Brief statement of facts regarding actions taken by contractor that are believed to constitute good faith efforts toward enabling the DBE to perform.
- To date percentage of work completed on each bid item by the DBE.
- The total dollar amount paid, per bid item, to date for work performed by the DBE.
- 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.
- 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.
- A written, signed statement from the DBE, provided the DBE concurs with request to terminate, indicating its unwillingness or inability to perform.
- At the contractors request and if necessary, an additional 7 days may be

granted. OCR will evaluate based on the criteria previously described in 26.53(f)(3) and provide written determination to the project manager and contractor stating whether or not good faith efforts have been demonstrated.

### **Contract Change Orders**

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

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

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

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

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

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

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



### **§26.55 (a) DBE Credit**

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

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

### **§26.55 (b) Joint Ventures**

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

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

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

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

Commercially Useful Function is defined in 49 CFR 26.55 (c), in part, as follows: *A DBE is considered to perform a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved.*

### **DBE Work Plan Proposal Form**

The Contractor shall require each DBE participating on the project as a subcontractor and each Committed DBE, regardless of work type or form of agreement, to complete the [Disadvantaged Business Enterprise Work Plan Proposal - Form 3A](#). The form shall be filled-in electronically, then printed, and signed by an authorized representative of the DBE and of the Contractor. The Contractor shall submit the completed form to the Engineer.

For Committed DBEs, the Contractor shall submit the completed DBE Work Plan Proposals to the Engineer at or before the pre-construction conference. For non-Committed DBE subcontractors, the Contractor shall submit the completed forms to the Engineer in time for review of the Contractor's request for consent to use the DBE subcontractor on the project.

The purpose of the DBE Work Plan Proposal 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 rules. The Contractor shall ensure the form is completed with sufficient information about the DBE's intended work, personnel, equipment, materials, and performance to allow the Agency to determine whether the DBE's proposed performance will meet commercially useful function requirements. Additional information and documentation may be requested by the Agency as needed to alleviate program compliance concerns and must be provided promptly according to 49 CFR 26.109.

The DBE Work Plan Proposal specifically solicits information regarding the following:

- 1) Type of Work - List the types of work the DBE will perform.

- 2) Personnel Required - List the names and/or craft classifications for personnel who will perform. Indicate whether the individual is regularly employed by the DBE, or the source from which the individual was or is to be recruited.
- 3) Equipment Required - List the items of equipment that will be used on the project. Indicate whether the equipment is owned, rented or leased. If rented or leased, consent to the rental or lease shall be obtained from the Agency prior to beginning of the work.
- 4) Supplies and Materials Required - List the supplies and materials that will be used on the project. Indicate the source, by name, address, and phone number, from which supplies and materials will be obtained. For a DBE supplier committed to meet an assigned DBE contract goal, attach documentation showing how the DBE meets manufacturer, regular dealer, or broker requirements, as applicable to the credit being claimed and provide any additional explanation needed regarding ordering, scheduling, and delivery according to the section "Agreements/Leases" below.
- 5) Prime Contractor Resources - Discuss any plans for the DBE to share any resources of the Contractor, e.g. personnel, equipment, tools, or facilities.
- 6) Additional Information - Provide comments or explanation of any of the information provided above. Include information related to joint check arrangements or any plans the DBE has to subcontract work to a lower tier or perform work through a specialty contractor.

The Engineer and Office of Civil Rights (OCR) Field Coordinator will review the work plan proposals and may provide written comments as to whether the activities and type of work identified in the work plan proposals complies with program regulations. In those instances where proposed activity and type of work violates applicable regulations, written comments will be offered as to corrective action required in order to comply with the regulations.

#### **CUF Review - Construction**

The actual CUF review will be performed by personnel assigned the task by the Project Manager per the 2017 ODOT Construction Manual, or the Contract Administrator for non-construction contracts. The [Commercially Useful Function Report \(CUF\) – Form 3 B 734-2165](#) will be maintained as part of the

project file. The results of the CUF are entered into OCR's CRCT database. The PM or designee must perform at least one CUF review for each DBE on a project depending on the following milestones during the project:

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

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

The CUF review for A&E and Professional Services includes the verification of the DBE firm's professional licensing, review of the DBE firms subcontract agreement, monitoring of payments made to the DBE firm, and whenever possible, an electronic copy of the deliverable for which the DBE firm was hired. The CUF review is performed by personnel assigned the task by the OCR or its assignee. The PM or designee must perform at least one CUF review for each DBE on a project depending on the following milestones during the project:

- Early in the DBE's Work, at or near the DBE's peak of operations.
- Whenever a significant change in the operation of the DBE occurs.
- Whenever a replacement or substitution of a DBE occurs.
- Whenever a significant Change Order changes or affects the Work to be accomplished by the DBE.

#### Determination

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

### 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.

### Agreements/Leases

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.

### CUF Violation

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 26.37

Monitoring Performance of Other Program Participants of this document. Decisions on commercially useful function matters are subject to review by the concerned operating administration (FHWA or FTA), but are not administratively appealable to USDOT.

### DBE Management

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

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

Daily work operations must be under the direct supervision of the DBE majority owner(s) or a superintendent or foreman (on a full-time basis) 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.

### DBE Workforce

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

The DBE must:

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

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

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

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

### DBE Equipment

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

Emergency use of equipment owned by the Prime contractor or another subcontractor, where the equipment normally used by the DBE is unavailable, will not be considered a CUF violation if the use is of short duration and in a situation where not using the equipment would cause physical harm to a person or would have such a negative impact on the project work 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.

### Equipment Leased From the Prime

The DBE may lease equipment from the prime contractor provided a written rental agreement, separate from the subcontract specifying the terms of the lease arrangement, is consented to by the Project Manager prior to the DBE starting work.

The DBE must:

- Hire;
- Direct;
- Supervise;
- Control and carry the operator of the equipment on its payroll. Specialized equipment and operator leased from the prime contractor:
- The DBE may lease specialized equipment, through a written rental agreement, separate from the subcontract specifying the terms of the lease arrangement, and consented to by the Project Manager prior to the DBE starting work.

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

- 1) The equipment is of a specialized nature,
- 2) The equipment is readily available at the job site,
- 3) The operation of the equipment is under the full control of the DBE,
- 4) The lease arrangement is for a short term, and
- 5) The lease arrangement is a normal industry practice.

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

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

- 1) 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.
- 2) The DBE must itself own and operate at least one fully licensed, insured and operational truck used on the contract.
- 3) 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.
- 4) 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.

- 5) 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.
- 6) 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.
- 7) DBE Trucking Forms--Whenever a DBE trucking firm has been committed to meet an assigned DBE contract goal, the Contractor shall ensure that the Committed DBE individually identifies each truck intended for use on the Project on its ["Disadvantaged Business Enterprise Work Plan Proposal - Form 3A"](#) or an attached list.

The DBE trucking Subcontractor(s) are required to maintain a [Daily DBE Trucking Log Form 734-2916](#) of all trucks used on the Project. The form 734-2916, or an alternate form, must include the same information and shall identify the truck 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 DBE Contractor/Subcontractor is required to submit to the PM the Daily DBE trucking log within 14 days of the first recorded date of the Work and then on a weekly basis thereafter.

- 8) DBE Crediting for Trucking Firm Services

Project Managers will be responsible for determining the crediting for the DBE Trucking firm. To determine 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.

### **§26.55(e) Materials and 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. To be a regular dealer, the DBE firm shall engage in, as its principal business and in its own name, the purchase and sale of the products in question. A regular dealer in such items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock if it owns and operates distribution equipment. Any supplementing of a regular dealer's own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis, and such equipment shall be operated by the DBE's own employees. If services are brokered, or materials or supplies are purchased from a broker, only the brokerage fee will be credited.

### **Non-certified Firms**

ODOT will not count its participation towards any DBE goals if the firm was not certified prior to bidding their scope of work for the project. ODOT does not count the dollar value of work performed with a firm after it has ceased to be certified.

*ODOT does not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on its contract until the amount being counted has actually been paid.*

## Subpart D – DBE Certification Standard

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

### **§26.61 Burdens of Proof**

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

### **§26.63 Group Membership Rules**

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

Black Americans (African American)	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	
Other	Any additional groups whose members are designated as socially and economically disadvantaged by the SBA in 13 CFR 124.103(b), at such time as the SBA designation becomes effective.

- a) These individuals do not have the burden to prove they are socially and economically disadvantaged. However, if COBID has a well-founded reason to question whether an individual is a member of such a group, COBID will require the individual to produce appropriate documentation.
- b) COBID will take special care to insure that it does not impose a disproportionate burden on members of any designated group.
- c) COBID will provide the individual a written explanation of the reason(s) for questioning his or her group membership and a written request for additional evidence as outlined below.
- d) In making such a group membership determination, COBID will consider:
  - 1) Whether or not the person has held himself/herself out to be a member

of the group over an extended period of time prior to application for certification, and;

- 2) Whether the relevant community regards the individual as a member of the group.
- 3) If COBID determines an individual is not a member of a designated group, the individual must demonstrate social and economic disadvantage on an individual basis using the guidelines in 49 CFR 26, [Appendix E](#).
- 4) This includes completing a social and economic disadvantaged questionnaire.
- 5) COBID's decision concerning membership in a designated group will be subject to certification appeals procedures.

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

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

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

#### **(a) Presumption of Social Disadvantage**

- 1) Individuals who are citizens (or lawfully admitted permanent residents) of the United States who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent

Asian Americans, or other minorities found to be disadvantaged by the SBA, are presumed socially and economically disadvantaged individuals.

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

2) (i) Economic Disadvantage

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

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

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

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

- Exclude only an individual's ownership interest in the applicant firm;
- Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). The equity is the market value of the residence less any mortgages and home equity loan balances.
- COBID must ensure that home equity loan balances are included in the equity calculation and not as a separate

liability on the individual's personal net worth.

- Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes.
- Do not use a contingent liability to reduce an individual's net worth.
- With respect to assets held in vested pension plans, IRAs, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.

- (iv) Notwithstanding any provision of Federal or State law, COBID must not release an individual's personal net worth statement or any documents pertaining to it to any third party without the written consent of the submitter.

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

(b) Rebuttal of presumption of disadvantage.

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

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

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



- ii. (A) If the statement of personal net worth and supporting documentation that is submitted demonstrates the individual is able to accumulate substantial wealth, the presumption of economic disadvantage is rebutted. In making this determination, COBID may consider the factors that include, but are not limited to the following:
  - 1) Whether the average adjusted gross income of the owner over the most recent three year period exceeds \$350,000;
  - 2) Whether the income was unusual and not likely to occur in the future;
  - 3) Whether the earnings were offset by losses;
  - 4) Whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm;
  - 5) Other evidence that income is not indicative of lack of economic disadvantage; and
  - 6) Whether the total fair market value of the owner's assets exceed \$6 million.

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

- 2) With a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially or economically disadvantaged, COBID may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. The proceeding must follow the procedures of §26.87.
- 3) In such a proceeding, COBID has the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and/or economically disadvantaged. The individual may be required to produce information relevant to the determination of his or her disadvantage.
- 4) When an individual's presumption of disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility unless and until he or she makes an individual showing of disadvantage.

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

*c) Transfers within two years.*

- 1) Except as set forth in paragraph (c)(2) of this section, COBID must attribute to the individual any assets which have been transferred to an immediate family member, to a trust whose beneficiary is an immediate family member, or to the applicant firm for less than fair market value within two years prior to application for DBE participation or within two years of COBID's review of the firm's annual affidavit, unless the individual claiming disadvantage can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.
- 2) COBID must not attribute any assets transferred by that individual to an immediate family member that are consistent with customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

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

Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including those whose presumed disadvantage has been rebutted) may apply for DBE certification. In such a proceeding, the applicant firm has the burden of demonstrating, by preponderance of evidence, that the individuals who own and control it are socially and economically disadvantaged.

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

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

### **§26.69 Determining Ownership**

- a) In determining whether the socially and economically disadvantaged individual(s) own the firm, all the facts in the record must be viewed as a whole, including the origin of assets and how and when they were used in obtaining the firm.
- b) To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.

- I. 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.
  - II. In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals. The firm's partnership agreement must reflect the ownership structure.
  - III. In the case of a limited liability company, socially and economically disadvantaged individuals must own at least 51 percent of each class of member interest.
- b) (1) The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership of the firm and must be reflected in the ownership documents. Proof of contribution of capital should be submitted at the time of application. When the capital is through a loan, there must be documentation of the value of the assets used as collateral.
- (2) Insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual - participation in a firm's activities as an employee, or capitalization not equal to the value of the firm.
  - (3) Disadvantaged owners must enjoy the customary incidents of ownership and share in the risks and be entitled to the profits and loss commensurate with their ownership interest, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits are grounds for denial of certification.
  - (4) Debt instruments from financial institutions do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.
- c) All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if-
- I. The beneficial owner of the securities or assets is a disadvantaged individual, and the trustee is the same or another such individual; or
  - II. The beneficial owner of a trust is a disadvantaged individual who, rather

than the trustee, exercises effective control over the management, policy making, and daily operational activities of the firm.

- e) Contributions of capital or expertise by disadvantaged owners to acquire their ownership interests must be real and substantial.
- f) The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership;
  - (1) The owner's expertise must be-
    - I. In a specialized field;
    - II. Of outstanding quality;
    - III. In areas critical to the firm's operations;
    - IV. Indispensable to the firm's potential success;
    - V. Specific to the type of work the firm performs; and
    - VI. Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.
  - (2) The individual whose expertise is relied upon must have a significant financial investment in the firm.
- g) COBID must always deem as held by a disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual –
  - I. As the result of final property settlement, court order, divorce or legal separation; or
  - II. Through inheritance
- h) (1) A presumption of not being held by a disadvantaged individual, for purposes of determining ownership, all interests , assets obtained by the individual as the result of a gift, or transfer from any non-disadvantaged individual or non-DBE firm who is –
  - I. Involved in the same firm the individual is seeking certification, or an affiliate of that firm;
  - II. Involved in the same or similar line of business; or
  - III. Engaged in an ongoing business relationship with the firm, or an affiliate of the firm for which the individual is seeking certification.

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

## **§26.71 Determining Control**

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

- I. Personnel
- II. Facilities
- III. Equipment
- IV. Financial and bonding support
- V. Other resources
- VI. Present or recent employer/employee relationships
- VII. Relationship with prime contractors
- VIII. Other factors related to the independence of a potential DBE firm

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

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

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

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

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

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

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

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

### **§26.71(n) NAICS Codes**

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

### **§26.73 Certification–Other Rules**

- (a.) (1) When making certification decisions, COBID evaluates the eligibility of the firm on the basis of present circumstances. Whether a firm

performs a commercially useful function is not considered in any way in making certification decisions.

- (2) COBID may consider, however, whether a firm has exhibited a pattern of conduct attempting to evade or subvert the intent or requirements of the DBE program.
- (b.) (2) COBID does not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past. COBID does not refuse to certify a firm solely because a firm is newly formed, has not completed projects or contracts, not yet realized profits or demonstrated a potential for success.
  - (c.) Firms seeking certification must cooperate with requests for information relevant to the process. Failure or refusal to provide the information is grounds for a denial or removal of certification.
  - (d.) Only for-profit firms may be eligible DBEs. Not-for-profit organizations are not eligible for certification.
  - (e.) An eligible firm must be owned by individuals who are socially and economically disadvantaged. A firm that is not owned by individuals that are disadvantaged, but is owned by another firm – even a DBE – cannot be an eligible DBE.
    - (e.)(1.) If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, COBID may certify the subsidiary if it otherwise meets all the requirements. In this situation, the individual owners and controller of the parent or holding company are deemed to control the subsidiary through the parent or holding company.
    - (e.)(2.) Such a subsidiary may be certified only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals. See CFR Part 26.73 for examples.
  - (f.) Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an



independent business, owned and controlled by socially and economically disadvantaged individuals.

- (g.) There is no requirement that a DBE firm be prequalified as a condition for certification.
- (h.) A firm that is owned by an Indian tribe or Native Hawaiian organization, rather than by Indians or Native Hawaiians as individuals, may be eligible for certification. Such firms must meet size standards and be controlled by socially and economically disadvantaged individuals.
- (i.) The following Special rules apply to the certification of firms related to Alaska Native Corporations (ANCs):
  - 1) A direct or indirect subsidiary corporation, joint venture, or partnership entity of an ANC is eligible for DBE certification if it meets all of the following requirements:
    - a) Natives and their descendants represent a majority of both the total equity and the total voting power of the entity for the purpose of electing directors, the general partner, or principal officers; and
    - b) The subsidiary, joint venture, or partnership entity has been certified by the Small Business Administration under the 8(a) or small disadvantaged business program.
    - c) COBID does not use the USDOT uniform application form. It must obtain documentation sufficient to demonstrate that the entity meets the requirements. The information obtained must not inhibit correct administration of the DBE program.
    - d) If an ANC-related firm does not meet all the conditions allowed, then it must meet the size standards and be controlled by socially and economically disadvantaged individuals in order to be certified on the same basis as firms owned by Indian Tribes or Native Hawaiian Organizations.

## Subpart E – Certification Procedures

### §26.81 through §26.91

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

- a) The Oregon Department of Transportation (ODOT) and other DOT recipients in the state of Oregon participate in a Unified Participation Program (UCP).
  - 1) Since January 1988, through Oregon Revised Statute (ORS) Chapter 200 and Oregon Administrative Rule (OAR) Chapter 123 Division 200, ODOT and other recipients of DOT funding have participated in a UCP.
  - 2) Per an interagency agreement with the Oregon Business Development Partner (OBDD), the Certification Office for Business Inclusion and Diversity (COBID) is the sole certification agency for the State of Oregon. COBID is housed within OBDD. ODOT provides funding to COBID to support the DBE certification process. The agreement provides for the establishment of a UCP meeting all the requirements of this section. The agreement specifies that the UCP will follow all certification procedures and standards of this part, on the same basis as recipients; that the UCP shall cooperate fully with oversight, review, and monitoring activities of USDOT and its operating administrations; and that the UCP shall implement USDOT directives and guidance concerning certification matters. The agreement also commits recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of this part. The agreement includes an implementation schedule ensuring that the UCP is fully operational no later than 18 months following the approval of the agreement by the Secretary.
  - 3) ODOT retains responsibility to the United States Department of Transportation (USDOT) for assuring that COBID performs DBE certification consistent with 49 CFR 26 standards.
  - 4) Signatures are required from all recipients attesting to their recognition of COBID as the UCP for the State of Oregon and that COBID's certification decisions are binding on all recipients in the state with respect to participation in the DOT DBE program.

- 5) COBID provides staff to conduct DBE certification, certification review, denials, de-certification, appeals and challenges, investigations of third party allegations, and public awareness and outreach activities pertaining to certification programs. This office became the certification authority for state programs under Oregon Revised Statutes (ORS) Chapter 200 in January 1988.
- 6) COBID provides “one-stop shopping” to applicants for certification. An applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.
- 7) An approved Unified Certification Program (UCP) Unified Certification Function Agreement has been in effect since 2000. ODOT and other USDOT federal aid recipients have signed the agreement.
- 8) The Oregon Department of Justice provides legal counsel for COBID.
- 9) COBID maintains a DBE Directory in accordance with 49 CFR 26.81(g). The directory identifies all firms eligible to participate as DBEs in Oregon. The directory lists the firm's name, address, phone number, e-mail address (if available), contact name, owner’s gender and ethnicity, ownership interest, North American Industry Classification System (NAICS) code(s), and a description of the type of work the firm is certified to perform. COBID revises the information and the directory is updated with current certification information on a nightly basis. The directory is available online.

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

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

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

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

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

- Control requirements; or
- Material changes.

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

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

### **§26.85 Interstate Certification**

- a) When an out-of-state firm, currently certified in its home state, applies for DBE certification in Oregon, COBID may accept the out-of-state's certification and certify within 60 days, without further procedures.
  - 1) To obtain certification in this manner, the firm must provide a copy of its certification notice.

Before certifying the firm, COBID must confirm that the firm has a current valid certification. COBID can do so by reviewing the other state's electronic directory or by obtaining written confirmation.

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

- a) When COBID denies certification it will provide a written explanation of the reasons for the denial, specifically referencing the evidence in the record

that supports the reason for the denial. All documents and other information must be made available to the applicant, on request.

- b) The firm will be required to wait at least 12 months before reapplying for DBE certification. The time period for reapplication begins on the date the explanation for denial is received by the applicant firm.
- c) The firm may appeal the denial to USDOT under §26.89.

### **§26.87 Removal Procedures**

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

#### **(a) Ineligibility complaints**

- 1) Any person may file a written complaint that alleges a currently certified firm is ineligible. A written complaint must specify the reasons for the allegation and include any information or arguments supporting the allegation. COBID will not accept general allegations or anonymous complaints. The Certification Manager of COBID will review the complaint, all certification records and other available information in order to determine whether there is reasonable cause to believe that the firm is ineligible. Confidentiality of complainants' identities must be protected as provided in §26.109(b).
- 2) The Certification Manager of COBID will review all records concerning the firm, any material provided by the firm and the complainant, and other available information. Additional information may be requested from the firm. The COBID manager may conduct any other investigation deemed necessary.
- 3) If, based on this review, it is determined that there is reasonable cause to believe that the firm is ineligible, COBID must provide a Notice of Intent to Decertify the DBE 21 days prior to the date of de-certification to the firm and to the ODOT DBE Program Manager, that it proposes to find the firm ineligible. Reasons for the proposed determination must be included. The notice will also include notification that the firm has

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

(b) Recipient-initiated proceedings. If, based on notification by a firm of a change in circumstances, ODOT/COBID determines reasonable cause to believe the firm is ineligible, it will provide written notice to the firm that it is proposing to find the firm ineligible. The notice will include the reasons for the proposed determination.

(c) USDOT directive to initiate proceedings.

- 1) If FHWA or FTA determines that information in our certification records provides reasonable cause to believe the certified firm does not meet eligibility criteria, USDOT may direct ODOT/COBID to initiate proceedings to remove the firm's certification.
- 2) USDOT must provide ODOT/COBID and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.
- 3) ODOT/COBID must immediately commence a proceeding to remove eligibility.

(d) Hearing. The firm must have an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments why it should remain certified. The hearing will be conducted in accordance with ORS 183.310 to 183.550 and OAR 445-050-0000. If no written request for a hearing is received by COBID within the 21-day period, the de-certification/denial will be final. In such a proceeding, ODOT/COBID bears the burden of proving by a preponderance of evidence, that the firm does not meet certification standards.

- 1) A complete, verbatim record of the hearing must be kept. If there is an appeal to DOT under §26.89, a transcript must be provided to DOT and, on request, to the firm.



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

- (g) Notice of decision. Once a decision has been made, the firm must be provided written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of the decision and of the availability of an appeal to the United States Department of Transportation.

A firm that has been denied certification or whose eligibility has been removed may make an administrative appeal to the USDOT. A complainant in an eligibility complaint to COBID may appeal to USDOT if COBID does not find reasonable cause to propose removing the firm's DBE eligibility.

*USDOT decisions are administratively final, and are not subject to petitions for reconsideration.*

- (i) Status of firm during proceeding. (1) A firm remains an eligible DBE during the proceeding to remove its eligibility. (2) The firm does not become ineligible until notice is issued.
- (j) Effects of removal of eligibility. The following actions must be taken when a firm's eligibility is removed:

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

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

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

- (3) *Exception:* If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, ODOT will continue to count its participation on that contract toward overall and contract goals.
- (k) Availability of appeal. When administratively a final removal of a firm's eligibility is made, the firm may appeal the removal to the USDOT. Such appeals may be sent to: U.S. Department of Transportation, Departmental Office of Civil Rights, External Civil Rights Programs Division (S-33), 1200 New Jersey Ave., S.E., Washington D.C. 20590. Phone: (202) 366-4754.

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

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

eligible to participate in the program and consequently should be removed. The suspension takes effect when the DBE receives, or is deemed to have received, the Notice of Suspension.

- (e) While suspended, the DBE may not be considered to meet a contract goal on a new contract, and any work it does on a contract received during the suspension shall not be counted toward ODOT's overall goal. The DBE may continue to perform under an existing contract executed before the DBE received a Notice of Suspension and may be counted toward the contract goal during the period of suspension as long as the DBE is performing a commercially useful function under the existing contract.
- (f) Following receipt of a Notice of Suspension if the DBE believes it is no longer eligible; it may voluntarily withdraw from the program. No further action is required. If the DBE believes it should be reinstated, it must provide to ODOT/COBID information demonstrating that the firm is eligible notwithstanding its changed circumstances. Within 30 days of receiving this information, ODOT/COBID must either lift the suspension and reinstate the firm or start a decertification proceeding. The suspension remains in effect during the proceeding.
- (g) The decision to immediately suspend a DBE is not appealable to the USDOT. The failure to lift the suspension and reinstate the firm or commence a decertification proceeding, as required, is appealable to the USDOT, as a constructive decertification.

### **§26.89 The Appeals Process**

- (a) (1) A firm denied certification or whose eligibility is removed by COBID, including SBA-certified firms, may make an administrative appeal to the USDOT.
- (2) A complainant in an ineligibility complaint to COBID may appeal to USDOT if COBID does not find reasonable cause to propose removing the firm's eligibility or, following a removal of eligibility proceeding, determines the firm is eligible.

Send appeals to the following address: U.S. Department of Transportation,

Departmental Office of Civil Rights, 1200 New Jersey Avenue SE, Washington, DC 20590-0001.

- (b) Pending the Department's decision in the matter, COBID's decision remains in effect. USDOT does not stay the effect of COBID's decision while it is considering an appeal.
- (c) The firm or the complainant must send a letter to USDOT within 90 days of the date of COBID's final decision, including information and setting forth a full and specific statement as to why the decision is erroneous, what significant fact COBID failed to consider, or what provisions COBID did not properly apply.
- (d) When it receives an appeal, USDOT requests a copy of COBID's complete, well organized, administrative record in the matter, including a hearing transcript, within 20 days of the request. USDOT may extend this time period if COBID can show good cause.
- (e) USDOT makes its decision based solely on the entire administrative record as supplemented by the appeal and does not conduct a hearing.
- (f) When COBID provides supplementary information to USDOT, it must make this information available to the firm and any complainant involved.
  - 1) USDOT will affirm COBID's decision unless it determines, based on its review of the entire administrative record, that COBID's decision is unsupported by substantial evidence or inconsistent with substantive or procedural provisions.
  - 2) If USDOT determines that COBID's decision was unsupported, it will reverse the decision and direct COBID to certify the firm or remove its eligibility, as appropriate. COBID will take the action immediately upon receiving written notice of it.
  - 3) USDOT's policy is to make its decision within 180 days of receiving the complete administrative record. If USDOT does not make its decision within this period, written notice will be provided to all parties concerned, including a statement of the reason for the delay and a date the appeal decision will be made.

- 4) All decisions are administratively final, and not subject to reconsiderations.

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

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

## Subpart F – Compliance and Enforcement

### §26.101-§26.109

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

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

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

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

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

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

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

Compliance with all requirements of this part by airport sponsors and other recipients of FAA financial assistance is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them. The provisions of §26.103(b) and this section apply to enforcement actions in FAA programs. Any person who knows of a violation of this part by a recipient of FAA funds may file a complaint under 14 CFR part 16 with the Federal Aviation Administration Office of Chief Counsel.

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

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



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

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

Rules Governing Information, Confidentiality, Cooperation, and Intimidation or Retaliation Notwithstanding any provision of Federal or Oregon law, ODOT will not release any information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting information. However, ODOT will transmit this information to USDOT in any certification appeal proceeding under 40 CFR part 26.89 or to any other state to which the individual's firm has applied for DBE certification.

The identity of complainants shall be kept confidential, at their request. If such confidentiality will hinder the investigation, proceeding or hearing, or result in a denial of appropriate administrative due process to other parties, the complainant must be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the

proceeding or hearing. For FAA-funded contracts, ODOT follows the procedures of 14 CFR part 16 with respect to confidentiality of information in complaints.

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

ODOT, Subrecipient, contractor, or any other participant in the DBE program, will not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by 49 CFR part 26 or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the DBE regulations. If ODOT, Subrecipient, contractor, or any other participant in the DBE program violates this prohibition, it will be in noncompliance with 49 CFR part 26.

## Attachments/Appendix

1. Attachment A - ODOT Policy Statement – DBE Program
2. Attachment B - Office of Civil Rights Organization Chart
3. Attachment C - Contract Goal Setting Methodology
4. Attachment D - Approach to Setting DBE Goal
5. Attachment E – OCR Project Goal Requests: Issues and Resolution Process

Attachment A

**Director's Policy Statement**

**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 amended in 2014 and effective as of November 3, 2014.

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, national origin, or disability in the award and administration of USDOT-assisted contracts. It is ODOT's policy to ensure DBEs, as defined in 49 CFR 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, (3) Members of the DBE and non-DBE business communities 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  
3930 Fairview Industrial Drive, MS-23  
Salem, OR 97302  
<http://www.oregon.gov/ODOT/Business/OCR/Pages/Non-Discrimination.aspx>

For questions or further information, please contact:  
Angela M. Crain, Manager  
Office of Civil Rights  
(T) 503-986-4353  
(F) 503-986-6382  
[Angela.M.CRAIN@odot.state.or.us](mailto:Angela.M.CRAIN@odot.state.or.us)



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Matthew Garrett, Director  
Oregon Department of Transportation



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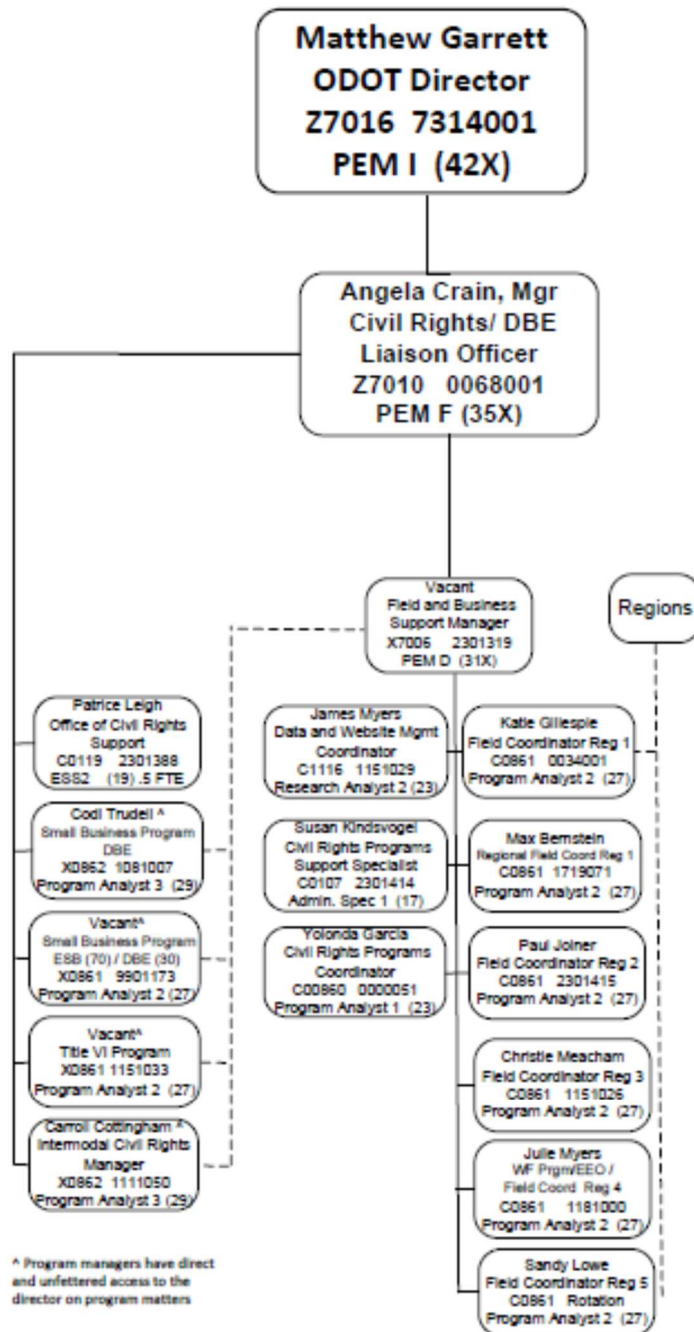
Date

Attachment B

Office of Civil Rights Organization Chart

# ODOT Office of Civil Rights

August 2018



Attachment C

**Contract Goal Setting Methodology**

DBE GOAL WORKSHEET (Includes Updated costs)					
<b>Key Number:</b>		<b>Date:</b>			
<b>Project Name:</b>					
<b>Location:</b>		<b>Size Limit (\$):</b>			
<b>OCR Reviewer:</b>					
<b>Requestor:</b>		<b>PM/CA:</b>			
<b>Kind of Work:</b>					
<p>The following criteria are considering in setting contract goals:</p> <ol style="list-style-type: none"> <li>1. Project location, size, duration, and dollar value.</li> <li>2. The nature of project, (type of work and potential scheduling and coordination work).</li> <li>3. Availability of certified DBE firms within a reasonable distance from the project location that perform items identified capable of being subcontracted.</li> <li>4. Any other relevant criteria, including court decisions and waivers or directives from US DOT.</li> </ol>					
<b>Location (usually, Counties)</b>			<b><u>COBID Database (DBE Directory) Search</u></b>		
<p>Found 2 firms matches for Key Word(s): (Match ANY word), Certification Type=Disadvantaged Business Enterprise, County=, City=Any, Ethnicity=Any Gender=Any</p>					
NAICS Code (s)	Keyword Match	Availability (total DBE firms in NAICS)	Project Estimate by NAICS	Frequently utilized	
	Flagging		\$ -	No	#VALUE!
	Erosion Control and Landscaping		\$ -	No	#VALUE!
	Excavation and Grubbing		\$ -	No	#VALUE!
	Trucking		\$ -	No	#VALUE!
			\$ -		#VALUE!
			\$ -		#VALUE!
			\$ -		#VALUE!

			\$ -	#VALUE!
			\$ -	#VALUE!
			\$ -	#VALUE!

<b>Value (Project Total Estimate):</b>	\$ -
Subcontracting Opportunities available to DBE	\$ -
Percentage Available	

Forecasting	Worksheet Goal	<b>DBE Goal</b>
		<b>0%</b>

**Copy and Paste Comments - Summary & Any Additional Criteria**

- The DBE Goal for this contract applies only to DBE firms in accordance with the FHWA approved goal calculation report for FFY 2018, which allows ODOT to set an overall goal of 11.6% with a race conscious breakout of 6.6% and a race neutral of 5%. Availability of these firms in the types of subcontractable work have been considered in calculating the contract goal.

- Based on very little opportunities to subcontract work and the short duration of the project, the DBE goal has been set at 0%. The goal has been set to allow both certified firms and non-certified firms to participate in subcontracting opportunities on the project.

Value calc	
Value without contingency	
engineering	
mobilization	
other non included items	
<b>Total</b>	\$ -

	Bid item	60% if supplying product	Amount
1	Flagging		
2	Erosion Control and Landscaping		
3	Excavation and Grubbing		
4	Trucking		
5			
6			
7			
8			
9			
10			

Region	Region Base	Duration	Duration Base

% of sub potentially allocated to DBE
#VALUE!

## Goal Setting Processes - Construction

[The e-mail address for construction goal requests is ocrgoalsrequest@odot.state.or.us and is found in the global address book under Office of Civil Rights Goals Request. The Civil Rights Programs Support Specialist \(Administrative Specialist 1\) monitors this mailbox and coordinates the goal setting for the WDP Program and the Small Business Programs.](mailto:ocrgoalsrequest@odot.state.or.us)

### Procedure

#### Administrative Role

1. [A goal request email is sent by the Specification Writer to the OCR Info Request Email In-box: OCRGOALSREQUEST@odot.state.or.us with the goal request form, construction schedule and estimate.](mailto:OCRGOALSREQUEST@odot.state.or.us)
2. [Open the goal request form and OCR's internal SharePoint webpage, Transact. This list can be found under Goal Setting > Construction.](#)
3. Scroll through the key numbers to where the key number should appear and verify it is not in the list.
  - a. If it is already in the list then this a re-evaluation request and you will need to edit the item and update the request with the new information. Follow steps below like normal but make sure those setting the goals are aware this is a goal re-request.



4. Select "Item" from the SharePoint menu bar then "New Item" and enter the information from the Goal Request Form into Transact. Copy and Paste is best so that information is not transposed.

5. Save the email as a pdf in the KN Files on OCRonly (OCRs Shared Drive). Create a new KN File Named "KN #####" then a subfolder named "Goals KN #####" then save the email in that subfolder named "KN #####" Goal Request" (Tip: Copy this file location for next step)

6. In the New Item in Transact select "Attach File", "Browse" then (Tip: paste the file location in the address bar to go right to the file location) Select the "KN #####" Goal Request" file that you just saved. Select "Open" then "Ok" then "Save"

7. Verify the new goal request you just created in Transact is now in the list.

8. You should receive an automatic email once the goal request is created from Transact.

9. Transact will automatically email those in charge of setting the DBE and OJT goals. (Currently this is the DBE Program Manager and Region 4 Field Coordinator)

10. If the Total Estimate is under 1 Million then the admin or DBE Program Manager can set the DBE Goal at zero. See process listed below on step 13.

11. Move the automated email records in the subfolder "Archived Goal Emails" for historical purposes

#### **Admin Filing Notes:**

- These records should be saved in pdf form not outlook mail documents to allow the file to be easily opened, combined and saved in multiple platforms. There should also always be a space between KN and the number so that when searching a computer for that key number the proper documents can be easily located.
- Once the project has been assigned a contract number the KN file in project documents should be changed to the contract number and moved to the appropriate folder location corresponding with the contract number.
- The goal sub folder named KN #####" Goals name should also be updated once a contract number is assigned as follows: (Contract #) Goals KN #####"
- The documents in the subfolder do not need to be renamed with the contract number since they will within a searchable folder with both contract and key number.

### **DBE Goal Setting Processes**

#### **Zero % Goal**

12. The admin or DBE Program Manager will record any goal requests with a total estimate below the one million dollar threshold for a 0% goal. The admin or DBE Program Manager will leave a comment stating this reason for a 0% goal in Transact (OCR's Sharepoint) with the date and their initials, set the DBE goal to 0% and delete the "Need\_DBE\_MWESB\_Review" text from transact. The automatic email generated from this change should be saved as the record in OCRonly in the goal subfolder as "KN #####" DBE Goal Comment"

#### **Non-Zero% Goal**

13. If the total estimate is above one million dollars then the project is evaluated for a goal by the DBE Program Manager or qualified assigned staff.

14. Transact will automatically send any change to the goal setting list to the DBE Program Manager. This is the trigger for review.

15. Setting goals requires both processes and program manager discretion. A forecasting tool developed in partnership with the Office of Project Letting (OPL) is currently being implemented as a tool to make sure ODOTs overall goals are met. The factors that are used to determine the DBE goal are:

a. Length of the project – starting with the mobilization date – projects eligible for goals must be over 90 days (Not compressed).

b. Triennial goal (Note: Set per FHWA Federal Fiscal Years (FFY))

c. Regional availability for subcontracting opportunities (Note: Prime must do at least 30% of the work)

16. Tools for setting goals can be found on OCRonly:\Goal Setting\DBE Goal Setting Toolbox. Tools include:

a. DBE Goal Setting Worksheet – used to calculate the goals

b. Forecasting Tool – Search the spreadsheet to see if a goal has already been forecasted

c. COBID Download – depending on which ethnicities are allowed as part of the DBE Program waiver the COBID directory can be downloaded every 1-3 months and filtered by ethnicity then saved as a PDF to use for key word searches

17. Once you have determined the DBE goal for a project open the OCR's internal SharePoint webpage, Transact. This list can be found under Goal Setting > Construction. Select the Key Number > "Edit Item" > enter the DBE Goal under "DBE goal" and delete the "Yes" under "Need DBE MWESB Review" then select "Save."

18. The Admin will be notified when each of the goals is set and can then go back into Transact and view the set goals

19. Using the Goal Response Letter Templates reply all to the original email for the goal request and paste the response letter. Update the response letter with the information for the project from Transact. CC. the goal request mailbox, WDP Program Manager, DBE Program Manager and any other staff that assisted with the goal setting and send the email. Save a copy of this email in the KN goal file under "KN ##### Goal Response"

20. Enter the "Goal Sent" date in Transact and Save.

Attachment D

## Approach to Setting DBE Goal



# OREGON DEPARTMENT OF TRANSPORTATION PROPOSED OVERALL DBE GOAL FFY 2017 – 2019 FHWA-FUNDED CONTRACTING

The Oregon Department of Transportation hereby submits its proposed annual, overall Disadvantaged Business Enterprise goal for federal fiscal years 2017 through 2019 to the Federal Highway Administration pursuant to [49 CFR Part 26, section 26.45](#).

### SUMMARY

The Oregon Department of Transportation (ODOT) proposes an overall Disadvantaged Business Enterprise (DBE) goal for its Federal Highway Administration (FHWA) funded contracting of 11.6% for federal fiscal years (FFYs) 2017 through 2019. The overall goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses currently ready, willing, and able to participate on ODOT's U.S. Department of Transportation (USDOT)-assisted contracts. ODOT estimates 5.0% of the overall goal can be achieved through race- and gender-neutral (RN) participation on ODOT projects and the remaining 6.6% of the overall goal will need to be met through the use of race- and gender-conscious (RC) contract goals. ODOT proposes all DBE groups be eligible to participate in meeting race- and gender-conscious contract goals assigned in federal fiscal years 2017 through 2019.

Overall DBE Goal FFY 2017- 2019	11.6%
▪ RN Portion	5.0%
▪ RC Portion	6.6%

### BACKGROUND

In setting the overall DBE goal, 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 Tips for Goal-Setting 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).

## GOAL SETTING METHODOLOGY

After considering the options under 49 CFR 26.45(c), ODOT determined it would use option three, which provides that a recipient may use a percentage figure derived from a valid, applicable disparity study to determine the base figure of DBE relative availability.

In late 2014, ODOT retained Keen Independent Research to conduct a disparity study. ODOT formed an External Stakeholder Group, which met seven times to provide study input and review preliminary information from the beginning through the end of the study. ODOT also retained a Quality Services Provider, Dr. Maura Kelly of Portland State University, who monitored completeness and accuracy of study information as Keen Independent conducted the research.

A draft ODOT 2016 Disparity Study report was completed in March 2016 and published on the study website on March 18, 2016 for public review and comment. After holding public meetings and receiving public comments on the report in late March and through April 30, 2016, Keen Independent prepared a final ODOT 2016 Disparity Study report, which is published on the study website at <http://ODOTDBEstudy.org/>.

Concurrent with the public comment period for the draft report, ODOT presented its proposed overall DBE goal for federal fiscal years 2017 through 2019 at the public meetings, consulted with stakeholders, and solicited comments prior to submitting this

final, proposed overall DBE goal to FHWA. A more detailed description of ODOT's public involvement process is summarized in section V. below.

ODOT took the following steps to calculate this proposed overall DBE goal for FHWA-funded contracts for federal fiscal years 2017 through 2019:

- I. **Base figure determination.** First, ODOT determined the base figure to be 15.84%<sup>1</sup>. The base figure is from the final ODOT 2016 Disparity Study report, in which Keen Independent calculated the relative availability of current and potential DBEs on a dollar-weighted basis. The relative availability calculation is summarized in Chapter 6, Section G of the report, with supporting information in Appendix D.
- II. **Consideration of possible step-2 adjustments.** Second, ODOT considered the possible step-two adjustments identified in Chapter 9 of the report and then proposed a downward adjustment to 11.6%. This was calculated by averaging the base figure (15.84%) with median past participation of certified DBEs over the last five years (7.42%).
- III. **Race-neutral / Race-conscious projections.** Third, ODOT used the average race- and gender-neutral participation figure of 5% that Keen Independent calculated in Chapter 10 of the report to project the portions of the overall goal expected to be met through race- and gender-neutral and race- and gender-conscious measures respectively. The figure is based on DBE participation on ODOT's FHWA-funded contracts without goals.
- IV. **DBE groups eligible to meet contract goals.** Finally, ODOT proposed that all DBE groups be eligible to participate in meeting race- and gender-conscious contract goals assigned in federal fiscal years 2017 through 2019, which is based on the disparity analysis identified in Chapter 7, results summarized in Chapter 10 and other analyses in the report.
- V. **Public participation.** This document also talks about public participation in Section V.

## **I. BASE FIGURE DETERMINATION – PURSUANT TO 49 CFR 26.45(c)**

Consistent with USDOT regulations and guidance, ODOT has determined the base figure to be 15.84%, which is derived from the DBE availability analysis calculated as part of the ODOT 2016 Disparity Study. This section explains how the relative availability of current and potential DBEs was calculated on a dollar-weighted basis.

**Relevant Market – Oregon and Portland Metropolitan Area.** For the study, Keen Independent examined prime and subcontractor transportation contracts for ODOT and local agency subrecipients from October 2010 through September 2014. The information examined primarily included construction and engineering-related contracts.

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<sup>1</sup> The percentages shown in figures prepared by Keen Independent in the disparity study report are generally shown to the nearest hundredth. ODOT rounded the proposed overall goal figures to the nearest tenth of a percent per FHWA guidance provided during the review of ODOT's 2015 – 2016 overall goal, as this is consistent with how DBE participation is reported on the federal Uniform Report of DBE Commitments/Awards and Payments.

Figure 1 shows that about 88% of ODOT and local agency FHWA-funded contract dollars went to firms with locations in Oregon and Southwest Washington counties in the Portland Metropolitan Area (\$1.702 billion ÷ \$1.926 billion = 88%).

Figure 1. Dollars of ODOT and local agency transportation prime and subcontracts by location of firm, October 2010-September 2014

	Oregon and two Washington counties	Out of market area	Unknown	Total
Dollars (millions)				
FHWA-funded	\$ 1,407	\$ 164	\$ 19	\$ 1,590
State-funded	295	32	10	337
Total	\$ 1,702	\$ 196	\$ 29	\$ 1,926
Percent of total dollars				
FHWA-funded	88 %	10 %	1 %	100 %
State-funded	88	9	3	100
Total	88	10	2	100

Note: Numbers may not add to totals due to rounding.

Source: Keen Independent availability analysis, Ch. 3, Fig. 3-5, Page 8.

Based on this analysis showing where the substantial majority of contracting dollars are expended, Keen Independent determined that Oregon and the Southwest Washington counties that are part of the Portland Metropolitan Area (Clark and Skamania counties) should be selected as the relevant geographic market area for the study. Therefore, the availability analysis and research concerning the statewide transportation contracting marketplace focused on firms with locations in this area. (See Section D in Chapter 3 of the report.)

**DBE Availability.** As briefly set out below and explained in detail in Chapter 6 of the report, Keen Independent compiled a master availability database and calculated the relative availability of current and potential DBEs on a dollar-weighted basis. This analysis produced an availability figure of 15.84% for ODOT's FHWA-funded transportation contracts.

**Master Availability Database.** Keen Independent developed a master availability database (current and potential DBEs and non-DBEs) by contacting thousands of firms through telephone and online surveys to collect information about availability for ODOT and local government contracts. The firms contacted for the database came from sources including but not limited to:

- Companies that had previously indicated their interest in ODOT or transportation-related work by registering with the Oregon Procurement Information Network

(ORPIN) or ODOT's electronic Bidding Information Distribution system/database (eBIDS); or by bidding on or performing work on ODOT or local agency transportation contracts.

- Businesses listed on the state directory of certified firms.<sup>2</sup>
- Businesses that Dun & Bradstreet (D&B) identified in certain transportation contracting-related sub-industries in Oregon or Southwest Washington (D&B's Hoover's business establishment database). (D&B's Hoover's database is accepted as the most comprehensive and complete source of business listings in the nation.)

The study team completed surveys with 7,119 Oregon businesses. After consolidating duplicate responses and removing companies that are no longer in business, not-for-profit, unable to perform highway-related work, or uninterested in discussing availability for ODOT work, the final database contains 1,639 businesses out of which 446, or 27%, are minority- or women-owned (MBE or WBE).

The 27% figure represents a simple "head count" of MBE and WBE firms, and is only the first step in calculating the DBE availability base figure. The availability calculation is further refined by dollar-weighting and by removing any MBE or WBE firms that are ineligible to become DBE certified from the potential DBE count.

**Dollar-Weighted Availability.** For each of the availability analyses prepared for the disparity study, Keen Independent developed dollar-weighted availability benchmarks. This approach is consistent with USDOT's "Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program."

To calculate dollar-weighted availability, relative DBE availability is first identified for each prime contract and subcontract, with those results then dollar-weighted to determine overall DBE availability for FHWA-funded contracts. The method to determine the dollar-weights is described in detail in Chapter 6, Section E, and Appendix D of the report.

Dollar-weighted availability is much more precise than a simple "head count" of businesses because it considers the following factors regarding available firms: (1) type of work performed, (2) qualifications and interest in transportation-related contracting, (3) size of contract opportunities, and (4) location of contracting opportunity.

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<sup>2</sup> <http://www.oregon4biz.com/How-We-Can-Help/COBID/>

Figure 2 presents overall dollar-weighted availability estimates by MBE/WBE groups. Overall dollar-weighted MBE/WBE availability for FHWA-funded contracts is 19.29%. The dollar-weighted result is lower than the headcount of available MBE/WBE firms (27%), because minority- and women-owned firms comprised a smaller portion of firms available for large highway construction prime contracts than for specialty trade prime contracts or

subcontracts.

**Figure 2. Overall Dollar-Weighted Availability Estimates by MBEs/WBEs for FHWA-Funded Contracts, October 2010–September 2014**

Race/ethnicity and gender	WA
African American-owned	2.92 %
Native Hawaiian or Pacific Islander-owned	3
South or Southeast Asian American-owned	2
Hispanic American-owned	1
White American-owned	2.78
Total MBE	9.47 %
WBE (white women-owned)	3.82
Total MBE/WBE	19.29 %

Source: Keen Independent 2015 DBE Availability and Disparity Study, Ch. 6, Fig. 6-6, Page 13.

**Potential and Certified DBE Availability.** To determine the DBE base figure, including potential and certified DBE availability, Keen Independent further refined the 19.29% dollar-weighted availability figure by removing any MBE or WBE firms that are ineligible to become DBE certified from the potential DBE count. There were three groups of MBE/WBEs that did not count as potential DBEs when calculating the base figure:

- MBE/WBEs that in recent years graduated from the DBE Program or had applied for DBE certification in Oregon but were denied (based on information supplied by the Oregon Certification Office for Business Inclusion and Diversity).
- MBE/WBEs that reported in the availability interviews annual revenue that exceeded the revenue limits for DBE certification for their sub-industry over the most recent three years (at the time of the 2015 interview).
- MBE/WBEs or any other firm in the availability interviews that were prohibited from contracting for any portion of the federal fiscal years 2017 through 2019 time period based on their inclusion on the Oregon Bureau of Labor and Industries (BOLI) List of Contractors Ineligible to Receive Public Works Contracts (as of November 2, 2015).

After subtracting the availability of these three categories of MBE/WBEs, the dollar-weighted availability for current and potential DBEs is 15.84%, or 3.45% lower than total



MBE/WBE availability. This information is shown in Figure 3 below.

**Figure 3. Overall Dollar-Weighted Availability Estimates for Current and Potential DBEs for FHWA-Funded Contracts, Oct. 2010–Sept. 2014**

Calculation of base figure	FHWA
Total MBE/WBE	19.29 %
Less firms that graduated from the DBE Program	
or denied DBE certification in recent years	<u>3.45</u>
or exceed revenue thresholds or on BOLI list	-----
Plus white male-owned DBEs	<u>    </u>
Current and potential DBEs	15.84 %

Source: Keen Independent 2015 Availability and Disparity Study, Ch. 6, Fig 6-7, Page 14.

**Base Figure.** The base figure representing potential and certified DBEs available for ODOT’s FHWA-funded contracts is **15.84%**.

**II. CONSIDERATION OF POSSIBLE STEP-2 ADJUSTMENTS – 49 CFR SECTION 26.45(D)** DBE Program regulations require that after the base figure is calculated, ODOT must consider available evidence to determine whether or not the figure should be adjusted higher or lower than the base figure (a “step-2 adjustment”). The regulations indicate an agency must consider the following:

- Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years.
- Information on employment, self-employment, education, training, and unions.
- Any disparities in the ability of DBEs to get financing, bonding and insurance.
- Other relevant factors.

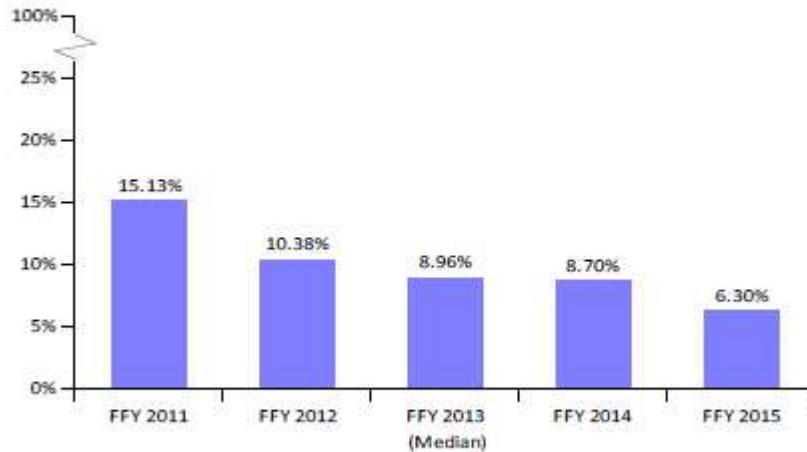
Taking into account relevant information from the 2016 Disparity Study, ODOT considered each of these factors below in determining whether or not to adjust the base figure.

**1. Current Capacity of DBEs to Perform Work, Measured by the Volume of Work DBEs Performed in Recent Years.** USDOT’s “Tips for Goal-Setting” suggests that agencies should examine data on past DBE participation on their USDOT-funded contracts in recent years.

**DBE Participation Based on ODOT Uniform Reports to FHWA.** Figure 5 shows DBE participation in FHWA-funded contracts based on ODOT commitments and awards data. Participation in federal fiscal year 2013 (8.96%) represents the median annual participation based on these data. DBE participation is shown for federal fiscal years 2011, 2012, 2013,

2014 and 2015. Note that ODOT had not included data about FHWA-funded engineering-related contracts in its Uniform Reports submitted to FHWA until federal fiscal year 2015. Analysis indicates lower DBE utilization on these contracts (3.3%). As such, Figure 4 somewhat overstates actual DBE participation.

**Figure 4. ODOT reported past DBE participation on FHWA-funded contracts based on awards, federal fiscal years 2011, 2012, 2013, 2014 and 2015**



Source: ODOT Uniform Reports of DBE Awards/Commitments and Payments (2011 - 2013); ODOT Shortfall Analysis reports (2014 - 2015)

That the 8.96% median DBE participation reported on the last five years of Uniform Reports for FHWA-funded contracts is significantly lower than the 15.84% Base Figure indicates ODOT might make a downward step-2 adjustment based on this factor.

**DBE Participation Based on Disparity Study Utilization Analysis for FHWA-Funded Contracts.** The 2016 Disparity Study identified 7.42% DBE participation on FHWA-funded contracts from October 2010 through September 2014. (See section B, Chapter 7,

Figure 7-2, Page 4.) Figure 5 provides these results.

Figure 5.

MBE/WBE and DBE share of ODOT prime contracts and subcontracts for FHWA- and state-funded contracts, October 2010–September 2014

	FHWA	
	\$1,000s	Percent of dollars
<b>DBEs</b>		
African American-owned	\$ 20,882	1.31 %
Asian-Pacific American-owned	3,117	0.20
Subcontinent Asian American-owned	10,372	0.65
Hispanic American-owned	23,801	1.50
Native American-owned	10,086	0.63
Total MBE	\$ 68,259	4.30 %
WBE (white women-owned)	49,661	3.12
White male-owned DBE	0	0.00
<b>Total DBE certified</b>	<b>\$ 117,920</b>	<b>7.42 %</b>
Non-DBE	1,471,254	92.58
<b>Total</b>	<b>\$ 1,589,174</b>	<b>100.00 %</b>

Note: Numbers rounded to nearest tenth of 1 percent. Numbers may not add to totals due to rounding.

Source: Keen Independent from data on ODOT and LPA contracts October 2010-September 2014.  
Keen Independent Disparity Study, Ch. 7, Fig 7-4, Page 7.

Because Keen Independent was able to research and include data for FHWA-funded engineering-related contracts, ODOT considers the 7.42% figure to be a more accurate assessment of past DBE participation on all FHWA-funded contracts than the 8.96% figure from ODOT Uniform Reports. ODOT thus used **7.42%** as the figure to measure current capacity of DBEs to perform work on ODOT's FHWA-funded contracts.

**Proposed Downward Adjustment.** (Median Past Participation of 7.42% + Base Figure of 15.84%) / 2 = 11.63%, or **11.6%** when rounded to the nearest tenth.<sup>3</sup> See the Adjustments Summary below regarding ODOT's rationale for proposing this downward adjustment.

**2. Information Related to Employment, Self-Employment, Education, Training, and Unions.** Analyses in Chapter 9, Section B-2 (see Figure 9-2, Page 5) of the 2016 Disparity Study indicate there are barriers that certain minority groups and women face related to entry, advancement, and business ownership. Such barriers may affect the availability of MBE/WBEs to obtain and perform ODOT and local agency transportation contracts. Keen Independent quantified and calculated the impact of disparities in business ownership rates on overall MBE/WBE availability to be 5.47%, and indicated that this factor could suggest an upward adjustment of the base figure to 21.31%. Appendix F of the Disparity Study provides detailed results of the business ownership regression analyses.<sup>4</sup>

<sup>3</sup> Based on advice from FHWA in 2015, ODOT has rounded its overall goal to the nearest tenth because reported goal achievement is rounded to the nearest tenth in the Uniform Report of DBE Commitments Awards and Payments.

<sup>4</sup> The study team examined U.S. Census data on business ownership rates using methods similar to analyses examined in court cases

involving state departments of transportation in California, Illinois, and Minnesota.

**Possible, Not Proposed Upward Adjustment:** Base Figure of 15.84% + Business Ownership Disparity Index Factor of 5.47% = 21.31%, or **21.3%** when rounded to the nearest tenth. See the Adjustments Summary below for ODOT's rationale for not proposing this upward adjustment.

**3. Any Disparities in the Ability of DBEs to Secure Financing, Bonding and Insurance.** Analyses of financing, bonding and insurance indicates that an upward adjustment could be justified. However, the impacts of these factors on availability could not be quantified. (See Chapter 9, Section B-3, Page 7.) Thus, no adjustment will be made on the basis of this factor. ODOT is, however, evaluating the agency's insurance requirements and bonding thresholds to identify whether neutral measures could help reduce barriers to participating on ODOT contracts.

**4. Other Factors:** Analyses of the quantitative and qualitative evidence of the impacts of the many barriers to success of MBE/WBEs in Oregon is set out in Chapter 8 of the study and could support an upward adjustment. However, the impacts could not be specifically quantified. Thus, no adjustment will be made on the basis of this factor. ODOT is in the process, however, of reevaluating the agency's small business support services programsto better target the specific needs of DBEs and other small businesses. Additionally, several agency procurement and contract administration processes are undergoing review to remove barriers and implement efficiencies to increase access to contract opportunities for DBEs and other small businesses on a neutral basis.

**Adjustments Summary.** ODOT proposes a downward adjustment to 11.6%, which is calculated by averaging the base figure (15.84%) with past participation of certified DBEs over the disparity study period (7.42%), rounded to the nearest tenth. ODOT proposes a downward adjustment based on the following rationale:

- The base figure of 15.84% and the upwardly adjusted figure of 21.3% are both significantly greater than currently certified DBE availability of 6%, which would make either metric very difficult to achieve under ODOT's transportation contracting market conditions.
- The proposed goal of 11.6% is greater than either measure of median past participation of 8.96% or 7.42% and is also greater than certified DBE availability of 6%. An 11.6% goal would therefore provide growth in opportunities to DBEs within the program. ODOT will have to strive to meet the proposed goal through neutral efforts, higher contract goals, encouraging potential DBE firms to become certified, and providing small business support services. Based on stakeholder feedback during the public comment period, ODOT is also researching and evaluating various alternative contracting methods and contract incentives as potential options to increase DBE participation.
- Chapter 8 of the report indicates that minorities and women experience barriers to entry and advancement in the construction industry in Oregon. This negatively impacts minority and women business ownership and could serve as the basis for a higher goal. ODOT is addressing this issue through a long-term strategy to build capacity among minority and women owned businesses by continually investing in Oregon's [Workforce Development programs](#), including on-the-job training, apprenticeship goals and supportive services.

- ODOT is also continually evaluating, refining, and investing in its DBE and other small business support services programs to build the capacity of minority- and women-owned businesses to compete for ODOT contracting opportunities.

**Proposed Goal.** The proposed goal after making a step-2 adjustments is **11.6%**.

### III. RACE-NEUTRAL / RACE-CONSCIOUS PROJECTIONS— 49 CFR SECTION 26.51 (c)

DBE Program regulations require that the maximum feasible portion of the DBE overall goal be met by using race- and gender-neutral (RN) measures. Where the projected portion of the goal using race- and gender-neutral measures is less than the overall annual goal, the remaining portion is expected to be achieved by establishing contract goals on select projects that have subcontracting opportunities, or race- and gender- conscious (RC) measures.

In accordance with federal regulations and USDOT guidance, ODOT proposes to meet its proposed 11.6% overall DBE goal by using a combination of both race- and gender-neutral and race- and gender-conscious measures. The current 2016 Disparity Study analyzed factors related to ODOT's race- and gender-neutral DBE program component based on 49 CFR Part 26, including analyzing the following:

- Whether there is evidence of discrimination within the local transportation- contracting marketplace for any racial, ethnic or gender groups. (See Chapter 10, Section A.)
- The agency's past experience in meeting its overall DBE goal. (See Chapter 10, Section B.)
- What DBE participation has been when the agency did not use race- or gender- conscious measures.<sup>5</sup> (See Chapter 10, Section C.)
- What the extent and effectiveness of race- and gender-neutral measures the agency has and could have in place for the next fiscal year. (See Chapter 10, Section D.)

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<sup>5</sup> USDOT guidance suggests evaluating (a) certain DBE participation as prime contractors if the DBE contract goals did not affect utilization,

(b) DBE participation as prime contractors and subcontractors for agency contracts without DBE goals, and (c) overall utilization for other state, local or private contracting where contract goals are not used.

Section C of Chapter 4 of the 2016 Disparity Study report provides an extensive discussion of the race- and gender- neutral measures ODOT has had in place. For example, ODOT:

- Arranges aspects of contracts in ways that facilitate participation by DBEs and other small businesses;
- Provides assistance in overcoming limitations such as inability to obtain bonding or financing;
- Provides technical assistance and other services;
- Carries out information and communications programs on contracting procedures and specific contract opportunities;
- Supports organizations that provide business management, recordkeeping, financial and accounting, and other training for DBEs and other small businesses;
- Operates an Emerging Small Business Program, a Small Contracting Program and a Project-Specific

Mentor-Protégé Program that assist small businesses in overcoming barriers to participating in ODOT contracting;

- Assists local groups that help new, start-up firms;
- Helps to distribute the DBE directory; and
- Assists DBEs and other small businesses develop their capability to utilize emerging technology and conduct business through electronic media.

The 2016 Disparity Study report provides detailed analyses of these issues, finding the following: (1) there is quantitative and qualitative evidence suggesting there is not a level playing field for minority- and women-owned businesses in the Oregon transportation contracting industry; (2) ODOT did not meet its overall goal from FFY 2012 through FFY 2016, as shown below; (3) DBE participation was significantly lower on contracts without goals; and (4) that despite the agency implementing a significant number of neutral measures, ODOT is still very unlikely to be able to meet the overall goal with neutral measures alone. Figure 6 below provides these results.

Figure 6.

**ODOT overall DBE goal and reported DBE participation on FHWA-funded contracts, FFY 2011 through FFY 2015**

Federal fiscal year	DBE goal	DBE commitments/ awards	Difference from DBE goal
2011	11.50 %	15.13 %	3.63 %
2012	11.50	10.38	-1.12
2013	16.95	8.96	-7.99
2014	16.95	8.70	-8.25
2015	13.10	6.30	-6.80

Source: ODOT Uniform Reports of DBE Awards/Commitments and Payments.

Source for 2014 and 2015: ODOT Shortfall Analysis reports submitted to FHWA. Keen Independent Disparity Study, Ch. 10, Fig 10-2, Page 5.

Chapter 10, Section E of the report identified 5% DBE participation on a race- and gender-neutral basis over the study period. ODOT considers this 5% figure as its projection of the portion of the overall goal it can expect to meet through race- and gender-neutral measures in federal fiscal years 2017 through 2019. ODOT projects the balance of the overall goal (6.6%) will need to be met through race- and gender-conscious means, through the setting of contract goal.

This is calculated as follows: Overall Goal of 11.6% - Projected RN Participation of 5% = Projected RC Portion of 6.6%.

Overall DBE Goal FFY 2017- 2019	11.6%
▪ RN Portion	5.0%
▪ RC Portion	6.6%

#### IV. DBE GROUPS ELIGIBLE TO MEET CONTRACT GOALS.

The federal DBE regulations require that goals on USDOT-funded contracts “must provide for participation by all certified DBEs and must not be subdivided into group-specific goals” 49 CFR § 26.51(e)(4). However, the federal Ninth Circuit indicated in its 2005 *Western States Paving Co., Inc. v. Washington State DOT* decision that to implement the Federal DBE Program in a narrowly tailored manner, agencies should limit the use of race- and gender-conscious measures to those minority groups “that have actually suffered discrimination” within its transportation contracting industry.<sup>6</sup>

**Waiver history.** On January 18, 2008, ODOT first applied to FHWA to request a waiver of the requirements in 49 CFR § 26.51(e)(4) to allow the agency to subdivide its use of race- and gender-conscious goals by group on its FHWA-funded contracts to comply with USDOT and FHWA guidance regarding the *Western States Paving* case. ODOT’s first waiver, based on evidence of disparities in DBE utilization gathered through a 2007 disparity study conducted by MGT of America, Inc., was approved by USDOT on September 9, 2008. The waiver allowed ODOT to assign goals on construction contracts for African American- owned and Asian America-owned DBEs. On September 16, 2010, ODOT was granted an extension to the 2008 waiver to allow the agency time to complete its 2011 disparity study update.

On August 20, 2012, ODOT received approval to modify its waiver for federal fiscal years 2013 - 2015 based on the results of ODOT’s 2011 disparity study update. This waiver modification allowed the agency to assign goals for African American and Subcontinent Asian American DBE groups on construction contracts. It also allowed goals for all groups except Asian Pacific American DBEs on architecture and engineering and related services contracts.

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<sup>6</sup> *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 997-98 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

Based on an internal agency review of contracting data, ODOT submitted a request to FHWA on September 30, 2015 to modify the waiver to allow more DBE groups to participate in construction goals. Subsequently, after receiving the draft 2016 Disparity Study results, on May 2, 2016 ODOT submitted a request to FHWA to discontinue the waiver and to allow all DBE groups to meet contract goals. On May 18, 2016, FHWA approved ODOT’s May 2, 2016

request.

**No waiver proposed.** ODOT proposes that all DBE groups be eligible to participate in meeting any goals assigned on FHWA-funded contracts in federal fiscal years 2017 through 2019 without waiver from rule 49 CFR § 26.51(e)(4). This is based on Keen Independent’s analyses as shown in the Executive Summary and Chapters 5, 7, 8, 10 and 11 of the 2016 Disparity Study report.

Keen Independent found evidence of disparities in ODOT transportation contracting for firms owned by African American-, Asian-Pacific American-, Subcontinent Asian American-, Hispanic American-, Native American- and white women-owned firms. The evidence of disparities in ODOT contracting for Hispanic American-owned firms is for federal fiscal years 2013 and 2014. For reasons discussed in Chapter 7 of the report, Keen found these two years are more indicative of current and future conditions regarding Hispanic American-owned firms than results for federal fiscal years 2011 and 2012. Additionally, the study provides evidence showing Hispanic Americans in the Oregon marketplace experience lower business ownership rates and entry and advancement in the construction industry than non-minorities. Finally, ODOT’s in-house data for federal fiscal year 2015 and year-to-date 2016 show Hispanic-owned firms continue to experience disparities in ODOT contracting.

## **V. PUBLIC PARTICIPATION – 49 CFR SECTION 26.45(G) 26.15(B)(1)**

**Notice of Proposed Goal.** ODOT published notice of its proposed overall goal on its [Office of Civil Rights](#) and [DBE Program](#) webpages and [DBE Disparity Study](#) website on March 18, 2016. The agency also published notices in newspapers across the state, sent out listserv notices through Oregon eGovdelivery, and on the ODOT Facebook page. ODOT posted a [draft proposed goal calculation](#) on its DBE Program webpage and circulated [informational flyers](#) and presented information at various stakeholder meetings in advance of and during the comment period between March 18 and April 30, 2016 (a 44-day public comment period).

ODOT invited members of the Workforce and Small Business Advisory Committee to participate in the Disparity Study External Stakeholder Group during a WSAC meeting on December 3, 2014. In addition to WSAC members, ODOT extended invitations to Associated General Contractors, American Council of Engineering Companies, DBE Primes, and the Oregon Laborer’s Union.

ODOT presented a proposed overall DBE goal summary to the Disparity Study External Stakeholder Group meeting on March 18, 2016. The agency also held five public meetings



concerning the study results and the proposed DBE goal in La Grande on April 5, Bend on April 6, Medford on April 7, Portland on April 11, and Eugene on April 12. Informational materials from the public meetings are posted under the [library tab](#) of the study website. **Opportunity to Comment.** ODOT requested public comments concerning information in the disparity study report as well as ODOT's proposed overall DBE goal be made through April 30, 2016 as follows: (a) in person at public meetings; (b) online at [www.ODOTDBEstudy.com](http://www.ODOTDBEstudy.com); (c) via email at [info@ODOTDBEstudy.com](mailto:info@ODOTDBEstudy.com); and (d) through regular mail to ODOT Office of Civil Rights, MS31, 355 Capitol Street NE, Salem OR 97301-3871.

**Comments Considered.** In determining whether to make any adjustments to the proposed goal, ODOT considered comments received during the April 2016 public meetings and the written comment submitted to the Oregon Transportation Commission regarding the study results and proposed goal. ODOT also took into account stakeholder comments received throughout the disparity study project. A compendium of stakeholder input, including responses to surveys, interviews, and public meeting presentations, as well as written submissions, is included in Appendix J of the final 2016 Disparity Study report.

Overall, the feedback received at the public and stakeholder meetings regarding the proposed overall DBE goal for federal fiscal years 2017 through 2019 was supportive. A minority contractors organization commented that ODOT should have a higher goal and not make a downward adjustment. Most comments received during the public comment period and throughout the disparity study related to ways ODOT could expand or improve its contracting and outreach processes and encouraged ODOT to explore options to incentivize more meaningful DBE subcontract opportunities.

ODOT received significant stakeholder support for discontinuing use of the DBE Program waiver due to the apparent negative impacts it had overall on DBE Program operations and on individual businesses. Prime contractors and subcontractors (both DBE and non-DBE) indicated support for allowing all DBE groups to meet contract goals. Minority- and Women-owned businesses that were ineligible to meet contract goals reported that setting contract goals on projects near them negatively impacted their ability to win work. Out of frustration, some of these minority and women-owned businesses withdrew from the DBE program. Hispanic business and advocacy organizations provided both written and oral testimony during the study regarding the effects of the waiver, indicating the waiver was unfair because the whole Hispanic group was excluded from meeting DBE contract goals based on the success of only a few Hispanic-owned businesses. African American DBEs generally indicated support for including all DBE groups in the goals program. However, some commenters also expressed concerns that adding all groups back into the program

may result in decreased utilization of African American DBEs. This is a valid concern, and ODOT will encourage and continue to work with all interested groups, ensuring inclusion of African American DBEs and their advocacy organizations, to build relationships and contracting capacity to win and perform work on ODOT contracts.

Not all stakeholders, however, support ODOT having a race- and gender-conscious DBE program. In March 2015, during the early stakeholder input period of the disparity study, ODOT received a lengthy written comment from the Pacific Legal Foundation urging ODOT to run a fully neutral DBE program. Based on the results of the 2016 Disparity Study, the data does not support implementing a fully neutral DBE Program in Oregon.

After considering stakeholder comments, ODOT proposes an overall DBE goal of 11.6% with projected race- and gender-neutral participation of 5% and race- and gender-conscious participation of 6.6% on FHWA-funded contracts for federal fiscal years 2017 through 2019.

## References

### Full report:

- [2016 ODOT Disparity Study Final Report](#) (full report)

### Referenced Chapters and Appendices:

- [Executive Summary](#)
- [Chapter 3: ODOT Transportation Contracts](#)
- [Chapter 5: Marketplace Conditions](#)
- [Chapter 6: Availability Analysis](#)
- [Chapter 7: Utilization and Disparity Analysis](#)
- [Chapter 8: Further Exploration of MBE/WBE and DBE Utilization on FHWA- and State- funded Contracts](#)
- [Chapter 9: Overall Annual DBE Goal](#)
- [Chapter 10: Portion of DBE Goal for FHWA-funded Contracts to be Met through Neutral Means](#)
- [Chapter 11: Recommendations](#)
- [Appendix D: General Approach to Availability Analysis](#)
- [Appendix F: Business Ownership in the Oregon Construction and Engineering Industries](#)
- [Appendix J: Qualitative Information from In-Depth Personal Interviews, Telephone Interviews, Public Meetings and Written Comments](#)

## Attachment E

### **OCR Project Goal Requests: Issues and Resolution Process**

It's important that accurate project information is provided to the Office of Civil Rights (OCR) before PS&E so OCR can perform the correct goals analyses for that project. The agency has a strong preference against changing the goals, targets, or related provisions by addendum, as it's important to ensure the correct goals and targets are included in the project advertisement.

### **Common Issues with OCR Goals & Targets (DBE, MWESB, OJT, etc.)**

- **Stale Goals:** How goals are assigned may be impacted by changes to applicable policy, regulations, overall goals, and subcontractor availability.
- **Significant Changes in Scope or Estimated Quantities:** This data impacts the goals analyses and may require a change in the goals amounts.
- **Funding Source – NOTE:** The goals analyses for State- versus Federal-funded projects are quite different. Also, different Special Provisions apply based on funding.

### **Guidance on OCR Goals Requests**

- **Use Goals Request Form:** Available on OCR web page at: [http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/pages/forms.aspx#other\\_for\\_m](http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/pages/forms.aspx#other_for_m) or ([Civil Rights Request for Goals](#))
- **Copy ODOT PM on Request:** ODOT PMs (or Area Managers) who would like to discuss or provide input on the project goal are encouraged to contact the Program Manager prior to the goal request deadline identified on the request form.
- **Timing of Original Request:** Submit OCR Goals Request at approx. **90% PS&E**
- **Funding:** Please be clear and accurate about the Funding Source on the original goals request form.
- **Resubmission Required If:** Resubmit the goal request along with the new information or documentation for reevaluation if any of the following occurs:
  1. The goal is stale (more than 3 months old),
  2. There have been significant changes in the estimate (greater than 10% +/-),  
or
  3. The funding source changes (Fed/State)
  4. Significant addenda add a major scope or a significant amount of work proportional to the project.

The project team should send an email to [OFFICE OF CIVIL RIGHTS GOALS REQUEST](#). The email will come back from OCR Goals and will be fairly simple –

re-stating the goals with the text "confirmed" or noting the "changed" goals.

- **Office of Project Letting is Second Line of Defense** - QA reviewers watch for these issues, but, ideally, any goal requiring an update should already have been updated before project PS&E submission.