

## 26.1 General Discussion

Under Public Law 105-178 (TEA-21), a 10 percent aspirational goal was established for the participation of Disadvantaged Business Enterprises (DBEs) in transportation contracting, in an effort to valuate equal opportunity in the award and administration of U.S. DOT-assisted contracting and address the effects of past and current discrimination. Requirements of the DBE Program, as prescribed in 49 CFR Part 26, apply to all recipients (and subrecipients) of highway, transit, and airport funds.

A local agency, when participating in programs funded in whole or in part with federal funds made available by the Washington State Department of Transportation (WSDOT), must either adopt WSDOT's DBE Participation Plan, or develop an equivalent plan. The local agency equivalent plan must have the approval of WSDOT's Office of Equal Opportunity and the Federal Highway Administration (FHWA).

While WSDOT's Office of Equal Opportunity (OEO) has the overall responsibility for administration and implementation of WSDOT's DBE Program, local agencies (as subrecipients) also have an important role to ensure that their federally-assisted contracts are administered in accordance with the State's approved DBE Program Participation Plan, which is available on WSDOT's website.

WSDOT's OEO, in coordination with Highways and Local Programs, will conduct compliance reviews of the local agency's administration of the DBE Plan. A local agency that is found to be in noncompliance may be subject to formal enforcement action (suspense or loss of federal funds and/or CA status). A finding of noncompliance will result for failure to comply with the requirements of WSDOT's DBE Plan.

Each federally-assisted contract/subcontract must include the following assurance:

*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 applicable requirements of 49 CFR Part 26 in the award and administration of USDOT-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.*

## 26.2 Procedures

- 1. Local Agency DBE Liaison Officer.** The local agency is responsible for ensuring program compliance and monitoring its contractor's DBE activities. To accomplish this, a DBE liaison officer must be appointed by

the local agency. This liaison officer must be an administrator responsible to the chief executive of the agency. This administrator should have the authority to delegate the responsibility to the people who perform the contractor compliance function. The liaison officer's duties are to ensure compliance with the DBE Plan by the local agency and by their contractors.

2. **DBE Firm(s) Certification.** The Washington State Office of Minority and Women's Business Enterprise (OMWBE) is the sole authority in the State of Washington to perform certification of all minority business enterprises, women business enterprises, and socially and economically disadvantaged business enterprises for programs administered by any State, local, or Federal agency. This statutory authorization extends to and binds all USDOT DBE Program recipients in the State of Washington. In order to count DBE participation, only DBE firms that are currently certified by OMWBE may be used by prospective bidders on federally funded projects. A directory of certified DBE firms is maintained and published by OMWBE. The directory is available via OMWBE's website at [www.omwbe.wa.gov/biznetwas](http://www.omwbe.wa.gov/biznetwas) or by calling (360) 753-9693
3. **Establishment of Project DBE Goals.** The Highways and Local Programs Project Development Engineer will review each project to determine if it involves work elements that are conducive to DBE participation. To initiate this review, the local agency must submit an engineer's estimate with their suggested DBE goal to the Region Local Programs Engineer when the contract work is determined. The estimate must show the item quantities and costs of the project.

If a local agency has any other projects tied to a federally funded project which utilizes one set of bid documents, the total project is considered a federal aid project for DBE goal setting purposes.

The goals for federal aid projects will be set under one of the following categories based on the projected participation level during the year to achieve the overall goal:

- Mandatory Goal
- Zero Goal

The Highways and Local Programs Project Development Engineer will then establish a DBE goal for the project. The methodology employed by WSDOT determining state and local agency project contract goals is as follows:

A. Elements

- a. Geographical location of the project;
- b. Type(s) of work included in the project, i.e., structure, roadway, new construction;

- c. Availability of DBEs to perform the type(s) of work;
- d. Potential subcontractable items of the work; and
- e. Total dollar value of the contract.

The attainment accomplished through this analysis will be reviewed annually to determine the appropriateness of the method of setting goals.

#### B. Goal Setting Process

- a. Review the department's overall DBE goal and the means to meet the goal.
- b. If the contract includes federal funds, a DBE goal is considered;
- c. If the contract amount is under \$100,000.00 then no goal is set. (However, if the work is such that the prime contractor has a distinctly separate class of work available, and meets the requirement for the prime to do 30% of the work, a goal may be considered);
- d. The bid items are sorted by pre-qualification work classes and the total estimated dollar amounts to help identify opportunities for subcontracting;
- e. Prime contractor work is assumed to be one class (the largest) unless two classes are needed to total a minimum of 30% of the total contract;
- f. Mobilization and specialty work are not considered for subcontracting;
- g. The remaining work is totaled, both as a percentage and a dollar amount. It is then evaluated to maximize the participation and to ensure that there are two distinct combinations of work classes to achieve the established goal; and
- h. Ensure that DBE firms are ready, willing, and able to perform the work at the geographic location and time of the project.

If a local agency feels the project goal set by the Highways and Local Programs Project Development Engineer is inappropriate, they may submit a request to have it changed. This request must be accompanied by justification based on the above criteria for establishing the contract goal.

#### 4. **DBE Provisions in the Plans, Specifications, and Estimate (PS&E).**

After the goal has been determined, the applicable WSDOT General Special Provision (GSP), for the type of goal set as outlined above shall be included in the PS&E. These GSPs are available on the WSDOT website or from the Region Local Programs Engineer. Only the WSDOT GSPs are approved for use on a FHWA funded project.

To complete the DBE requirements in the PS&E, when a mandatory goal is established, Form 272-056A, "Disadvantaged Business Enterprise Utilization Certification," will be included. This form shall be in the proposal given to each bidder. This form is available from the Region Local Programs Engineer. When a zero goal is established the DBE Utilization Certification form is not required.

5. **Bid Opening.** Each bid proposal must be reviewed to determine if the bid is responsive. For a contract with goals, each proposal shall contain the form "Disadvantaged Business Enterprise Utilization Certification" completed by the contractor.

Failure to accurately complete this form will be considered as evidence that the proposal is unresponsive and, therefore, is not eligible for award.

6. **Is the DBE Firm Certified by OMWBE?** The DBE firm named by the contractor in the bid proposal shall be certified as a DBE firm by OMWBE to be eligible for work on a FHWA funded project. (See b, above.) To verify whether a firm is certified as a DBE and eligible to perform work on a FHWA funded project, you must contact OMWBE at (360)753-9693 or at their website [www.omwbe.wa.gov/biznetwas](http://www.omwbe.wa.gov/biznetwas) and document your contact effort in the project file. To meet the goals for the project, DBE firms not certified at the time fixed for the bid opening will not be accepted by the local agency for participation, as a Condition of Award (COA) Contractor, in the project.

7. **Selection of the Successful Bidder**

- A. Selection of Successful Bidder (When a mandatory goal is established.)

- a. The successful bidder shall be selected on the basis of having submitted the lowest responsive bid and, in order to be responsive, making good faith efforts to meet the DBE goal. The bidder can meet this requirement in either of two ways:
      1. The bidder can meet the established DBE goal, documenting they have obtained enough commitments for participation by DBE firms to meet the goal; or
      2. If the bidder does not meet the established DBE goal, the bidder can document its adequate good faith effort and submit it with their proposal.

This means that the bidder must show that it took all necessary and reasonable steps to achieve the DBE goal, and by their scope, intensity, and appropriateness to the objective, the bidder could reasonably be expected to obtain sufficient DBE participation, even if the bidder were not fully successful in meeting the established

DBE goal. Efforts done as a matter of form or for the sake of appearance, are not considered “good faith efforts” to meet the contract requirements for DBE utilization.

- b. Should the low and otherwise responsive bidder fail to attain the goal and provide adequate good faith effort documentation in the bid submittal, its bid will be determined to be non-responsive and the next low responsive bid accepted.
- c. If the apparent low bidder submits Good Faith Effort documentation with the bid, the Local Agency will submit the Good Faith Effort to Highways and Local Programs for approval action prior to awarding the project.

B. After Execution

The Local Agency will request that the apparent low bidder submit a description of the specific items of the work each DBE subcontractor named in the DBE Utilization Certification will perform. This description, dollar amount, and name of the DBE firm is identified in the award letter and made Condition of the Award (COA) of the contract.

C. Administrative Reconsideration

If Highways and Local Programs determines that the apparent successful bidder/offer did not meet the DBE goal or has failed to make a good faith effort to meet the goal, the Local Agency will, before awarding the contract, notify the bidder/offerer that it has five working days (from the date of notification) to request reconsideration or forfeit the right to reconsideration.

- a. WSDOT’s decision on reconsideration shall be made by an official who did not take part in the original determination that the bidder/offer or failed to meet the goal or make adequate good faith efforts to do so;
- b. The bidder/offerer shall have the opportunity to meet in person with said official to discuss the issue as to why it did not meet the goal or make good faith efforts to do so. The bidder’s position must be based on its bid submittal. The bidder may provide further explanation/clarification of the information and materials in the submittal, but no new material or information will be considered by the official in reaching a decision on reconsideration;
- c. WSDOT shall send the bidder/offerer a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or whether it made adequate good faith efforts to do so; and

d. The results of the reconsideration process is not administratively appealable to the USDOT.

8. **Condition of Award Letter.** The condition of award letter carries the same contractual obligation as the contract specifications and is only required when a mandatory goal is established for a project. A condition of award letter appears as Appendix 46.42. The second, third, fourth, and fifth paragraphs must be included in the letter. The DBE work shall be shown in the fifth paragraph. If a portion of an item is sublet to a DBE and the remainder is done by the contractor or another subcontractor, the DBE's work must be shown in detail in the fourth paragraph of the letter. Also, any DBE suppliers and manufacturers shall be shown.

Send a copy of this letter and a copy of the "Disadvantaged Business Enterprise Utilization Certification" to the Region Local Programs Engineer as a part of the award documentation submittal explained in Chapter 46.

Attach a copy of the letter to the contract papers that you send to your contractor for signature. The Region Local Programs Engineer shall be provided information on subletting by DBE contractors.

9. **Between Award and Execution.** The contractor shall supply a contractor's bidders list as described in the GSP's for all categories (zero and mandatory goals). The list shall include all firms (names and addresses) that bid on prime contracts or bid or quote subcontracts (successful and unsuccessful) on USDOT-assisted projects, including both DBEs and non-DBEs. The local agency shall immediately notify the Region Local Programs Engineer by email with the name and address of the successful contractor for forwarding to the OEO's contract compliance officer.

10. **Monitoring of DBEs During Construction.** The local agency must place special emphasis on the DBE requirements at the preconstruction conference. Changes to a Condition of Award letter shall be handled in accordance with the GSP (Changes in the Quantity of Work). All change orders affecting the work of DBEs shall be submitted to the Region Local Programs Engineer.

Project diary documentation of the DBE's activities on the project must be performed in the same manner as is done on the prime contractor and any other subcontractor's activities.

In addition to the project diary, the form "DBE On-Site Review" shall be completed by the CA Agency for every DBE contractor performing work on the project. See Appendix 26.33.

- at the start of work, and/or
- at the peak period of work, and/or

- whenever changes in the performance of the work warrants its completion.

The review should be completed per on-site observations, documentation review, and interviews of contractor's personnel. This completed form becomes a part of the local agency's project records. Additional forms are available from your Region Local Programs Engineer.

The WSDOT GSP, Disadvantaged Business Enterprise Participation Plan, and Chapter 1 of the WSDOT Construction Manual shall be followed to ensure compliance with the DBE Plan.

In order to receive credit for DBE participation (count towards the contract goal) a DBE firm must be performing a commercially useful function on that contract. A DBE performs a commercially useful function when it is responsible for executing one or more distinct elements of the contract work and is carrying out those responsibilities by actually performing, managing, and supervising the work involved. The documentation in the project diary and on the DBE On-Site Review form is the information that the local agency will use to valuate whether a DBE is performing a commercially useful function. If there is evidence that a DBE firm may not be performing a commercially useful function, immediately contact your Region Local Programs Engineer.

- 11. Prompt Payment.** Refer to Amendment Section 1-08, Prosecution and Progress (March 6, 2000) and RCW 60.28 for "Prompt Payment" requirements.
- 12. During Construction and Upon Completion.** For all federal aid projects the contractor shall submit Quarterly Report of Amounts Credited as DBE Participation, WSDOT Form 422-102 EF (Appendix 26.31), to the local agency. On this form, the contractor shows the actual amount paid to the DBE firm for the contact work. The local agency shall forward a copy to the Region Local Programs Engineer. This completed form is required quarterly and a final at the completion of the project must be submitted to Highways and Local Programs Project Development Engineer as specified on the form.
- 13. Records and Reports.** The local agency will maintain such records and provide such reports as necessary to ensure full compliance with the Plan.

Upon request from the OMWBE, WSDOT, or the USDOT, (or its operating administrations) the local agency shall submit the records deemed necessary for inspection, auditing, and review purposes.

### 26.3 Appendices

- 26.31 Quarterly Report of Amounts Credited as DBE Participation
- 26.32 Disadvantaged Business Enterprise Utilization Certification
- 26.33 M/D/WBE On Site Review

**Quarterly Report of Amounts Credited as DBE Participation**



**Quarterly Report of Amounts Credited as DBE Participation**

Check appropriate reporting period and enter reporting year. <input type="checkbox"/> 1st Quarter - January (Oct. - Dec.) <input type="checkbox"/> 4th Quarter - October (July - Sept.) <input type="checkbox"/> 2nd Quarter - April (Jan. - Mar.) <input type="checkbox"/> Final <input type="checkbox"/> 3rd Quarter - July (April - June)    Reporting Year _____		State Contract Number <hr/> Federal Employer I.D. Number
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Contractor \_\_\_\_\_

DBE Participant Name and Federal Employer I.D. Number	Contract Type	Date of Payment	*Dollar Credit Amount

**Contract Type:**    S = Subcontractor    A = Agent  
                               M = Manufacturer    R = Regular Dealer  
                               J = Joint Venture     V = Service Provider

I, the undersigned, do hereby certify that in connection with all work on the project for which this statement is submitted, each DBE participant contracted by me has been paid on the dates shown. \*Further, I certify that the amounts shown under "Dollar Credit Amount" are in accordance with the "DBE Eligibility" portion of the DBE Special Provision.

Signature \_\_\_\_\_ Title \_\_\_\_\_

This form is due on the 20th of the month following the end of the respective Quarter (January, April, July, October).



Disadvantaged Business Enterprise Utilization Certification

To be eligible for award of this contract the bidder must fill out and submit, as part of its bid proposal, the following Disadvantaged Business Enterprise Utilization Certification relating to Disadvantaged Business Enterprise (DBE) requirements. The Contracting Agency shall consider as non-responsive and shall reject any bid proposal that does not contain a DBE Certification which properly demonstrates that the bidder will meet the DBE participation requirements in one of the manners provided for in the proposed contract. If the bidder is relying on the good faith effort method to meet the DBE assigned contract goal, documentation in addition to the certificate must be submitted with the bid proposal as support for such efforts. The successful bidder's DBE Certification shall be deemed a part of the resulting contract. Information on certified firms is available from OMWBE, telephone 360-753-9693.

\_\_\_\_\_ Name of Bidder certifies that the Disadvantaged Business Enterprise

(DBE) Firms listed below have been contacted regarding participation on this project. If this bidder is successful on this project and is awarded the contract, it shall assure that subcontracts or supply agreements are executed with those firms where an "Amount to be Applied Towards Goal" is listed. (If necessary, use additional sheet.)

Name of DBE Certificate Number	Project Role * (Prime, Subcontractor, Manufacturer, Regular Dealer)	Description of Work	Amount to be Applied Towards Goal **
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			

Disadvantaged Business Enterprise Subcontracting Goal: \_\_\_\_\_ DBE Total \$ \_\_\_\_\_ \*\*\*

\* Regular Dealer status must be approved prior to bid submittal by the Office of Equal Opportunity, Wash. State Dept. of Transportation, on each contract.  
 \*\* See the section "Counting DBE Participation Toward Meeting the Goal" in the Contract Document.  
 \*\*\* The Contracting Agency will utilize this amount to determine whether or not the bidder has met the goal. In the event of an arithmetic difference between this total and the sum of the individual amounts listed above, then the sum of the amounts listed shall prevail and the total will be revised accordingly.



**MBE/DBE/WBE On-Site Review**

Prime Contractor		Federal Aid Number
Subcontractor		Contract Number
Project Engineer	Region	<input type="checkbox"/> MBE <input type="checkbox"/> DBE <input type="checkbox"/> WBE

**1. Per the condition of award, indicate M/D/WBE work observed this date (Note partial items)**

Bid Item Number	Approximate % Complete	Item Description (Note partial items)	Dollar Amount

2. M/D/WBE Subcontractor's Start Date	3. WSDOT Contract Percent Complete	4. Anticipated Completion Date
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5. Subcontractor's <input type="checkbox"/> Site Superintendent <input type="checkbox"/> Foreman (Name)	6. Exclusively Employed by the M/D/WBE Contractor? <input type="checkbox"/> Yes <input type="checkbox"/> No
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6a. If No, Please Explain

7. Is Superintendent / Foreman Shown on M/D/WB Payroll? <input type="checkbox"/> Yes <input type="checkbox"/> No	8. Is Superintendent/Foreman Shown on any other On-Site Contractor's Payroll? <input type="checkbox"/> Yes <input type="checkbox"/> No
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8a. If yes, Please Explain

9. If Known, to Whom does the M/D/WBE's Superintendent/Foreman Directly Report to Within His/Her Own Organization?  
 Name \_\_\_\_\_ Title \_\_\_\_\_

10. List Names and Crafts of M/D/WBE's Crew as Observed (Use additional sheets, if needed).

11. Are any Crew Members on the Prime or any other Project Suncontractor's Payroll(s)? <input type="checkbox"/> Yes <input type="checkbox"/> No	11a. If yes, Please Indicate
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12. List M/D/WBE's Major (Self-Propelled) Equipment Used

13. Does Equipment have M/D/WBE's Markings or Emblems? <input type="checkbox"/> Yes <input type="checkbox"/> No	13a. If No, Please Indicate	14. Equipment <input type="checkbox"/> Owned <input type="checkbox"/> Leased
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15. Has any other Contractor Performed, on behalf of the M/D/WBE, Substantial Amount of Work Designated to be M/D/WBE?  Yes  No

15a. If Yes, Please Explain

16. Has the M/D/WBE Owner been present on the Job Site?  Yes  No What % \_\_\_\_\_

17. Are Personnel and Equipment Under Direct Supervision of the M/D/WBE Subcontractor? <input type="checkbox"/> Yes <input type="checkbox"/> No	18. Does the M/D/WBE Subcontractor Appear to have Control over Methods of Work in its items? <input type="checkbox"/> Yes <input type="checkbox"/> No
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Comments

**Note: Attach any documents pertinent to the review, i.e., Invoices, Photographs, Daily Reports, Correspondence, etc.**

Review Conducted By \_\_\_\_\_ Date of This Review \_\_\_\_\_

DOT Form 272-051 EF  
Revised 4/2002

Distribution: Region EEO Office, State EEO Office, State OMWBE Office

## Instructions

The M/D/WBE On-Site Review should be completed for every M/D/WBE condition of award.

The On-Site Review should be completed during the peak period of the M/D/WBE's work and/or whenever changes on the performance of the work warrants its completion.

If a recognized M/D/WBE is employed on the project, but not listed on the condition of award, conduct an On-Site Review.

If by substitution or change order, a condition of award M/D/WBE is replaced by another M/D/WBE, an On-Site Review should be completed on the new M/D/WBE.

The review should be completed per on-site observation, documentation review, and interviews with contractor's personnel.

Response to questions on the On-Site Review form should be completed as thoroughly as possible. Additional sheets should be used, if needed.

The On-Site Review should be completed by the Project Engineer, or his/her designee.

Headquarter's copy should be forwarded as soon as it is completed.

### Headquarters Use Only

DOT Form 272-051 EF  
Revised 4/2002

