

# **Chapter 700      *Disadvantaged Business Enterprise***

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## **700.01      Introduction**

The focus of this chapter is WSDOT's application of the federal Disadvantaged Business Enterprise (DBE) program requirements under 49 CFR 26 to federally funded (United States Department of Transportation [USDOT]) consultant contracts. The procedures outlined herein are designed to also comply with 2 CFR 200.321 and 23 CFR 172.7.

## **700.02      Roles and Responsibilities**

### **700.02.01      *WSDOT Office of Equity and Civil Rights (OECR)***

The Director of the OECR has been designated as WSDOT's Disadvantaged Business Enterprises (DBE) Liaison Officer, in accordance with [49 CFR 26.25](#). The DBE Liaison Officer reports to the WSDOT Secretary and is responsible for developing, implementing, and monitoring all aspects of WSDOT's DBE program. This includes coordinating with appropriate offices within WSDOT to ensure statewide compliance with [49 CFR 26](#).

The responsibilities of the OECR include, but are not limited to: gathering statistical data to report to respective USDOT Operating Administrations; establishing the department's overall Disadvantaged Business Enterprise (DBE) goal and contract goals (DBE), as appropriate; analyzing progress toward attainment of goals and identifying mechanisms to improve progress; conducting internal and external assessments/reviews of DBE program activities and coordinating enforcement action, as necessary; and advising the Secretary and other office directors on DBE matters.

The OECR is responsible for setting DBE goals on WSDOT consultant contracts.

OECR performs Commercially Useful Function reviews for the Department.

### **700.02.02      *WSDOT HQ Consultant Services Office (CSO)***

The CSO is responsible for ensuring its programs and activities are implemented consistent with the department's DBE Participation Plan and policies. The CSO, in coordination with the OECR, is responsible for ensuring that area consultant liaisons (ACLs) and project personnel are adequately trained in DBE program requirements as they pertain to architectural and engineering (A&E) contracts.

The CSO manager will designate a DBE point of contact in the CSO to work with the OECR and the ACLs in matters related to DBE program development and implementation, and conduct project reviews for compliance, as necessary.

The CSO manager will also assign other responsibilities as necessary to the CSO DBE point of contact to meet the department's DBE responsibilities. These duties may include, but are not limited to: gathering and reporting statistical data to the OECR; maintaining a running tally of amounts paid to DBE firms (in comparison to commitments made); assisting the OECR and ACLs (when requested) in monitoring the performance of DBEs (to ensure the DBEs are performing a Commercially Useful Function - CUF); tracking complaints; and, enforcing contractual DBE requirements (in cooperation with the OECR).

### **700.02.03 Area Consultant Liaisons (ACLs)**

ACLs are responsible for interactions between the CSO and project personnel in matters that pertain to DBE goals oversight and implementation in their respective areas as requested by the CSO manager. ACLs are responsible for working with their respective project manager to monitor the performance of DBEs (e.g., ensure submittal of monthly reports, et al) in accordance with contract terms and conditions. Other DBE activities will be assigned to the ACL by the CSO manager as needed.

The WSDOT project manager (PM) will be responsible for tracking DBE participation during the contract, conduct CUF reviews and ensure a good faith effort is made throughout the project to meet the project goals.

### **700.02.04 Office of Minority and Women's Business Enterprises (OMWBE)**

The OMWBE is currently the only agency in the State of Washington approved by USDOT to act as the Unified Certification Process (UCP) authority under the DBE Participation Plan. The OMWBE is responsible for certifying DBE/SBE business entities in the State of Washington.

## **700.03 Implementation**

The WSDOT OECR will be involved in all matters related to DBE issues.

As a recipient of federal financial assistance, WSDOT is required to have a DBE Participation Plan that meets the requirements of 49 CFR 26. The OECR works with all offices in WSDOT (including the CSO) to ensure the department is implementing its DBE Participation Plan correctly and consistently.

The agency procedures and guidelines will include a plan that provides these assurances. The level of participation by DBE firms must be consistent with their general availability within the professional communities involved. The project manager and the ACLs are responsible for the implementation of these processes. The CSO will work with the ACLs and the project managers from project inception to ensure all regulations are satisfied.

Prior to soliciting any federally funded contract, the subject of DBE goals needs to be discussed between the project team and the CSO. DBE goals are developed using WSDOT's contract DBE goal setting methodology described in WSDOT's DBE Participation Plan. In addition, there are significant reporting requirements that must be completed. Prime consultants shall submit monthly payments information in accordance with the terms and conditions of the contract.

DBE firms proposed for DBE commitment must be certified prior to the solicitation due date. For DBE's proposed after the solicitation due date, the firm must be certified prior to execution of their subcontract.

### **Bidders List**

WSDOT OECR will conduct an annual survey for WSDOT let contracts/agreements receiving federal-aid funds. The survey will remain open from October 1 through September 30.

WSDOT CSO Division will require consultants on contracts/agreement with Federal financial assistance to participate in the Bidders List Survey generated by WSDOT OECR.

### **700.03.01 Subconsultants Fixed in Negotiations**

After negotiations are completed, the subconsultants are fixed to the contract, or to the work effort when task orders are negotiated as part of a Task Order contract. If a DBE subconsultant cannot complete the work, or is not available for any reason during the contract, the prime will notify the project manager and the ACL. Prime consultants are responsible for seeking and finding a substitute DBE when the original subconsultant is a DBE (ref. 700.05.01).

If the work originally planned for a DBE subconsultant is terminated/cancelled or determined not to be needed, the prime will be required to make a good faith effort to find suitable replacement work for the DBE firm or to reallocate work to a subsequent DBE proposed by the prime. All substitutions, cancellations of work, or changes that affect DBE participation will be submitted to the OECR for approval prior to termination and subsequent substitution. All OECR approved changes require a supplement to the Agreement and/or an amendment to the Task Order(s). De-obligation of authorized amounts to DBE subconsultant is considered a termination of DBE work and the process as outlined in the departments DBE Participation Plan must be followed. (**Note:** As mentioned below (700.05.01), if a DBE subconsultant (identified as a commitment towards DBE goal) is terminated/substituted without WSDOT's prior approval, the Prime Consultant shall not be entitled to any payment for that work unless it is performed by the listed DBE.) The DBE Participation Plan may be found on OECR's website at the following link: [www.wsdot.wa.gov/EqualOpportunity/default.htm](http://www.wsdot.wa.gov/EqualOpportunity/default.htm).

Subcontracting is an important topic because the determination of "best qualified firm" is based in part on the project team's makeup, which includes subconsultants.

For "Project Specific" procurements, often the ranking, short-listing, and contract award are based on the qualifications of the proposed teams. In those procurements, dropping or replacing subconsultants will not be done without prior approval of the CSO Manager. The CSO Manager, at his/her discretion, may reconvene the selection board to consider the impacts on the ranking of the firms entering negotiations.

### **700.03.02 Contract Execution**

#### **Written Confirmation Form(s)**

A written Confirmation Form(s) is required for each DBE identified as part of any agreement or task order containing a DBE goal. The form must be completed and approved prior to agreement or task order execution.

#### **Prime Consultant**

The prime consultant must obtain a Written Confirmation form from each DBE and submit to the Consultant Services Office (CSO) prior to execution of the Agreement/ anytime a DBE is named as a commitment on the contract/Agreement. A Written Confirmation form is also required to be submitted anytime a DBE is proposed as a substitute commitment.

#### **Consultant Services Office**

CSO will forward the completed forms to the Office of Equal Opportunity within two (2) business days.

**Office of Equal Opportunity**

OECR will have two (2) business days after receipt to provide CSO with a response. OECR will verify that the DBE firm(s) is certified to perform the scopes of work listed in the contract. After the verification process, OECR will generate a clearance memo and provide the memo to CSO.

**700.04 Contract Progress and Project Requirements**

WSDOT has several reporting requirements under 49 CFR 26 and the statewide DBE program plan developed as part of the federal regulations. They include, but are not limited to:

- Contract and/or sub-contract awards to DBE(s);
- Verification of negotiations matching contract and sub-contract documents;
- Verification of DBE's performing commercially useful function;
- Certification of prompt payments to DBE(s);
- Monthly progress toward project DBE goals;
- Contract modifications and adjustments;
- Determination of DBE goal attainment at contract close-out;
- Signed written certification that DBE performance (working on the project) has been monitored/tracked.

Details regarding the effects of these requirements on the progress of the contract will be covered with the consultant during the project kick-off meeting or with delivery of the consultant's original executed contract.

**700.04.01 Contract and/or sub-contract awards to DBE(s)**

The consultant will provide the Region OECR staff (as shown below), or the appropriate area consultant liaison (ACL), with copies of the executed contracts between the consultant and each sub-consultant, including each DBE firm, demonstrating the contract terms as negotiated and agreed to by the State.

A list of email addresses that project managers will send the sub contracts in each region.

[NWRegionOECR@wsdot.wa.gov](mailto:NWRegionOECR@wsdot.wa.gov)

[FerriesOECR@wsdot.wa.gov](mailto:FerriesOECR@wsdot.wa.gov)

[SCRegionOECR@wsdot.wa.gov](mailto:SCRegionOECR@wsdot.wa.gov)

[ERegionOECR@wsdot.wa.gov](mailto:ERegionOECR@wsdot.wa.gov)

[SWRegionOECR@wsdot.wa.gov](mailto:SWRegionOECR@wsdot.wa.gov)

[ORegionOECR@wsdot.wa.gov](mailto:ORegionOECR@wsdot.wa.gov)

[NCRegionOECR@wsdot.wa.gov](mailto:NCRegionOECR@wsdot.wa.gov)

[ABOUTAF@wsdot.wa.gov](mailto:ABOUTAF@wsdot.wa.gov)

49 CFR 26.13(b) specifies that any contract that WSDOT signs with a consultant and any contract between the consultant and any sub-consultant (regardless of tier) include the following statement:

The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of [US]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, which may include, but is not limited to:

1. Negative Performance Evaluation;
2. Potential disqualification from future proposals; and or
3. Suspension/ debarment.

As such, each sub-consultant must agree to the verification of compliance with the provisions of the federal regulations by WSDOT. This might include scheduled visits to the sub-consultant's place of business, interviews with employees and verifications of data supporting invoices for work performed.

#### **700.04.02 Verification of negotiations matching contract and sub-contract documents**

In all cases where the team make-up was part of the final selection criteria (i.e. project specific, TOD submittal, etc.) the contract copies should match with those sub-consultants included in the proposal/submittal package, and as accepted prior to contract execution.

The OECR will verify that the work covered in the contract reflects that which was originally proposed for the DBE and is a category (NAICS and associated work description) for which the DBE firm has been certified to perform.

#### **700.04.03 Commercially Useful Function (CUF) (DOT Form 272-051)**

DBE participation can only be counted towards DBE goals (contract goal and State's overall DBE goal) if the DBE has performed a CUF. The responsibility for ensuring CUF lies with the master Consultant, while responsibility for evaluating and determining CUF lies with the contracting agency (WSDOT). WSDOT will conduct a CUF review(s) for each DBE performing work on the contract/agreement. WSDOT Form 272-051 *DBE/FSBE On-Site Review Form/ Commercially Useful Function Architect & Engineering/ Professional Services Firm* shall be utilized for this purpose. DBE Credit will not be granted for DBE participation if a CUF review has not been performed, or it is determined that the DBE failed to perform CUF.

##### **WSDOT Project Manager**

The WSDOT Project Manager (PM) is responsible for completing sections I and II of the CUF On-Site Review form in its entirety on every DBE firm working on federal agreements regardless of whether or not the DBE firm is performing in a race-neutral or race-conscious capacity. Completion of the form is based primarily on verification by the PM/Region OECR of the products/services performed by the DBE, as opposed to a question and answer session with the DBE. On multi-year projects, a new on-site review will be conducted for each DBE each calendar year. The PM will forward the completed form to the Region OECR and the Area Consultant Liaisons (ACL).

**Area Consultant Liaison (ACL)**

Once the ACL receives the On-Site Review form, the ACL will forward the form to the Consultant Services Office.

**Office of Equal Opportunity**

After agreement execution, OEER CSO Liaison will check with the Region Project Manager on a regular basis to ensure that CUF on-site reviews have been initiated for each DBE utilized. If CUF forms are missing, OEER/ CSO Liaison will send out reminder notices to ACL.

The Region OEER is responsible for reviewing Sections I and II of the CUF form completed by the Project Manager, and for completing Section III of the CUF form. If Sections I or II of the form is submitted with missing/incomplete information, it will be returned to the PM for completion. The Region OEER will upload the completed CUF review form into the Diversity Management & Compliance System (DMCS).

**700.04.04 Verification of prompt payment**

Both state law and federal regulations require prompt payment.

State law [RCW 39.76.011](#) requires the state to pay Consultants within 30 days of a properly submitted invoice.

Federal Prompt Payment provisions, 49 CFR part 26.29, requires prime consultants to pay sub consultants within 30 days of receiving payment from the state.

WSDOT is required to verify that the consultant is adhering to the prompt payment provisions of both federal and state regulations. For contracts not reported through the Diversity Management Contract System (DCMS), the consultant shall include a summary in each monthly invoice documenting the payment history to each sub-consultant and the status of any open invoices received from sub-consultants. WSDOT will verify receipt of payments by DBEs through CUF and other monitoring mechanisms associated with WSDOT's responsibilities for monitoring DBE participation.

The consultant shall provide a final statement regarding payment disbursements to all sub-consultants and vendor purchases within 20 days of receiving final payment from the state.

Note - the same provisions extend to services, products or materials purchased from vendors and/or considered a non-labor indirect cost of the project.

**700.04.05 Monthly progress toward project DBE goals**

As part of the monthly progress report required by the contract, the consultant will provide a summary of work accomplished by DBE sub-consultant(s) and the current status of progress toward the DBE goal. This summary should relate the DBE(s) work to their portion of the project schedule.

WSDOT project manager will monitor the DBE goal throughout the life of the contract. If at any time during the progress of the contract a prime consultant determines that the work effort toward meeting the DBE goals is going to fall short, the consultant will immediately notify the WSDOT project manager and the appropriate ACL. The prime is expected to explore all additional opportunities available for meeting the contract goal, including documented good faith efforts.

Any modification to a DBE commitment requires prior approval from CSO, in coordination with OECR. Requests for modification of a commitment must include documentation of the prime consultant's Good Faith Efforts (GFE) to achieve the contract goal (ref. [700.05.02](#)). Any additions of DBE sub-consultants to the contract or additional work assignments require contract supplement/amendment, approval of the CSO Manager, and OECR verification of NAICS code.

#### **700.04.06 Contract modifications and adjustments**

During the life of the contract circumstances may bring changes to the original contract scope of work. By necessity, work may be added, re-defined or removed from the contract. Firms may go out of business or be purchased by, or merged with other firms. Each of these circumstances requires a change to the contract that will affect the DBE contract goal.

If unplanned contract work is added, that work has to be evaluated for potential DBE sub-contracting opportunities. Any changes to the DBE sub-consultant's scope of work need to be evaluated by WSDOT OECR or categorical relevance. Reductions or elimination of work on the contract, as well as reductions or elimination of work committed to DBE(s) will also impact the project goal.

While a supplement/amendment to the contract is being negotiated, the consultant and the ACL (or a representative from the CSO), together with the WSDOT project manager, should look at potential sub-contracting opportunities, either in the added work, or in existing work not yet completed for sub-contracting opportunities. The consultant should make a good faith effort toward sub-contracting additional work to DBE(s) to meet the original contract goal.

If the state reduces or eliminates work from the contract that has been committed to a DBE, the consultant should look at other DBE sub-contracting opportunities within the contract. The consultant will make a good faith effort toward meeting the original contract DBE participation goal.

In the event a consultant is unable to meet the original contract DBE participation goal after making a full good faith effort, the consultant will submit GFE documentation through the ACL and CSO Manager, to the Region OECR Specialist for review and approval. The consultant should include the request for contract change or modification made by the WSDOT project manager and the efforts made by the consultant to achieve the project goal during the supplement negotiations.

#### **700.04.07 Determination of DBE goal attainment at contract close-out**

As part of the project close-out process the consultant will submit Written Certifications (Total Amounts Paid for Consultant Agreements as DBE Participation) of the DBE participation on the project.

This final report may be submitted with the final project invoice provided all DBE invoices have been received and all sub-consultant payments have been made. In any event, the DBE participation report shall be received by the ACL or the CSO within 20 calendar days of the consultant's receipt of final invoice payment.

WSDOT will not accept any requests for contract/agreement modifications after work on the project has been completed (work toward project deliverable other than final administrative tasks).

**700.04.08 Consultant evaluation process – DBE utilization**

It is the project managers responsibility to discuss and monitor goal attainment with the Consultant throughout the life of the contract/agreement. The discussion should include possible sanctions if the goal is not met.

Each consultant contract includes an evaluation of the consultant's performance throughout the contract. Part of the evaluation pertains to the consultant's performance regarding the contract's DBE requirements.

On contracts that have a DBE participation goal, the evaluation will include narrative regarding the consultant's efforts toward meeting the project goal, any adjustments that had to be made during the contract, substitutions of DBE(s), complaints raised by DBEs/DBEs, and if the project goal was met (and if not, why not).

For those projects that don't have a formal DBE participation goal, the consultant's evaluation will note whether there were any DBE(s) that participated in the project and the dollar value and percentage of DBE participation if there were DBE(s). The consultant will not be evaluated negatively for lack of participating DBE(s) on a contract that has no formal DBE participation goal.

DBE participation on a contract without a DBE participation goal will be noted and may reflect positively in the DBE/sub-consultant portion of the project evaluation.

Failure to meet a DBE goal and/or provide GFE may result in one or more sanctions listed in [Section 700.04.01](#).

**700.05 Goal Monitoring and Reporting**

In accordance with 49 CFR 26, WSDOT is required to report the participation of DBE certified firms on all projects funded by the Federal Highway Administration, Federal Transit Administration, and Federal Aviation Administration.

**New Contracts Executed After April 1, 2018**

All new contracts executed after April 1, 2018 shall report payment information on a monthly basis utilizing the Diversity Management & Compliance System (DMCS). Terms and Conditions of the Prime's contract stipulate the requirement for payment information to be submitted monthly.

**Contracts Executed Prior to April 1, 2018**

All consultant contracts executed prior to April 1, 2018 shall report DBE participation on a monthly basis utilizing Form 271-56.

**700.05.01 Contract Substitutions & Terminations****Consultant Services DBE Substitutions**

Requests to substitute a DBE commitment shall follow the same process as described below for DBE termination. The Prime Consultant may only replace a DBE with another certified DBE.

**DBE Termination**

Termination of a DBE (or an approved substitute DBE) is only allowable for good cause and with prior written approval of WSDOT OECR. If the Prime Consultant terminates a DBE commitment without prior written approval by WSDOT OECR, the Prime Consultant is not entitled to any payment for work or material associated with that



subconsultant agreement, nor will the Prime Consultant receive credit towards the DBE Goal for that work.

For purposes of the DBE program, good cause may exist if:

- The DBE fails or refuses to execute a written agreement.
- The DBE fails or refuses to perform the Work of its subconsultant agreement in a way consistent with industry standards, provided however, that good cause does not exist if the failure or refusal of the DBE to perform its work on the contract results from the bad faith or discriminatory action of the prime consultant.
- The DBE becomes bankrupt, insolvent, or exhibits credit unworthiness.
- The DBE is ineligible to work on professional service agreements because of suspension and/or debarment proceedings pursuant to Federal law or applicable State law.
- The DBE is ineligible to receive DBE credit for the type of work required (e.g., they are not certified in the appropriate NAICS and corresponding work description for the type of work involved);
- The DBE voluntarily withdraws from the Project and provides written notice of its withdrawal.
- The DBE's owner dies or becomes disabled with the result that the DBE is unable to complete its Work on the Agreement.

Good cause does not exist if:

- The Prime Consultant seeks to terminate a DBE so that the Prime Consultant can self-perform the Work.
- The Prime Consultant seeks to terminate a DBE so the Prime Consultant can substitute another DBE contractor or non-DBE contractor after execution of the DBE subconsultant agreement.
- The failure or refusal of the DBE to perform its Work on the subconsultant agreement results from the bad faith or discriminatory action of the Prime Consultant (e.g., the failure of the Prime Consultant to make timely payments or the unnecessary placing of obstacles in the path of the DBE's Work).

Prior to requesting termination, the Prime Consultant shall provide written notice to the DBE, with a copy to WSDOT, of its intent to request to terminate and/or substitute and the reasons for doing so. The DBE shall have five (5) business days to respond to the Prime Consultant's notice. The DBE's response shall either support the termination or advise WSDOT and the Prime Consultant of the reasons it objects to the termination of its agreement.

When a DBE Subconsultant is terminated or fails to complete its Work on the Agreement for any reason, the Prime Consultant shall make good faith efforts to substitute with another DBE for the same amount of work under the original agreement that was terminated. The Prime Consultant shall submit substitution information and/or documented good faith efforts to WSDOT within three business days of the approval of termination.

Reduction of authorization amount to a DBE subconsultant is considered a termination.

**700.05.02 Good Faith Efforts (GFE) – Good Faith Effort Procedures pursuant to 49 CFR Part 26.53 and Appendix A to CRF 49 Part 26**

The Prime Consultant must demonstrate GFE in achieving the goal prior to contract award. The Prime Consultant can demonstrate GFE in either of two ways:

1. The prime consultant has obtained sufficient DBE participation to meet the established goal; or
2. The prime consultant provides documentation that evidences its good faith efforts to meet the goal, even though it failed in obtaining sufficient DBE participation to do so.

**Prime Consultant**

The Prime is responsible for providing documentation that shows tangible evidence that good faith efforts were made to meet the goal and submit to Consultant Services Office (CSO).

**Consultant Services Office**

CSO is responsible to forward GFE submission to OECR with two (2) business days of receipt.

**Office of Equal Opportunity**

OECR will have five (5) business days after receipt to provide response. OECR will review, analyze and provide determination/recommendation to CSO. OECR will utilize the requirements established in 49 CF 26.53 and 49 CFR 26 Appendix A as the foundation of the review process. [Appendix A](#) is not an all-inclusive list of efforts and shall only be used as guidance in OECR's analysis.

**700.05.03 Written Certification Form (271-057)****WSDOT Project Manager (PM)**

The Written Certification will be completed for all agreements during contract close out. The WSDOT PM will be required to sign and certify that he/she has reviewed the contract records, monitored the work site (as appropriate) and determined that the DBE performed the work of their subcontract with their own forces. The WSDOT PM will crosscheck the documents to ensure the information on the form is consistent with the DBE program documents submitted by the Prime Consultant. The WSDOT PM will forward the Written Certification form, attach the completed DBE On-site Reviews forms and any written explanation of underruns (that have been provided by the consultant) to their Area Consultant Liaison (ACL) and the Region OECR.

**Region OECR**

Region OECR will upload the form and documents in DMCS and provide completed copy to HQ OECR DBE staff.