

## CHAPTER 14 – DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

### 14.1 OVERVIEW

United States Department of Transportation (USDOT) regulations at [49 CFR 26](#) require recipients of Federal-aid highway and other funding to participate in the Disadvantaged Business Enterprise (DBE) program. The program is intended to remedy past discrimination and remove barriers to competition among disadvantaged businesses in Federal-aid contracting. All Local Agencies and their contractors and consultants must take steps to make sure that DBEs are encouraged to compete for construction contracts, procurement contracts, grants, services, financial aid or other benefits.

#### 14.1.1 Contract Assurances

Under **49 C.F.R. 26.13**, local agencies are required to have a signed policy statement expressing their commitment to DBE participation. For an example, see the comprehensive template in [Attachment D](#) of the [Nondiscrimination Handbook for Local Agencies](#). All LAP Agreements executed with FDOT include the federally required (DBE participation) assurance language provided at [49 CFR 26.13\(a\)](#). In addition, each Local Agency contract signed with prime contractors, prime consultants and all related contracts signed with subcontractors and subconsultants must also include the assurance language provided at [49 CFR 26.13\(b\)](#). For *construction* contracts advertised after August 2012, this assurance is included as part of the [FHWA 1273](#). For *consultant* contracts, the assurance is included as part of the Department's Appendix I: [Terms for Federal-Aid Contracts](#) and is available for Local Agencies' incorporation into professional services or other non-construction contracts and sub-contracts.

The Local Agency Resident Compliance Specialist (RCS) is responsible for ensuring the prime contractor incorporates **FHWA 1273** in all construction subcontracts, per [District Construction Office Memo 10-12](#). The Local Agency project manager or designated responsible charge is responsible for ensuring prime consultants incorporate the Terms for Federal-Aid Contracts in all subconsultant contracts.

### 14.2 STATEWIDE GOVERNING DBE PROGRAM

The only approved DBE Program in the State of Florida for application on Federal-aid highway projects is the [FDOT DBE Program Plan](#) and related [FDOT Approved Goal](#). **Local Agencies participating in LAP may not use alternate DBE programs or goals on FHWA funded projects without USDOT approval, even if the program is approved by another modal agency.** Under the federal requirements and the direction of FHWA, the Florida Department of Transportation (FDOT) performs the following key actions:

- Establish a certification program which registers and certifies businesses as

DBE.

- Provide a DBE directory listing of all eligible firms statewide. Firms must have each by certified work type listed in association with their contact information,
  - FDOT's directory may be accessed at:  
<http://www3b.dot.state.fl.us/EqualOpportunityOfficeBusinessDirectory/>
- Report DBE awards or commitments and payments (on behalf of the sub-recipients or Local Agencies) biannually
  - FDOT achieves this by utilizing the [Equal Opportunity Compliance \(EOC\)](#) web-based application for payment data collection.
- Report bidders lists for all Federal-aid projects (on behalf of the Local Agencies)
  - FDOT achieves this utilizing data collected in EOC.

**Note:** A Local Agency may track other programs and/or goals for informational purposes on Federal-aid highway projects, BUT they may not set contract goals for the use of these businesses and are prohibited from providing a preference for local business use.

#### 14.2.1 Race Neutral Program

[49 CFR 26.51](#) requires FDOT to meet the maximum feasible portion of its overall goal through race neutral means without setting DBE goals on individual projects. Further, because FDOT has met and achieved its overall DBE goal for two or more consecutive years, it is not permitted to set race-conscious project goals until or unless it can no longer achieve its overall goal through normal, race-neutral competitive procurement processes.

If the Department does not meet the DBE program goal, it may be required to return to a race-conscious program. In a race-conscious program, goals are imposed on individual contracts, both construction and consultant. The same requirement would also be imposed on LAP projects.

#### 14.2.2 Overall DBE Goal

FDOT is required to set overall DBE goals every three (3) years. The overall FDOT DBE goal for **Federal Fiscal Years (FFY) 2015-2017 is 9.91%, effective October 1, 2014.** (The goal for fiscal years 2012-2014 was 8.60%.) FDOT aspires to spend 9.91% of FHWA funds on projects with Certified DBEs as prime contractors/subcontractors and prime consultants/subconsultants. *The goal is not a contractual requirement and neither FDOT nor Local Agencies in the LAP program may take sanctions or other punitive actions for failure of contractor(s) to meet the 9.91% goal.* However, FDOT strongly encourages contractors to seek out, solicit bids/quotes and use DBEs wherever possible, and it expects Local Agencies in LAP do likewise.

Local Agencies may include the FDOT overall goal in its federal-aid project solicitations, or an agency may determine an alternate DBE availability goal percentage for a project. DBE goals may vary based on a number of factors including but not limited to

geography, DBE availability, and scope. Setting alternate DBE goals is described in greater detail in **Section 14.2** of this chapter. It is important to note, whether a Local Agency chooses to utilize the FDOT DBE goal or a project specific DBE goal, the goal is not mandatory and cannot be incorporated as a contractual requirement.

### 14.2.3 Training and Supportive Services

Local Agencies requiring assistance with DBE program implementation should contact the District LAP Administrator, who will arrange the necessary training with the FDOT Equal Opportunity Office (EOO). In addition, FHWA and FDOT fund a number of supportive services for DBEs and firms/agencies seeking to use them. For information on how supportive services can assist Local Agencies in meeting the overall goal or on FDOT's overall Business Development Program services, visit the [EOO webpage](#).

## 14.3 LOCAL AGENCY DBE AVAILABILITY GOAL PERCENTAGES

If a Local Agency elects not to use the FDOT DBE goal of 9.91% for its Federal-aid projects, then the Local Agency must review each LAP project and set a DBE availability goal percentage accordingly. *The DBE availability goal percentage is **not** a mandatory contract requirement.* Rather it is an indicator for the contractor of the likely work that could be reasonably contracted to a DBE. The availability goal percentage could exceed or be less than the overall FDOT Goal, depending on the project size, type of work and location. The Local Agency should consider the following criteria when determining an availability goal:

1. the dollar amount of the contract to make sure that it is large enough to allow efficient subcontracting,
2. the portions of the work on the project that can be subcontracted, and
3. the availability of DBE firms in the project area able to do the required work.

The Local Agency's DBE availability goal and supporting documentation for the goal will be reviewed by the Department's EOO and also by FHWA, as applicable.

## 14.4 BID OPPORTUNITY DATA COLLECTION

In order to ensure that the DBE program is narrowly tailored in compliance with [49 CFR 26.45](#) and applicable [Supreme Court decision\(s\)](#), FDOT must maintain a statewide database of all firms that are participating or attempting to participate in FHWA-assisted contracts. The list must include all firms that bid on prime contracts or bid or quote subcontracts on FHWA-assisted projects, including both DBEs and non-DBEs. The ***Bid Opportunity List*** is used to record bidders' information for all subcontractors or subconsultants who submitted bids to primes. All contractors must enter their bid opportunity information in the [Equal Opportunity Compliance \(EOC\) System](#) within 3 business days of submission of the bid or Proposal for all subcontractors or subconsultants who quoted bids for FHWA-assisted projects.

All federally funded contracts appear in EOC referenced by the assigned five-digit FDOT contract number for bid opportunity reporting. This reporting function is separate from actual DBE payment reporting and does not require the Local Agency to create a contract screen in the [Local Agency Program Information Tool \(LAPIT\)](#) as described in **Section 14.4.1** of this chapter.

#### **14.4.1 Local Agency Responsibilities**

All LAP projects are funded by FHWA and subject to bid opportunity data reporting requirements. Local Agencies are required to notify their bidders of the requirement to report information in EOC. As part of the notification, the local agency will need to provide the LAP project contract number as assigned by the Department to all bidders. Contract numbers are 5 digits and are located on page 1 of the LAP Agreement. The Local Agency shall incorporate this information and identify the contract number as part of their division one specifications federal requirements.

[DBE Special Provision \(7-24\)](#) contains the bid opportunity reporting requirement for construction contracts. The reporting requirement shall be physically incorporated in solicitations for professional service contracts. A best practice is to include the instructions in the bid/solicitation documents and also remind potential bidders at the project information or pre-bid meeting they will need to submit the required information. In addition, the agency should also notify bidders when a bid is submitted. The Local Agency will need to submit verification of reporting by the contractors or consultants to the District LAP Administrator. Verification is further explained in the following section.

**Note:** all new Primes submitting a bid will need to apply for an [EOC Userid and Password](#).

#### **14.4.2 FDOT Responsibilities**

Prior to providing concurrence to award a construction or consultant contract, the District LAP Administrator shall verify the bid opportunity information was reported in the EOC system. At a minimum, the recommended contractor or consultant for contract award will need to have demonstrated compliance with bid opportunity reporting requirements. The Local Agency may include a screenshot from EOC in the concurrence package for the District LAP Administrator's review. District LAP Administrator's will access EOC to verify information as needed for concurrence. The example provided in **Table 1** is acceptable for concurrence of recommendation to award the contract.

**TABLE 1: Bid Opportunity List Report**



Florida Department of Transportation  
Bidder Opportunity List Report

Prime Vendor: F161617641 - BARRACUDA BUILDING CORPORATION		
Proposal ID: AQU66-43119613801		Bidder Opportunity List Submitted on: 5/20/2014
Sub Vendor ID	Sub Vendor Name	Specialty Area
F592027389	WINTER GARDEN GRASSING INC	561730 - LANDSCAPING SERVICES

## 14.5 REPORTING DBE COMMITMENTS, ACTUAL PAYMENTS

USDOT regulations identify DBE Commitments as the measure for goal achievement. However, the regulations at [49 CFR 26.37\(c\)](#) also require that FDOT maintain a ‘running tally’ in order to compare the actual payments to commitments reported. FDOT complies with these requirements through the [Equal Opportunity Compliance \(EOC\) System](#).

### 14.5.1 LAPIT and Equal Opportunity Compliance System Interface

In order for a LAP project to appear in EOC, a “Local Agency Contract” screen must be created for the project in the Local Agency Program Information Tool (LAPIT) first. Contracts screens are created by the Local Agency for both professional services and construction contracts at the time of contract award. Agency staff may access LAPIT at: <https://www3.dot.state.fl.us/LocalAgencyProgram/Account.aspx/LogOn>.

The Local Agency will complete the following steps to successfully create a contract in LAPIT.

1. Login to LAPIT and select or click on “Local Agency Contracts” tab near the top of the page.
2. Select the “Create New” tab. It is located directly above the column header for Local Agency Contract #.
3. Select the project number in the drop down menu under Step 1. A separate Financial Project Identification Number (FPID) will appear for each phase (38 design, 58 construction, 68 CEI, etc.) of the project. Be sure to select the correct FPID for the phase of the contract you are creating. For example, if you are selecting the FPID for a construction contract the number may appear as 123456-1- **58**-01.
4. Complete the information in full for Step 2 Contract Information.
5. Enter the information for Step 3 Setting Dates.
  - a. The Construction Begin Date and the Estimated Construction Complete date should be entered when the Local Agency issues a Notice to Proceed.
  - b. The Actual Construction Complete Date should be entered when the Local

Agency issues a project acceptance to the contractor.

6. Complete the information for Step 4 Creating Amounts.
  - a. The Original Contract Amount equals the total contract award amount at execution.
  - b. The Current Contract Amount equals the adjusted contract award amount, as applicable. A contract award amount may only be adjusted by change order with the concurrence of FDOT. The EOC system imports the Current Contract Amount entered in LAPIT. ***The Current Contract Amount must be updated every time the contract changes in order for the EOC System to reflect the correct contract amount and also the correct DBE percentage(s) applicable to that contract.***
  - c. If there are no changes to the contract, the Original Contract Amount and the Current Contract Amount should always match.
7. Complete Step 5 Create New Contract by selecting the “Create” button.
8. In approximately 24-48 hours, the LAP project information entered in LAPIT will export and appear in the EOC System.

#### 14.5.2 Anticipated DBE Participation or Commitments

The Prime Contractor is required to enter anticipated DBE utilization data in the EOC System at or before the Preconstruction or Pre-Work Conference. The anticipated DBE participation is also known as “commitments” and would also be reflected on the Certificate of Sublet work submitted by the prime contractor. The data includes:

1. DBE company name,
2. specialty code/North American Industry Classification System (NAICS) code identifying work to be performed, and
3. the total contract amount.

In addition, prime contractors are required to promptly update the EOC System whenever DBEs are added or removed from the Certificate of Sublet Work, or when utilization changes. Even when DBEs are not used on a project, the prime contractor is still responsible for reporting zero DBE utilization in the EOC System. Prime contractors who are certified DBEs must report the portion of the contract which will be performed directly by them with their own workforces. Other DBE subcontractors that the DBE prime contractor anticipates using must also be reported.

#### 14.5.3 Payments to DBEs

The Prime Contractor must report data on actual payments, minority status, and the type of work of *all subcontractors and major suppliers* **monthly** in the EOC System. Included in the reporting are monies paid from each monthly pay application to each DBE for the work performed in their certified area(s). If no payment is made to a DBE, the Prime must report a zero dollar payment. The Prime must continue monthly reporting in the EOC System until such time that the DBE has been ‘finalized or closed out’ of the project.

#### 14.5.4 Prompt Payment

Monthly actual payment reporting requirements for prime contractors and consultants are based on prompt payment rules and laws. The same holds true for return of retainage after the sub-contractor has completed its work, not when the overall project is finished. [Florida Law](#) requires timely payment for both construction and non-construction services. Generally, invoices for construction contracts must be paid within 25 days of receipt. Invoices for consultant contracts are payable per the contract terms, but shall not exceed federal regulations in [49 CFR 26.29](#) that requires payment of all subcontractors for satisfactory performance within thirty (30) days of payment to the Prime.

**Note:** A Local Agency cannot be reimbursed by the FDOT without proof of payment to all prime contractors/consultants and sub- contractors/consultants.

Local Agencies should review and compare monthly payment applications to actual payments reported in EOC and use all available means to ensure prompt payment for subcontractors or subconsultants. Both FDOT and FHWA have a vested interest in promoting the growth and sustainability of DBEs and other small businesses. Unjustified late or default payments by the prime contractors and consultants to subcontractors or subconsultants thwart this goal, creating delays in project delivery often exposing the Prime to civil or even criminal liability.

#### 14.5.5 Local Agency Responsibilities

The role of the Local Agency (or the agency's consultant) RCS is to review and approve the DBE Commitments and DBE Payments entered into the EOC System by the Prime Contractor on Local Agency contracts. Local Agency RCS staff must monitor the system for timely entry of anticipated amounts and payment reporting activity. Local Agency RCS Staff must reject DBE credit where [Commercially Useful Function \(CUF\)](#) cannot be documented/verified or where the DBE (excluding DBE Truckers) does not [self-perform at least 30%](#) of their contract. In these events, the Prime must enter a negative payment amount equal to the amount reported so that it is not counted as DBE credit.

**Note:** CUFs are submitted to the District Contract Compliance Managers (DCCM) for final signature. CUFs and payments reported in EOC will be reviewed and verified by the FDOT as part of the Contract Compliance Reviews performed on all LAP projects. All state and federal contract compliance requirements, functions and duties are described in detail in the FDOT ***Contract Compliance Manual*** (formerly known as the ***Contract Compliance Workbook***).

### 14.6 AGENCY COOPERATION

Both FDOT and FHWA are committed to transparency and accountability in LAP project delivery. Further, the LAP program is of interest to other USDOT, Federal and State

agencies, including Offices of Inspector General (OIG), Government Accountability Offices (GAO), Program Management Improvement Teams (PMIT) and similar review groups. Local Agencies should anticipate the possibility of project or program reviews, particularly for DBE compliance. Wherever possible, FHWA or FDOT will provide reasonable notice in advance of the review, along with the material to be inspected and staff interviewed, if any. Local Agency cooperation is both expected and required by [USDOT](#) and [Highways regulations](#). Review teams will always make efforts to minimize burden or business impacts to the Local Agency during the review.

## 14.7 SANCTIONS

In the event the Local Agency fails or refuses to comply with the terms of the DBE Program and LAP, FDOT may take any or all of the following sanctions:

- A. Cancel, terminate, or suspend the LAP Agreement in whole or in part;
- B. Refrain from extending any further assistance to the Local Agency under LAP with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received from the Local Agency;
- C. Take such other action that may be deemed appropriate under the circumstances, including but not limited to Certification termination, until compliance or remedial action has been accomplished by the Local Agency;
- D. Refer the case to the U.S. Department of Transportation for appropriate legal proceedings.

## 14.8 AUTHORITIES AND RESOURCES

### [Authorities and Resources](#)

Local Agency Program Information Tool (LAPIT)

<https://www3.dot.state.fl.us/LocalAgencyProgram/Account.aspx/LogOn>

Equal Opportunity Compliance System login, training and information page:

<http://www.dot.state.fl.us/equalopportunityoffice/eoc.shtm>

FDOT's DBE directory:

<http://www3b.dot.state.fl.us/EqualOpportunityOfficeBusinessDirectory/>

[FHWA 1273](#) required for inclusion on all construction contracts and subcontracts.

[Terms for Federal Aid Contracts](#) (FDOT Appendix I) required on all consultant and subconsultant contracts.

[DBE Special Provision \(7-24\)](#) required on all construction contracts and subcontracts.

[Commercially Useful Function \(CUF\)](#) Form