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Civil Rights Disadvantaged Business Enterprise Project Contract Administration

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Disadvantaged Business Enterprise Program requirements must be met to receive Federal-aid



If you advertise and award a Federal-aid contract, as a local public agency (LPA) you have the responsibility to manage Federal Disadvantaged Business Enterprise (DBE) Program requirements.



Failure to properly manage the DBE program could lead to project termination or potential delay due to complaints or lawsuits.

To avoid this, the Federal Highway Administration (FHWA) requires you to follow your State's federally approved DBE program in which your key responsibility is DBE contract administration. While the specific requirements within each State's DBE program may vary, your main responsibility is DBE contract administration.

To keep it simple, let's separate contract administration into two phases: pre-award and post-award. Let's talk about the pre-award phase first. In the pre-award phase of a Federal-aid contract, you are expected to address administrative elements of the contract. For every contract, you must include the following clauses:



- **Assurances.** The required DBE assurances are found in the Federal DBE regulations. These assurances are contract provisions that hold the prime contractor, the subcontractors, and you, the LPA, accountable to your State's approved DBE program guidelines.
- **Prompt Payment.** The prompt payment clause ensures that the sub-contractors, including DBEs, receive payment for work performed within 30 days of the prime contractor receiving its payment.
- **Compliance and Enforcement.** Compliance and enforcement provisions may be termed differently in your State's DBE Program. However, if prime, sub-, or DBE contractors do not comply with program requirements, these provisions serve as a guide for action by LPAs and State departments of transportation.

You will also need to determine if your State's program includes a retainage provision. Retainage is the withholding of a portion of payments until the contractor's work is completed and accepted. If the answer to this question is "yes," you will need to ensure the

return of retainage verbiage is included in the contract. A return of retainage clause ensures all subcontractors, including DBEs, receive retained monies due to them upon the completion of their part of the contract. The LPA is responsible for enforcing the return of retainage clause.



Also in the pre-award phase, we also must address the DBE goal. This goal ensures DBE participation. If a DBE goal is included in the advertisement of the Federal-aid contract, you have these responsibilities:

1. Review the prime contractor's response to ensure they are:
 - a. Able to meet the goal, or if not,
 - b. Review and evaluate the prime contractor's good-faith efforts. Good-faith efforts are the actions that prove that, even if the contractor was unable to meet all or part of the DBE goal, it took all necessary and reasonable steps to do so.
2. Obtain a written list of the DBEs named by the prime contractor. This should include a description of the type of work and the dollar amount of the subcontract.
 - a. Ensure that DBEs identified on the Federal-aid contract are certified for the type of work they are performing using your State's certified DBE directory.
 - b. Ensure that the dollar amount listed for the work the DBE is to perform is consistent with the actual value of that work.
3. You must verify the prime contractor's commitment to the DBE firms. To do this, obtain

a written confirmation of the commitment from the listed DBEs to ensure the information obtained from the prime contractor is accurate. This written confirmation must identify the name of the DBE, the type of work the DBE will perform and the subcontract award amount the DBE is expected to receive.

Our key points for the pre-award phase were:

- Ensure your contract includes the required DBE Program provisions
- If DBE goals apply, confirm the prime contractor has complied with the program requirements.

In the post-award phase of contract administration for a Federal-aid contract, you are responsible for monitoring the project to ensure DBE Program compliance.



After a Federal-aid contract has been awarded, your responsibilities are to:

1. Conduct project-level monitoring. This means you are expected to visit the project site and to confirm and document that the listed DBEs are:
 - a. Performing the type of work specified in the contract
 - b. Performing a commercially useful function. This means the DBEs are using their own resources, including employees, equipment, materials.

You must also get confirmation from the DBE that the prime contractor is adhering to the specific contract provisions for the DBE Program, such as prompt payment, and return of retainage, if applicable.

2. Maintain records and reports. This means collecting payment, DBE participation, and other data for submission as required by your State DOT.

If you answered "yes" to the DBE goal in the pre-award phase, you have another responsibility in the post-award phase. You must ensure that the DBEs listed by the prime contractor in the pre-award contract phase, are actually awarded a subcontract for the type of

work and dollar amount (award amount) that was listed.



You must also ensure that the prime contractor does not terminate or substitute the DBE without your written approval.

The simplest way to sum up your responsibilities for a contract with DBE goals is to think of Commitment Award Payment, or CAP. By carefully and effectively monitoring your projects, the project CAP will always be straight. The prime contractor must notify you, the LPA, if the CAP is no longer equal and why prior to any change.

In other words, the DBE (or contract) goal commitment made by the prime contractor in the pre-award phase should equal the actual award made to DBE subcontractors. And finally, in the post award phase payments made to DBE subcontractors should equal the DBE goal commitment and award amounts. In essence, there should be no surprises at the end of a Federal-aid project and your CAP should always be straight. In other words:

$$\text{Commitment} = \text{Award} = \text{Payments}$$

Compliance and enforcement are essential to all aspects of contract administration. As an LPA,

you are expected to monitor Federal-aid projects to ensure that prime, sub-, and DBE contractors comply with DBE Program provisions.

Finally, as an LPA, you want to guarantee compliance with these responsibilities to ensure your project is reimbursed for funds that may have already been expended on a Federal-aid contract. By complying with your State's approved DBE Program, you will prevent project delays due to complaints, lawsuits, withholdings, or suspensions. You will also ensure successful project closeout and prevent termination or loss of State DOT funds.

Remember, these are your key responsibilities for the DBE Program:



- Follow your State's federally approved program
- You have contract administration responsibilities in two phases:

Pre-award – ensure your contracts include DBE Program provisions

Post-award – monitor and enforce DBE Program provisions

If you do these things, you will successfully complete your Federal-aid projects.

Additional Resources

- Information regarding the DBE program requirements for Federal -aid projects
<http://www.osdbu.dot.gov/dbeprogram/dbeqna.cfm>
- Regulation for participation by Disadvantaged Business Enterprises in the U.S. DOT program
http://www.ecfr.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title49/49cfr26_main_02.tpl

The content of this document is not a substitute for information obtained from State departments of transportation, appropriate FHWA Division Offices, and applicable laws. Scenarios have been simplified for emphasis and do not necessarily reflect the actual range of requirements applicable to the scenario or this topic. This document was created under contract number DTFH63-11-D-00066 by the Federal Highway Administration, U.S. Department of Transportation, and is offered to the public to heighten and focus awareness of Federal-aid requirements within the local public agencies community and reinforces the importance of these necessary policies, procedures, and practices.

This companion resource is the script content for the video production of the same name.