

4. ENSURING DBE PARTICIPATION

4.1 Procedures to Ensure Participation (§ 26.53)

A. Pre-Bid Procedures

- (1) Disadvantaged Business Enterprise (DBE) Contractor Notification
 - (a) Oregon Department of Transportation's (ODOT's) [Contracting with ODOT](#) portal is designed to provide links to the most commonly needed contracting information for current and potential contractors, including DBE contractors and subcontractors. The portal provides links to the schedule of upcoming construction projects and the Small Contracting Program (SCP) opportunities. Additionally, the Office of Civil Rights (OCR) provides a [Search Page for Upcoming Projects](#) for the next 6 months, which allows the contractor to search by component, bid let date, county, region, estimated project size, or keywords. If there are contracted DBE supportive services, bid documents will be available at the offices of the DBE Supportive Services Contractor(s).
 - (b) Plans and detailed project information may be secured from ODOT Office of Procurement, Salem, Oregon, and the Region Engineer's office in the region in which a project is located, and on [ODOT e-BIDS](#) for highway construction projects. Designated plan centers also provide project information.
- (2) Prime Contractor Notification
 - (a) All highway construction bidding opportunities are posted on the ODOT Procurement Office website as soon as they are advertised. All Bid Documents, including Plans, Specifications, Requests for Qualifications and Requests for Proposals are available for inspection by DBE contractors at ODOT's Office of Procurement in Salem, Oregon, on [ODOT e-BIDS](#), and at plan centers. Non-construction contracting opportunities are published on the Oregon Procurement Information Network (ORPIN).
 - (b) Solicitation Documents for Projects with assigned DBE goals contain written notice of the goal for Highway

Construction, non-construction contracting, and for Transit contracts, and the Special Provisions and Supplemental Standard Specifications for Highway Construction.

- (c) The Disadvantaged Business Enterprise Supplemental Required Contract Provisions are included in the Special Provisions and Supplemental Standard Specifications for Highway Construction on all federal-aid projects, as well as Required Contract Provisions Federal-Aid Construction Contracts Form FHWA 1273 (see Exhibit G).

(3) DBE Directory

The DBE Directory is available on the Internet site: <http://www4.cbs.state.or.us/ex/dir/omwesb/>

Hard copies can still be requested by contacting the Office of Minority, Women and Emerging Small Business at:

OMWESB
775 Summer Street NE, Suite 200
Salem, OR 97301-1280
Phone: (503) 986-0075
Fax: (503) 581-5115

B. Bid Opening and Contract Award

ODOT will award construction contracts to the lowest responsive, responsible bidder as required by Oregon Revised Statute (ORS) 279A, 279B, and 279C, unless an alternative contracting process is approved by FHWA or FTA. For these contracts, as well as contracts awarded pursuant to a Request for Proposal procedure (where the low bid is not the only determining factor in award, but where the Bidder must still be a responsive and responsible bidder), any bidder that fails to demonstrate that it achieved the contract-specific DBE participation goal and, upon such failure to achieve the goal, also fails to demonstrate that it made sufficient good faith efforts to do so, shall be deemed non-responsive and therefore shall be ineligible for award of the contract.

ODOT requires that any DBEs listed by the bidder for participation in the contract be certified as eligible DBEs as of the date of bid opening. The OCR shall review the bidder's submittal to confirm each DBE firm's certification status.

(1) DBE Commitment and Utilization Form Part I (see Exhibit I)

All bidders (including DBE bidders), must submit with their sealed bid proposal the DBE Commitment Certification and Utilization Form Part I listing the name, type and value of work committed to each

DBE subcontractor whose work will be used to fulfill a project-specific goal. If the project-specific goal is zero, all Bidders on federal-aid funded projects must submit the signed form with business and project information, even if there are no committed DBE firms listed.

Credit toward meeting the contract goal varies with the type of DBE firm:

- (a) Construction firms: supply labor and materials to perform a discrete element of the work - 100% credit. The DBE firm must have an active role in purchasing supplies and materials to perform its specific element of work. To receive credit towards the project goal, the DBE firm shall negotiate price, arrange for delivery, and pay for the supplies and materials required for the work to be performed
- (b) Manufacturers: firms that operate or maintain a factory or establishment that produces on the premises the materials or supplies obtained by the contractor - 100% credit.
- (c) Equipment rental firms: equipment must be owned by and registered to the DBE - 100% credit.
- (d) Regular Dealers/Suppliers: must assume actual and contractual responsibility for materials - 60% credit.
- (e) Brokers, packagers, ad hoc suppliers, manufacturers' representatives: no credit for materials, transportation, or other costs - Net Fee credit
- (f) Joint Venture: The contractor may count toward its DBE goal only that portion of the work that the eligible DBE firm actually does with its own forces. For DBE Joint Venture Application, see Exhibit J.

Should the joint venture be comprised of eligible DBEs only, the entire contract award amount shall be counted toward meeting the DBE project goal.

Joint ventures bidding as primes must also meet the assigned project goal for providing subcontracting opportunities for DBEs.

In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, count the work the eligible DBE has committed to performing with its own forces as well as the work that it has committed to be performed by eligible DBE subcontractors and eligible DBE suppliers.

A review of the committed DBE firm's work areas (bid items) as listed on the DBE Commitment Certification and Utilization Form is

then completed. If the review by the Office of Civil Rights indicates that the committed DBE firm may not be able to perform the bid items for which the firm has contracted, or that the DBE firm is not certified in the specific types of work, the prime contractor and the DBE firm will be informed and given an opportunity to provide reasonable documentation that the work the DBE firm performs is eligible for DBE credit on the project.

The signature of the Bidder shall be affixed to the DBE Commitment Certification and Utilization Form, or, in the case of an electronic bid, the authority of the person submitting the bid shall be verified. Failure of the Bidder's signature to appear on the form shall render the bid proposal non-responsive.

(2) DBE Commitment and Utilization Form Part II (Good Faith Efforts)

In the event a bidder is unable to meet the minimum expected participation per the requirements of DBE Commitment Certification and Utilization Form, Part I, that bidder shall provide additional information regarding good faith efforts per the requirements of Part II. This information must be included at the time of bid opening.

Types of actions that should be considered as part of the bidder's good faith efforts to obtain DBE participation are listed in Appendix A to 49 CFR 26. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

In determining whether a bidder has made good faith efforts, ODOT may take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, ODOT may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, ODOT may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts in accordance with 49 CFR 26 Appendix A.

(3) Administrative Reconsideration

If it is determined that the apparent successful bidder/offeror has failed to meet the goal or demonstrate adequate good faiths efforts, ODOT, before awarding the contract, will notify the bidder/offeror in writing within 15 (fifteen) calendar days of the bid opening. The notification will include the reason for the determination and provide the bidder/offeror an opportunity for administrative reconsideration.

Administrative Reconsideration includes:

- (a) The bidder/offeror will have the opportunity to provide written documentation or argument to the Review Committee, consisting of ODOT personnel, 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.
 - (b) Upon request, the bidder/offeror 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.
 - (c) The Review Committee will make a decision on reconsideration within 3 working days after reviewing the evidence provided by the apparent successful bidder/offeror.
 - (d) 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.
 - (e) The result of the reconsideration process is not administratively appealable to the U.S. Department of Transportation.
- (4) Committed DBE Breakdown and Certification Form (See Exhibit K)

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 ("Form 2") for each DBE committed to meet the goal on the project.

The Form 2 must be completed and submitted within ten calendar days of notification of award, and prior to contract execution. Completed forms may be submitted by email, fax, or mail to:

Email: OCRInfoRequest@odot.state.or.us

Fax: (503) 986-6382

Mail: ODOT Office of Civil Rights,

355 Capitol Street NE, MS 31
Salem, OR
97301-3871

Failure to provide detailed DBE information to ODOT within ten calendar days after receiving award notification shall be cause for cancellation of the award and withdrawal of the contract and may be cause for forfeiture of the proposal guaranty.

The contractor must 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 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. If the value of work indicated on the Committed DBE Breakdown and Certification Form is less than that indicated on the DBE Commitment Certification and Utilization Form, the contract award will be canceled and the contract withdrawn.

Authorized representative of both the prime contractor and the committed DBE must sign 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 will cause the contract award to be canceled and the contract withdrawn.

C. Counting DBE Participation Towards Contract-Specific Goals

(1) Crediting

The contractor shall count toward meeting its DBE goal only those expenditures originally committed to eligible DBEs prior to contract award, and those on which committed DBEs perform a Commercially Useful Function (CUF) on the project.

When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward the DBE goal only if the DBEs subcontractor is itself an eligible DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals, with the exception of trucking where specific conditions apply. (See Section 3.3, Counting DBE Participation Towards Meeting Annual Goals).

Credit shall be authorized for DBE subcontractor participation under a DBE contractor provided a CUF is performed and such participation was part of the DBE contractor's original commitment prior to contract award.

If a DBE is no longer certified, the dollar value for work performed under the contract after the date of decertification will not be counted towards the overall goal.

The participation of a DBE subcontractor will not be credited towards the prime contractor's DBE achievements, or the overall goal, until the amount being counted toward the goal, and any retainage held by the prime contractor has been paid to the DBE.

(2) Good Faith Efforts

If a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, the prime contractor will make good faith efforts to find another DBE subcontractor to substitute for the original DBE. 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 project. Good Faith Efforts shall include steps as outlined in 49 CFR 26, Appendix A.

(3) Crediting for DBE Prime Contractors

The requirements of Section 4.0 will apply to DBE bidders/offers for prime contracts. In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, only the work the DBE has committed with its own forces as well as the work that it has committed to be performed by DBE subcontractors or suppliers will be counted.

(4) Over-concentration Considerations

If OCR determines that DBE participation is so over-concentrated in certain types of work or contracting opportunities that it unduly burdens the opportunity of non-DBEs to participate in that type of work, OCR will develop appropriate measures to address the over-concentration. The OCR will seek approval of such measures from the appropriate operating administrations and, at that time, the measures will become a part of this Program. Currently, ODOT is unaware of any types of work that have a burdensome over-concentration of DBE participation, however, OCR will continue to monitor for indications of over-concentration.

D. Civil Rights Compliance Tracking System (CRCT)

See Section 7, Monitoring and Record Keeping for information on DBE program data collection, tracking, and reporting activities.

4.2 Contract Performance

The [ODOT Construction Manual](#) provides procedures and guidance for administration of construction contract performance after award of the

contract, and delegates the authority for all DBE Program compliance to the Project Manager assigned to the project. All communication with the Prime Contractor will be through the Project Manager, and all decisions regarding contract compliance will be made by the Project Manager and the Office of Contract Administration.

A. Contractor's DBE Liaison Officer

Section 08.00 of the Disadvantaged Business Enterprise Supplemental Required Contract Provisions requires the contractor/vendor to designate a DBE Liaison Officer to administer the contractor's DBE program. The name of this individual must be provided to ODOT project management personnel at the pre-construction conference.

B. Submission of Committed DBE Subcontracts

The contractor must enter into subcontracts with the DBEs identified in the Committed DBE Breakdown and Certification Form for the bid items and amounts specified therein or more. These agreements must be submitted for approval to the Project Manager prior to the start of work under the subcontract in accordance with ODOT's Construction Manual. It shall be the responsibility of the Project Manager or Contract Administrator to assure that all required Federal and State provisions are included in all contracts and subcontracts.

C. Commercially Useful Function (§ 26.55(c))

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.

(1) DBE Work Plan Proposal - Form 3A

The prime contractor is responsible for collecting and submitting the the [DBE Work Plan Proposal Form 3A](#) (Exhibit M), which must be completed by all committed DBEs and all DBEs participating as subcontractors. The purpose of the Form 3A 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 rule.

(2) DBE Commercially Useful Function Review – Form 3B

The actual CUF review will be performed by personnel assigned the task by the Project Manager per the ODOT Construction Manual, or the Contract Administrator for non-construction contracts. The CUF report will be maintained as part of the project file. The results of the CUF report are entered into OCR's CRCT database. The PM or designee must complete at least one [DBE Commercially Useful Function Review Form 3B](#) (Exhibit N) as follows:

- For each twelve month period, for Projects where the DBE's Work lasts longer than twelve months.
- 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, (for the new DBE).
- Whenever a significant Change Order changes or affects the Work to be accomplished by the DBE (when a new type of work is added).

D. CUF 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 PM or CA, in consultation with OCR, will determine if the DBE is performing a CUF given the type of work involved and normal industry practices.

Decisions on CUF matters are subject to review by the concerned operating administration (FHWA or FTA), but are not administratively appealable to USDOT.

(1) DBE Management

The DBE majority owner(s) must manage the work contracted. The management shall include scheduling work operations, ordering equipment and materials (if materials are part of the contract), 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.

(2) DBE Workforce

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:

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

(3) 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 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.

(4) Equipment Leased From the Prime Contractor

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

- (a) The equipment is of a specialized nature,
- (b) The equipment is readily available at the job site,
- (c) The operation of the equipment is under the full control of the DBE,
- (d) The lease arrangement is for a short term, and
- (e) The lease arrangement is a normal industry practice.

(5) DBE Trucking Firms

When a DBE trucking firm is being used to meet an assigned contract goal, the DBE subcontractor will be required to individually identify all trucks intended for use on the Project on its DBE Work Plan Proposal Form 3A, or an attached list. The DBE must provide detailed information about each driver, each truck and any required supporting documentation.

ODOT will require submission of a DBE Daily Trucking Log Form (734-2916) or an approved equivalent that include the same information on a weekly basis for any weeks in which DBE trucking was performed on the project. The DBE Daily Trucking Log must identify the trucks 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 following factors will be used to determine if a DBE Trucking firm is performing a CUF:

- (a) 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.
- (b) The DBE must itself own and operate at least one fully licensed, insured and operational truck used on the contract.
- (c) 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.

- (d) 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.
- (e) 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.
- (f) 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.

E. Sub-Tier Contracting

Sub-tier DBE subcontracts may be counted toward the prime contractor's DBE goal provided it was listed in the original DBE commitment prior to bid award.

F. Termination and Substitution

The 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. These requirements apply to both pre-award and post-award terminations or deletions of, or substitutions for, DBE firms put forward by offerors in negotiated procurements.

Approval for DBE termination or replacement will be granted only if the following has been demonstrated:

- The committed DBE is unable, unwilling or ineligible to perform, poses a health or safety risk, or for other documented good cause as set out in 49 CFR 26.53(f) that the agency determines compels the termination of the DBE subcontractor;
- The contractor exercised good faith efforts to enable the DBE to perform; and,

- The work/amount is being replaced by another certified DBE, or the contractor has submitted written documentation of good faith efforts to obtain a substitute DBE.

Before transmitting its request to terminate and/or substitute a DBE subcontractor, the prime contractor must give notice in writing 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. The prime contractor must give the DBE five days to respond to the prime contractor's notice and advise ODOT and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why ODOT should not approve the prime contractor's action. 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.

The contractor's ability to negotiate a more advantageous contract with another subcontractor will not be considered a valid basis for replacement. Requests to substitute committed DBEs will be scrutinized closely. The contractor must document efforts made at the time of commitment to determine that the DBE was capable of performing the work and subsequent efforts made to enable the DBE to perform. The evidence must show that the contractor investigated the DBE's capacity and capability of performing at the time of the commitment. The DBE must have possessed or have had access to adequate resources and workforce. The evidence must also show that the contractor assisted the DBE with supportive actions to enable the DBE to perform.

The notice from the contractor requesting replacement must include the following:

- (1) Documentation as to the contractor's investigation, at the time of the commitment, of the DBE's capacity to perform work;
- (2) Documentation as to the contractor's good faith efforts to enable the DBE to perform as outlined in Appendix A of 49 CFR part 26;
- (3) All documentation describing and citing specifications or inaction of the DBE which constitute their unwillingness or inability to perform;
- (4) Identification of the DBE proposed for replacement with the bid items and amounts to be performed by the replacement; and
- (5) The total dollar amount, per bid item, paid to date to the DBE to be replaced.

G. Prompt Payment

In accordance with ORS 279C.850, the agency includes provisions in each contract that require the contractor to promptly pay each subcontractor, including a materials supplier, for satisfactory performance of their

subcontracts, within 10 days out of amounts paid to the contractor by the agency under the contract. If the contractor fails to make payment to the subcontractor within 30 days, the contractor owes the amount due, plus interest charges that begin at the end of the 10 day period within which payment was due.

These prompt payment provisions are included in the [Oregon Standard Specifications for Highway Construction](#), Section 00170.0 Required Payments by Contractors. Section 00195.50(d) Reduction of Retainage provides a process for the return of any retainage held after a subcontractor's work is satisfactorily completed.

The contractor must maintain records of all subcontracts entered into with DBEs and records of materials purchased from DBE suppliers. Such records shall show the name and business address of each DBE subcontractor or vendor and the total dollar amount actually paid to each DBE subcontractor or vendor.

(1) Summary Report of Subcontractors Paid:

The contractor must also submit a signed [Summary Report of Subcontractors Paid](#) to the Project Manager's office, which certifies that the contractor has made payments to the subcontractor as indicated on the report and has supporting documentation. All progress payments and payments made when any retainage held is returned to a subcontractor must be indicated on the report.

A [Summary Report of Subcontractors Paid](#) must be submitted monthly and at the completion of the project. The report must be submitted by the fifth of the month following the contractor's receipt of payment from the agency. (Example: Work performed in January will be paid by the agency in February; the Summary Report showing work performed in January and the related payments made in February must be submitted to the Project Manager by March 5.)

(2) Crediting Payments

The participation of a DBE subcontractor will not be credited towards the prime contractor's DBE achievements, or the overall goal, until the amount being counted toward the goal, and any retainage held by the prime contractor has been paid to the DBE.

H. DBE Supplemental Required Contract Provisions

Failure of any contractor to meet the DBE Supplemental Required Contract Provisions and the DBE program authorities cited in provisions, may constitute a breach of contract for which the imposition of the following sanctions, at the discretion of the ODOT Highway Division Administrator, may occur:

- (1) Temporarily withholding progress payments until the contractor complies with these contract provisions where possible through future performance.
- (2) Permanently withholding payment for work already performed in a manner that constitutes a breach of contract.
- (3) Suspension of work for cause as provided under the current Standard Specifications for Highway Construction in sections 00150.00 and 00180.70.

Any bidder, contractor, or subcontractor on a public contract (State or Federal) that violates the provisions of ORS 200.075 may have its right to bid on or participate in any public contract suspended for up to 90 days for a first violation, up to one year for a second violation, and up to five years for a third violation. Each violation shall remain on record for five years. After five years, the violation will no longer be considered in reviewing future violations.

Failure of a bidder, contractor, or subcontractor to comply with the DBE Supplemental Required Contract Provisions and other authorities cited in Section 01.00 (b) of these provisions wherein there appears to be evidence of criminal conduct will be referred to the Oregon Department of Justice and/or the USDOT Office of Inspector General for criminal investigation, and if warranted, prosecution.

4.3 Race Neutral Remedies and Other Good Faith Efforts

A. Fostering Small Business Participation (§ 26.39)

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. In addition, the OCR will provide information on DBE certification and DBE program requirements and procedures.

While sub-recipient agencies are not eligible to participate in ODOT's Small Contracting Program, ODOT encourages sub-recipients 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. Each year the OCR is involved in at least two small business

events, which may be coordinated with other USDOT recipients and open to all small businesses. These events as well as others that might be of interest to the small businesses are regularly updated and available on the [OCR Events page](#).

(1) 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.

The Small Contracting Program is made up of three divisions:

- (a) Small Contracting Program for Architectural, Engineering (SCPAE): This program registers companies to provide architectural, engineering, land surveying, and related services on ODOT projects. Contracts awarded under this program will have a value not to exceed \$150,000. This type of procurement is defined in ORS 279C.100.
- (b) Small Contracting Program for Construction (SCPC): This program registers contractors to provide Public Improvement and Public Works construction on ODOT projects. Contracts awarded under this program will have a value not to exceed \$100,000. This type of procurement is defined in ORS 279A.010(1)(cc) for Public Improvement and ORS 279C.800(6) for Public Works.
- (c) Small Contracting Program for Other Services (SCPOS): This program registers companies to provide non-architectural and engineering (Non-A&E) Professional Services and Trade Services. Contracts awarded under this program will have a value not to exceed \$150,000. The scope of services under the SCPOS is based upon the procurement authority outlined in ORS 279A.050(2), 279A.050(3), and OAR 125-246-0170(2)(c).

See the [SCP Frequently Asked Questions document](#) for additional information about ODOT SCP.

(2) Small Business Supportive Services & Outreach

Through the use of state funds, ODOT provides training and a host of supportive services to small businesses through the initiatives below:

- (a) Business Management classes through the Small Business Development Center (SBDC) Network: ODOT offers scholarships to DBE, MBE, WBE or ESB certified firms to pay all but \$200 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.
- (b) Quarterly Small Business Workshops: These are events hosted in Portland on a quarterly basis and in other regions. The workshops provide free training and information on a variety of topics common to small businesses, ranging from bonding to panel discussions on how to do business with ODOT. The workshops provide networking opportunities with prime contractors and other agencies to assist with certification questions.
- (c) Mentor-Protégé Program: ODOT sponsors several Mentor-Protégé partnerships managed through the Port of Portland's program.
- (d) Small Business Resource Guide: ODOT contracted with a consultant to survey a wide range of training and business services providers and compile a guide to be used as a resource directory by small businesses. The Guide has been distributed in hard copy and is available on the Office of Civil Rights' website.
- (e) Turner School of Construction Management: ODOT supports the annual classes provided by the Turner School and participates in presenting information to the attendees. Classes offered cover business essentials such as estimating, developing a business plan, and blueprint and CAD drawing reading.
- (f) Tradeshows and Marketplaces: Outreach is critical to the success of ODOT programs. Therefore, ODOT contributes to and participates in minority chamber of commerce events and the annual Oregon Association

of Minority Entrepreneurs (OAME) Tradeshow, the annual Minority Enterprise Development Week Tradeshow, and various other race- and gender-neutral small business events hosted by ODOT stakeholders.

(3) 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.

B. Business Development Program(s) (BDP)

ODOT has developed race- and gender-neutral small business programs including the Emerging Small Business (ESB) Program, which was established in response to Oregon Revised Statute (ORS) 200. The ESB Program has strict limits on average gross receipts, number of employees and participation time. In 2007 all certified DBE, MBE and WBE firms which met the eligibility criteria were granted ESB certification status to increase the contracting opportunities available to them.

C. Mentor-Protégé Program

In order to further the development of DBEs to move into non-traditional areas of work and to compete in the marketplace outside the DBE program by receiving training and assistance from other firms, the Mentor-Protégé Program as outlined in 49 CFR 26.35 is available. ODOT has partnered with the Port of Portland to participate in their established Mentor-Protégé Program. DBEs involved in this program are independent business entities that meet the requirements of section 6.3 of this document. Firms are Oregon state certified DBEs before they begin participation in the Mentor-Protégé program.

D. DBE Supportive Services Program

Contingent upon availability of Federal Highway Administration supportive services funds, ODOT will provide supportive services through consultant contractors to DBEs who are interested in participating in highway construction projects. The purpose of supportive services is to increase the number of socially and economically disadvantaged firms participating in highway construction projects and to contribute to the growth and eventual self-sufficiency of the DBE firms. ODOT will provide resource

referral information and will support business support services provided by other organizations to the greatest extent possible.