

Applicability of FHWA-1273

Contractors and service/product providers are sometimes concerned that including (or referencing) FHWA-1273 will legally obligate them to all its provisions. Is this true?

No. The point of FHWA-1273 is to have a one-stop compendium of requirements. Provisions do not attach through 1273 inclusion or reference, but by law. This means that it is *never wrong* to include 1273. It is legally impossible to hold contractors to inapplicable provisions because they included (or referenced) FHWA-1273. Though not official guidance, please see below a rough breakdown of applicability:

Section I – General

- all parties
- all legal instruments

Section II – Nondiscrimination

- EEO starts at \$10k (however Title VII, ADEA, EPA and ADA do not have dollar thresholds)
- Title VI has no threshold. *Recipients* must ensure nondiscrimination based on race, color, n.o.

Section III – Nonsegregated Facilities

- \$10k threshold

Section IV – DBRA

- 2k Prime Contract threshold

Section V - CWHSSA

- applies at \$100k

Section VI – Subletting or Contract Assignment

- applies to all prime contracts

Section VIII

- all parties
- all legal instruments

Section IX – Clean Air & Water Pollution

- all parties
- all legal instruments

Section X – Certification of Suspension/Debarment

- applies at \$25k (regardless of tier)

Section XI – Lobbying Certification

- applies at \$100k

Attachment A – Appalachian Development Preferences

- applies to projects funded under the ARDA of 1965

Contractors and service/product providers sometimes object to compliance requirements on projects, even elevating concerns to District or State Construction.

While reasonable minds can differ, allowing contractors to interpret compliance requirements at the project level is ill-advised and irresponsible. Compliance with terms and conditions as determined by the contractor creates a conflict of interest and lacks credibility. Further, FHWA has original jurisdiction over FHWA-1273 and, under the Stewardship & Oversight Agreement, approves the FDOT compliance program. This makes FDOT the arbiter of what constitutes compliance. Contractors are regulatorily required to cooperate with State DOT requests for project information and documentation. That said, this does not mean the industry does not have a critical role in building and sustaining the compliance program. Some of the best compliance practices have come by suggestion from

	industry. Suggestions, complaints, comments should all be documented and sent to EOO for consideration in the next CCM update. EOO is also conducting regular meetings with FTBA to ensure that industry interests are systemically considered.
What happens when all or part of FHWA-1273 is missing from a contract or subcontract?	It depends. When/if this occurs, immediately contact the DCCM for instructions. Where the contract was procured with the full knowledge of all parties that federal provisions apply, then it may be possible to cure the oversight with a CO or SA. But contracts noticed, bid and let without this understanding may be ineligible for FHWA-assistance.
Sometimes FHWA-1273 has a space at the bottom of each page for contractor/subcontractor initials. Is this considered altering the FHWA-1273?	No. FHWA-1273 should not be altered, edited or reformatted. However, adding a line for initials to acknowledge receipt does not materially change the document. Initialing each page is not required and failure to do so is not a violation. When in doubt about possible alterations to FHWA-1273 contact the DCCM, Statewide Compliance Administrator or FHWA Division Office
Electronic Payroll and Compliance Systems	
If a contractor uses an electronic payroll system, can they also allow paper/pdf submissions?	No. Even if the electronic system is contractor-elected, the specification requires exclusive use of that system. Some contractors elect to use these systems voluntarily. This is especially true of large primes that work in states where these systems are required. In Florida, even voluntary adoption of electronic systems requires exclusive use of that system.
How can smaller firms with limited computer access use electronic payrolls systems?	Elations populates live data from a contractor's accounting system, whether paper or pdf copies of payrolls. Currently, FDOT is not certain whether LCP tracker can populate live data. The system has to be able to MAP to the contractors accounting system for download otherwise manual entry can be used.
Would this be used for LAP projects or just DOT projects or both?	Currently, FDOT only requires e-systems on select major projects none of which are LAP administered. If or when FDOT adopts a statewide system, LAP would likely be included. However, electronic system can be used for all projects if the State DOT elects to do so. For example, Colorado DOT currently uses an electronic system on both CDOT-advertised and Local Agency advertised projects. It will be implemented on all LAP projects effective 7/1/22. There are no limitations on the "type" of project that it can be used on as the systems are web based and merely require the project to be set up and access granted.
How are records retained?	The specification requires that the data be delivered at the end of the project into a combination of pdf files and excel reports.
Is there training for RCSs on projects using these systems?	Yes. The specifications require the system owners provide training and guidance to owner's reps (RCS), contractors and subcontractors to ensure that all parties can use the system.
What happens if a sub is suspended/debarred?	In Elations, debarment and suspension data is validated on a weekly basis in Elations. LCPtracker does not have a built-in check for debarment and suspension validation.
What is the cost to the contractors?	The Systems are subscription based and are dependent on several variables including Modules used, the scale of the client and volume of projects, project construction cost or number of projects).

Are these systems available in the Spanish language?	Training is available in both English and Spanish.
Do these systems calculate annotated fringe so value applies to ST & OT equally?	<p>Applying fringe is calculated differently if ST & OT hours apply. For example, employee base rate of pay for OT may exceed WRT OT rate. Those extra dollars paid can reduce ST rate owed.</p> <p>The fringe benefits reporting function provided by Elation allows the contractor to specify in detail how their fringe benefits are paid out, not only for regular time hour worked, but also for the premium time (OT) worked. Therefore, the system will be able to validate against the total OT pay compliance.</p> <p>LCPtracker takes the hourly fringe value (that is calculated outside of the system by the user and input by the use) and applies it to all hours worked both ST and OT. Note: FDOT is addressing this as it can result in incorrect fringes.</p>
Does program compare total gross wages owed by WRT to total gross dollars/fringe paid by contractor?	Yes. Both e-systems currently in use in Florida compare gross wages owed to gross dollars/fringe paid.
How do e-systems handle OJT?	For LCPTracker and Elations, training Classifications are entered like a wage classification with rates and trainees are reported in that training classifications. Training hours are then cumulated against that training classification for that trainee. Reports can then be generated for each trainee and hours accumulated.
Are Florida and Texas OJT and SWD programs federally funded or state-funded?	Both FDOT and TxDOT use annual OJT Supportive Services apportionment from FHWA for their OJT programs. Both states have also applied for and received FHWA grants of 400k for strategic workforce development. However, both also invest significant state funding into workforce development. For example, FDOT's current investment is approximately \$2.5 million.
EEO	
If the subcontract, purchase order or lease agreement is under 10k and there is no labor, does EEO apply? What does apply?	No. EEO and the obligation to ensure Nonsegregated Facilities apply to legal agreements of \$10k or more.
How often does OFCCP update its participation goals for women and minorities?	OFCCP sets workforce goals using the decennial census, so updates are rare. OFCCP will generally adjust goals after each census, whenever it updates the desk references or if there has been a substantial change in the workforce. The goal for women in construction has been 6.9% for many years. However, minority inclusion goals are based on state and county. OFCCP's website offers a list of construction participation goals: https://www.dol.gov/sites/dolgov/files/ofccp/ParticipationGoals.pdf
Is failure to achieve the OFCCP Construction Participation Goals a compliance deficiency?	No. These goals are aspirational based on OFCCP's analysis of census products. They are not quotas and may not be enforced as such. Rather, it is the contractor's good faith efforts toward parity that are reviewable and sanctionable.

<p>What about changes to the workforce related to Hurricanes?</p>	<p>OFCCP understands that populations change. It emphasizes the importance of monitoring and documenting the contractor’s efforts to achieve parity. In other words, goal achievement is not as important as contractor demonstration of its efforts.</p>
<p>Who has jurisdiction over contractor compliance with EEO requirements?</p>	<p>The US Department of Labor (USDOL) Office of Federal Contract Compliance Programs (OFCCP) is the agency responsible for EO 11246, 41 CFR 60 and Affirmative Action Goal compliance for all FHWA-assisted contracts. However, US Equal Employment Opportunity Commission (EEOC) has original jurisdiction for enforcing EEO laws like Title VI, ADEA, EPA and Title I of the ADA. For EEOC, it is the size of the employer that determines applicability, not the type of firm or how its work is funded. These two agencies work and may issue violations independently. Thus, discriminatory terms/conditions of employment by a contractor may violate both OFCCP (based on the federal contract) and EEOC authorities (based on the firm’s size), though rights to file in court for private damages rests with EEOC in most cases.</p>
<p>Since US Census discontinued American Fact Finder, it is difficult to conduct company-wide workforce analyses. Any suggestions?</p>	<p>As with many aspects of contract compliance oversight, DCCMs and compliance specialists may exercise leeway how to assess contractor recruitment or training parity. Risk may be an important factor, as is the ‘inexorable zero’ or when the workforce is comprised of only one race, gender or ethnicity. In other cases, the contractor may request training or assistance on achieving workforce parity for itself or subcontractors. Here are some options:</p> <ul style="list-style-type: none"> • OFCCP sets the minimum standard for parity analysis with its women and minority participation goals. Simply compare the workforce make-up with percentage goals provided by OFCCP. This analysis is simple to conduct and it provides a threshold for determining whether deeper analysis is necessary. However, the percentages are based on construction generally and not broken down by work discipline. This could mean a higher availability than is reasonable or even possible for the transportation construction industry. • Use the EEO tables from the 5-year American Community Survey. Go to: https://www.census.gov/acs/www/data/eoo-data/eoo-tables-2018/. From here you can choose occupation by sex, race and ethnicity using either worksite or residence geography. There are also tables for EEO-1 Job Categories, as well as Occupation Codes. Spend some time learning how to use the new Census tools and the limitations of the data. Avoid categories that are too broad for effective use. For example, ‘carpenter’ will provide availability data for anyone in the region available for carpentry – vertical construction included, whereas ‘paving/tamping machine operator’ might be a bit narrower. • Put the July Report to work for you. FHWA-1392 aggregate data for an FDOT District may not be perfect data, but it is data that is specific to the transportation construction industry. It is also a lot easier to work with a definite list of job categories you know and understand rather than trying to seek out applicable SIC, SOC or NAICS in general population data. • Check out the new EEO Explore tool provided by the US EEOC. It uses the data collected from annual submission of Forms EEO-1 to provide a searchable database. It also has a convenient mapping feature! • Ask an expert. The Florida Department of Economic Opportunity (floridajobs.org) maintains various industry data for geographic areas of the state. If you cannot find what you need online, contact them at 850-245-7205 or wser.info@deo.myflorida.com.
<p>Will the updated 1273 include updated list of posters?</p>	<p>Currently, FHWA does not anticipate any change to bulletin board posting requirements. This could change. Fortunately, FDOT EEO and SCO regularly check the FHWA website at</p>

	https://www.fhwa.dot.gov/programadmin/contracts/poster.cfm and communicate frequently with the Division Office. Any changes will be shared with DCCMs as soon as available.
What is VEVRAA and does it apply to FHWA-assisted construction contracts	VEVRAA is the Vietnam Era Veterans Readjustment Assistance Act, as amended. It applies to firms holding contracts and subcontracts directly with the federal government. FHWA-assisted contracts are between the State DOT and the contractor. VEVRAA does not apply.
District 6 July Workforce Application Beta Test	
Why is it necessary to automate the July Report?	For several reasons (beyond cost saving, time saving, and paperwork reduction). First, the size of the FHWA-assisted highway construction program in Florida makes manual reporting and roll-up an administrative burden. Second, there is currently no capacity for analyzing the submitted data. Third, USDOT and FHWA are becoming increasingly reliant on this and similar data. Finally, other State DOTs are quickly outpacing FDOT in the adoption of e-compliance tools. Florida prides itself on a state of art compliance program.
What are the features of the application?	The application includes simple, intuitive on-line data entry coupled with automatic calculation and computation. All contractors and their subs will have the ability to assign designees/agents to enter and report their workforce data on their behalf for FDOT and LAP administered contracts. It will be programmed for various reports to review data by city, contractor, county, occupation, gender, race, ethnicity, etc. As for more complex functions, the application will allow detailed workforce analysis, layering July report data over industry availability geographically and otherwise. This should assist contractors with evaluating parity and FDOT for assessing contractor successes or if any needs in recruitment assistance exist.
When will the Beta begin?	Phase 2, which is planned for FY 22-23.
Is the beta open to anyone or only those working in District 6?	All interested parties in the construction industry can volunteer to take part in the testing, regardless of location or compliance role. Send email to D6.CCWJJAuserTesting@Dot.State.FL.US to volunteer or ask general questions. During Phase 2 of the development the Application Development team will correspond with volunteers to sort them according to their areas of involvement in the Construction Contractors Annual EEO Reporting process. Once compiled, cross-sections of users will be selected to participate and give their feedback. The Application Development Team is hoping for a robust pool of volunteers for the User Acceptance Testing.
Is the District 6 application part of FDOT's move towards e-compliance?	Yes and no. District 6 identified efficient July reporting and analysis as an unmet need and proceeded with its application development. However, the FDOT has not yet determined if and how it will automate compliance for the EEO, OJT, DBE and DBRA programs. When/if FDOT decides on a statewide e-compliance system that is both functional and able to integrate with its other systems, it will ensure inclusion of automated July reporting.
DBE	
What is a bidders list and why is it important?	The DBE regulations at 49 CFR 26.11 require recipients to develop and maintain a bidders list. These lists help establish Florida's road/bridge market area so that DBE goal setting and program operations are narrowly tailored to achieve the objectives of the program. USDOT does not prescribe a particular method for creating a bidders list nor does it provide an exhaustive list of how recipients use the data. FDOT chooses to collect the data from bidders and uses it as the principal source for setting the triennial goal. Recent focus by FHWA and FDOT on the BOL is a result of construction bidders failing to provide the information. FDOT has yet to make this a matter of responsiveness, though it is only state that does not.

<p>In EOC, the first tab is sub information. Isn't that the same as a bidders list? Before EOC, wasn't it a perpetual list that could be updated.</p>	<p>No. Bidder Opportunity List entry is required by all bidders, both successful and unsuccessful, and for both State and LAP administered projects. Entry of subs into the first tab of EOC is for the winning prime and for a different purpose, namely establishing DBE eligibility and providing DBE commitments and payments (running tally). There is no regulatory prohibition against keeping perpetual or running list of bidders. However, it would be critical to keep such a list updated and not by adding newly bidding firms, but by removing those that have not submitted bids in recent years. Bidders lists must also include information about firms that is variable by nature – size, age, etc.</p>
<p>Are contractors required to enter a zero-dollar payment monthly into EOC?</p>	<p>No. Zero-dollar entries make it easier to track prompt payment in EOC, but they are not required.</p>
<p>How often must contractors enter DBE payments?</p>	<p>The regulations at 49 CFR 26.37 require recipients to maintain a 'running tally' of commitments to payments. This is especially important in a race-neutral environment as without regular payment entry, there is no way to track whether the contractor is achieving DBE commitments. While FDOT does not expect real time entry of payments, it strongly suggests monthly entry as a minimum. FDOT is hesitant to mandate this because not every project is the same and field staff need the leeway to act based on greater knowledge of the project. That said, the measure should be reasonability. Persistent, willful delays or attempts to hide lack of achievement are grounds for noncompliance findings. But delays due to unforeseen circumstances, changing project needs, etc. may be perfectly acceptable.</p>
<p>Is DBE credit awarded when no payments are entered into the EOC system?</p>	<p>If payments are not entered into EOC, then the commitments are withdrawn automatically when the project closes. Reconciliation is a valued feature of EOC but FDOT cannot rely on it because it does not occur commensurate with required biannual reporting. Where projects close in the same reporting period, the reconciliation means the data is perfect. However, on multiyear projects, a lag in payment entry can lead to overreporting.</p>
<p>What should I input into EOC if the prime contractor is not paid due to noncompliance?</p>	<p>Payments to the prime contractor triggers the obligation to make prompt payment to subcontractors and enter DBE payments. If FDOT or the LAP does not make the progress payment, then there is nothing to enter into EOC.</p>
<p>How does the RCS know if progress payments include pay items performed by specific subcontractors?</p>	<p>This question came up many times during the last two years of national audits of prompt payment and return of retainage. Some State DOTs base prompt payment on the prime's pay application, cross checking the schedule A, subcontractor invoices and DWRs. Others (including Florida) take a simpler approach. Subcontractors must be paid for properly invoiced work conducted during the period for which the prime receives a progress payment. The progress payment begins the 30-day payment window for 1st tier subs; 60-days for 2nd tier, etc. Of course, there could be exceptions for the DCCM to consider, but there is a difference between reasonable monitoring of prompt payment and accounting for payments on subcontracts to which the State DOT is not a party.</p>
<p>Can a district designate a specific day of the month by which payments must be entered into EOC by the prime?</p>	<p>FDOT requires a prime contractor to report in the EOC system payments to each DBE and MBE (at all tier levels), within 30 days of them being paid for the work performed by the DBE in their certified area(s) and mark the final payment checkbox when the prime contract has made the final payment. Failure of contractors to enter DBE payments monthly into EOC is a violation of 49 C.F.R. 26.11 and grounds for compliance action up to and including withholding of progress payments. A specific due date is not addressed at this time in the manual.</p>

Regarding long term Design Build Contracts (3+ years), why shouldn't the Prime input the overall commitment goal for the specific DBEs? Should the Commitment match the Partial Certification of Sublet amount and be adjusted with each updated sublet?	FDOT splits up the multi-year projects to reflect actual work that was done for each year. It helps with reporting accurate DBE commitments and the DBE letter grades to prevent overstating the commitments.
For DBE Primes, how are non-DBE dollars counted?	EOC removes credit for non-DBE sublets/agreements and for DBE work in areas for which the firm is not certified. The information is validated by compliance staff using the certification of sublet, subcontract and other legal agreements, CUF evaluation, etc.
If DBE Payments are not entered monthly should a Non-Compliance be issued if work was performed?	No. The RCS has flexibility in determining what is reasonable. Noncompliance action should be used when all else fails. In other words, when noncompliance reflects continued, persistent or willful failure to enter data after the RCS has requested it.
For a LAP project administered by FDOT, what is the percentage that governs? The state 40% or the Federal Agency 30%?	Roadway Classes A, B, and C are 40% regardless of FDOT or LAP administered. FDOT recommends 30% on purely local roads not on the federal highway system. Let me know if this answers the question.
False Statements and DBE Fraud	
I was shocked by the USDOT OIG presentation and it is hard to imagine any of our contractors in Florida committing these crimes. But what should I do if I suspect For a LAP project administered by FDOT, what is the percentage that governs? The state 40% or the Federal Agency 30%?	We often joke about FDOT, FHWA and the industry being a family in Florida and how those from DC or other states are <i>not</i> family. Joking aside, there is nothing funny about fraud, waste or abuse on highway projects. All of us regardless of our positions or employers have the right <i>and the responsibility</i> to report suspicious activity to the appropriate authorities. For state-funded projects, the FDOT OIG Hotline information is at https://www.fdot.gov/ig/default.shtm . For FHWA-assisted project (State or LAP-administered), USDOT OIG contact is at https://www.oig.dot.gov/fraud-hotline . Federal law provides retaliation protection for those who report fraud, waste or abuse. If you believe you have been adversely treated for having reported to or cooperated with USDOT OIG, contact the Whistleblower Protection Coordinator at 202-366-1514 or oigwhistleblowerinfo@oig.dot.gov .