

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 Program (FAHP) 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 Federal-aid contract signed with prime contractors, prime consultants and all related Federal-aid contracts signed with subcontractors and subconsultants must also include the assurance language provided at **49 CFR 26.13(b)**.

For *construction* contracts, this assurance is included as part of the [FHWA 1273](#). The Local Agency Resident Compliance Specialist (RCS) is responsible for ensuring the prime contractor incorporates *FHWA 1273* in all Federal-aid construction subcontracts.

For professional services contracts, the assurance is included as part of the Florida Department of Transportation (department) [LAP Terms for Federal-Aid Professional Services Contracts \(FDOT Form No. 375-040-84\)](#) and is available for Local Agencies' incorporation into professional services or other non-construction contracts and subcontracts. The Local Agency project manager or designated responsible charge is responsible for ensuring prime consultants incorporate the Terms for Federal-Aid Contracts in all Federal-aid subconsultant contracts.

14.2 STATEWIDE GOVERNING DBE PROGRAM

The only approved DBE Program in the State of Florida for application on Federal-aid Highway Program projects is the department's [DBE Program Plan](#) and related [DBE Goal for Federal Fiscal Years 2018-2020](#).

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. DBE programs approved by the Federal Transit

Administration (FTA) are not applicable to FHWA assisted contracts and cannot be implemented in lieu of the FDOT DBE Program.

Under the federal requirements and the direction of FHWA, the department performs the following key actions on behalf of Federal-aid sub-recipients:

- Establishes a [DBE certification program](#) which registers and certifies businesses.
- Provides a [DBE directory](#) listing of all eligible firms statewide and each firm's certified work type listed in association with their contact information.
- Reporting DBE awards or commitments and payments biannually by utilizing the [Equal Opportunity Compliance \(EOC\)](#) web-based application for payment data collection.
- Reporting bidder opportunity lists for all Federal-aid projects 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, small, minority, or disadvantaged business use.

14.2.1 Race Neutral Program

[49 CFR 26.51](#) requires the department to meet the maximum feasible portion of its overall goal through race neutral means without setting DBE goals on individual projects. Further, because the department 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 current goal is 10.65% effective October 1, 2017 and remain in effect until September 30, 2020. The overall FDOT DBE goal for **Federal Fiscal Years (FFY) 2018-2020 is 10.65%**. The department aspires to spend 10.65% 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 10.65% goal. However, the department strongly encourages contractors to seek out, solicit bids/quotes and use DBEs wherever possible, and it expects local agencies in LAP do likewise.

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 the department 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 the department's overall Business Development Program services, visit the [EOO webpage](#).

14.3 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\(s\)](#), the department 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.

The Bidder Opportunity submission in EOC closes after **90 days from the LAP Agreement execution date between the department and the local agency**. This means that EOC will not allow consultants or contractors to submit their Bidder Opportunity information greater than 90 days from the time the LAP Agreement was executed. Agencies are required to advertise within thirty (30) days from the date of the Notice to Proceed (NTP) from the department. Generally, department NTPs coincide with the date of the LAP Agreement execution. When determining the wage rate, the cut-off day for the ninety days is the date the contracting agency formally notifies the bidder. Local Agencies must continue to collect paper bid opportunity forms as needed for projects that will not be advertised within the bid opportunity reporting window. The use of paper forms ensures compliance with the Federal-aid and DBE program requirements.

LAP projects appear in EOC referenced by the assigned five-digit FDOT contract number for bid opportunity reporting. This would be the 5 digit number beginning with 'G' found at the top of your LAP Agreement. (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 14.5.1** of this chapter.)

14.3.1 Local Agency Responsibilities

Local agencies are required to notify their bidders of the requirement to report bidder opportunity information in EOC in their construction bid packages and professional services requests for proposals. As part of the notification, the local agency will need to provide the 5 digit number beginning with 'G' found at the top of your LAP Agreement to all bidders and consultants.

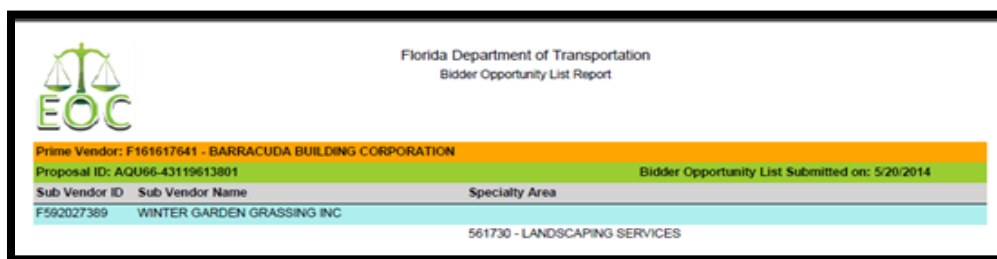
Bid opportunity instructions to contractors are included in [FDOT Form # 275-030-11](#). A best practice is to include the instructions in the bid/solicitation documents and also remind potential bidders at the project information or pre-bid meeting they will need to submit the required information. In addition, the agency should also notify bidders when a bid is submitted.

Note: Contractors and consultants must apply for an [EOC Userid and Password](#) to access the system.

14.3.2 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 OR verify the paper forms are in the local agency's project file. At a minimum, the recommended contractor or consultant for contract award must demonstrate compliance with bid opportunity reporting requirements. 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		
EOC		
Prime Vendor: F161617641 - BARRACUDA BUILDING CORPORATION		
Proposal ID: AGU66-43119613801		Bidder Opportunity List Submitted on: 5/20/2014
Sub Vendor ID	Sub Vendor Name	Specialty Area
F592027389	WINTER GARDEN GRASSING INC	561730 - LANDSCAPING SERVICES

14.4 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 the department maintain a 'running tally' in order to compare the actual payments to commitments reported. The department complies with these requirements through the [Equal Opportunity Compliance \(EOC\) System](#).

14.4.1 LAPIT and Equal Opportunity Compliance System Interface

In order for a LAP project to appear in EOC, a "Local Agency Contract" screen must first be created for the project in LAPIT. Contract screens are created by the Local Agency for both professional services and construction contracts at the time of contract award. Instructions on how to successfully create a contract screen in LAPIT are provided in **Chapter XX: LAPIT User Guides**.

14.4.2 Anticipated DBE Participation or Commitments

The Prime Contractor or Consultant 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”. For construction contracts, this information would be found on the Certificate of Sublet work submitted by the prime contractor. Consultant contracts would have a list or identification of subconsultants in their contract award document as per the local agencies’ processes. 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/consultants 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 (0) DBE utilization in the EOC System. Prime contractors/consultants 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/subconsultants that the DBE prime contractor/consultant anticipates using must also be reported.

14.4.3 Payments to DBEs

The prime contractor/consultant must report data on actual payments, minority status, and the type of work of *all subcontractors/subconsultants 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 may report a zero (0) dollar payment. The zero-dollar payment feature is optional. It can be used if you don’t have any payments to report for the month. Note: If you use this selection, you will need to specify the Zero Payment reason. 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.

14.4.4 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 department 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 the department 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.

14.4.5 DBE Affirmative Action Plans

The Department will monitor contractor compliance with DBE specifications in the contract and the contractor's implementation of the DBE AA Plan through formal reviews including contract compliance reviews. The DBE AA Plan is not a requirement for a local agency project; however, a local agency must comply with **49 C.F.R. Part 26**. While FDOT Standard Specification 7-24 is applicable to LAP construction projects; provisions 7-24.1 and 7-24.3 that describe the DBE Affirmative Action Plan requirements are not applicable to LAP construction projects.

14.4.6 Local Agency Responsibilities

For LAP consultant contracts, the local agency project manager shall verify the consultants reporting of DBE commitments in the EOC system.

For LAP construction contracts, the role of the Resident Compliance Specialist (RCS) includes the review and approval of the DBE Commitments and DBE Payments entered into the EOC System by the Prime Contractor on local agency contracts. If a consultant RCS is utilized by the local agency, the local agency must also have a staff member performing oversight of the RCS consultant's activities.

14.5 AGENCY COOPERATION

Both the department 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 the department 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.

14.6 SANCTIONS

In the event the local agency fails or refuses to comply with the terms of the DBE Program and LAP, the department 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.

14.7 AUTHORITIES AND RESOURCES

[Equal Opportunity Compliance \(EOC\) System Prime Contractor/Consultant User Manual](#)

[Equal Opportunity Construction Contract Compliance Manual](#)

[Equal Opportunity Compliance System Login](#)

[FDOT DBE Directory](#)

[FDOT DBE Certification program](#)

[FDOT DBE Program Plan](#)

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

[LAP Terms for Federal Aid Professional Services Contracts FDOT Form No. 375-040-84](#) required on all consultant and subconsultant contracts.

[Local Agency Program Information Tool \(LAPIT\)](#)