

SECTION X.

Future Implementation of the Federal DBE Program and Programs for State-funded Contracts

Sections VIII and IX focus on information to assist ODOT:

- Develop its overall goal for DBE participation;
- Project the portion of its overall DBE goal that could be achieved through neutral measures; and
- Consider whether all or only certain DBE groups would be eligible for any race-conscious programs that ODOT might use.

Section X summarizes these DBE Program elements and other requirements of the Federal DBE Program. Section X is organized in two parts:

- A. Federal requirements of implementing the Federal DBE Program; and
- B. Additional program options for ODOT's state-funded contracts.

A. Federal Requirements in Implementing the Federal DBE Program

Regulations in 49 CFR Part 26 and associated guidance, including a sample plan provided by USDOT, provide direction on implementation of the Federal DBE Program. ODOT can build on those program documents and on its current plan.

Plan elements are discussed in the order identified in 49 CFR Part 26. Because only certain portions of the Federal DBE Program are discussed below, ODOT should refer to the complete federal regulations when considering its implementation of the Program.

Reporting to DOT — 49 CFR 26.11 (b). ODOT must periodically report DBE participation to FHWA. BBC's review indicates that, until recently, past utilization reports have not had complete information on DBE subcontractor participation in ODOT's FHWA-funded engineering and related professional services contracts. ODOT should continue to take steps to capture complete information about DBE subconsultants on those contracts.

Bidders list — 49 CFR Section 26.11 (c). As part of its implementation of the Federal DBE Program, ODOT must develop a bidders list of firms that are available for its contracts.

Meeting the federal requirements. The bidders list must include the following information about each available firm:

- Name;
- Address;
- DBE status;
- Age; and
- Annual gross receipts.

One option for developing the bidders list is to conduct a survey of firms. BBC's availability interviews collected all of the above information for local firms available for ODOT construction and engineering-related prime contracts and subcontracts. BBC recommends that ODOT use the availability database for its bidders list per 49 CFR Section 16.11 (c).

Maintaining a mailing/contact list of firms interested in ODOT work. As part of its evaluation of prequalification requirements for construction contracts, ODOT may want to consider developing a routine way for firms interested in doing business with ODOT to electronically receive ODOT information and to make their interest known to other contractors.

ODOT now makes prequalification lists and planholders lists for construction contracts available on its website, which may be helpful for subcontractors seeking out prime contractors that are bidding on particular projects. ODOT should continue this practice for construction and explore ways to provide equivalent information for engineering and other professional services contracts. The agency currently provides information about letters of interest that prime consultants have submitted on professional services contracts.

Maintaining comprehensive vendor data. In order to effectively track future utilization of minority- and women-owned firms as prime contractors and subcontractors, ODOT will need to improve the information it collects on the ownership status of firms with which it does business. Firm information that BBC collected as part of the disparity study can be a start toward improving ODOT's vendor data.

ODOT might consider implementing a bidder registration program to collect vendor data for all firms bidding on its contracts. Businesses could register with ODOT through an online vendor management system to be notified when bidding opportunities arise in their fields of work. In addition, a bidders list would give ODOT another tool to widely advertise contract opportunities.

Publishing information on bidders/proposers. ODOT's website includes bid tabulations for current and past construction contracts and should continue to do so. ODOT should also consider posting summary results of each stage of its consultant evaluations.

DBE financial institutions — 49 CFR Section 26.27. Currently, there are eleven financial institutions listed through the Treasury Department as owned and controlled by socially or economically disadvantaged individuals in the Oklahoma marketplace. It appears that ODOT has not used any of those institutions in the past and has not encouraged prime contractors to do so.

ODOT should thoroughly investigate the full extent of services that those financial institutions offer and make reasonable efforts to use them and also encourage their use among prime contractors in accordance with the federal regulations.

Prompt payment mechanisms — 49 CFR Section 26.29. ODOT currently has a policy that requires prime contractors to pay subcontractors within 30 days of receiving each progressive payment from ODOT, unless for good cause. FHWA has accepted that provision as part of ODOT's implementation of the Federal DBE Program. However, ODOT may want to consider shortening the time allowed for subcontractor payment, to the extent permitted by law, as discussed in Section IX of this report.

DBE Directory — 49 CFR Section 26.31. ODOT maintains a DBE Directory, which is available on its website. It should continue to do so.

Overconcentration — 49 CFR Section 26.33. Agencies implementing the Federal DBE Program are required to report and take corrective measures if it finds that DBEs are so overconcentrated in certain types of work as to unduly burden non-DBEs in that type of work. In conducting the disparity analysis, BBC did not identify instances of overconcentration.

Business development programs — 49 CFR Section 26.35. Business development programs (BDPs) are efforts to assist DBE-certified firms to develop the capabilities to compete outside of the DBE Program. ODOT may want to develop a BDP for DBE-certified firms per the federal regulations. Specialized assistance would be tailored to developing firms and firms in transitional stages of development. This program may be especially needed if ODOT chooses to no longer include certain DBE groups in any race-conscious programs.

The assistance that ODOT would provide to participating DBEs would be specific to the business plan that each firm would develop in conjunction with ODOT. Business plan elements include:

1. An analysis of market potential, competitive environment and other business analyses estimating the participant's prospects for profitable operation;
2. An analysis of the firm's strengths and weaknesses, with particular attention to the means of correcting any financial, managerial, technical or labor conditions that could impede the participant from receiving contracts outside of the DBE program;
3. Specific targets, objectives and goals for the participant's business development during the next two years, using the results of the above analyses;
4. Estimates of contract awards from the DBE program and from other sources that would be needed to meet the objectives and goals for the years that the business plan would cover; and
5. Other information that the participant may require.¹

¹ See Appendix C to Part 26.

The business plan and supporting projections for each firm should be updated at least once a year. To implement business development programs for participating DBEs, ODOT would need to increase its internal and external capabilities to provide specialized technical assistance to construction firms.

A firm could participate in a BDP for multiple years. Indicators that a firm would no longer need assistance include meeting objectives related to profitability, sales, net worth, access to bonding and business credit and other firm capabilities. Firms meeting those objectives would then graduate from the program.

ODOT may also discontinue a firm's participation in the BDP due to a failure of the firm to engage in business practices that would promote its competitiveness within a reasonable period of time.

ODOT's current method of delivery for BDP services is through the Small Business Development Centers (SBDC) and the Oklahoma Bid Assistance Networks (OBAN). ODOT signed a memorandum of understanding (MOU) with these agencies in June 2009 to serve the Department's DBEs in these efforts. Prior to partnering with the SBDC and OBAN, ODOT contracted with a private firm to facilitate their business development program.

Mentor-protégé program – 49 CFR Appendix D to Part 26. As part of the BDP or as a separate component of its implementation of the DBE Program, ODOT might consider developing a mentor-protégé program. A mentor-protégé relationship matches a larger, more experienced mentor with a smaller, less experienced DBE firm that could benefit from training, technical assistance and other services that the mentor would provide. A mentor-protégé program could be one component of the BDP discussed above.

To operate a mentor-protégé program, ODOT would need to design general program guidelines and submit them for FHWA approval. If the program is approved, ODOT could then develop individual development plans for specific mentor-protégé pairs. ODOT might consider working with the local chapter of the Association of General Contractors of America or other organizations to implement the program.

For each mentor-protégé relationship, ODOT could require:

- A written development plan that sets forth the objectives of both parties and their respective roles in the mentor-protégé relationship, the duration of the arrangement and the services and resources that the mentor would provide to the protégé.
- The fees to cover the direct and indirect cost for training and assistance services that the mentor would provide, which may be reimbursable by FHWA.
- A review to ensure that the mentor and protégé are independent business entities according to federal regulations (49 CFR Appendix D to Part 26).

Monitoring the performance of other program participants — 49 CFR Section 26.27.

ODOT has implemented mechanisms to ensure that all DBE program participants comply with necessary provisions and regulations. For example, ODOT has a monitoring and enforcement mechanism to ensure that DBEs actually perform the work that prime contractors and the agency commits to them.

ODOT maintains progress reports on actual DBE utilization (e.g., payments made to DBE firms), and compares that utilization to award commitments. The reports that ODOT sends to FHWA include data for both commitments and payments.

Prohibition of DBE quotas, and prohibition of set-asides for DBEs unless in limited and extreme circumstances — 49 CFR Section 26.43. Although DBE quotas are prohibited, and set-asides are only to be used in extreme circumstances, the Federal DBE Program does allow for implementation of a small business program for firms bidding or proposing as prime contractors. ODOT would need to determine that any such small business program is allowable under state law. ODOT's implementation of such neutral programs would be consistent with the Federal DBE Program.

Setting overall annual DBE goals — 49 CFR Section 26.45. Section VIII of the report uses data and analytical techniques from the disparity study to develop overall annual DBE goals. ODOT should consider adopting that approach as it develops its DBE goals in the future.

On February 3, 2010, USDOT posted a final rule concerning how often agencies that implement the Federal DBE Program are required to submit overall annual DBE goals. Agencies such as ODOT now only need to develop and submit overall annual DBE goals every three years. That change was effective as of March 5, 2010.

Means used to meet overall DBE goal — 49 CFR Section 26.51. Section IX of the report focuses on information and methods ODOT might use to project the portion of its overall DBE goal that it might be able to meet through neutral means.

Maximum feasible portion of goal met through neutral programs. ODOT must meet the maximum feasible portion of its overall goal through race-neutral means of facilitating DBE participation. Taking this requirement into consideration, ODOT should maintain its current neutral efforts and evaluate and consider using other neutral measures discussed in Section IX.

ODOT must project the portion of its overall DBE goal that could be achieved through neutral means. The agency should consider the information and analytical approaches presented in Section IX when making future projections.

Use of DBE contract goals. The Federal DBE Program requires ODOT to establish contract goals to meet any portion of its overall DBE goal that it does not project being able to meet using race-neutral means, as noted in 49 CFR 26.51(d). Based on this report and all other information and evidence available to ODOT, the Department should consider whether it should utilize contract goals to meet any portion of its overall annual DBE goal that ODOT does not project being able to meet using race-neutral means. If ODOT determines that it needs to establish contract goals, then it should also evaluate which, if any, DBE groups should be considered eligible to participate in any contract goals it determines are appropriate per the federal regulations to use for its construction and engineering contracts.

USDOT guidelines on the use of DBE contract goals include the following:

- Contract goals may only be used on contracts that have subcontracting possibilities.
- Agencies are not required to set a contract goal on every FHWA-funded contract.
- Over the period covered by the overall DBE goal, an agency must set contract goals so that they will cumulatively result in meeting the portion of the overall goal that agency projects being unable to meet through neutral means.
- An agency's contract goals must provide for participation by all DBE groups eligible for race-conscious measures and must not be subdivided into group-specific goals. This last point is important as ODOT considers which DBE groups, if any, it determines should be eligible for contract goals. If it determines to include specific DBE groups but not others for contract goals, it must submit a waiver request to FHWA. FHWA has approved state DOT implementation of programs that limit participation in DBE contract goals to underutilized DBEs (UDBEs).
- ODOT must maintain and report data on DBE utilization separately for contracts that include and do not include DBE goals.

Good faith effort procedures — 49 CFR Section 26.53. Under the Federal DBE Program, bidders do not have to meet the DBE goal to be awarded a contract. The Program requires agencies to also consider bidders that make good faith efforts to meet the contract goal. USDOT has provided guidance for agencies to review good faith efforts, including materials in Appendix A of 49 CFR Part 26.

ODOT appears to be implementing good faith effort procedures in compliance with the federal regulations. ODOT reported that prime contractors rarely use good faith efforts. ODOT reported only about two bidders annually do not meet contract goals on projects, and that in these instances their good faith efforts are typically valid and approved.

Counting DBE participation toward goals — 49 CFR Section 26.55. USDOT outlines how agencies implementing the Federal DBE Program should count DBE participation in contracts and evaluate whether a bidder has met the DBE contract goal. USDOT also gives specific guidance for counting participation of different types of DBE suppliers and trucking companies. ODOT appears to have developed and implemented processes to appropriately count DBE participation in its contracts.

DBE certification — 49 CFR Part 26 Subpart D. ODOT has an operating certification program that attempts to comply with Subpart D of 49 CFR Part 26. It operates the Uniform Certification Program (UCP) for the state of Oklahoma. ODOT should make the following considerations as it continues to operate the UCP:

- If ODOT makes a determination that contract goals are appropriate for specific DBE groups for certain contracts, it should continue to certify all groups included in the Federal DBE Program. For example, if ODOT determines that white women-owned firms are not eligible to participate in contract goals, ODOT should nonetheless maintain its current process for certifying white women-owned firms as DBEs.
- Although the analyses in the disparity study focused on marketplace conditions in Oklahoma, and the study team collected availability information on Oklahoma firms, ODOT would still need to allow firms located outside of the state to be certified as DBEs.
- ODOT should be aware that USDOT is considering by pending notice of rulemaking to increase the size ceilings and personal net worth ceilings for DBE certification. ODOT would need to revise its certification forms and processes accordingly.

B. Additional Program Options for ODOT State-funded Contracts

The Federal DBE Program does not pertain to state-funded contracts, nor is there currently any state law that requires ODOT to implement programs to encourage MBE/WBE utilization in state-funded work. ODOT should consider the following options for its state-funded contracts.

Reporting. ODOT should initiate reporting of MBE/WBE and DBE utilization on state-funded contracts using the same methods that it would use for FHWA-funded contracts. That practice will allow ODOT to track how well it is addressing the disparities that BBC found for MBE/WBEs in its state-funded professional services contracts and for certain MBE groups in its state-funded construction contracts. Monitoring utilization and assessing progress in addressing any disparities for state-funded contracts will also help ODOT understand how its neutral programs may be affecting participation in its FHWA-funded contracts.

Bidders list. All of the recommendations included in previous discussions of bidders lists would also pertain to state-funded contracts. Information tools that ODOT develops for FHWA-funded contracts would extend to state-funded contracts.

Business development programs. Any BDPs that ODOT establishes for DBE firms — including mentor-protégé programs — would help those firms be more competitive on FHWA-funded contracts and on state-funded contracts.

Neutral programs. ODOT could consider applying the race-neutral programs identified in Section IX and Section X for its state-funded contracts. One program that may be useful on state-funded contracts, to the extent permitted by state law, would be a small business subcontracting program. All small business enterprises including small white male-owned firms and small minority- and women-owned firms would be eligible for the program. ODOT would need to establish a small business certification process in order to operate such a program.