

## Chapter 10 *FHWA and Civil Rights*

---

This chapter provides guidance for WSDOT personnel that are involved with Federally-funded design-build projects. It is intended to be used with the Federally-funded version of the General Provisions RFP template.

The Secretary of the Washington State Department of Transportation (WSDOT) has established a Secretary's Executive Order E 1009.02 to affirm WSDOT's commitment to promoting equity in contracting. This includes a priority to expand efforts to include Disadvantaged Business Enterprise (DBE), and Federal Small Business Enterprise (FSBE) certified firm participation in Federal aid contracts and to afford those entities fair and equal opportunity to compete for WSDOT contracts.

The Office of Equal Opportunity is tasked with increasing contracting opportunities for DBE businesses and to provide a welcome and responsive environment for contractors and consultants that support such efforts. The Office of Equal Opportunity is identifying and changing internal processes in order to achieve the agency's overall goal for DBE and FSBE participation in contracting. Additionally, the Secretary's Executive Order assists WSDOT and its sub-recipients with implementing and monitoring the DBE Program in a manner to achieve the intent of the program at both the project and program level.

OEO continues to reorganize the management of the DBE and Civil Rights programs to determine best practices to develop, implement, monitor, and measure directives in order to deliver more successful DBE and FSBE programs. The reorganization process provides WSDOT the opportunity to increase small business participation via design-build and other alternative project delivery methods.

### **10-1 FHWA Involvement**

The U.S. Department of Transportation (DOT) was established in 1967 and is currently responsible for overseeing and administering a wide range of transportation programs, policies and regulations for both aviation and surface transportation. The top priorities at DOT are to keep the traveling public safe and secure, increase their mobility, and have our transportation system contribute to the nation's economic growth. The DOT is comprised of multiple administrations. WSDOT interacts primarily with the following three operating administrations of the DOT:

#### **Federal Highway Administration**

The Federal Highway Administration (FHWA) coordinates highway transportation programs in cooperation with states and other partners to enhance the country's safety, economic vitality, quality of life, and the environment. Major program areas include the Federal-Aid Highway Program, which provides Federal financial assistance to the States to construct and improve the National Highway System, urban and rural roads, and bridges. This program provides funds for general improvements and development of safe highways and roads.

The Federal Lands Highway Program provides access to and within national forests, national parks, Native American reservations and other public lands by preparing plans and contracts, supervising construction facilities, and conducting bridge inspections and surveys. The FHWA also manages a comprehensive research, development, and technology program.

### **Federal Transit Administration**

The Federal Transit Administration (FTA) assists in developing improved mass transportation systems for cities and communities nationwide. Through its grant programs, FTA helps plan, build, and operate transit systems with convenience, cost and accessibility in mind. While buses and rail vehicles are the most common type of public transportation, other kinds include commuter ferryboats, trolleys, inclined railways, subways, and people movers. In providing financial, technical and planning assistance, the agency provides leadership and resources for safe and technologically advanced local transit systems while assisting in the development of local and regional traffic reduction.

### **National Highway Traffic Safety Administration**

The National Highway Traffic Safety Administration (NHTSA) is responsible for reducing deaths, injuries and economic losses resulting from motor vehicle crashes. NHTSA sets and enforces safety performance standards for motor vehicles and equipment, and through grants to state and local governments enables them to conduct effective local highway safety programs.

## **10-1.1 Stewardship and Oversight Agreement**

The [Stewardship and Oversight \(S&O\) Agreement](#) sets forth the agreement between the FHWA and the Washington State Department of Transportation (WSDOT) on the roles and responsibilities of FHWA and WSDOT with respect to project approvals, related responsibilities and oversight activities. The Construction Monitoring Plan is part of the S&O Agreement outlining additional reporting requirements on Federal projects.

FHWA must review and approval certain operating procedures and guidance documents such as:

- WSDOT's DBE Program Plan
- *Construction Manual*
- Standard Specs/GSPs
- [Design Manual M 22-01](#)

Design-build projects will follow the processes and procedures outlined in the S&O Agreement and as described in this manual. Listed below are the processes and procedures for involving the FHWA on design-build projects.

### **10-1.1.1 FHWA Approval of Design-Build Manual**

The FHWA has approved the WSDOT *Design-Build Manual M 3126* for use in Washington State. All WSDOT design-build projects will follow this manual. All future modifications to the *Design-Build Manual* will be made in accordance with the S&O Agreement.

## 10-1.2 FHWA Authorization of Design-Build Projects

The FHWA must authorize any design-build project involving Federal funds before the RFP can be issued. Federal authorization requires an accumulation of various planning and pre-design activities. This procedure outlines the steps and procedures for obtaining Federal authorization.

1. Unless otherwise authorized by the FHWA, the following is necessary prior to requesting Federal authorization:
  - a. Completion and approval of the NEPA process\* per Section 300.04 of the *Design Manual* M 22-01.
  - b. The Conceptual Design Approval memorandum, channelization plans, and alignment plans
  - c. All ROW is acquired\* per Chapter 510 of the *Design Manual* M 22-01 and the *Right of Way Manual* M 26-01
  - d. ROW certifications per the *Right of Way Manual* M 26-01
  - e. Any Public Interest Funding (PIF) has been obtained
  - f. DBE/FSBE goals have been calculated using WSDOT's FHWA-approved contract goal setting methodologies
  - g. Funding sources have been identified and funding groups have been finalized per the *Program Management Manual*
  - h. Engineer's Estimate is complete
  - i. State-furnished materials and proprietary materials have been tabulated per Section 700.01 of the *Plans Preparation Manual*
  - j. Value Engineering has been completed, when applicable, as described in Chapter 310 of the *Design Manual* M 22-01
  - k. The Detailed Damage Inspection Report (DDIR) has been completed, when applicable
  - l. Agreement numbers have been obtained
  - m. The draft transportation management plan has been completed for Significant Projects as per Chapter 1010 of the *Design Manual* M 22-01 (the final TMP is completed by the design-build team).
2. FHWA approval is achieved per the requirements of Chapter 300 of the *Design Manual* M 22-01, Chapter 8 of the *Program Management Manual*, and the March 2015 FHWA/ WSDOT S&O Agreement.

\*See Chapter 11 of the WSDOT *Design-Build Manual* for potential exceptions.

### 10-1.2.1 Project Delivery Method Selection

WSDOT may invite the FHWA to Project Delivery Method Selection workshops for federally funded projects.

### 10-1.3 FHWA Concurrence of Design Analyses on NHS Highways

WSDOT [Design Manual Chapter 300](#) provides WSDOT design procedures, documentation and approvals necessary to deliver successful projects involving the Federal Highway Administration. All Design Analyses, whether initiated by WSDOT pre-award or by the Design-Builder post award, shall be developed and approved in accordance with Section 300.06(4) of the [Design Manual](#) M 22-01.

### 10-1.4 FHWA Projects of Division Interest (PoDIs)

Projects of Division Interest (PoDI) are a set of projects for which FHWA determines the need to exercise oversight and approval authority. These are projects that have an elevated risk, contain elements of higher risk, or present a meaningful opportunity for FHWA involvement to enhance meeting program or project objectives. See [Design Manual](#) Section 300.05(1) for additional guidance on PoDI projects.

## 10-2 Civil Rights

WSDOT's Office of Equal Opportunity (OEO) has several programs that require the incorporation of specific provisions within the RFPs of Federally-funded design-build projects. These programs include:

- Disadvantaged Business Enterprise (DBE)
- Federal Small Business Enterprise (FSBE)
- On-the-Job Training (OJT)
- Equal Employment Opportunity (EEO)

These Federally-mandated programs (DBE, FSBE, OJT, and EEO) are utilized on all projects with Federal funding.

### 10-2.1 Disadvantaged Business Enterprise (DBE)

Secretary's Executive Order E 1009.02 directs WSDOT divisions and offices to increase contracting opportunities for DBE businesses and to provide a welcome and responsive environment for contractors and consultants that support such efforts.

#### 10-2.1.1 Disadvantaged Business Enterprise Goals

The DBE Goal is determined by OEO and is an assigned numerical percentage of the proposal price that may applied separately to the design portion and construction portion of the project. This is the minimum amount that the Proposer shall commit to by submission of the DBE Performance Plan including Good Faith Efforts. The DBE Goal will also be applied to change orders associated with this the contract. HQ OEO determines the DBE Goals for the project; a DBE Design Goal and a DBE Construction Goal.

### 10-2.1.2 DBE Performance Plan

The DBE Performance Plan is submitted with the Proposer's proposal pursuant to the Instructions to Proposers and updated in accordance with Section 1-07.11(12) of the General Provisions. Region OEO as a technical advisor, reviews the DBE Performance Plan in accordance with Section 6-2.4 of this manual.

After execution, the DBE Performance Plan is updated monthly. For more information refer to Section 1-07.11 (12) of the General Provisions.

## 10-2.2 Federal Small Business Enterprise (FSBE)

The Federal Small Business Enterprise (FSBE) Program is a race and gender-neutral element of the Disadvantaged Business Enterprise (DBE) in accordance with the requirements of [49 CFR Part 26.39](#). WSDOT is committed to ensuring small businesses are afforded equal and fair opportunities to participate on WSDOT contracting, consulting, and procurement opportunities. The FSBE Program aims to structure contracting requirements to facilitate competition by small business concerns, take all reasonable steps to eliminate obstacles for small businesses to participate, and eliminate unnecessary and unjustified bundling of contract requirements.

### 10-2.2.1 Goals

WSDOT uses a similar goal setting methodology for FSBE goals that is used to set DBE Goals. Federally-funded WSDOT design-build projects may have FSBE goals established for both the design and construction portion of a project. Both FSBE goals can be established in addition to any DBE Goal requirements on a project.

Design-Builders are expected to achieve the FSBE goal or demonstrate Good Faith Efforts to do so and FSBE firms are required to perform a Commercially Useful Function in order for participation to be credited toward the FSBE goals.

## 10-2.3 On-the-Job Training (OJT)

Section 1-07.11(13) of the General Provisions is where you will outline your training requirements. There is only one fill-in in this section. It is for listing the required number of training hours. You will obtain this number from the HQ OEO office.

## 10-2.4 Equal Employment Opportunity (EEO)

Section 1-07.11(10).2 of the General Provisions is where you will find Office of Federal Contract Compliance Programs (OFCCP).

## 10-2.5 Apprenticeships

### On-the-Job Training (OJT) – Federally Funded Contracts

The amount of training hours are determined by HQ OEO. The requirements for trainee, training plan approval, and trainee payment are all specified in the contract. Refer to the Section 1-07.11(13), Special Training Provisions, of the General Provisions for training requirements.

The contract allows the Design-Builder to accomplish required training hours as part of their work activities, or through the activities of their subcontractors or lower-tier subcontractors. However, the Design-Builder is designated as being solely responsible for the completion of the training requirements.

Increases in training hours are allowable and may be approved on a case by case basis by the WSDOT Engineer in consultation with the Regional EEO Officer.

### On-the-Job-Training Required Reports

#### ***DOT Form 272-049, Training Program***

This report shall be submitted to the WSDOT Engineer for approval prior to commencing contract work. For projects within Northwest Region, the DOT Form 272-049 Training Program reports are forwarded to the NW Region EEO Officer for approval before the work begins. The Project Office has the authority to approve Apprenticeship, Training, Employer and Labor Services (ATELS) or State Apprentice and Training Council (SATC) programs provided they meet the requirements specified in the contract. The Region EEO Officer will review any non-ATELS/SATC training plans submitted under Section III of the form for compliance and submit the plan to HQ OEO for concurrence and submittal to FHWA for final approval.

#### ***DOT Form 272-050, Apprentice/Trainee Approval Request***

Approval of an individual trainee cannot be authorized until an approved Training Program is filed with the Region. This form shall be submitted by the Design-Builder for each trainee to be trained on the project. When an ATELS/SATC trainee is first enrolled, a copy of the trainee's certificate showing training registration shall accompany the Trainee Approval Request. Trainees are approved by the Project Office based on the criteria in the Special Provisions. If the Design-Builder submits a request for approval of a trainee who is neither female, nor a minority, the Design-Builder shall submit a GFE and the Project Office will obtain concurrence from the Regional EEO Officer and OEO prior to approval.

#### ***DOT Form 226-012, Trainee Interview Questionnaire***

One trainee interview is to be conducted for each craft designated on an approved training program for contracts which have 600 or more training hours or as designated by the Region EEO. The Region EEO shall designate additional contracts on which trainee interviews are to be completed in conjunction with those that meet the criteria above to ensure that trainee interviews are conducted on at least one fourth of all the contracts that have training hours established for any given construction season. The intent of these

training interviews is to document that the trainees are working and receiving proper training consistent with their approved programs, that the trainee is being paid at the appropriate wage rate, and that discrimination/harassment is not occurring. Interviews are to be confidential and aside from the Design-Builder and subcontractors unless the Trainee states otherwise. The individual's identity should not be disclosed to the employer without employee's written permission.

Submit completed interviews to the Region EEO Office.

### ***DOT Form 272-060, Federal-Aid Highway Construction Annual Project Training Report***

This report will be completed annually by the WSDOT Engineer summarizing the training accomplished by the individual trainees during the reporting period beginning January 1 and ending December 31 of the calendar year. This report is due at the Regional EEO Office by December 20th of the same calendar year, for submission to FHWA.

## **10-2.6 Requirements for Affirmative Action to Ensure Equal Employment Opportunity**

### **EEO (State Funded Projects)**

The Design-Builder shall comply with the EEO requirements detailed in Section 1-07.11 of the General Provisions. The WSDOT Engineer should be alerted and respond to any indications or accusations of discrimination. If the WSDOT Engineer, or any other Project Office staff, becomes aware of any indications or accusations of discrimination, they will immediately notify the Region OEO Compliance Specialist, who will in turn immediately notify OEO. OEO will handle any investigation that is warranted.

### **EEO (Federally Funded Projects)**

WSDOT has committed to FHWA to perform comprehensive construction compliance reviews, consistent with WSDOT's approved EEO Assurances Program document, to ensure compliance with the Federal non-discrimination requirements (49 CFR Part 26) and FHWA 1273 as referenced in Section 1-07.11(10).2 of the General Provisions. This review is performed by OEO on a select number of FHWA funded contracts and may take place at any time, including after contract Completion. These reviews do not normally involve the Project Office other than notification of their occurrence and the resulting findings, however, OEO may elect to interview Project Office staff associated with the contract as part of their review. OEO will contact the Region OEO Compliance Specialist or Project Office to facilitate the timing of the review.

### **Sanctions**

The WSDOT Engineer shall take steps to stop any acts that are harassing in nature as described in the Section 1-07.11(2) of the General Provisions. These steps may include removing a Design-Builder's employee pending outcome of an investigation. ASCE approval is required in the case where the WSDOT Engineer determines that the conditions warrant removal of a Design-Builder's employee. It is important to note that

this is not a request that the employee be terminated by the Design-Builder, just that they are removed from this project. The ASCE will consult with the Region OEO and investigate the conditions prior to directing the removal. Care should be taken to ensure that all parties are treated with respect and in a nondiscriminatory manner. The facts should be established and everyone should be given a chance be heard.

## **Records and Reports**

### ***FHWA-1391, Federal-Aid Highway Construction Contractors Annual EEO Report***

FHWA Form 1391 is required from both the Design-Builder and each subcontractor on Federally funded contracts that have construction activity during the month of July. These forms shall be submitted to the WSDOT Engineer, and are due by August 25<sup>th</sup> of each year.

A Design-Builder who works on more than one Federally funded contract in July is required to file a separate report for each of those contracts. For multi-year projects, a report is required to be submitted each year work was performed for the duration of the contract. A responsible official of the company must sign the completed report.

Upon receipt, the WSDOT Engineer will review, sign and date, and forward the annual report to the Region EEO Officer by September 5<sup>th</sup>. The Region EEO staff at the direction of the OEO will compile and report the information noted on the forms.

### ***FHWA-1392, Summary of Employment Data Report***

WSDOT is required to submit a summary of employment data to FHWA for each Federal fiscal year. This report is prepared using the data from FHWA-1391 (project specific annual reports) that have been submitted to the Region OEO Compliance Specialist by the Project Offices. The summary is prepared by the Region OEO Compliance Specialist or other Region designee for each Federally assisted project. The report also includes Local Agency Projects administered through the Region's Highways and Local Programs Offices. The completed FHWA-1392 Report, including all FHWA-1391 reports, are then submitted by the Region EEO Officer to the WSDOT Office of Equal Opportunity by September 15<sup>th</sup> each year, for formal submission to FHWA.

### ***DOT Form 820-010, Monthly Employment Utilization Report***

The information required by DOT Form 820-010 may be accepted in an alternate format provided that format contains all of the data required by and is completed in accordance with the instructions for DOT Form 820-010. The Region EEO staff should be consulted regarding the acceptability of any alternate format proposed by the Design-Builder.

Instructions for completing the form can be found on the back of the form itself. This monthly report is to be maintained by the Design-Builder in the Design-Builder's or subcontractor's records for a period of three years from Acceptance of the contract, and available to WSDOT and/or Federal reviewers upon request.

### ***DOT Form 272-055, Final DBE Utilization Plan Report***

The Final DBE Utilization Plan Report is required on all contracts that include DBE requirements and must be accompanied by a report of the final amounts paid to DBEs, as verified from the final report generated through DMCS. The signed Final DBE Utilization Plan Report and the attached final amounts paid report become part of the three-year Temporary Final Records retained by the Region. The form may be signed by the WSDOT Engineer, Region Construction Engineer or the Region OEO Compliance Officer.

The Final DBE Utilization Plan Report represents a certification that contracting records associated with DBE work have been reviewed, on-site performance has been monitored, and it has been determined that work committed to DBEs was performed by the designated DBEs. Signing this report also testifies that all DBE On-site Reviews are complete, on file, and can be retrieved as supporting documentation for the certification. This certification is a requirement of [49 CFR Part 26.37\(b\)](#).

#### **10-2.7 Title VI**

Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, and national origin in the provision of benefits and services. Additional nondiscrimination laws include the Federal-aid Highway Act of 1973, which added sex (gender) as a protected class; and Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, which prohibits discrimination on the basis of disability.

The Civil Rights Restoration Act of 1987 clarified the broad institution-wide application of Title VI and other nondiscrimination statutes. The term “program or activity” means all of the operations of Federal-aid recipients, subrecipients, and contractors, whether such programs and activities are Federally funded or not.

#### ***Title VI Discrimination Complaints Procedure***

The Title VI Discrimination Complaints Procedure is a mechanism to resolve grievances, remedy discrimination and improve program delivery and services. Any person/s who believes they have been subjected to unlawful discrimination (denied the benefits of, access to, or participation in the programs and activities of WSDOT) based on race, color, national origin, sex, age, disability, income or Limited English Proficiency in programs, activities, or services of WSDOT or organizations funded through WSDOT may file a complaint. The complaint may be filed by the individual or his/her representative. A complaint must be filed no later than 180 days after the date of the alleged discrimination, unless extended by WSDOT. The complaint should be forwarded to WSDOT’s Office of Equal Opportunity for processing.

#### **10-2.8 ADA**

American with Disabilities Act of 1990 guidance can be found in Chapter 15 of the [Design Manual M 22-01](#)

This page intentionally left blank.