

DBE 101

External Training for Prime and DBE/MSVWBE Contractors

OFFICE OF EQUITY AND CIVIL RIGHTS

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The Office of Equity and Civil Rights

**YOU
ARE
HERE**

**Equal Employment
Opportunity
Contract
Compliance**

Americans with Disabilities Act (ADA)

**Tribal Employment Rights Ordinance
(TERO)**

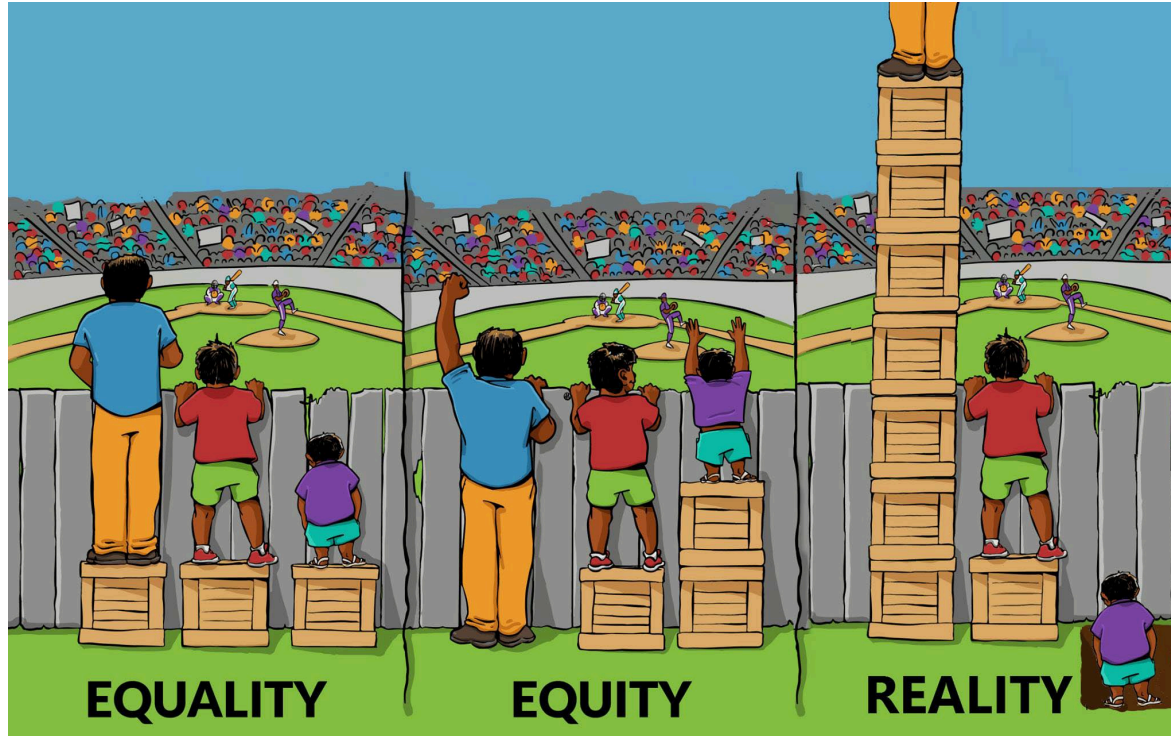
Title VI & Limited English Proficiency

**Pre- Apprenticeship & Supportive
Services (PASS) Program**

**Highway Construction &
Maritime Trades Scholarships**

**Capacity Building Mentorship
Program**

Why does this work matter?



Goal Setting & Bid Clearing



Disparity Study

Past and Upcoming

State of Washington
Disparity Study
2019



CH COLETTE
HOLT
& ASSOCIATES

1. Three (3) years of data
2. Identified disparities between its utilization and DBE availability
3. Evaluated whether the use of race-conscious measures is supported by the results* of the analysis

* A new Disparity Study was completed in August 2023.

DBE Contract Goal Setting

The Basics & Considerations



1. You must set an overall goal for DBE participation in your DOT-assisted contracts
2. Your overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all business ready, willing and able to participate on your DOT-assisted contracts

Project Goal Considerations




1. Projects receiving federal funds, with a value over **\$250,000** are considered for race-conscious goal setting
2. Projects of **\$100 million** will also be evaluated to determine a separate overall project goal

Goal Setting



Step 1 | Baseline Goal

1. Use the availability percentage from the Disparity Study for each work scope group by the NAICS code;
2. The work scope group amount is multiplied by DBE availability percentage, which equals the estimated DBE participation amount;
3. Review the bid items, group by work scopes, and assign NAICS codes to each work scope;



NORTH
AMERICAN
INDUSTRY
CLASSIFICATION
SYSTEM

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
United States, 2022

WORK SCOPE X DBE AVAILABILITY = DBE PARTICIPATION AMOUNT

Step 1 | Baseline Goal (continued)

- Total DBE participation amount divided by the project engineer's estimate (before tax) = the weighted DBE participation amount; and
- The weighted DBE participation figure derived from the previous step will be:
 - ratcheted up for projects located in areas with a high concentration of DBEs; and
 - ratcheted down for smaller projects located in remote areas.

Proposal Management: Goal Setting

[Proposal Main](#) [View Proposal](#) [Settings](#) [Docs](#) [Goal Setting](#) [Comments](#) [Linked Records](#) [Reports](#)

CSO - WSF Structures Group Staff Augmentation: WSF Structures Group
Staff Augmentation

Update goal numbers as needed. To add/edit work scopes, click [Edit Work Scopes & Goal Calculation](#).

* required entry

Goal Calculation	
GOAL TYPE *	<input type="text" value="DBE"/>
ESTIMATED TOTAL AMOUNT	\$1,774,880.00
CALCULATED PARTICIPATION AMOUNT	\$339,002.08
CALCULATED GOAL *	<input type="text" value="19.100"/> % Edit Work Scopes & Goal Calculation
PAST ACHIEVEMENT *	<input type="text" value="0.000"/> % Edit Past Achievement Calculation
FINAL/ADJUSTED GOAL *	<input type="text" value="19.000"/>
ATTACHED FILE(S)	Attach File
COMMENTS	<input type="text"/>

Determining Availability

$$\text{*WORK SCOPE AVAILABILITY} = \frac{\text{CERTIFIED FIRMS IN WORK SCOPE}}{\text{ALL FIRMS IN WORK SCOPE}}$$

CERTIFIED FIRMS
=
OMWBE directories by industry
Code (NAICS) and in your
Marketplace by county

ALL FIRMS
=
D&B, Census or Registered Vendors
By Industry code and in your
Marketplace by county

***RULE: MUST HAVE 3 OR MORE FIRMS IN ANY SCOPE OF WORK
TO HAVE AVAILABILITY IN THAT SCOPE**



Step 2 | Adjustments

1. Adjustments to the DBE availability in **Step 1**, may be made based on evidence such as:

- Specialized projects
- Lack of available certified firms
- Additional insurance requirements
- Unreasonable mobilization cost



Step 2 | Adjustments (continued)

2. Diversity Monitoring and Compliance System (DMCS), will calculate a weighted value for the participation on the historical contracts
3. WSDOT will consider historical DBE attainment for projects of a similar nature and compare this to the statistical result of Step 1
4. The participation value may be used as Step 2 DBE goal



Final Goal

1. Final DBE Project Goal established utilizing **Step 1** or **Step 2**, if necessary.
2. Standard rounding applied to arrive at nearest whole percentage.



$$\text{WORK SCOPE AVAILABILITY} = \frac{\text{CERTIFIED FIRMS IN WORK SCOPE}}{\text{ALL FIRMS IN WORK SCOPE}}$$

State Funded Contracts - Diversity Roadmap

2017

Current Voluntary Measures:

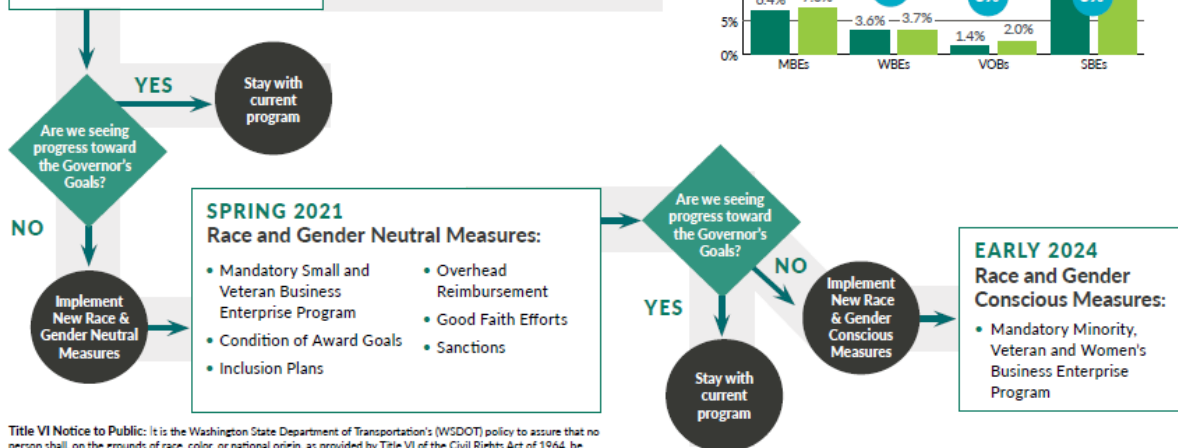
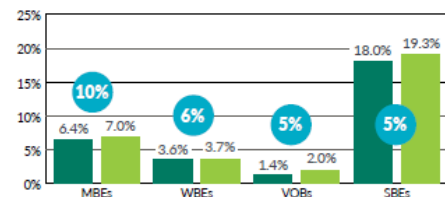
- Goals and Contract Language
- Inclusion Plans
- Community Engagement
- Technical Assistance
- Capacity Building Mentorship Program

Progress is currently defined as:

- New WSDOT subcontracts and subcontractors
- New private sector contracts
- Increased bonding
- Increased gross receipts
- Increased bidding
- Decreased disparity

Spent on State Funded Contracts SFY22 vs SFY23

- SFY 2022
- SFY 2023
- State Goals



Title VI Notice to Public: It is the Washington State Department of Transportation's (WSDOT) policy to assure that no person shall, on the grounds of race, color, or national origin, as provided by Title VI of the Civil Rights Act of 1964, be excluded from participation in, be denied the benefits of, or be otherwise discriminated against under any of its programs and activities. Any person who believes his/her Title VI protection has been violated, may file a complaint with WSDOT's Office of Equity and Civil Rights. For additional information regarding Title VI complaint procedures and/or information regarding our non-discrimination obligations, please contact OECR's Title VI Coordinator at (360) 705-7090.

Americans with Disabilities Act (ADA) Information: This material can be made available in an alternate format by emailing the Office of Equity and Civil Rights (OECR) at wsdotada@wsdot.wa.gov or by calling toll free, 855-362-4ADA(4232). Persons who are deaf or hard of hearing may make a request by calling the Washington State Relay at 711.

23-08-0266

MORE INFORMATION Jackie Bayne

WSDOT Office of Equity and Civil Rights
360-705-7084
BayneJ@wsdot.wa.gov

Being Committed vs. Compliant



Bid Clearing



Clearance Documents

1

DBE Utilization
Certification Form
(not applicable to
design build projects)
submitted with bid
proposal

2

Good Faith Effort
(GFE)
Documentation

3

Bid Item
Breakdown/Written
Confirmation form

1. WSDOT OECR will review all responsive documents
2. Forms not filled out according to instruction **may result** in bidder being non-responsive
3. *De minimis* errors like spelling mistakes or transposing numbers **may not result** in non-responsiveness





Bidders List



Bidder Questionnaire Update

WSDOT Form 272-022 | Updated 09/2024

PREVIOUS VERSIONS OBSOLETE

*******UPDATED 9/3/2024*******

**BIDDER: BE ADVISED THIS PROPOSAL AND THE SUBJECT CONTRACT
CONTAINS A DISADVANTAGED BUSINESS ENTERPRISE (DBE) CONDITION OF
AWARD (COA) PARTICIPATION REQUIREMENT**

The Washington State Department of Transportation (WSDOT) made additional changes to Condition of Award (COA) requirements. Failure to meet COA DBE contract goals as required by the specifications will result in your bid being considered non-responsive and your bid may be rejected.

YOU MUST INCLUDE IN YOUR BID OR SUBMIT AS A SUPPLEMENT TO YOUR BID:

1. INCLUDE WITH BID: BIDDER QUESTIONNAIRE

You must submit the Bidder Questionnaire (WSDOT Form 272-022). This shall be filled out for each firm who submitted a bid or quote in attempt to participate in the project whether they were successful or not.

Bidders List (Continued)

Code of Federal Regulations | 49 CFR 26.11


(2) You must obtain the following bidders list information about all DBE and non-DBEs who bid as prime contractors and subcontractors on each of your federally assisted contracts:

- (i) Firm name;
- (ii) Firm address including ZIP code;
- (iii) Firm's status as a DBE or non-DBE;
- (iv) Race and gender information for the firm's majority owner;
- (v) NAICS code applicable to each scope of work the firm sought to perform in its bid;
- (vi) Age of the firm; and
- (vii) The annual gross receipts of the firm. You may obtain this information by asking each firm to indicate into what gross receipts bracket they fit (e.g., less than \$1 million; \$1-3 million; \$3-6 million; \$6-10 million; etc.) rather than requesting an exact figure from the firm.

Bidder Questionnaire Form

WSDOT Form 272-022 | Updated 09/2024

PREVIOUS VERSIONS OBSOLETE

 Washington State Department of Transportation						Bidder Questionnaire		
Agency Name						Federal Aid Number		
Prime Contractor Name						Contract Number		
Contract Name								
Firm/ Subcontractor Name	Address (incl. Zipcode)	DBE Status	Race	Gender	NAICS Codes	Scope of Work	Firm Age	Firm Gross Receipts
		▼	▼	▼				▼
		▼	▼	▼				▼

A copy of this form is included in the Proposal Forms.

Irregular Proposals

General Special Provisions | Section 1-02.13

Failure to return completed form as part of the Bid Proposal package will cause the Bid to be considered irregular in accordance with [Section 1-02.13](#).

[Implementation Guidance for the Final Rule](#)





How to Count It,
When to Count It.

How to Count DBE Credit

- DBE participation counting rules are found at 49 CFR Part 26:

§ 26.55 How is DBE participation counted toward goals?

- This section includes the following topics:
 - Count only the value of work performed by the DBE
 - DBE credit when in a Joint Venture
 - Only when performing a Commercially Useful Function
 - DBE trucking counting rules
 - DBE credit for materials or supplies
 - DBE certification applicability
 - When to count DBE credit (after DBE has been paid)

Certification and Credit

- To receive DBE credit, the DBE company must be certified under the appropriate [North American Industry Classification System](#) (NAICS) code(s)
- DBE must be certified in appropriate NAICS code to receive credit
 - ✓ No credit if firm does not possess appropriate NAICS code
 - If performing plumbing work, firm must be certified in NAICS code that includes plumbing scope.

Loss of Certification

- DBE must be certified at time of execution of contract
 - ✓ If not certified at execution of contract, no credit is allowed
 - ✓ If a DBE is decertified during the life of the contract, please reach out to your Compliance Lead to discuss next steps.

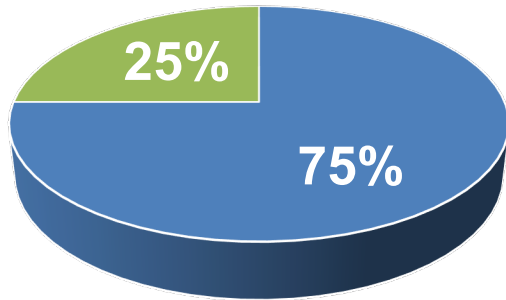
Subcontractor DBE Credit

100% Credit: DBE DOES ALL THE WORK



Subcontractor DBE Credit

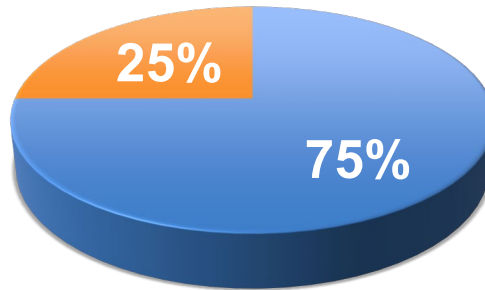
100% Credit



■ DBE ■ DBE SUB

If a DBE contracts to another DBE, you still get 100% credit

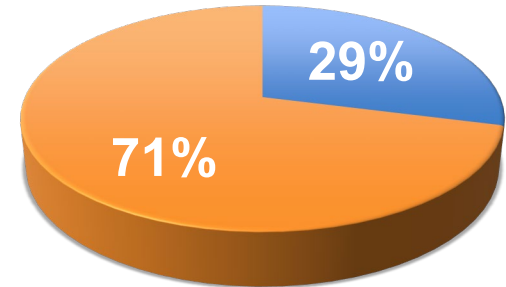
75% Credit



■ DBE ■ NON-DBE SUB

If a DBE subcontracts out to a Non-DBE, you only get credit for what the DBE performed.

0% Credit



■ DBE ■ NON-DBE SUB

A DBE must self perform a minimum of 30% of the work on the contract or it fails a CUF, and you get 0% credit.

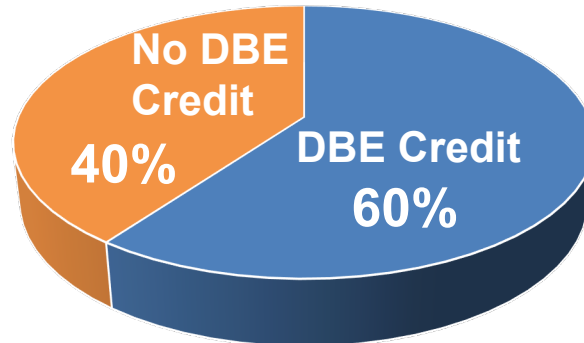
Counting DBE Credit – Manufacturer, Supplier, Distributor, and *Broker

New supplier category

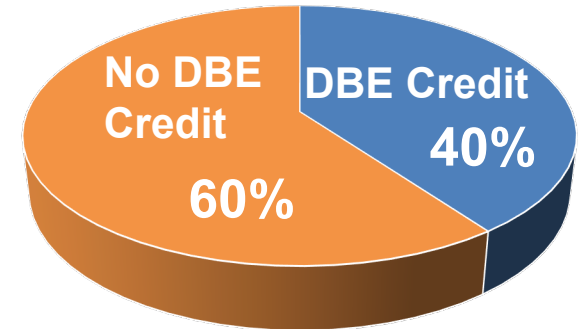
DBE Manufacturer



DBE Supplier



DBE Distributor



The term *Broker* is now is now called **Transactional Facilitator*, and eligible credit for broker fees is limited to a maximum of 5%.

Regular Dealer and Distributor

USDOT DBE rule adds “**Distributor**” as a new subset of DBE suppliers.

Supplier - Manufacturer
Supplier - Regular Dealer
Supplier - Distributor
Supplier - Packager, Broker, Distrib., Wholesaler, Manuf. Rep.



Distributors are permitted to drop-ship from manufacturers if the firm has a distributorship agreement or assumes all responsibility for the materials after point of origin, allowing **40% credit** for the cost of materials.

TYPE OF PARTICIPATION *	Supplier - Distributor
	Percent of payments to be counted: <input type="text" value="40"/> %

DBE Suppliers must be preapproved for Regular Dealer or Distributors status during the contract, allowing 60% or 40%, respectively, of the cost of materials to count toward goal.

For State Funded Projects, Suppliers count 100%



Pre-Construction Meetings

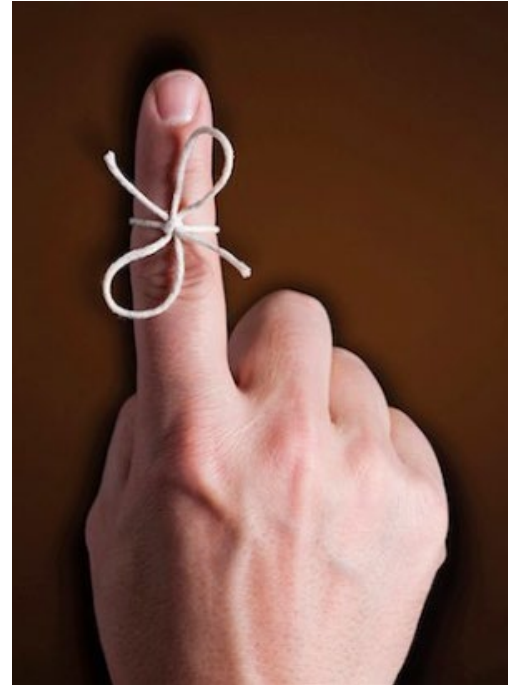


Pre-Construction Meetings

Things to Remember Document

See ***DBE Things to Remember**
document sent by OECR before the
pre-con meeting

**to be included with the meeting agenda*



Pre-Construction Meetings

Things to Remember Document | First Page

1. DMCS
 - Information
2. Prompt Pay
 - (Standard Spec 1-08.1)
3. Withholdings
 - (Standard Specs 1-08.1)
4. Retainage Release
 - [GSP 1-08.1(1)]



Pre-Construction Meetings

Things to Remember Document | First Page

1. DMCS
2. PROMPT PAY
3. WITHHOLDINGS
4. RETAINAGE RELEASE

DBE Program Things to Remember – Name of Contract, Pre-Con Date/Time: xxxx

Contract #XXX, DBE Condition of Award (COA) goal set as XXX%, with XXX training hours. Commitment = \$XXX

COA Committed DBEs as listed on DBE Utilization Certification and Written Confirmation forms at bid opening and Active Construction, Inc.'s Bid Item Breakout and COA amounts that must be achieved as part of the Active Construction's identification as the successful bidder:

- | | |
|---|------|
| 1. EXAMPLE - BI# 36-37, 39-49, 56-62: Landscaping | \$XX |
| 2. SUB #2 - BI# 71: Traffic Control Services | \$XX |
| 3. SUB #3 - BI# 2 (Partial); 63-65: Guardrail | \$XX |

NOTE - work items indicated as Partial are expected to achieve or exceed the DBE COA commitment amounts BEFORE any part of work item(s) can be performed by other subs or prime.

DBE Commitment Total = \$xxx (commitment amount is incorporated into the contract and shall meet or exceed the commitment to not be breach of contract).

Diversity Management and Compliance System (DMCS) - Standard Spec 1-08.1(7)A

1. WSDOT Office of Equity and Civil Rights will enter COA subcontractors in the Diversity Management & Compliance (DMCS) System but prime shall enter ALL other firms used/performing on the project into DMCS. *NOTE – Per Standard Spec 1-08.1(1) Subcontracting, all work that is not performed by the Contractor will be considered as subcontracting (with two potential specific exceptions).
2. Prime and subprime(s) shall certify monthly to the actual amounts paid to all firms that were used as subcontractors, lower tier subcontractors, manufacturers, regular dealers, or service providers on the contract, including all DBE firms, in DMCS for WSDOT engineer review.
3. Online User Manuals are available on WSDOT's website at [Equal opportunity in contracting, diverse business programs page](#): go to the "Diversity Management and Compliance System (B2GNow)" section, and to the [DMCS user manuals](#) topic. Or within DMCS, User Manuals are available under *Help & Support*.

Prompt Payment Standard - Standard Spec 1-08.1(7)B

1. Prime shall comply with the requirements of the 10-day prompt pay provisions and RCW 39.04.250, 39.76.011, 39.76.020, and 39.76.040, and GSP 1-07.11.OPT3 (and per 49 CFR §26.29(a), in particular regarding prompt payment to subcontractors.
2. Once WSDOT has paid prime, prime shall make payment to their first-tier Subcontractor(s) no later than 10 (ten) calendar days after receipt of payment for work satisfactorily completed and enter payments in DMCS.
3. If not paid within 10 days, the Standard Specification 1-08.1 withholding procedures shall be followed.

Monthly Retainage Report and Retainage Release - Standard Spec 1-08.1(7)C

1. **Monthly Retainage Report (WSDOT form 272-065)**-prime completes form monthly for ALL subcontractors on the project regardless of whether or not retainage was/is held -- due to PEO and cc email to OECR at [Regional email](#) within 15 calendar days after receipt of prime's monthly progress payment.
2. **49 CFR §26.29(c)**- subcontractor's work is defined as satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented as required by WSDOT. When WSDOT has made an incremental acceptance of a portion of a prime's contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed.
3. Prime has ten days from date of written request from subcontractor to release retainage or provide subcontractor with written notification (see also Withholdings in next section, below) regarding why work was not satisfactorily completed & resolution to achieve completion.
4. **49 CFR §26.55(h)**- Do not count the participation of a DBE subcontractor toward a prime's final compliance with its DBE obligations/commitment on a contract until the amount being counted has actually been paid to the DBE.

Withholdings Standard Specs 1-08.1 Whenever prime withholds payment to a subcontractor for any reason including disputed amounts and retainage (49 CFR§26.29), Prime shall provide notice within 10 calendar days to subcontractor and WSDOT Engineer to include:

1. Accounting of payments to date;
2. Dollar value of the withholding and the reason for amount withheld; and
3. Explanation of what must occur to have the withheld amount released.

DBE General Special Provision (GSP) 1-07.11.OPT3

1. **DBE/FSBE Truck Unit Listing Log (WSDOT Form 350-077)** - supplemental information shall be submitted in an electronic format to the Engineer prior to any trucking services being performed for DBE credit. Logs shall be submitted and accepted by the Engineer no later than ten calendar days of utilizing applicable trucks. Each DBE trucking firm shall complete a **Daily DBE/FSBE Truck Unit Listing Log** (same form) for each day that the DBE performs trucking services for DBE credit. The Daily DBE/FSBE Truck Unit Listing Log forms shall be submitted by Friday of the week after the Work was performed by email to [Regional email](#)
2. **Commercially Useful Function (CUF)** 49 CFR §26.55 - Prime may only take credit for the payments made for work performed by the DBE that is actually performing, managing, and supervising the work that is determined to be performing

Pre-Construction Meetings

Things to Remember Document | Second Page

5. GSP 1-07.11\OPT3 DBE:

- a. Commercially Useful Function (CUF)
- b. On-Site Reviews (OSR)
- c. Joint Check
- d. Termination, in whole or in part
- e. Change orders
- f. Good Faith Efforts (GFE) – Appendix A
- g. DBE/FSBE Truck Unit Listing Log



6. Subcontracts

Pre-Construction Meetings

Things to Remember Document | Second Page

5. GSP 1-07.11\OPT3 DBE
6. SUBCONTRACTORS

a CUF. Payment must be commensurate with the work actually performed by the DBE and applies to all DBEs performing work on a project, whether or not the DBEs are COA or not.

3. **On-Site Review (OSR)** – WSDOT Field Engineer/Inspector will conduct a minimum of one on-site review for each DBE (COA or non-COA) for each construction and for each primary scope of work to ascertain whether DBEs are performing a CUF. A DBE performs a CUF when it is carrying out its responsibilities of its contract in accordance with the requirements of the 49 CFR §26.55. OSR shall be conducted at periodic intervals:
 - a. when the DBE is at the peak period of the DBE's work,
 - b. any time there is a change in the nature or methods of the DBE's work, e.g., if a DBE is performing multiple different scopes of work an on-site review must be completed for each scope of work.
 - c. when there is a change in the DBE performing the work (e.g., substitution of a DBE firm).
 - d. on multi-year or construction season projects, a new OSR is required for each DBE performing work on the contract each year.
 - e. any time the DBE performs work as a lower tier to other subcontractors on the project.

WSDOT Field Inspector shall perform these on-site reviews for all DBE's performing work on the project, whether Condition of Award work or other work, so **DBE must inform prime & prime must inform WSDOT PEO accordingly & timely when DBEs are on the project performing work.**

4. **Joint Check** - is a check between a subcontractor and the prime to the supplier of materials/supplies, and **must be approved in advance by WSDOT, in order to receive credit.** The check is issued by prime as payer to the subcontractor and the material supplier jointly for items to be incorporated into the project. Joint checks can only be initiated or requested by the subcontractor.
5. **Change Orders** – any changes affecting DBE commitment or work scope must be processed as a change order.
6. **Termination in whole or in part** (per 49 CFR §26.53(f)(1)(i)) – Prime cannot reduce the amount of work committed to a COA DBE without good cause. Reducing DBE commitment is viewed as partial DBE termination, and therefore subject to the GSP termination procedures. Active Construction shall provide DBE subcontractor and engineer with written notice regarding termination and give DBE subcontractor five (5) days to respond prior to terminating the DBE subcontractor.
7. **Good Faith Efforts (GFE)** & 49 CFR §26.53(g) – is required in the event the commitment amount will not be achieved. If a COA DBE fails to complete its work on the contract **for any reason**, prime shall substitute with another DBE to perform at least the same amount of work under the contract, or provide documentation of GFE. Prime should use [Appendix A](#) to guide and document any such GFE submissions.

8. Subcontracts

- a. [Federal Highway Administration \(FHWA\) Form 1273](#) must be physically incorporated to all subcontract(s) and lower tier subcontracts. **Active Construction must insert this form into each subcontract, as well as further require and confirm its inclusion in all lower tier subcontracts.**
- b. [49 CFR §26.13\(b\)](#) each subcontract prime signs with a subcontractor must include the assurance from this section.
- c. [49 CFR §26.29\(b\)](#) - must ensure prompt and full payment of retainage from prime to all subcontractors within **10 days** (per [RCW 39.04.250 \(1\)](#)) after the subcontractor's work is satisfactorily completed.
- d. [49 CFR §26.29\(e\)\(1\)](#) - subcontract must include a dispute resolution process incorporated into subcontract(s).
- e. Include provisions from Standard Spec 1.08.1 in every subcontract and lower tier subcontract. Collectively, lower tier subcontractors shall not do work that exceeds 25% of the total amount subcontracted to prime's Subcontractor/Subprime.
- f. [49 CFR 26.53\(j\)](#) - Prime must make available upon request a copy of all DBE subcontracts. **All DBE subcontracts must be submitted to WSDOT OECR PRIOR to the DBE firm's start of work on the project – email to [Regional Email](#) and cc [Engineer Office](#).**

REMINDER: WSDOT PEO to provide OSR backup documentation along with each completed DBE OSR form, and send to [Regional Email](#):

1. Copy of the executed applicable DBE subcontract, if not previously provided to OECR by Active Construction;
2. An approved Request To Sublet (RTS);
3. The IDR for the day the OSR was performed.
4. One week's Certified Payroll (CP) for both the DBE & Prime, for the same week the OSR was conducted.
5. If the DBE is a "Furnish & Install", also provide the following:
 - a. The invoices for materials delivered that day of the OSR performed.
 - b. Proof of payment made by the DBE to the source of the materials delivered that day.

DBE Questions? Call Regional OECR at (360) XXX-XXXX, or email [REGIONAL EMAIL](#) **Thank You!**

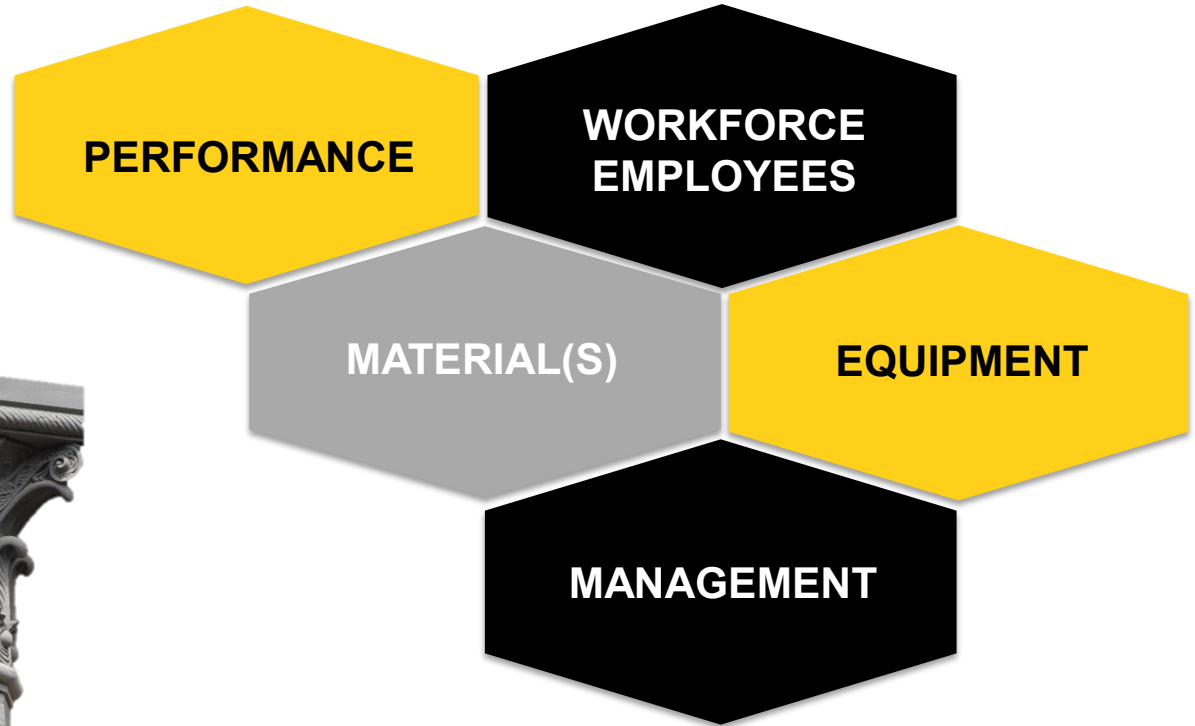


Commercially Useful Function & Onsite Reviews



Commercially Useful Function

5 Components



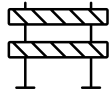
Commercially Useful Function

1. DBE firm(s) must perform CUF in order to receive countable participation
2. Prime contractor(s) are required to ensure DBE firm(s) perform CUF
3. DBE performs CUF when: Performing, managing, and supervising work



Commercially Useful Function

4. WSDOT General Special Provisions (GSPs) include basic CUF information on the following:



Temporary Traffic Control

- Traffic Control Supervisor (TCS)
- Flaggers
- Flagging Equipment



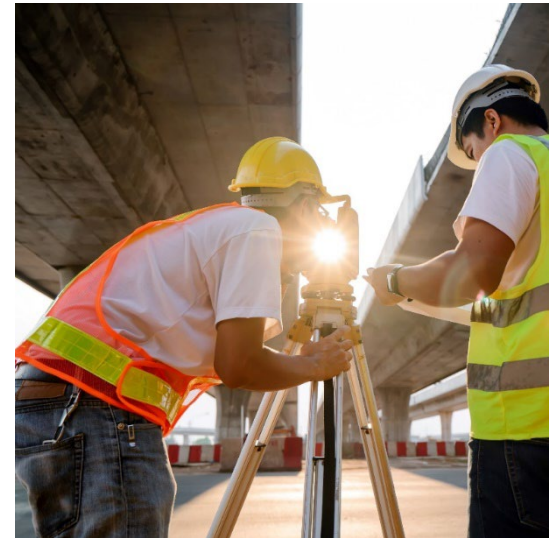
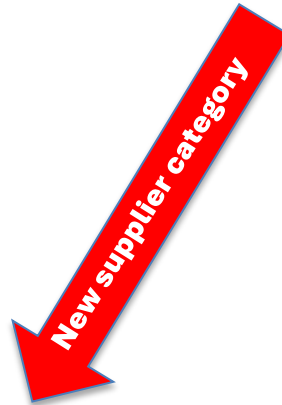
Trucking

- In two locations in the GSPs
- Language applies to all DBEs



Manufacturer/Regular Dealer/**Distributor**

- 100% participation – **NEW CLARIFICATION:** a DBE that makes minor material modifications is not a manufacturer for goal attainment purposes (*Manufacturer*)
- 60% participation (*Regular Dealer*)
- **40% participation. Permitted to drop-ship from manufacturers if the firm has a distributorship agreement or assumes all responsibility for the materials after point of origin. (*Distributor*)**



CUF Supporting Documents for OSR



CUF Supporting Documents

Furnish and Install

1. The Executed DBE Subcontract if not sent to Region OECR mailbox
2. DBE Request to Sublet
3. Invoices from DBE for materials/supplies purchased for the project
4. Lease/rental/ownership documents from the DBE firm for major equipment used on the project



CUF Supporting Documents

Labor Only

1. DBE's Request to Sublet (RTS)
2. Lease/rental/ownership documents from the DBE firm
3. Lease/rental agreements from DBE firm



CUF Supporting Documents

Owner & Operator

1. DBE's Request to Sublet (RTS)
2. Vehicle Registrations
3. Delivery Tickets
4. Truck Unit Listing Logs
5. Invoices
6. Certified Payroll



CUF Supporting Documents

Supplier Categories (Manufacturer, Regular Dealer, **Distributor**)

1. Purchase order or manufacturer or material/supply agreement
2. Invoices of materials/supplies
3. Bills of Lading
4. Equipment titles of ownership
5. Equipment lease/rental agreements
6. Hauling/Delivery tickets
7. DBE's cancelled checks for materials purchases
8. Payroll records



TIPS

Owner & Operator

1. DBE must perform at **30%** of the work of its subcontract with its own forces
2. If a DBE subcontracts a portion of its contract out to a lower tier non-DBE, it will not receive countable participation for the amount of the lower tier subcontract
3. If the DBE subcontracts out more than their allowable work (even if to another DBE), you can't count any of their participation.





Terminations, Substitutions, & Change Orders



Terminations & Substitutions



Two applications of the termination process:

1. Remove/replacement of a DBE becomes a necessary action
2. Partial termination (shift/change in commitment)



You cannot reduce the amount of work committed to a COA DBE without a **good cause**.

Examples of Good Cause

49 CFR 26.53(f) (3)

- (3) For purposes of this paragraph, good cause includes the following circumstances:
- (i) The listed DBE subcontractor fails or refuses to execute a written contract;
- (ii) The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor;
- (iii) The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements.
- (iv) The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;
- (v) The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant [2 CFR Parts 180, 215](#) and [1,200](#) or applicable state law;
- (vi) You have determined that the listed DBE subcontractor is not a responsible contractor;
- (vii) The listed DBE subcontractor voluntarily withdraws from the project and provides to you written notice of its withdrawal;
- (viii) The listed DBE is ineligible to receive DBE credit for the type of work required;
- (ix) A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract;
- (x) Other documented good cause that you determine compels the termination of the DBE subcontractor. Provided, that good cause does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award.

Termination Process

1. You shall **give notice in writing** to the DBE & Engineer of your intent to terminate DBE & the reasons for doing so.
2. The DBE has **five (5) days to respond**. The DBE's response shall either support the termination or advise the Engineer and the contractor of the reasons it objects to the termination.
3. Request for the termination and DBE response **must be provided to the contracting agency for review and approval/disapproval prior to termination of DBE**.
4. You **must receive prior written approval from OECR** in order to terminate.



Consequences of Improper Termination

1. If the termination and substitution process is not followed, you **will be entitled to any payment for COA work not performed by the existing DBE.** Substitution of a COA DBE cannot occur without termination.
2. Each federal-aid contract containing a DBE goal includes the contract clause required by Part 26.13(b) stating that, “failure by the contractor to carry out the requirements of this part is a material breach of the contract and **may result in the termination of the contract or such other remedies that WSDOT deems appropriate** if the the Prime Contractor/Prime Consultant fails to comply with the requirements of this section.”
3. Federal scrutiny w/ potential loss of funding and additional oversight and review.



Substitution Process

1. All substitutions **must be approved** by the contracting agency with OECR having final approval
2. After receiving a termination with good cause approval, you may replace a DBE with another DBE or provide a GFE.
3. The contractor **must submit a plan** to Engineer on how they intend to achieve the revised DBE Utilization Plan **within two (2) days**. Need before approval of the termination.
4. **Complete packet must include:**
 - a. Substitution DBE
 - b. Amounts
 - c. Bid items
 - d. A copy of the Partial Termination documentation

MUST HAVE
GOOD CAUSE

Change Orders



1. Need for a change order:
Changes in specifications, materials, quantities, and change in condition of award (COA)
2. You cannot do a change order after project has reached physical completion, prime will need to do a good faith effort (GFE).



Good Faith Effort



Good Faith Effort (GFE)

Learning Outcomes

1. The Rules that Govern
2. Pre and Post Award Good Faith Efforts
3. Documentation Requirements
4. Alternative Project Delivery Methods
5. Avoiding Bias
6. Questions and Answers

Good Faith Effort (GFE)

The Rules That Govern

1. Federal Regulations
2. 49 CFR Part 26.53
3. Appendix A



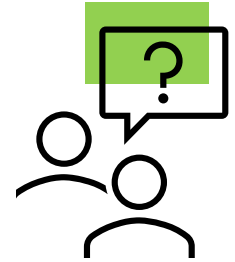
Good Faith Effort (GFE)

49 CFR Part 26.53

- A. When you have established a DBE contract goal, you must award the contract only to a bidder/offeror who makes good faith efforts to meet it. You must determine that a bidder has made good faith efforts if the bidder/offeror does either of the following things:
 - 1. Documents that it has obtained enough DBE Participation to meet the goal; or
 - 2. Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the bidder/offeror does document adequate good faith efforts, you must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal.

Good Faith Effort (GFE)

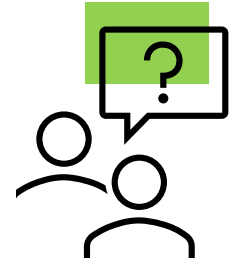
Appendix A | 11 Questions (1-6)



1. Did the bidder solicit through all reasonable and available means the interest of all certified DBEs who had capability to perform work on the contract?
2. Did the bidder solicit interest within sufficient time to allow the DBEs to respond to the solicitation?
3. Did the bidder take appropriate steps to follow-up initial solicitations?
4. Did the bidder break out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces?
5. Did the bidder provide DBEs with the adequate information about the plans, specs and requirements of the contract in a timely manner?
6. Did the bidder negotiate in good faith with interested DBEs?

Good Faith Effort (GFE)

Appendix A | 11 Questions (7-11)



7. Did the bidder make portions of the work available to DBE subcontractors and suppliers to be consistent with availability of DBEs, so as to facilitate DBE participation?
8. Did the bidder make any efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance?
9. Did the bidder make an effort to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance to services?
10. Did the bidder effectively use the services of available minority/women community organizations; minority/women contractors' groups; local, state, and federal minority/women business assistance centers?
11. Were other bidders able to meet the Condition of Award goal based upon information submitted with their DBE Utilization form?

Good Faith Effort (GFE)

Documentation

1. Bidders' List
2. Contact Log
3. Notification to Certified Firm(s)
- example: emails & web postings
4. Initial Solicitation Follow-up
- provide a contact log
5. Copies of Public Announcements
- example: newspapers & community outreach notices



Good Faith Effort (GFE)

Specific portion of work identified for DBE subcontractors should include:

- Scope identified
- Estimated value of contract
- Estimated percentage of contract

Outreach and engagement events held, and did you reach out to your OECR Regional Contact to attend:

- Provide sign-in sheets

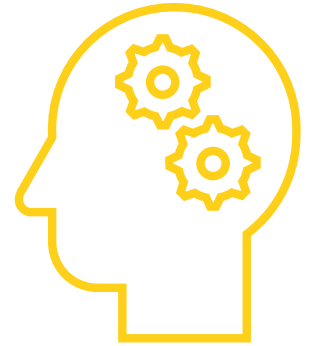
Proof you negotiated in good faith – this should include:

- DBE subcontractor name
- Scope of work
- Date rejected and *reason

**If price competitiveness was the reason for the rejection, you should provide copies of all quotes received.*

Good Faith Effort (GFE)

Post Award



We still utilize the 11 questions **even during post award GFEs**

Additional things to think about:

- Did you take necessary and reasonable steps to achieve the goal?
We consider intensity/effort to obtain the goal. ***It's not just the quantity of your efforts but also the quality.***
- When change orders arise, consult with your Regional OECR contact on the impact or potential impact to DBEs.
- Partial termination documentation. When did you know you would not meet commitment to the DBE, and when did you reach out to the DBE? Did you give good cause? Did you give the DBE five (5) days to respond to the notice of intent to partially terminate? What was the response from the DBE? Did you try to find other scopes of work that the DBE is certified in for the DBE to perform?

Good Faith Effort (GFE)

Alternative Project Delivery Methods

- The GFE is a **continuously ongoing process.**

The new DBE rules names it an Open-Ended Participation Plan (OEPP)

- We will ask for: *current plan, payments, forecast of participation, outreach events, DBE's being mentored, etc.*
- Request **monthly compliance meetings** with OECR and Local Agencies
- Know **who** is going to be on your projects and **when**



Good Faith Effort (GFE)

Help Your Contractors Achieve the Goal | Post Award

- What was your intensity/effort to obtain the goal? It's not just the quantity of your efforts, but the quality.
- Partial termination documentation: When did you know you would not meet your commitment to the DBE, and when did you reach out to the DBE?
- Did you give good cause? Did you give the DBE five (5) days to respond to the notice of intent to partially terminate?
- What was the response from the DBE?
- Did you try to find other scopes of work that the DBE is certified in for the DBE to perform?

Good Faith Effort (GFE)

We want to Help You Achieve the Goal

1. Provide training opportunities to your DBEs.
2. Have proactive thinking of inclusion from the start.
3. You can build and mentor capacity on your private sector jobs to increase participation when performing on you're your public sector jobs.
4. **Be responsive when disputes arise.**





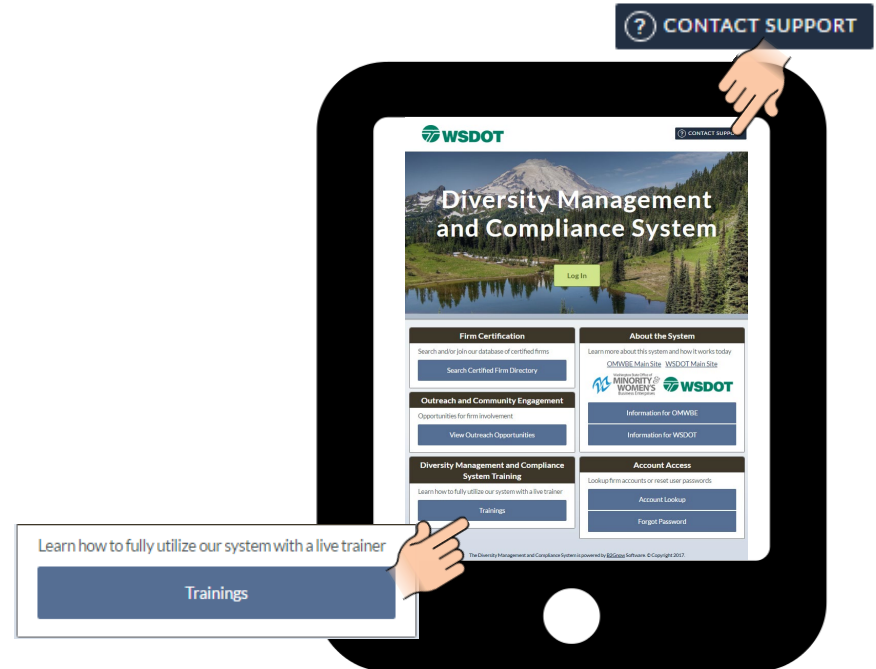
DMCS Project Closeout



DMCS

<https://wsdot.diversitycompliance.com/>

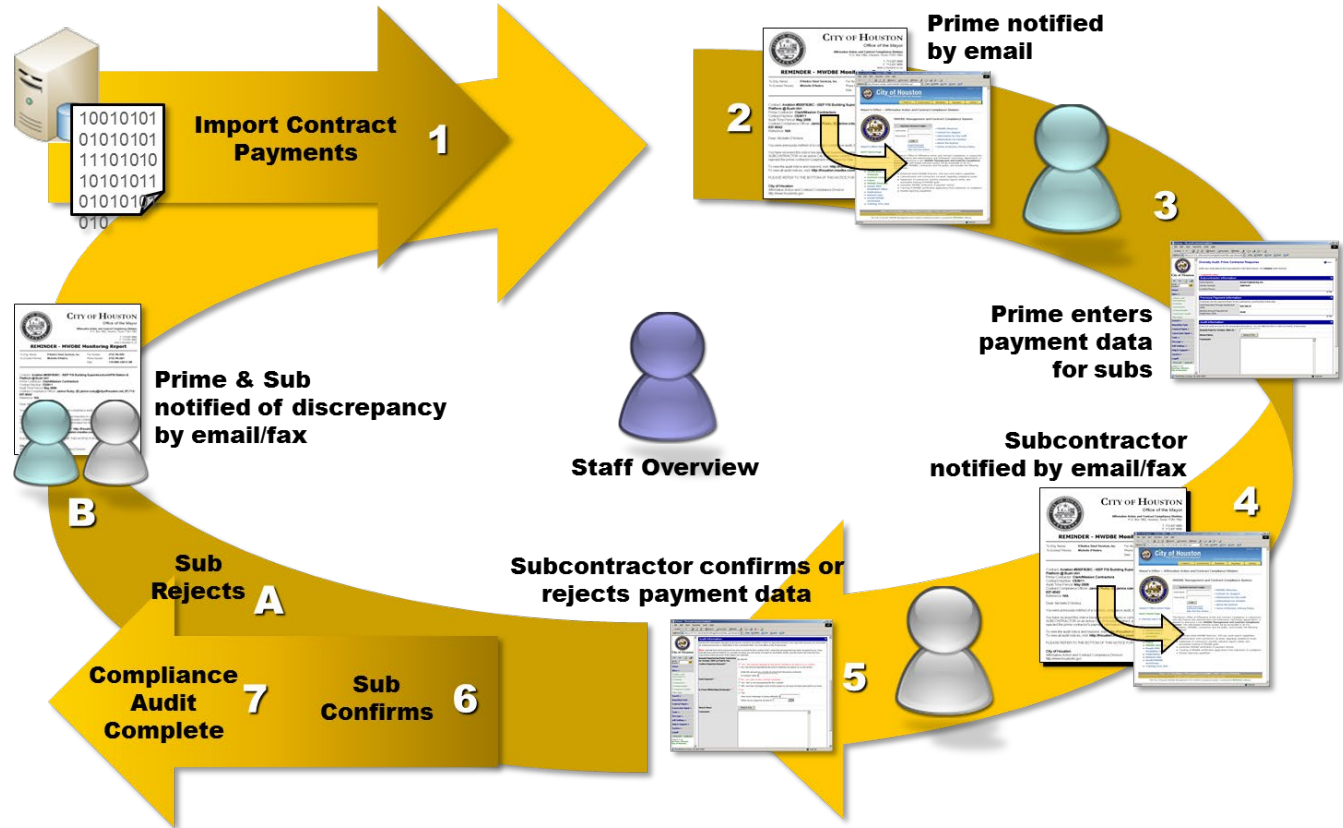
1. Tracks payments to all firms on the contract
2. Enables subs to verify payments
3. Shows participation of diverse firms
4. Assists with prompt pay compliance



diversityreporting@wsdot.wa.gov

DMCS

Audit Process



DMCS

Prime Duties

1. **Add ALL Firms** involved with the contract, including non-diverse firms
2. **Enter amounts** received from Agency and amounts paid to **ALL** firms monthly:
 - amount paid*
 - payment date*
 - prompt payment?*
 - payment detail, supporting documents, comments
3. **Respond to Discrepancies**

* - required fields

Contract Management: Subcontractor List [Help & Tools](#)

[Contract Main](#) [View Contract](#) [Subcontractors](#) [Compliance Audit List](#)

[Compliance Audit Summary](#) [Messages](#) [Comments](#) [Reports](#)

Washington State Department of Transportation
WSDOT_Test_Contr: PAVING DOWN THE HIGHWAY
Prime: AAA Good Prime

All subcontractors assigned to this contract are listed below.

[Refresh Page](#)

Subcontractor List

[Add First Tier Subcontractor](#)

Subcontractor Name	Certified	Current Award	Type	Inc. in Goal	Compliance Audit	Final Pmnt	Actions
1 BBB Good Sub	No	\$25,000	Sub	No			Add Tier 2 Sub Substitute Remove

DMCS

Subcontractor Duties

1. Verify amounts received from prime monthly (even if \$0)

- Correct:
 - payment date*
 - prompt?*
 - detail of work*
 - paid in full?*
- Retainage withheld?*
- Final payment made?

2. Add ALL lower-tier Firms involved with the contract & report payments to them as a Sub-Prime.

* - required fields

Confirm Reported Amount? *

[Show all options and fields](#)

Correct - the amount reported by the prime contractor as PAID to us is correct (\$20,474.

1. Payment Date: *
» If multiple payments were received, enter the date of the first payment.

2. Were you paid in accordance with the organization's prompt payment policy? *
» According to our records, the prime contractor was paid on 12/26/2023.
» "Prompt Pay" means payment within 10 days.

Yes - we were paid on or before 1/5/2024.
 No - we were not paid on or before 1/5/2024.
 N/A - we cannot determine if we were paid promptly.

3. Detail the work you performed for this payment: *

4. Is the amount above a partial payment relative to your invoiced amount? *
 Yes - we were partially paid.
Enter the amount you invoiced: \$
 No - we were paid in full.

Incorrect - the amount reported by the prime contractor as PAID to us is not correct.

DMCS

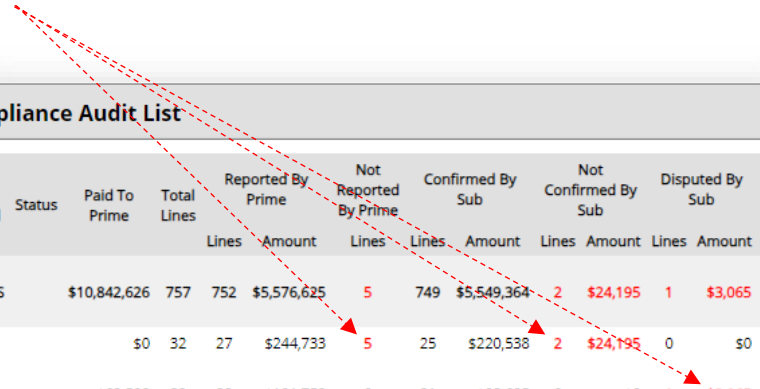
Staff Duties (Project Engineer Office, Local Agency & Office of Equity and Civil Rights)

1. **Monitor reporting** in DMCS – ensure all firms added & payments received/reported monthly
2. **Approve new diverse Subs:** e.g., DBE's
3. **Address reporting issues** – “follow the **red road**”
4. **Discuss prompt pay** issues with Prime
5. **Resolve Discrepancies**
6. **Attach OSR's** & diverse participation documents



Staff Overview

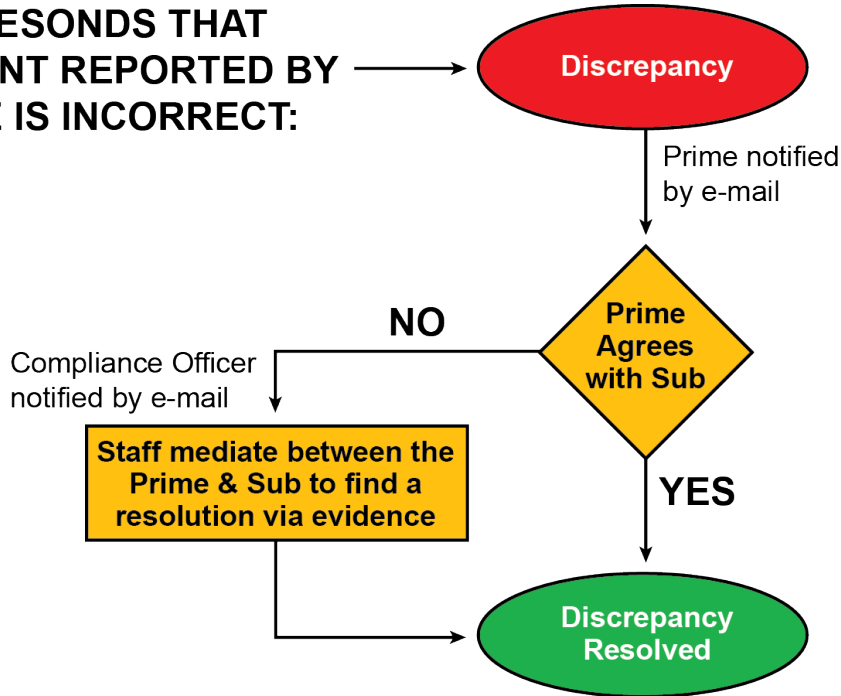
Compliance Audit List														
Audit Period	Status	Paid To Prime	Total Lines		Reported By Prime		Not Reported By Prime		Confirmed By Sub		Not Confirmed By Sub		Disputed By Sub	
			Lines	Amount	Lines	Amount	Lines	Amount	Lines	Amount	Lines	Amount		
TOTALS		\$10,842,626	757	752	\$5,576,625	5		749	\$5,549,364	2	\$24,195	1	\$3,065	
Jan 2024		\$0	32	27	\$244,733	5		25	\$220,538	2	\$24,195	0	\$0	
Dec 2023		\$62,509	32	32	\$101,759	0		31	\$98,695	0	\$0	1	\$3,065	



DMCS

Discrepancies

IF A SUB RESONDS THAT THE AMOUNT REPORTED BY THE PRIME IS INCORRECT:



Reporting Status [Audit Period](#)

Discrepancy All

1 Discrepancy [January 2024](#)

Original Compliance Audit Data Reported

AMOUNT REPORTED BY PRIME	\$1,275.00
AMOUNT REPORTED BY SUBCONTRACTOR	\$1,425.00

Discrepancy Resolution Data Reported

NEW AMOUNT REPORTED BY PRIME	\$1,275.00 NOT included in Goal (change)
NEW AMOUNT REPORTED BY SUBCONTRACTOR	\$1,425.00
NEW ATTACHED FILE(S) FROM PRIME	<input type="button" value="View Attachments"/>
NEW PRIME PRIVATE COMMENTS	Payment reported of \$1,425 was paid in December, \$1,275 is January payment

DMCS


Prompt Payment & Final Retainage

Compliance Audit List		
Subcontractors -	This Period	Confirmed By Sub
	\$19,152.00	Confirmed
	View Edit	View Edit
	Prompt: No	Prompt: No

Staff shall monitor for any **red** prompt pay issues reported by Subs.
We will work with Primes to correct.

- It is suggested to present the Prime with a Compliance Audit List specific to a particular month*

The contract cannot be closed in DMCS until all **Retainage Release** is reported. The Prime is required to submit a Monthly Retainage Report (Form 272-065) until Every Subs' retainage is released.

 **Washington State Department of Transportation**

Monthly Retainage Report

Agency Name:						Federal Aid Number:	
Prime Contractor Name:						Contract Number:	
Contract Name:						Month/Year or Report:	
Subcontractor Name	Start Date	Percent Complete	Monthly Amount of Retainage Withheld	Total Amount of Retainage Withheld	Retainage Released Date	Date Subcontractor's Work (physical and paper) Completed	Remarks

DMCS

Project Closeout

DMCS TAB	REVIEW
Compliance Audit Summary	All Subcontractors and lower-tier subs added in DMCS, and payments to them reported?
	Retainage Release reported?
	Commitments to Condition of Award subcontractors met?
Compliance Audit List	Payments to Prime reported?
	Payments confirmed by Subs and Disputes resolved?
Docs	On-Site Reviews attached?
	Required Closeout documents attached?



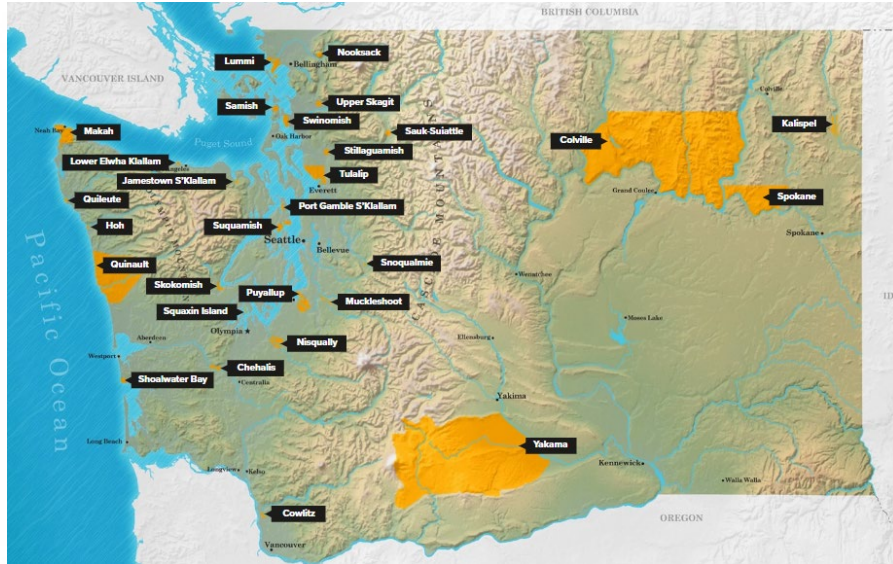
Tribal Employment Rights Ordinance (TERO)



Each federally recognized Tribal Nation is a unique **Sovereign Government**, and each tribal nation operates its own TERO office with varying strategies and policies to protect the employment rights of their tribal workforce.



There are **574** federally recognized Tribes throughout the nation



There are **29** federally recognized Tribes throughout Washington State

- Chehalis
- **Colville**
- Cowlitz
- Hoh
- Jamestown S'Klallam
- Kalispel
- **Lower Elwha Klallam**
- **Lummi**
- **Makah**
- Muckleshoot
- Nisqually
- Nooksack
- Port Gamble S'Klallam
- **Puyallup**
- Quileute
- **Quinault**
- Samish
- Sauk-Suiattle
- Shoalwater Bay
- Skokomish
- Snoqualmie
- **Spokane**
- Squaxin Island
- Stillaguamish
- Suquamish
- **Swinomish**
- **Tulalip**
- Upper Skagit
- **Yakama**

Compliance

Tribal Employment Rights Ordinance

1. TERO offices work directly with you on a compliance plan
2. Agreements/plans require approval from the tribal TERO staff before work can begin
3. The plan submitted to the Tribal TERO office ensures protection for the TERO workforce
4. The compliance plan also covers penalties for violation of TERO laws that may include fines and sanctions

Where can I find the regulations?

Tribal Employment Rights Ordinance

- **General
Specials
1-07.12.OPT2**
- **Construction
Manual
• 1-07.12**



Monitoring/Oversight Best Practices



Oversight & Monitoring

Contract Oversight

1. Community Engagement & Outreach

- Monthly Association meetings
- 1:1 with community members

2. Routine Contractor Meetings

- Designate an Inclusion Manager
- Subcontracting Progress
 - Who is getting started, who is wrapping up
 - Who needs additional assistance, who is performing well



Oversight & Monitoring

Monitoring Performance

1. 1:1 Meetings with Project Engineer Offices and Regional Compliance Staff
2. Monitoring DMCS for prompt pay issues
3. Review and validation of Contractor Progress Reports
4. Monitoring Trucking
5. No CUF – No CREDIT!



The **Regional Compliance Staff** are your **Best Resource** for Inclusion & Participation on Contracts.



Best Practices

1. Host an Equity Strategy Meeting
2. Understand the importance of inclusion to WSDOT as well as to the project
3. Perform on-site reviews on schedule — **No CUF – No CREDIT!**
4. Monitor trucking activities

Best Practices

1. Know when to have a meeting
2. Ensure commitment to inclusion remains on your radar
3. Be responsive when lower tier disputes arise



Resources

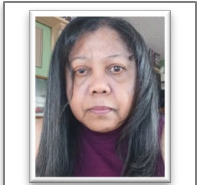


Economic Inclusion Team

Office of Equity and Civil Rights



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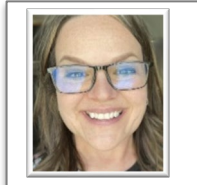
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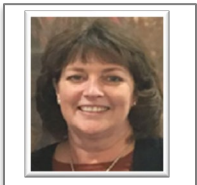
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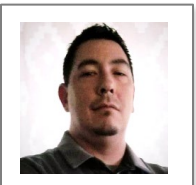
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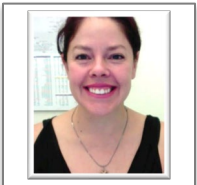
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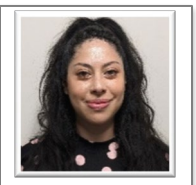
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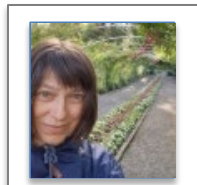
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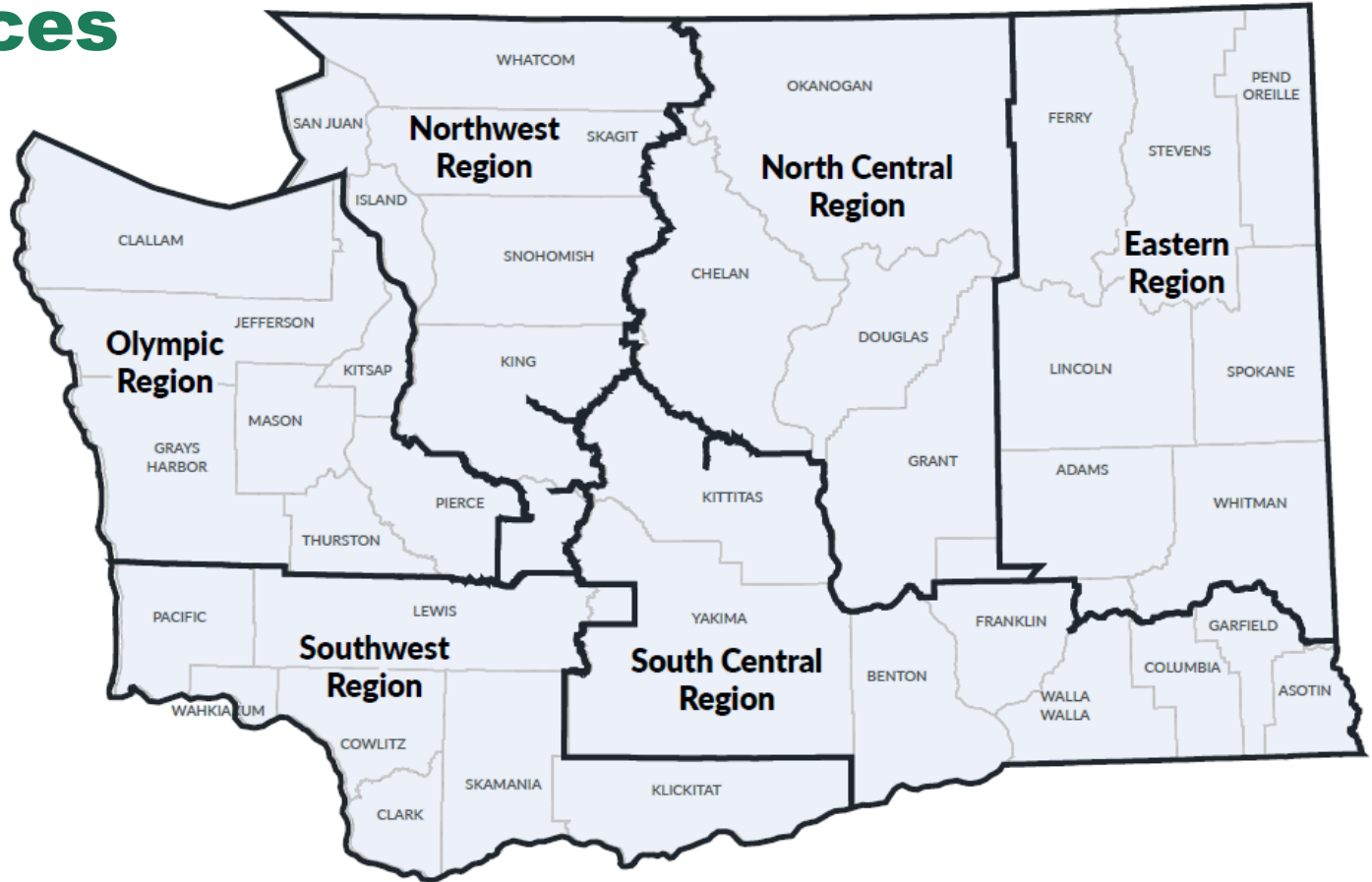
Resources

Emails

REGION	EMAIL
Headquarters	HQoeo@wsdot.wa.gov
Eastern Region	ERRegionOEO@wsdot.wa.gov
North Central Region	NCRegionOEO@wsdot.wa.gov
Northwest Region	NWRegionOEO@wsdot.wa.gov
Olympic Region	ORegionOEO@wsdot.wa.gov
South Central Region	SCRegionOEO@wsdot.wa.gov
Southwest Region	SWRegionOEO@wsdot.wa.gov
Washington State Ferries	Ferriesoeo@wsdot.wa.gov
Tribal Employment Rights (TERO)	TERO@wsdot.wa.gov

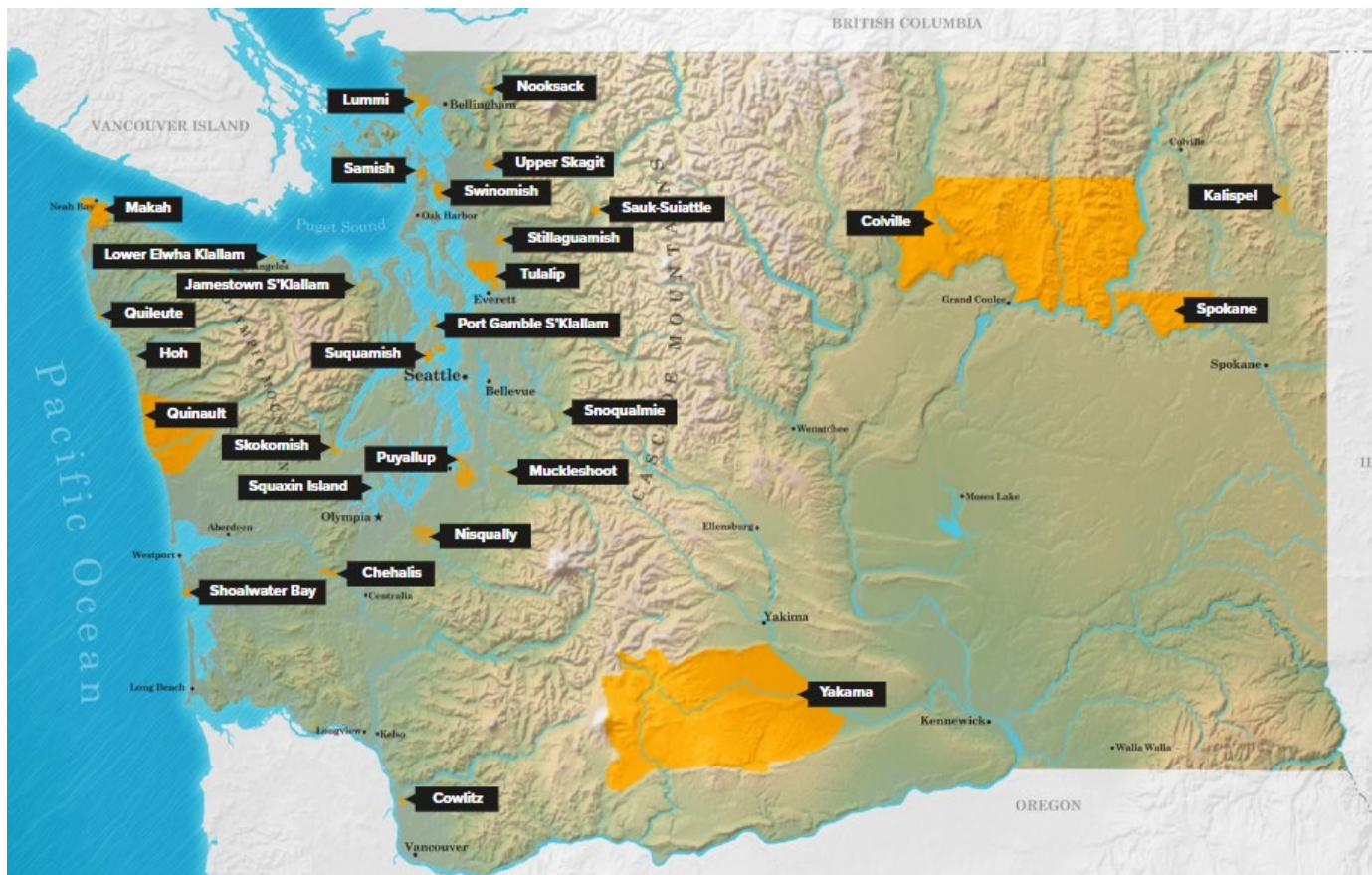
Resources

Regional Map



Resources

Tribal Map



Resources

Links

[THE OFFICE OF EQUITY AND CIVIL RIGHTS \(OECR\)](#)

[THE OFFICE OF WOMEN AND MINORITY BUSINESS ENTERPRISES \(OMWBE\)](#)

[DIVERSITY ROADMAP](#)

[DBE SUPPORTIVE SERVICES \(DBESS\)](#)

[LAG MANUAL](#)

[MWBE SUPPORTIVE SERVICES \(MWBESS\)](#)

[GENERAL SPECIAL PROVISIONS](#)

[DIVERSITY MANAGEMENT COMPLIANCE SERVICES \(DMCS\)](#)

[CODE OF FEDERAL REGULATIONS \(CFR 49.26\)](#)

[DBE PARTICIPATION PLAN](#)

[CAPACITY BUILDING MENTORSHIP PROGRAM](#)

[HIGHWAY CONSTRUCTION WORKFORCE PARTNERSHIP](#)

[TRIBAL EMPLOYMENT RIGHTS ORDINANCE \(TERO\)](#)



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OECR weekly updates!

The End