

7. Program Administration

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7.1. General

There are a number of administrative programs mandated by both the federal and the state government that may apply to contracts that fall under the Project Engineer's contract administration responsibility. Most of these programs do not have universal application. The administrative programs fall into two groups:

1. Programs that are under the authority of the Civil Rights Office (CRO) and are known as external affirmative action programs (these include EEO, OJT and DBE programs); and
2. All other administrative programs (federal and state labor requirements, Buy American (FAA) the Buy America Act (FHWA), and the Alaska Product Preference program).

A brief review of these programs appears in the following sections.

7.2. External Affirmative Action

There are three affirmative action programs mandated by the federal government that apply to most federally funded contracts that fall under the Project Engineer's contract administration responsibility:

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

The parallel state affirmative action program is State Administrative Order 76. It requires compliance with federal EEO requirements on all state-funded projects. State Administrative Order 76 requires increased contracting opportunities for minority and women-owned firms. There is no DBE goal on state-funded construction contracts; DBE certification is recognized for participation under an incentive program developed to encourage prime contractors to voluntarily use DBE firms on these projects.

Every federally funded contract includes the EEO and DBE requirements. Only selected FHWA-funded projects include OJT requirements, depending upon specific criteria identified in federal guidelines such as: the type of work, size of workforce in each craft, and length of the project. A contractor's performance with respect to compliance with each of these programs is part of each Contract Compliance Review mandated by the federal government and performed by the Statewide Contract Compliance Review Officer in the Civil Rights Office. For this reason, it is imperative that contractors understand their contractual obligations regarding these programs. It is also imperative for enforcement purposes that Project Engineers administer these programs consistently and uniformly in the field.

Policy and Procedure 01.02.010 delegates final authority on all external affirmative action matters (EEO, OJT, and DBE programs) to the Civil Rights Office. This authority covers implementation, interpretation and clarification of policies, related contract specifications, and reporting requirements of these programs. This authority has been delegated to ensure uniform and consistent interpretation, application, and enforcement of these federally-mandated programs within the Department statewide.

The Contracting Officer has final authority with regard to construction contract decisions and resolution of problems.

If issues or questions arise regarding external affirmative action programs, contact the construction staff person that has been assigned duties as Regional Contract Compliance Liaison (RCCL). If they can't resolve the problem then the issue will be sent to the Civil Rights Office. This includes issues or questions involving the following contract provisions:

1. Statewide Special Provisions, Section 120, Disadvantaged Business Enterprise (DBE) Program, and all related forms;
2. Statewide Special Provisions, Section 645, Training Program, and all related forms;
3. Federal EEO Bid Conditions (Form 25A-301);
4. Form 25D-55, Sections I, II and III.

Construction personnel must obtain concurrence from the Civil Rights Office prior to issuance and/or approval of change documents involving DBE and OJT.

Construction personnel are encouraged to coordinate with the contract compliance liaisons or the Civil Rights Office as soon as possible when issues arise. The primary goal is to coordinate early in the process to avoid contract compliance violations later on. Proper contract administration of these programs can help the contractor avoid serious Contract Compliance Review problems, up to and including debarment.

The Department's External Affirmative Action Plan and annual EEO Assurances explain the Department's obligations, procedures, and performance with respect to these programs. Internal operating methods of the Civil Rights Office provide guidance on how the Department will meet its obligations to the federal government. All other documents are obsolete. Because of the dynamics and evolution of these programs, it is impractical for the Department to develop and distribute official policies and procedures just to have them become outdated soon after publication. For these reasons, please use the Civil Rights Office as the resource for current, effective information and/or assistance with these programs.

7.2.1 Equal Employment Opportunity (EEO)

The authority for the EEO program requirements on FHWA-funded Department projects is 23 USC 140. The Department implements the EEO Program as a condition of receiving FHWA funds. EEO goals and timetables in construction come from the US Department of Labor through Executive Order 11246. The requirements apply to contractors, subcontractors, and materials suppliers on federally-funded projects whose contracts/subcontracts exceed \$10,000. Specific project EEO goals, good faith efforts, and reporting requirements are included in every construction contract.

7.2.2 Disadvantaged Business Enterprise (DBE) Program

The DBE Program is intended to provide the contracting opportunities on federally funded projects for DBE-owned firms in accordance with federal regulatory criteria. The Civil Rights office establishes a DBE utilization goal for each project, as a percentage of the total contract award amount. The Civil Rights office establishes the DBE project goal in

accordance with federal guidelines based upon the subcontractable items for which there are certified DBEs to perform that type of work. Statewide Special Provision, Section 120 explains in detail determination of DBE compliance.

7.2.3 On-the-Job Training (OJT) Program

This program, mandated by 23 USC 140a and implemented only on selected FHWA-funded projects, becomes part of the contractor's required affirmative action program. The Department selects the specific construction projects that will utilize the OJT program and establishes the project training goal in terms of individuals to be trained and the number of hours of training to be provided. The Department establishes annual OJT goals in accordance with federal guidelines; FHWA approves OJT goals before including them in contract documents.

Statewide Special Provisions, Section 645, explains the OJT Program requirements and contractor obligations for that project. Contract documents, Form 25A-310 (OJT- DOT&PF Training Program Request) and Form 25A-311 (OJT Training Utilization Report), once approved by the Civil Rights Office, establish the type of training to be provided and bind the contractor, prior to contract award, to specific training curriculum and reporting requirements. Failure by the contractor to comply with OJT requirements during the course of the contract may result in the withholding of progress payments and deduction of damages from the contractor's final payment, as specified in section 645. Also, failure to comply will result in a finding of noncompliance in a Contract Compliance Review.

7.2.4 Commercially Useful Function (CUF) Monitoring Report

Complete a CUF Monitoring Report (Report), Form 25A-298, for each project that has DBE requirements. Reports are required regardless of the amount of the DBE project goal. However, state-funded projects do not have DBE requirements so CUF Reports are not required.

Collect information for the Report by interviewing the DBE's on-site representative while they are on the job site. Only project personnel can complete the Report; it may not be filled out by the contractor or DBE. The Report must be signed and dated by the project person performing the interview.

Complete a Report when each DBE first shows up on the job site. If the project extends for multiple seasons,

a Report must be completed for each construction season the DBE is on-site. A Report should also be completed whenever there are significant changes to the DBE's day-to-day operations: such as a change in, or the lack of, an on-site representative.

Send the Report to the RCCL. The RCCL or Project Engineer will verify that the DBE on-site representative is a key employee.

The RCCL should be immediately notified if the interview reveals a potentially adverse finding. Some examples of potentially adverse findings include:

- A "Yes" answer to the two-party check question.
- An employee working for both the DBE and prime.
- If the DBE is renting or leasing equipment.
- If no DBE on-site representative is present.

Discuss findings and significant changes with the RCCL. The RCCL will coordinate potentially adverse findings with the CRO as appropriate.

A copy of the Report may be provided to the contractor upon request. The Project Engineer or RCCL may notify the contractor of potentially adverse findings, and discuss ways to resolve issues.

Depending on regional policy, either the Project Engineer or the RCCL will send a copy of all Reports to the CRO. They may be paper copies or an electronic PDF file.

7.3. Labor Compliance

All federally funded contracts fall under the Copeland Act and the Davis-Bacon and Related Acts (29 CFR Parts 1, 3 and 5) regarding wages and the conditions of their payment. These regulations require the payment to all project mechanics and laborers of not less than the prevailing minimum wages for the local area that are contained in the latest wage rate decision published by the US Department of Labor. This decision is included in the contract. The regulations also cover such other matters as frequency of wage payments, fringe benefits, overtime wages, and legitimate deductions. Further details are contained in the contract, in the Required Contract Provisions for Federal-aid Contracts section (Form 25D-055).

Both state-funded and federally funded contracts fall under the requirements of AS 36, which requires the payment of not less than the prevailing minimum wage rates contained in the latest wage rate decision

published by the Alaska Department of Labor and Workforce Development (DOWLD). This decision is also included in the contract. On federally funded contracts, if there is a difference between the federal and the state minimum wage rates, the higher rate will govern. Both the federal and the state wage rate decisions also include minimum fringe benefit rates. The federal wage rates are established at the time of contract advertisement and remain in effect for the life of the contract. State wages are established ten days prior to bid opening and remain in effect for the life of the contract, or 24 months, whichever is less. The count of the 24-month period starts at award of the contract. Upon expiration of the initial 24-month period, the latest state wage rates issued by the DOWLD shall become effective for a subsequent 24-month period or until the original contract is completed, whichever occurs first. This process shall be repeated until the original contract is completed.

The contractor and each subcontractor are required to prepare a weekly payroll and statement of compliance (14 CFR 151.53, 23 CFR 635.130, and 29 CFR 3.4) and submit them to the Project Engineer and to DOLWD within seven days of the payroll ending date. The payrolls must be project specific, identify each employee by name and work classification, and must include the hour's worked and hourly rate(s), price extensions, and deductions. Bona fide truck owner-operators hauling materials for the project must appear on the certified payrolls (as owner-operators) of the prime Contractor or an approved subcontractor.

Labor compliance interviews must be conducted on federally funded projects by project staff or by the regional contract compliance liaison. Interviews are conducted to determine if contractor employees are receiving the wages and benefits they are entitled to (correct wages and classifications, fringe benefits, hours worked = hours paid).

Conduct interviews at a time that is reasonable and convenient for the worker, with questions and answers documented on a Labor Compliance Interview (Form 25D-040).

Each season, the Project Engineer will conduct one interview per Prime Contractor and one interview per subcontractor for 50% of the subcontractors. The subcontractors must be on the project more than one day per season. The seasons are summer and winter.

No interviews are required during periods of seasonal shutdown. Conduct additional interviews if there are

indications of possible noncompliance. Information given during the interview is confidential.

Following the interview, the information received should be compared to payroll data to determine compliance. Each compliance evaluation should cover the employee's name, actual wage rates, and deductions from wages.

7.4. Buy American

Steel and manufactured products produced in the United States have a preference with funds expended under a grant issued by the FAA under the Airport Improvement Program.

FAA-funded projects require the contractor to submit the Buy American Certificate (Form 25D-61) to the Contracting Officer (section 3.4), with the other executed contract documents prior to the award of the contract. FAA-funded projects also contain a list of specifically exempted products on pages 2 and 3 of the form; any product not appearing on that list is also subject to the Buy American requirements.

The only four exceptions to the Buy American requirement are:

1. Applying the provision is not in the public interest. This is reserved for significant public interest determinations.
2. The steel or manufactured product is not available in sufficient quantity or quality in the United States; this refers to the manufacturing capability of the United States and whether it can meet demand.
3. The cost of components and subcomponents produced in the United States is more than 60 percent of the total components of a facility or equipment, and final assembly has taken place in the United States. (The term "final assembly" for purposes of this provision should be substantial rather than a light bulb put in a vehicle.) The application of this subsection is determined after bid opening. FAA Airports Offices should use the cost of the facility being constructed in determining the cost of the components. For example, if a project is to construct a runway, the components would cover things such as rebar, lights, etc. If a project is for runway lights only, the components would be the lenses, etc. Depending on the project scope, therefore, a piece of equipment may be found to not comply with

this section in one instance and be acceptable in another.

4. Applying this provision would increase the cost of the overall project by more than 25 percent.

7.5. Buy America

Applicable only to FHWA-funded contracts, the terms of Public Law 98-229 require that under most conditions only certain domestic materials be incorporated into the project (23 CFR 635.410). On FHWA-funded projects, this covers steel, steel-manufactured products, and iron and steel coatings. The contractor must provide a Buy America Material Origin Certificate (Form 25D-60) demonstrating compliance with the provisions of the Buy America Act prior to award of the contract. A signed statement by the contractor may amend the certificate following award and only up to the limit specified in the contract. Minimal use of foreign steel and iron materials is allowed, if the cost of such materials used does not exceed one-tenth of one percent (0.1 percent) of the total contract cost or \$2,500, whichever is greater. The cost is that shown to be the value of the steel and iron products as they are delivered to the project including freight. The North American Free Trade Agreement (NAFTA) does not apply to the Buy America requirement. There is a specific exemption within NAFTA (article 1001) for grant programs such as the Federal-aid highway program.

There are several exceptions to the Buy America requirement. The exception for minimal use is accommodated on the form; the nationwide waivers for pig iron and iron ore are noted on the form; the other exceptions are covered in the contract. The contractor shall take whatever steps are necessary to ensure that all manufacturing processes for each covered product comply with the Buy America requirement. The contractor shall replace non-conforming products at no expense to the State. Failure to comply may also subject the Contractor to default and/or debarment.

7.6. Alaska Product Preferences

Under the provisions of the Alaska Product Preferences chapter in the Alaska Statutes (AS 36.15.050), the use of Alaska agricultural and fisheries products, including Alaskan timber and products manufactured in the state from timber and lumber, is required on state-funded contracts when the Alaskan items are priced no more than seven percent above similar outside products. Additionally, under

AS 36.30.324, the Department encourages the use of Alaskan products and recycled Alaskan products in all Department procurements. Bidding preferences and monetary penalties for the use of or for the failure to use such products are established for all products except timber, lumber, and manufactured lumber products. The Alaska Product Preferences are not acceptable for FHWA-funded projects.

The Alaska Department of Commerce and Economic Development maintains the Alaska Product Preferences List which lists all Alaskan products that have established eligibility for the program. Contracts containing Alaska Product Preferences reference the availability of the Department's "Alaska Product Preference Program Preparation Pamphlet" in a Special Notice to Bidders. The Project Engineer should review this pamphlet and all staff members involved with Alaskan Preference items. It contains complete information on the program including: instructions to bidders for completing the Alaska Product Preferences Worksheet (Form APPW); required product specification and installation schedule submittals; inspection procedures and procedures for correcting absent, nonconforming or not substantiable Alaskan products; documentation required to substantiate the declared value of Alaskan products (3AAC 92.050); and instructions for calculating applicable preferences and penalties.

7.7 High Profile Project

A Federal highway project that has been designated *high profile* will have a high level of project level oversight. These requirements are noted in Appendix B of the Federal Oversight Agreement, attached to the Chief Engineer's Directive dated Sept. 28, 2009.

Document submittals to FHWA are made by the regional construction engineer or their delegate.

Submit the following documents to FHWA as informational copies:

- A minor change order of less than 5% of the contract amount or less than \$500,000, whichever is greater
- Materials Certification
- Progress Estimate
- Form FHWA 1446C

- Final Construction Payment and Project History
- Letter of Project Completion

Submit the following documents to Headquarters for FHWA for concurrence:

- ARRA Contractor Monthly Reports (Headquarters will submit a summary of ARRA monthly activities to FHWA)

Submit the following documents to FHWA for approval:

- Supplemental Agreements
- A major change order of over 5% of contract amount or more than 500,000, whichever is greater
- Experimental Features

Project status reports are required to be available for FHWA review.

7.8. American Recovery and Reinvestment Act (ARRA)

This is a federal program to fund selected construction projects with economic stimulus money. All projects with 2009 ARRA funding are designated as High Profile.

Federal ARRA rules require the Department to compile data from the contractor's monthly reports and from the Department's payroll system, and deliver that information to our funding agencies and to congress. Data must also be collected from consultants and sub-consultants hired by the Department using ARRA funds. Alaska's ARRA funding is dependent on the submission of required reports. In order for the Department to complete mandatory reports the contractor's and consultant's monthly reports must be received in a timely manner.

The contract specifications require the contractor (consultant) file **monthly employment reports** (Form 25D-1589). The reporting period is from the Saturday following the last Friday of the previous month through the last Friday of the reported month. These reports include information on employees of the contractor, subcontractors, lower tier subcontractors, and owner-operators. Data includes the number of employees, hours worked, and wages paid, for those

people who are working on projects funded wholly or in part by stimulus money.

The contractor (consultant) will sign paper copies of the monthly reports (Form 25D-1589) and submit them along with electronic files to the Project Engineer within five days of the last Friday of the month. If the contractor does not provide reports within this time frame, the specifications require assessment of liquidated damages and withholding of progress payments.

Uploading Data: The Project Engineer should send the electronic files to the regional contract compliance liaison (RCCL) no later than three days after receiving them. Retain the signed paper copies in the project files.

The RCCL (may be delegated to other staff) will upload the contractor's (consultant's) monthly reports into the MRS system. Upload data no later than the 8th of the month.

The Statewide Project Coordinator (Headquarters ARRA Program Development) will use the MRS system and AKSAS system data to generate and submit the required ARRA reports.

Projects funded by stimulus money may receive a high level of federal scrutiny.

Staff Reasonableness Check: The Project Engineer should perform a reasonableness check on the contractor's (consultant's) monthly reports, within 30 days of receiving them. Check that the report is properly signed, and includes contractor's employees, subcontractor's employees (including lower tiers), and owner-operators. Compare total hours and wages for the prime contractor and at least one of the subcontractors against the weekly certified payrolls. The totals should substantially agree.

If totals do not substantially agree, coordinate with the contractor and investigate as necessary to resolve the discrepancy. The reasonableness check may be expanded to include all subcontractors and owner-operators. One source of discrepancies may be employees working on multiple projects, or people not on certified payroll.

If the reasonableness check reveals that the previous month's data is incorrect, the contractor must file a corrected report with the Project Engineer and the RCCL.

ARRA Funding Amounts: FAA will not increase their funding amount, so try to stay within original budget. Before initiating change documents or quantity overruns that increase contract amounts identify additional funding sources or re-scope the project.

FHWA may agree to increase their funding amounts. All change orders must be sent to FHWA as required for high profile projects.