

## Chapter 9 Civil Rights & Disadvantaged Business Enterprise

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[Exhibit 9-D: DBE Contract Goal Methodology](#)

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[Exhibit 9-H: Sample Procedure for Reconsideration Hearing](#)

[LAPM 9-I: DBE Confirmation](#)

[LAPM 9-J: Disadvantaged Business Enterprise Commercially Useful Function Evaluation](#)

[LAPM 9-K: Disadvantaged Business Enterprise Joint Check Agreement Request](#)

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All LAPM Exhibits are located at:

<https://dot.ca.gov/programs/local-assistance/forms/local-assistance-procedures-manual-forms>

## Chapter 9 Civil Rights & Disadvantaged Business Enterprise

### 9.1 Introduction

As subrecipients of United States Department of Transportation (USDOT) funding, Local Public Agencies (LPAs) are required to comply with and enforce certain nondiscrimination requirements in the award and administration of USDOT assisted contracts and procurements. The information contained in this chapter has been extracted from other documents and should not be considered as a replacement or substitute for the laws, rules and regulations, agreements, circulars, or other guidance available. Extensive reference is made to the United States Code (U.S.C.) and Code of Federal Regulations (CFR).

Caltrans Division of Local Assistance (DLA) is responsible for developing policies and procedures to help LPAs implement a Title VI, ADA, and DBE Program. DLA has included checks and balances throughout its processes including legal review of major agreements and documents. Some of the following implemented processes are taken from various federal regulations for compliance with Title VI, ADA, and DBE.

### 9.2 Title VI of the Civil Rights Act of 1964 and Related Statutes

Title VI of the Civil Rights Act of 1964 prohibits discrimination based upon race, color, and national origin. Specifically, 42 U.S.C.2000d states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

In addition to Title VI of the Civil Rights Act of 1964, other nondiscrimination statutes afford legal protection under the Federal Highway Administration's (FHWA) Title VI Program. These statutes include the following:

- Section 162(a) of the Federal-Aid Highway Act of 1973 (23 U.S.C.324) (sex)
- Age Discrimination Act of 1975 (age)
- Section 504 of the Rehabilitation Act of 1973 (disability)
- Americans with Disabilities Act of 1990 (disability)

Two Presidential Executive Orders place further emphasis on the Title VI protections of race and national origin and are included in the scope of the FHWA's Title VI Program:

1. Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," directs federal agencies to develop strategies to address disproportionately high and adverse human health or environmental effects of their programs on minority and low-income populations. The order is also intended to promote nondiscrimination in federal programs substantially affecting human health and the environment, and to provide minority and low-income communities access to public information and an opportunity for public participation in matters relating to human health or the environment.
2. Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency," directs federal agencies to evaluate services provided and implement a system that ensures that Limited English Proficiency (LEP) persons are able to

meaningfully access the services provided, consistent with, and without unduly burdening, the fundamental mission of the LPA. Additionally, each federal agency shall ensure that recipients of federal financial assistance provide meaningful access to programs, services, and information to their LEP applicants and beneficiaries free of charge.

Taken together, these requirements define an overarching Title VI nondiscrimination program. Title VI and the additional nondiscrimination requirements are applicable to all programs and activities administered by a recipient and subrecipient, in addition to programs receiving federal financial assistance, due to the Civil Rights Restoration Act of 1987.

Nondiscrimination provisions apply to all programs and activities of federal-aid recipients, subrecipients, and contractors, regardless of tier (49 CFR 21).

Agencies that receive federal funds from Caltrans are referred to as subrecipients. Subrecipients that receive FHWA funds through Caltrans are required to establish a Title VI program that is subject to review by Caltrans pursuant to 23 CFR 200.9(b)(7). The purpose of the program is to prohibit discrimination and ensure non-discrimination through establishing policies and procedures and conducting regular subrecipient program reviews.

Caltrans Division of Local Assistance, Office of Guidance and Oversight (OGO) monitors Caltrans subrecipients for Title VI compliance. The following is a listing of items that are required as part of a subrecipient's Title VI program.

#### 1. Title VI Implementation Plan

The LPA must develop a written plan that sets priorities and procedures for Title VI compliance. This plan must be updated every 3-5 years or as needed, and made available to the public and address matters such as the procedures for handling complaints, the provision of civil rights training for its staff, the allocation of staff to different compliance functions, department area reviews, data collection methods, dissemination of Title VI information, Limited English Proficiency analysis, and Title VI accomplishments and goals (23 CFR 200.9(b)(11)).

The plan must contain the following:

##### a. Designation of a Title VI Coordinator

The LPA must designate a Title VI Coordinator who has a responsible position in the organization and easy access to the head of the agency. Identification of the Title VI Coordinator must be disseminated to the public via such methods as posting in public areas or on the LPA's website (23 CFR 200.9(b)(1)).

##### b. Title VI Assurances in Contract Documents and Agreements

LPAs sign assurances as part of [Exhibit 4-C: Master Agreement – Administering Agency-State Agreement for Federal-Aid Projects](#) with Caltrans. The Program Supplement Agreement (PSA) (see [Exhibit 4-D: Sample – Program Supplement Agreement](#)) for each project includes the LPA's reaffirmation of the nondiscrimination assurances contained in the Master Agreement.

The LPA must include the provisions indicated in Appendices A - E to Exhibit B of the Title VI Assurances, included as part of Exhibit 4-C in contracts and agreements, between the LPA and the contractor, where applicable.

**c. Title VI Nondiscrimination Statement**

The LPA must develop a Title VI policy statement for signature by the head of the agency. The statement must give reasonable guarantee that the programs administered by the agency are conducted in compliance with all Title VI nondiscrimination requirements. The signed statement must be disseminated to the public via such methods as posting in public areas and/or on the agency's website (49 CFR 21.7(b)).

**d. Dissemination of Title VI Information**

The LPA must develop Title VI information for dissemination to the general public and, where appropriate, in languages other than English. The purpose of the information must be to communicate information about the public's rights under Title VI. Sample information includes, but is not limited to, posters, brochures, flyers, "frequently asked questions" documents, web pages, etc. Alternative formats must be offered and made available at no cost to the requester, where applicable (23 CFR 200.9(b)(12)).

**e. Title VI Training**

The LPA must provide Title VI training for its managers, supervisors, and staff with frequent public contact every two years (23 CFR 200.9(b)(9)).

Sample of Title VI training, please refer to [Federal-aid Essentials for Local Public Agencies](#).

**f. Title VI Complaint Process**

An LPA that receives federal financial assistance is required to adopt procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging discrimination on basis of race, color, national origin, age, sex, or disability (23 CFR 200.9(b)(3)).

Any person who believes they have been discriminated against based on race, color, or national origin by Caltrans or a subrecipient may file a Title VI complaint by completing and submitting the agency's Title VI Complaint Form. The [Office of Civil Rights \(OCR\)](#) processes complaints received no more than 180 days after the alleged incident. OCR will only process complaints that are complete, which include the complainant's contact information, details of the alleged discrimination, and the complainant's signature.

The subrecipient must forward the completed complaint form to OCR upon receipt. Once the Title VI complaint is received, OCR will determine the federal administering agency that has jurisdiction to investigate/process the complaint.

**Title VI Complaints Processed Under the Federal Highway Administration (FHWA):**

Title VI complaints filed with Caltrans in which Caltrans is named as the Respondent will be forwarded to the FHWA Division Office. The Complainant will receive an acknowledgement letter informing them that the complaint has been received and forwarded to the FHWA.

NOTE: Per the FHWA Guidance Memorandum, Processing of Title VI Complaints, dated June 13, 2018, all Title VI complaints received by a subrecipient are to be forwarded to Caltrans to be submitted to FHWA Division

Office. Complaints should be sent within one business day of receipt via email to [Title.VI@dot.ca.gov](mailto:Title.VI@dot.ca.gov). If FHWA Headquarters Office of Civil Rights (HCR) determines a Title VI complaint against a subrecipient can be investigated by Caltrans, HCR may delegate the task of investigating the complaint to Caltrans.

**Title VI Complaints Processed Under the Federal Transit Administration (FTA):**

Title VI complaints filed with Caltrans in which Caltrans is named as the Respondent will be investigated by Caltrans. Per FTA, Title VI complaints are to be handled at the local level or elevated to FTA under egregious Title VI discriminatory circumstances. The Complainant will receive an acknowledgement letter informing them that the complaint has been received and whether the complaint will be investigated by Caltrans or forwarded to FTA.

Title VI complaints filed with Caltrans against a subrecipient will be investigated by Caltrans. If the complaint is filed with the subrecipient, the subrecipient is responsible for investigating the complaint in accordance with [FTA Circular 4702.1B, Title VI Requirements and Guidelines for Federal Transit Administration Recipients](#).

**FTA – Filing a Local Complaint**

FTA recommends, but does not require, that individuals first file a complaint directly with their transit provider to give the provider an opportunity to resolve the situation. FTA grantees are required under the ADA, Title VI, and EEO to have local complaint procedures.

**Caltrans Office of Civil Rights Investigation Process**

If OCR is delegated the responsibility of performing an investigation, OCR has 90 days to investigate the complaint. If additional time is needed, OCR will call the Complainant and inform them.

If more information is needed to resolve the case, the OCR investigator may contact the Complainant. The Complainant has 10 business days from the date of the letter to send the requested information to the investigator assigned to the case.

If the investigator is not contacted by the Complainant or does not receive the additional information within 10 business days, OCR can administratively close the case. A case can be administratively closed also if the complainant no longer wishes to pursue their case.

OCR will consult with HCR regarding the disposition of the complaint. Disposition of Title VI complaints will be undertaken by HCR, through either (1) informal resolution or (2) issuance of a Letter of Finding of compliance or noncompliance with Title VI. A copy of the Letter of Finding will be sent to all parties via the FHWA Division Office.

A person may also file a complaint directly with:

Federal Transit Administration  
Civil Rights Division  
Attention: Complaint Team  
East Building, 5th Floor – TCR  
1200 New Jersey Avenue, SE  
Washington, DC 20590

or  
Federal Highway Administration  
U.S. Department of Transportation  
Office of Civil Rights  
8th Floor E81-105  
1200 New Jersey Avenue, SE  
Washington, DC 20590

**g. Data Collection and Analysis**

The subrecipient must develop procedures for the collection of statistical data (race, color, national origin, age, sex, and disability) of participants in, and beneficiaries of, federally-funded roadway projects, i.e., citizens impacted by relocation and participants attend the public hearing during an environmental review. In addition, the LPA must analyze the data collected to determine the effectiveness of outreach methods to ensure that all groups are included during the decision-making process and are given an opportunity to voice their opinions or concerns (23 CFR 200.9(b)(4)).

**2. Limited English Proficiency**

Executive Order 13166, “Improving Access to Services For Persons with Limited English Proficiency,” directs federal agencies to evaluate services provided and implement a system that ensures that Limited English Proficiency (LEP) persons are able to meaningfully access the services provided, consistent with, and without unduly burdening, the fundamental mission of the LPA.

The LPA is required to ensure programs and activities normally provided in English are accessible to LEP persons. Each LPA must perform an annual assessment to determine if modifications are needed to their programs and activities to ensure meaningful access by LEP persons, culminating in the development of a language access plan.

The LPA’s assessment, sometimes referred to as a “four-factor” analysis, must be based on the following factors:

1. The number or proportion of LEP persons eligible to be served or likely to be encountered.
2. The frequency of LEP contacts.
3. The nature and importance of the programs, services, or activities provided.
4. The resources available for LEP persons.

For example, publications or public notices must be made available in languages understood by the affected population and in other languages by request. Interpreters must be made available for LEP persons and for the hearing impaired (see [LAPM Chapter 8: Public Hearings](#)).

Language barriers may prohibit LEP persons from:

- Obtaining services and information related to transportation services, programs, and projects.



- Taking advantage of the transit system, which could affect their jobs and social opportunities.
- Understanding the benefits to which they are entitled when their home or business property is acquired through eminent domain.

More information on LEP can be found at: [www.lep.gov](http://www.lep.gov).

### 3. Environmental Analysis

Presidential Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," is considered during the preliminary environmental investigation process and completion of the Preliminary Environmental Study (PES) Form. See [Exhibit 6-A: Preliminary Environmental Study \(PES\)](#), [Exhibit 6-B: Instructions for Completing the Preliminary Environmental Study \(PES\)](#), [LAPM Chapter 6: Environmental Procedures](#), or refer to the Local Assistance Environmental [website](#).

Upon completion of the Exhibit 6-A PES Form, if questions 23-32 are marked yes, or if the PES results in an Environmental Assessment or Environmental Impact Statement:

- a. Title VI implementation and outreach may be triggered. Any vital public communication must be translated and accessible when a significant number or percentage of the population is eligible to be served (5% or 1,000 individuals, whichever is less of the population to be served), likely to be directly affected by the program/activity, or needs services or information in a language other than English to communicate effectively.
- b. The LPA must contact the District Senior Environmental Planner and the District Senior Right of Way Agent to inform them the agency may implement Title VI and outreach for this project.

If a project requires that a Relocation Impact Study and/or Community Impact Assessment be conducted, the LPA must follow the guidance set forth in the Standard Environmental Reference (SER). The SER is an online electronic reference that sets forth document content and format, as required by law or regulation, and recommended format, if not specified by law or regulation. [Chapter 25 of the SER](#) addresses Environmental Justice and LEP requirements.

Each agency must make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority and low-income populations.

### 4. Accomplishments and Goal Report

Develop a Title VI Annual Accomplishments and Goals Report. List the goals accomplished in the past year, and goals for the next year. For instance, a goal may state where Title VI issues were identified and discrimination prevented, activities and efforts of the Title VI specialist and program area personnel in monitoring Title VI, etc. (23 CFR 200.9(b)(10)).

## Public Hearings, Public Involvement Meetings, and Community Meetings

The attendance and concerns of LEP persons, persons with disabilities, minority populations, and low-income populations at public involvement meetings and hearings must be carefully documented to comply with Title VI, including statistics of participants by race and gender. Public hearing announcements must be made available in languages understood by the affected population. Public hearings must be held at locations that are both geographically and structurally accessible.

## Right of Way

On federal-aid projects, all Right of Way (R/W) activities are conducted in accordance with [LAPM Chapter 13: Right of Way](#) and the Caltrans Right of Way Manual, unless the LPA has adopted its own Caltrans-approved procedures. These manuals require that the public be provided with Title VI information and complaint procedures within each of the following R/W functions: appraisals, acquisitions, relocation assistance program, and property management. Both the DLAE and Caltrans District R/W staff monitor R/W activities on local projects to ensure compliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

## Construction

Federal-aid construction contracts must include provisions, which require compliance with Title VI. The specific contract provision language is included in Form FHWA-1273 that is physically inserted in the federal-aid construction contract (see [LAPM Chapter 12: Plans, Specifications, and Estimate](#)). To further comply with Title VI, agencies must notify residents prior to construction that they may be impacted by construction zones (e.g. detours, noise, parking, pollution, etc.).

## Title VI Monitoring

The LPA must actively monitor its programs, services, and activities to ensure compliance with Title VI requirements. For example, efforts should be made to communicate regularly with management and employees with frequent public contact to address Title VI questions and provide technical assistance and training. Policies and procedures should be evaluated periodically for Title VI compliance and incorporate Title VI requirements, where applicable. Demographic data should be collected and analyzed on an ongoing basis to better understand the populations being served by the LPA, as well as inform the delivery of services. Public meeting notices and other communications should be reviewed for LEP purposes as a matter of practice.

LPA preliminary environmental studies, technical reports, environmental assessments, and Environmental Impact Statements provide for data collection and analysis on the demographics of neighborhoods and communities. Caltrans DLAEs and Environmental Specialists review the environmental documents to ensure that no disproportionate adverse impacts occur on minority and low-income neighborhoods or communities.

## Title VI Compliance Reviews

Caltrans DLA conducts program reviews of subrecipients of federal financial assistance to ensure compliance with Title VI requirements pursuant to 23 CFR 200.9(b)(7). Reviews can occur at any time, and at Caltrans' discretion. Reviews consist of a desk audit and/or on-site

visit. Reviewers summarize observations and findings in a formal compliance review report that is provided to the LPA and the FHWA. Corrective action may be required, where applicable.

### **Plans, Specifications & Estimate Checklist**

[Exhibit 12-D: PS&E Checklist](#) confirms the implementation of the mandatory requirements of FHWA Form-1273 such as Equal Employment Opportunity (EEO) certification, Disadvantaged Business Enterprise (DBE) provisions, and applicable wage rates. The LPA submits Exhibit 12-D to the DLAE along with the request for authorization to proceed with construction for federal-aid construction contracts.

### **Local Public Agency Construction Contract Administration Checklist**

[Exhibit 15-A: Local Agency Construction Contract Administration Checklist](#) confirms that DBE and labor/EEO compliance requirements are performed and documented in the project files. Exhibit 15-A documents that the LPA will meet all of the requirements prior to the award of the construction contract (see [LAPM Chapter 15: Advertise and Award Project](#)).

### **Resident Engineer's Construction Contract Administration Checklist**

[Exhibit 15-B: Resident Engineer's Construction Contract Administration Checklist](#) is completed by the LPA Resident Engineer. The purpose of this checklist is to assist the LPAs in administering federal-aid highway construction projects. It also provides a record that the EEO/Wage Rate/False Statements posters are being posted at specific locations, that employee interviews will be conducted in accordance with the Labor Compliance/EEO interview form, and that DBE requirements are met. The LPA submits Exhibit 15-B along with the Award Package shortly after award of the construction contract (see [LAPM Chapter 15](#)).

### **Additional Resources for Title VI Implementation**

Additional information on implementing Title VI (including potential Title VI issues, self-monitoring, good practices, and mitigation measures) in Caltrans' Title VI Program Plan and Title VI Guidelines is available at: <https://dot.ca.gov/programs/civil-rights/title-vi>.

In addition, Caltrans has produced a Title VI brochure that is available in ten different languages at the same [website](#).

## **9.3 Accessibility: Rehabilitation Act of 1973/Americans with Disabilities Act of 1990**

As part of FHWA's regulatory requirements under Title II of the ADA Section 504 of the Rehabilitation Act of 1973 (504), Caltrans ensures that subrecipients of federal and state funds do not discriminate on the basis of disability in any highway transportation program, activity, service, or benefit they provide to the general public. The subrecipients must ensure that people with disabilities have equitable opportunities to use the public rights-of-way system.

Section 504 of the Rehabilitation Act of 1973 (codified as 29 U.S.C.791 et seq.) requires that any entity receiving federal financial assistance must ensure that persons with disabilities are not discriminated against in any and all aspects of employment, or denied access to the goods or services that these federal fund recipients provide.

The intent of the Americans with Disabilities Act of 1990 (Public Law 101-336, codified as 42 U.S.C.12101 et seq.) is to assure equality of opportunity, full participation, independent living,

and economic self-sufficiency for persons with disabilities. This law extended the protections offered for persons with disabilities.

28 CFR 35 requires that facilities constructed on behalf of, or for the use of, a public entity shall be designed and constructed so that the facility is accessible to and usable by persons with disabilities.

49 CFR 27 requires nondiscrimination on the basis of disability in programs and activities receiving or benefiting from federal financial assistance. The State of California has also adopted regulations in Section 54 of the California Civil Code that specifies all buildings, structures, sidewalks, curbs, and related facilities constructed in California by the use of state, county or municipal funds, or the funds of any political subdivision of the state, shall be accessible to and usable by persons with disabilities.

### **American with Disabilities Act (ADA) Assurances**

Administering agencies sign ADA assurances as part of their [Exhibit 4-C: Master Agreement](#) with Caltrans. The Program Supplement Agreement (PSA) for each project includes the administering agency's reaffirmation of the nondiscrimination assurances contained in the Master Agreement.

### **Designation of an ADA Coordinator**

The LPA that employs 50 or more persons is required to designate an ADA Coordinator who is responsible for coordinating the efforts of the LPA to comply with ADA requirements, including investigation of complaints. The LPA must make available to the public the name and contact information (mailing address, telephone number, e-mail address, etc.) of its designated ADA Coordinator 28 CFR 35.107(a).

### **Adoption of Grievance Procedures**

The LPA that employs 50 or more persons is required to adopt and publish procedures for resolving grievances arising under Title II of the ADA (28 CFR 35.107(b)). Pursuant to 28 CFR 35.170, any individual who believes that he or she or a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity may file a complaint within 180 days of the date of the alleged discrimination, unless the time for filing is extended by an LPA for good cause.

Grievance procedures set out a system for resolving complaints of disability discrimination in a prompt and fair manner. The grievance procedure must include:

- A description of how and where a complaint under Title II of the ADA may be filed with the LPA.
- A statement notifying potential complainants that alternative means of filing a complaint, other than in writing, will be made available to individuals with disabilities.
- A description of the time frames and processes to be followed by the complainant and the LPA.
- Information on how to appeal an adverse decision.
- A statement of how long complaint files will be retained.

## ADA Nondiscrimination Policy

All public entities must provide information to the public, program participants, program beneficiaries, applicants, and employees about the ADA and how it applies to the public entity.

Here are some methods that public entities have used:

- Put the notice on the public entity's website.
- Include the notice in social media such as Twitter and Facebook.
- Post the notice at facilities.
- Publish the notice in local newspapers.
- Broadcast the notice in public service announcements on local radio and television stations.
- Include the notice in program announcements and applications.

The information must be provided in "alternative" formats so that it is accessible to people with hearing and vision disabilities. Examples of alternative formats:

- Captioned public service announcements on television
- Large print (recommend sans-serif typeface such as Helvetica or Arial, 18 point size; if an individual requests a specific point size, provide notice in that size)
- Braille
- Text file on a thumb disk or emailed to the person
- HTML format on an accessible website
- Audio recording
- Radio announcement

Public entities must provide the information not just once, but on an ongoing basis. For example when there's a new ADA Coordinator the ADA Nondiscrimination Policy should be updated.

## Self-Evaluation

The LPA is required to complete a self-evaluation of its current programs, policies, and practices to identify barriers for people with disabilities pursuant to 28 CFR 35.105, 49 CFR 27.11(c)(2), and Section 504 of the Rehabilitation Act of 1973. The scope of the self-evaluation includes both architectural and administrative barriers. The LPA must provide an opportunity for interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the self-evaluation process by submitting comments.

Critical areas to evaluate as part of a self-evaluation must accomplish the following, but are not limited to:

- Identify all programs (including public right-of-way facilities), activities, and services and their locations.

- Determine whether employees and officials are familiar with the public entity's ADA obligations, including the requirement to make reasonable modifications to policies, practices, and procedures.
- Determine whether employees and officials know how to arrange for auxiliary aids and services, such as sign language interpreters, material in Braille, and assistive listening systems; to ensure that communication with people with disabilities is as effective as others.
- Review service, activity and program's policies and procedures to determine whether they ensure an equal opportunity for people with disabilities to participate and benefit.
- Survey facilities and determine whether there are physical barriers to access programs. If non-structural changes, such as moving programs, should be made, include them in the self-evaluation. If structural changes are needed, include them in the transition plan.

All public entities are required to complete a self-evaluation. However, only those that employ 50 or more persons are required to maintain the self-evaluation on file and make it available for public inspection for at least three years pursuant to 28 CFR 35.105(c). Other public entities are not required to retain their self-evaluations but are encouraged to do so because these document evidence of a public entity's good faith efforts to comply with ADA requirements.

NOTE: LPAs must implement a system for periodically reviewing and updating self-evaluations and, if applicable, transition plans per 49 CFR 27.11(c)(2)(v). As a best practice, an updated self-evaluation is recommended every three (3) years prior to updating the agency's Transportation Improvement Program.

### Transition Plan

Following completion of a self-evaluation, an LPA with 50 or more employees is required to develop a transition plan to prioritize removal of structural barriers for accessibility purposes pursuant to 28 CFR 35.150(d). Although public entities with fewer than 50 employees are not required to develop a transition plan, it may be useful in setting priorities when structural changes are required to bring the organization into compliance.

The transition plan must accomplish the following, but are not limited to:

- Identify physical obstacles in the public agency's facilities that limit the accessibility of its programs or activities to individuals with disabilities.
- Describe in detail the methods that will be used to make the facilities accessible.
- Specify the schedule for taking steps necessary to upgrade pedestrian access to meet Section 504 and/or ADA requirements in each year following the transition plan.
- Indicate the official responsible for implementation of the plan.

NOTE: LPAs must implement a system for periodically reviewing and updating self-evaluations and, if applicable, transition plans per 49 CFR 27.11(c)(2)(v). As a best practice an updated transition plan is recommended every three (3) to five (5) years following adoption of the updated self-evaluation.

## Design

State and local governments, regardless of whether they receive federal financial assistance, are required to comply with federal [2010 ADA Standards](#), Title 24 of the California Code of Regulations (which contains California building regulations), or local code, whichever provides the greatest access. Private-funded improvements within the public Right of Way are also required to comply with the federal [2010 ADA Standards](#) or with Title 24, whichever code offers the greatest access or protection to individuals with disabilities. All new and altered pedestrian facilities such as, but not limited to, highway rest area facilities, sidewalks, crosswalks, pedestrian overpasses, underpasses, and ramps must be made accessible to persons with disabilities in accordance with federal and state accessibility standards on all LPA federal-aid projects. Facility maintenance does not constitute an alteration (see [LAPM Chapter 11: Design Guidance](#) for what constitutes an alteration triggering accessibility requirements).

## Certification

LPAs certify compliance with federal, state, and local ADA regulations, laws, and codes in the [Exhibit 12-D: PS&E Checklist](#).

## ADA Monitoring

### Local Public Agency ADA Annual Certification Form

Each LPA must provide the Caltrans DLAE with a completed [Exhibit 9-C: Local Agency ADA Annual Certification Form](#) by June 30 of each year for the following federal fiscal year (October 1 to September 30). The form must be received prior to submitting a Request for Authorization to proceed with a federal-aid project.

Exhibit 9-C includes:

1. Designated ADA Coordinator information (name, address, phone number, and e-mail address).
2. Certification that the LPA has an updated self-evaluation and transition plan, if applicable. If the LPA does not have an updated self-evaluation and transition plan, then the LPA provides an estimated date that they will have one, and may be subject to a desk or on-site program review.
3. Certification of the adoption of a grievance procedure. If the LPA does not have a grievance procedure, then the LPA provides an estimated date that they will have one.

## Field Reviews

During the field review, an agreement is reached among all interested parties (LPA, DLAE, FHWA) on the general design features and exceptions for the project. ADA deficiencies are discussed and agreed upon at this time (see [LAPM Chapter 7: Field Review](#)).

## Plans, Specifications & Estimate

LPAs certify that their project's Plans, Specifications & Estimate (PS&E) complies with all applicable federal and state regulations and codes (see [LAPM 3-A: Project Authorization/Adjustment Request](#) and [Exhibit 12-D: PS&E Checklist](#), and [LAPM Chapter 12: Plans, Specifications & Estimate](#)).



**Final Inspection**

The LPA conducts the final inspection and certifies on the [Exhibit 17-C: Final Inspection Form](#) that the project was constructed in accordance with the scope and description of the project authorization document and that all federal and state requirements have been met. If the DLAE reviews the job site and cannot verify completion of required ADA accessible components (as certified in Exhibit 17-C), the agency may be subject to sanctions as identified in [LAPM Chapter 20: Audits & Corrective Actions](#).

**9.4 Equal Employment Opportunity (EEO) Contractor Compliance**

The current Federal Transportation Act, 23 U.S.C.140(a), and implementing regulations of 23 CFR 230 require that LPAs receiving federal financial assistance assure that employment in connection with federal highway construction projects is provided without regard to race, color, religion, sex, national origin, age, or disability.

The LPA is also required to include notification of a federal-aid contractor's EEO responsibilities in the advertised contract specifications. The LPA must maintain and make available apprenticeship, skill improvement or other upgrading programs, which provide equal opportunity for training and employment without regard to race, color, religion, sex, national origin, age, or disability.

23 CFR 635.107 sets forth FHWA policy relating to federal-aid highway contract-letting, and requires equal opportunity for DBE participation. Other sections of the CFR include nondiscriminatory bidding procedures, subcontractor and contractor responsibilities, labor, employment and Native American Indian preference provisions, payroll and statements of wages paid, and contract termination procedures.

Form FHWA-1273, Required Contract Provisions for Federal-Aid Construction Contracts is a standard federal form containing required contract provisions and proposal notices and is required to be physically inserted into each federal-aid highway construction contract and subcontracts (at any tier). When a contractor signs a federal-aid contract of \$10,000 or more, the nondiscrimination provisions in the Form FHWA-1273 constitutes the contractor's Equal Employment Opportunity/Affirmative Action Program standards for that contract.

**EEO Implementation****Assurances**

LPAs sign assurances as part of their Master Agreement with Caltrans. Appendix A to Exhibit B of the Master Agreement includes nondiscrimination in the selection and retention of sub-applicants and the prohibition of discrimination in employment practices.

**Required Federal Contract Provisions**

LPAs must physically insert the Form FHWA-1273 into the contract document. LPAs are aware that contractor's noncompliance with the EEO specifications in the Form FHWA-1273 may be considered a breach of contract for which payment may be withheld, or the contract terminated (see [LAPM Chapter 12: Plans, Specifications & Estimate](#)).

**Construction**

Federal-aid prime contractors and subcontractor's employment practices in the areas of recruitment and selection decisions (hiring, promotions, terminations, training) are to be conducted without regard to race, color, religion, sex, national origin, age, or disability.



The LPA's resident engineer should be cognizant of the contractual requirement and monitor the contractor for compliance. Specifically, the resident engineer should be concerned whether discriminatory practices take place, particularly in the hiring, firing, training, promotion, and utilization of employees (see [LAPM Chapter 16: Administer Construction Contracts](#), Section 16.9: Equal Employment Opportunity).

### EEO Monitoring

The three checklists listed in Section 9.2: Nondiscrimination Title VI of the Civil Rights Act of 1964 and Related Statutes serve to assist LPAs in implementing EEO and are monitoring tools for DLAEs to ensure that EEO requirements are met. In addition, DLA performs periodic EEO process reviews that include reviews of the DLAE, LPA, and contractor.

Caltrans OCR includes LPA contracts in their compliance reviews of federal-aid contractors.

### EEO Reporting

During the last full pay period in July, the prime contractor must complete [Exhibit 16-O: Federal-Aid Highway Construction Contractor's Annual EEO Report](#) (Form FHWA-1391) for all federal-aid construction contracts that are active.

NOTE: The person who should be signing Exhibit 16-O would either be the LPA Resident Engineer or the Project Manager. The person signing the forms is responsible for verifying all the information provided is correct and will be the contact person if there are any discrepancies.

## 9.5. Disadvantaged Business Enterprise (DBE)

### Background

Caltrans is required under 49 CFR 26 to administer a Disadvantaged Business Enterprise (DBE) Program. The DBE Program is intended to ensure a level playing field and foster equal opportunity in federal-aid contracts. As a result, Caltrans periodically conducts studies that examine the availability, disparity, and discrimination of disadvantaged businesses in the transportation construction and engineering industry in California. Past studies have determined that discrimination continues to exist in the transportation contracting industry. When establishing the overall DBE goal, Caltrans must include the level of DBE participation that LPAs could contribute. This will include an assessment of the subcontracting opportunities for specific items of work and the DBE availability for specific items of work. In other words, that level of subcontracting opportunities that DBEs could reasonably be expected to compete for on a contract.

### DBE Definitions

Additional definitions for the DBE Program not listed below can be found in 49 CFR 26.5.

**Calendar Days** - Unless stated otherwise, days in this chapter refers to calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or federal holiday, the period extends to the next day that is not a Saturday, Sunday, or federal holiday. Similarly, in circumstances where the LPA's offices are closed for all or part of the last day, the period extends to the next day on which the LPA is open.

**Race-Conscious Measure or Program** - One that is focused specifically on assisting only DBEs. The use of contract goals is the primary example of a race-conscious measure in the DBE program.

**Race-Neutral Measure or Program** - A race-neutral measure or program is one that, while benefiting DBEs, is not solely focused on DBE firms. For example, small business outreach programs, technical assistance programs, and prompt payment clauses can assist a wide variety of small businesses, not just DBEs. For purposes here, race-neutral includes gender neutrality.

**Recipient** - In this section the recipient of federal funds refers to Caltrans.

**Small Business Concern** - Small Business Concern means with respect to firms seeking to participate as DBEs in federal-aid contracts, a Small Business Concern as defined pursuant to Section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR 121) that also does not exceed the cap on average annual gross receipts specified in 49 CFR 26.65(b).

**Statewide Overall DBE Goal** - As required by 49 CFR 26, Caltrans has established a statewide overall DBE goal. This is the average level of participation that Caltrans would expect DBEs to achieve in California. To ascertain whether the statewide overall DBE goal is achieved, Caltrans will track DBE participation on all federal-aid contracts.

**Subrecipient** - In this section subrecipient refers to the LPA receiving federal funds.

## DBE Program Responsibilities

### FHWA Responsibilities

FHWA administers the payment of federal-aid highway funds to recipients: states, counties, cities, and other agencies for transportation-related projects. FHWA is responsible for monitoring these agencies for compliance with Title VI and other aspects of the Civil Rights Acts of 1964, 1968, and 1973 concerning nondiscrimination in administration of federal funds.

### Caltrans Responsibilities

#### Office of Civil Rights (OCR)

- Administer (Caltrans DBE Program Plan).
- Maintain a directory of certified DBE contractors.
- Establish statewide overall DBE goal and race-neutral and race-conscious component projections.

#### Division of Local Assistance (DLA)

- Provide technical assistance to the districts.
- Monitor LPA compliance with DBE program requirements by conducting process reviews. FHWA and the District are invited to participate in these process reviews.
- Assemble statewide LPA DBE commitment, final utilization, and other information for reports to OCR.
- Provide training for district and LPA staff.

District Local Assistance Engineer (DLAE)

- Monitor LPA compliance with DBE program requirements by participating in process reviews.
- Ensure that LPAs with federal-aid contracts submit an [Exhibit 9-A: DBE Implementation Agreement for Local Agencies](#) form.
- Review and approve the [LAPM 9-B: Local Public Agency DBE Annual Submittal Form](#) for LPAs that award federal-aid contracts during the Federal Fiscal Year (FFY).
- Serve as the focal point for advice and assistance to the LPAs on DBE matters.
- Ensure that [Exhibit 10-O2: Consultant Contract DBE Commitment](#) and [Exhibit 15-G: Construction Contract DBE Commitment](#) are reported to the DLA in a timely manner.
- Ensure that the [Exhibit 17-F: Final Report-Utilization of Disadvantaged Business Enterprise \(DBE\) and First-Tier Subcontractors](#) is reported to the DLA in a timely manner.
- Provide DBE oversight of LPAs pursuant to the LAPM.
- Review at least one complete PS&E package (including DBE requirements) per agency, per year. If deficiencies are discovered, more frequent reviews should be conducted and a corrective action plan is to be submitted by the LPA for the DLAE's approval.
- Maintain a file with an index of all LPA's [Exhibit 9-A: DBE Implementation Agreement for Local Agencies](#) and [LAPM 9-B: Local Public Agency DBE Annual Submittal Form](#); information from these forms is entered into LP2000.

**Local Public Agency Responsibilities**

LPA responsibilities are detailed in [Section 9.6: Local Agency Responsibilities Under Caltrans DBE Program Plan](#) of this chapter, and the responsibilities include:

- Submit Exhibit 9-A and amendments to the DLAE.
- Designate a DBE Liaison Officer, accountable to the Chief Executive Officer of the LPA, to administer the Caltrans DBE Program as it pertains to LPAs.
- Ensure prompt and full payment to the prime consultant/contractor and subconsultants/subcontractors in compliance with the prompt payment clauses of the contract.
- Ensure [Exhibit 10-O2: Consultant Contract DBE Commitment](#) and [Exhibit 15-G: Construction Contract DBE Commitment](#) are reported to the DLAE within 30 days of contract execution.
- Ensure that [Exhibit 17-F: Final Report-Utilization of DBE and First-Tier Subcontractors](#) is reported by the prime contractor or consultant upon completion of the contract.

## 9.6 Local Public Agency Responsibilities under Caltrans DBE Program Plan

LPA recipients of federal financial assistance must comply with all the elements of 49 CFR 26 entitled Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs. These provisions apply to all federal-aid transportation projects. LPA responsibilities are detailed in the Caltrans DBE Program Plan. A copy of this plan is available from the DLA DBE website: <https://dot.ca.gov/programs/local-assistance/guidance-and-oversight/disadvantaged-business-enterprise>.

### DBE Implementation Agreement for Local Public Agencies

As an initial step, each LPA must submit Exhibit 9-A to formally acknowledge the LPA's commitment to implement the Caltrans DBE program, and to comply with all the prescribed responsibilities detailed in the LAPM.

[Exhibit 9-A: DBE Implementation Agreement for Local Agencies](#) form must be completed and submitted to the DLAE for execution by each agency before a request for authorization is processed. This agreement will need to be signed by a representative authorized by the governing body to take such action.

Some of the elements of the agreement are highlighted below.

### Objective/Policy Statement

Each agreement contains a policy statement expressing a commitment to the Caltrans DBE Program, stating its objectives, and outlining responsibilities for its implementation. Each LPA will circulate the statement throughout its organization and to the DBE and non-DBE business communities that perform work on its federal-aid contracts.

### Local Public Agency DBE Annual Submittal Form

Each LPA must provide the DLAE with a completed [LAPM 9-B: Local Public Agency DBE Annual Submittal Form](#) by June 30 of each year for the following Federal Fiscal Year. This form must be received prior to submitting a Request for Authorization to proceed with a federal-aid project.

This form will include:

1. Designated DBE Liaison Officer Information (name, address, phone number, and e-mail address).
2. Detail of planned race-neutral measures to be implemented as required by 49 CFR 26.51 and as outlined in the LPA's Exhibit 9-A.
3. The LPA's choice for method of Prompt Payment of Withheld Funds to Subcontractors, as well as a brief explanation of the monitoring and enforcement mechanisms the LPA has in place to ensure that all subcontractors, including DBEs, are promptly paid.

### Overall Statewide DBE Goal

The overall statewide DBE goal is obtained through race-conscious and race-neutral components. The overall statewide goal is displayed on the OCR DBE website: <https://dot.ca.gov/programs/civil-rights>.

## Race-Neutral Component

The race-neutral component of the overall statewide DBE goal is important because the race-neutral methods recipients can promote the participation of DBEs and other small businesses in their contracting programs by allowing all small business to compete with each other, including DBEs, to meet the DBE goal. The race-neutral component of the overall statewide DBE goal is accomplished when the prime consultant is a DBE firm or when DBE participation exceeds the contract DBE goal. Examples of race-neutral DBE participation are:

- A DBE wins a prime contract through customary competitive procurement procedures.
- A DBE is awarded a subcontract on a prime contract that does not carry a DBE goal.
- The DBE commitment exceeds the DBE contract goal.

Race-neutral means include, but are not limited to, the following:

- Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE and other small business participation (e.g., unbundling large contracts to make them more accessible to small businesses, and requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces).
- Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs and other small businesses obtain bonding and financing).
- Providing technical assistance and other services.
- Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs and other small businesses on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors, provision of information in languages other than English, where appropriate).
- Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capabilities for DBEs and other small businesses.
- Providing services to help DBEs and other small businesses, improve long-term development, increase opportunities to participate in various types of work, handle increasingly significant projects, and achieve eventual self-sufficiency.
- Establishing a program to assist new start-up firms, particularly in fields in which DBE participation has historically been low.
- Ensuring distribution of the DBE directory through print and electronic means to the widest feasible universe of potential prime contractors.
- Assisting DBEs and other small businesses to develop their capability to utilize emerging technology and conduct business through electronic media.

## Race-Conscious Component

The use of contract goals is the primary example of a race-conscious measure in the DBE program. LPAs must establish contract goals on each federal-aid contract where there are sub-contractable opportunities for DBEs.

## DBE Liaison Officer

Each LPA must designate a Disadvantaged Business Enterprise Liaison Officer (DBELO) who must have direct independent access to the LPA's Chief Executive Officer concerning DBE program matters. This person must be responsible for the duties as described in the [Exhibit 9-A: DBE Implementation Agreement for Local Agencies](#). Annually, the DBELO designation will be reported to Caltrans when the LPA completes its [LAPM 9-B: Local Public Agency DBE Annual Submittal Form](#).

## Required Contract Clauses

These and other requirements of this chapter are included in the [Exhibit 12-G: Required Federal-aid Contract Language](#).

## Contract Assurance

DBE regulations require the following contract assurance statement in every federal-aid contract and subcontract:

- The contractor or subcontractor must not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor must carry out applicable requirements of 49 CFR 26 in the award and administration of federal-aid contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract, or such other remedy as recipient deems appropriate.

## Prompt Payment from the Agency to the Contractors

Section 20104.50 of California Public Contract Code requires that LPAs pay contractors no more than 30 days after receipt of contractor's request for payment. The penalty is assessed, on the balance owed at 10% per annum. Section 7107 of California Public Contract Code provides that the agency must pay the prime contractor within 60 days after the date of completion (retention payment due). The penalty for failing to comply with this statute is the assessment of 2% per month on the balance owed in lieu of interest. In the event a lawsuit is filed, the prevailing party is entitled to attorneys' fees and costs.

Section 3329 of California Civil Code requires that LPAs pay design professionals within 30 days of their demand if it is progress payment, and within 45 days if retention is due. A penalty of 1.5% per month in lieu of interest plus attorneys' fees accrue to the prevailing party. If there is a good faith dispute as to an amount due, the LPA may withhold from the retention payment an amount not to exceed 150% of the disputed amount.

## Prompt Progress Payment to Subcontractors

As the implementing agency of federal funds, the DBELO or their designee (e.g. resident engineer, project manager, contract manager, etc.) must ensure that prompt progress payments are made by prime contractors, subcontractors, lead consultants, and subconsultants.

Section 7108.5 of the California Business and Professions Code (CBPC) requires a prime

contractor or subcontractor (i.e. builders) to pay any subcontractor no later than seven (7) days after receipt of each progress payment received, unless otherwise agreed to in writing. The payment cannot be delayed because of disagreements on other contracts. This requirement applies to both DBE and non-DBE subcontractors.

Section 3321 of the California Civil Code (CCC) requires prime design professionals (prime consultants directly in contract with a public agency) to pay any subconsultant no later than fifteen (15) days after receipt of each progress payment or final retention payment. The payment cannot be delayed because of disagreements on other contracts. This requirement applies to both DBE and non-DBE subcontractors.

### **Prompt Payment of Withheld Funds to Subcontractors**

49 CFR 26.29 requires one of the following three methods be used in federal-aid contracts to ensure prompt and full payment of any retainage kept by the prime contractor or subcontractor to a subcontractor:

1. The LPA may decline to hold retainage from prime contractors and prohibit prime contractors and subcontractors from holding retainage from subcontractors.
2. The LPA may decline to hold retainage from prime contractors and include a contract clause, obligating the prime contractor and subcontractors to make prompt and full payment of any retainage kept by the prime contractor or subcontractor to all subcontractors within the following timeframes:
  - a. For construction subcontracts, retainage must be paid within seven (7) days of receipt unless otherwise agreed to in writing for construction work completed (Section 7108.5 of the CBPC and Section 10262 of the CPCC), and
  - b. For consultant contracts, retainage must be paid no later than fifteen (15) days after receipt of final retention received after the subconsultant's work is satisfactorily completed (Section 3321 of the CCC).
3. The LPA may hold retainage from the prime contractor and provide for prompt and regular incremental acceptances of portions of the contract, pay retainage to prime contractors based on the acceptances, and include a contract clause obligating the prime contractor and subcontractors to pay all retainage owed to all subcontractors within the following timeframes:
  - a. For construction subcontracts, retainage must be paid within seven (7) days of receipt unless otherwise agreed to in writing for construction work completed (Section 7108.5 of the CBPC and Section 10262 of the CPCC), and
  - b. For consultant contracts, retainage must be paid no later than fifteen (15) days after receipt of final retention received after the subconsultant's work is satisfactorily completed (Section 3321 of the CCC).

In the above methods, a subcontractor's work is satisfactorily completed when all tasks called for in the subcontract have been accomplished and documented as required by the agency. The work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed, when an agency has made an incremental acceptance of a portion of the contract work. Annually, LPAs choose one of the above three methods to ensure prompt pay. The LPA's choice will be reported to Caltrans when it completes [LAPM 9-B: Local Public Agency DBE Annual Submittal Form](#).



## Prompt Payment Certification

For projects awarded on or after September 1, 2023: the prime contractor or consultant must submit Exhibit 9-P to the LPA administering the contract by the 15th of the month following the month of any payment(s). If the prime contractor or consultant does not make any payments to subcontractors, supplier(s) and/or manufacturers they must report “no payments were made to subs this month” and write this visibly and legibly on Exhibit 9-P.

A failure to complete the Prompt Pay reporting requirement may result in the withholding of the prime contractor or consultant’s next progress payment and/or final payment. Additionally, Caltrans may require the LPA to issue a corrective action plan and/or it may require the LPA to suspend the contract in whole or in part if the prime or consultant does not make up the shortfall.

LPAs must verify all Exhibit 9-P information, monitor compliance with prompt payment requirements for DBE and non-DBE firms, and address any shortfalls to the DBE commitment and prompt payment issues until the end of the project. The LPA must email a copy of Exhibit 9-P to [DBE.Forms@dot.ca.gov](mailto:DBE.Forms@dot.ca.gov) before the end of the month after receiving the Exhibit 9-P from prime contractor or consultant.

## Monitoring and Enforcement Mechanism for Prompt Payment

Per 49 CFR 26.29(d), the agency is required to stipulate the monitoring and enforcement mechanisms in the contract to ensure that all subcontractors, including DBEs, are promptly paid. These mechanisms may include appropriate penalties for failure to comply with the terms and conditions of the contract. The mechanisms may also provide that any delay or postponement of payment among the parties may take place only for good cause with the agency’s prior written approval.

## 9.7 DBE Participation on the Contract

### Participation Opportunities

The LPA should structure its contracts and cost estimates by task to provide opportunities for DBE participation. Participation by DBEs is possible during the Preliminary Engineering, Environmental, Final Design, Right of Way, and Construction phases of the project, and includes work as lead consultants, prime contractors, sub-consultants, subcontractors, suppliers, vendors, and truckers.

### DBE Contract Goals

All federal-aid contract that has subcontracting opportunities must have a DBE goal set. This includes, but is not limited to construction, consultant services such as project-specific Architectural & Engineering (A&E), and master on-call A&E contracts. A DBE contract goal is a percentage of the total contract amount that is expected to be performed by certified DBE firms. The DBE contract goal will vary depending on the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract.

The contract goal may be zero in situations such as extremely limited subcontracting opportunities, the lack of certified DBEs available in the district for the work to be performed, or other reasons. The LPA will need to keep documentation in the project file when a zero percent DBE contract goal is deemed appropriate.



Some contracts, such as Emergency Opening, Sole-source, or Nonprofit contracts do not require a DBE goal. Work performed through Force Account also does not need a DBE goal. In these cases, there is no contract goal (different from zero percent goal).

### Setting the DBE Contract Goal

When setting a DBE goal, the LPA may use contract goals only on those federal-aid contracts that have subcontracting possibilities. The goal for a specific contract may be higher or lower than the percentage level of the statewide overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs the work of the particular contract. However, over the period covered by the State's overall goal, the LPA must set contract goals, and these individual contract goals will cumulatively result in meeting any portion of the state's overall goal. The actual DBE participation for each of the LPA's contracts contributes to the calculation used to determine if the statewide goal has been met.

DBE contract goals are established to encourage more participation of DBEs for federal-aid transportation contracts. The bullets below provide a summary guidance of how to set the DBE contract goal. For a detailed set of instructions and a template example, please refer to [Exhibit 9-D: DBE Contract Goal Methodology](#).

- The project analysis starts with finalizing the cost estimate and determining potential sub-contractable items of work in the Exhibit 9-D: DBE Contract Goal Methodology template.
- The LPA must consider the type of work involved (Work Category Code), location of the work (by Caltrans District number), and the potential number of DBEs listed in the database. For each work category code, determine the number of available DBE subcontractor / subconsultants by conducting a search in the California Unified Certification Program (CUCP) database geographically by Caltrans District only. Use the district where the work will take place.
- Determine the DBE Work Factor for each task:
  - If the number of available DBE subcontractors or sub-consultants is 7 or more, use 100 percent.
  - If there are less than 7 (seven) DBEs available: for consultant contracts, use 0 Work Factor; for construction projects, determine whether or not there is a component of trucking or material supply, and apply a 10 or 12 percent DBE Work Factor, respectively; otherwise use 0.

### Submitting Exhibit 9-D

All federal-aid contracts must have an [Exhibit 9-D: DBE Contract Goal Methodology](#) submitted to the DLAE. The following are responsibilities and a flowchart for LPAs, DLAEs, and HQ DLA.

#### Local Public Agency Responsibilities

- LPAs must submit [Exhibit 9-D: DBE Contract Goal Methodology](#) in Microsoft Excel format to their DLAE for every federal-aid contract, including master on-call A&E contracts, prior to advertisement and/or with the request for authorization (RFA) package as applicable.
- LPAs may not advertise the contract before receiving DLAE feedback on the DBE goal.

- For construction contract estimates greater than \$2 million and consultant contract estimates greater than \$500,000, the DBE goal will need to be reviewed and approved by Caltrans. LPAs will have an opportunity to discuss and resolve any differences in the respective goal calculations; however, the final decision rests with Caltrans.

**DLAE Responsibilities**

- For construction contract estimates greater than \$2 million and consultant contract estimates greater than \$500,000, e-mail the Exhibit 9-D: DBE Contract Goal Methodology in Microsoft Excel format to HQ DLA: [DBEgoal.GFE@dot.ca.gov](mailto:DBEgoal.GFE@dot.ca.gov).
- Once the Exhibit 9-D: DBE Contract Goal Methodology has been reviewed by the Office of Civil Rights (OCR), send a confirmation e-mail to the LPA with the recommended DBE contract goal.
- For construction contract estimates less than or equal to \$2 million and consultant contract estimates less than or equal to \$500,000, conduct a cursory review of the Exhibit 9-D and send an email to the LPA to confirm the DBE contract goal.

**DLA Responsibilities**

The following applies to DBE goal setting for construction contract estimates greater than \$2 million or consultant contract estimates greater than \$500,000:

- Send confirmation to the DLAE that Exhibit 9-D is being processed.
- After processing, reply to the DLAE with the recommended DBE contract goal.
- If the agency disagrees with the DBE contract goal, review the reasoning and make a decision if the goal needs to be adjusted. The OCR is involved in the decision process to make an adjustment in the DBE contract goal.

It will not take more than 15 business days to review the Exhibit 9-D after receipt from the District. If there is no response from DLA after 15 business days, the DLAE has the discretion to move forward.

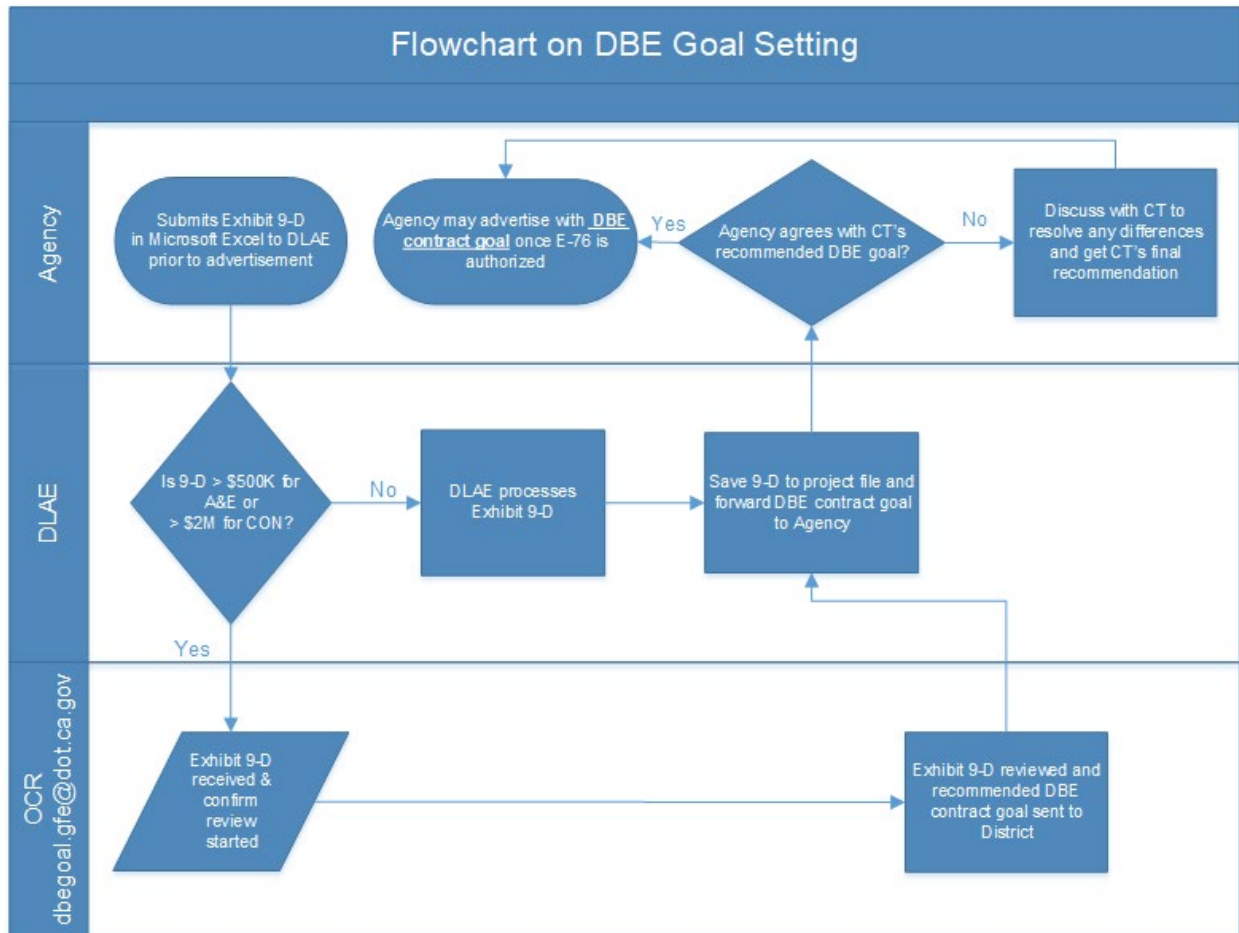


Figure 9-1: DBE Goal Setting Flowchart

**Local Public Agency Bidder or Proposer DBE Commitment and DBE Information Forms**

On construction contracts, the [Exhibit 15-G: Construction Contract DBE Commitment](#) must be provided by each bidder and submitted no later than 4pm on the 5<sup>th</sup> day after bid opening. On consultant contracts, [Exhibit 10-O1: Consultant Proposal DBE Commitment](#) must be included in each consultant’s proposal and the [Exhibit 10-O2: Consultant Contract DBE Commitment](#) form must be included in best qualified consultant’s executed consultant contract. Exhibit 15-G, Exhibit 10-O1, and Exhibit 10-O2 must include the names, addresses and phone numbers of DBE firms that will participate, and a complete description of work or supplies to be provided by each. Exhibit 15-G and Exhibit 10-O2 must also include the dollar value of each DBE work item or service to be performed (Exhibit 10-O1 will not have the dollar values since they are not known prior to consultant contract negotiation).

When 100% of a contract item of work is not to be performed or furnished by a DBE, a description of the exact portion of that work to be performed or furnished by that DBE should be included in the DBE information, including the planned location of that work. A bidder certified as a DBE should describe the work it has committed to perform with its own forces, as well as any other work that it has committed to be performed by DBE subcontractors, suppliers, and trucking companies. The bidder or proposer is required to provide written confirmation from

each DBE participating in the contract. For A&E contracts, any format for written confirmation can be used. For construction contracts, [LAPM 9-I: DBE Confirmation](#) (or equivalent form) and DBE's quote must be submitted. The written confirmation must be submitted no later than 4pm on the 5<sup>th</sup> day after bid opening. If a DBE is participating as a joint venture partner, the bidder or proposer is encouraged to submit a copy of the joint venture agreement. Exhibit 15-G or Exhibit 10-O2 must be included in the construction or consultant contract whether or not there is a DBE goal on the contract. The LPA must submit this form to the DLAE within 30 days of contract execution for timely reporting. Failure to submit Exhibit 15-G or Exhibit 10-O2 to the DLAE within 30 days of contract execution may result in de-obligation of federal funds on contract. The purpose of these forms is to capture all DBE proposed participation, or in instances when there is no DBE contract goal, DBE proposed participation acquired through normal contracting procedures as required under 49 CFR 26.

### Running Tally of Actual Attainments

For projects awarded on or after March 1, 2020, but before September 1, 2023: after submitting an invoice for reimbursement that includes a payment to a DBE, but no later than the 10th of the following month, the prime contractor/consultant must complete and email Exhibit 9-F: [Disadvantaged Business Enterprise Running Tally of Payments to business.support.unit@dot.ca.gov](#) with a copy to local administering agencies.

For projects awarded on or after September 1, 2023: Exhibit 9-F is no longer required. Instead, by the 15th of the month following the month of any payment(s), the prime contractor or consultant must now submit Exhibit 9-P to the LPA administering the contract. If the prime contractor or consultant does not make any payments to subcontractors, supplier(s) and/or manufacturers they must report "no payments were made to subs this month" and write this visibly and legibly on Exhibit 9-P.

### Final Report

Upon completion of the construction or consultant contract, regardless of whether DBE participation was obtained, a summary of the DBE records must be prepared, certified correct, and submitted on the [Exhibit 17-F: Final Report-Utilization of DBE and First-Tier Subcontractors](#), or equivalent by the contractor to the LPA showing total dollars paid to each subcontractor and supplier whether DBE or non-DBE. Exhibit 17-F is reviewed by the LPA and certified as complete and accurate. The information in this report is required by the DBE Program and the FHWA to demonstrate DBE participation on LPA projects.

The LPA must send one copy of the completed Exhibit 17-F to the DLAE as part of its Final Report of Expenditure package before final payment (see [LAPM Chapter 17: Project Completion](#)).

### Counting DBE Participation

Actual payment to subcontractors that are certified DBEs performing a commercially useful function will be counted as DBE participation. If the prime contractor is a qualified DBE, his/her work is reported and counted.

### Work Performed by DBEs

When a DBE participates in a contract, count only the value of the work actually performed by the DBE.

- Count the entire amount of that portion of a contract that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, supplies purchased, or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).
- Count the entire amount of fees or commissions charged by the DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a federal-aid contract, provided that the LPA determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
- When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted towards DBE participation only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE participation.

### Joint Venture

When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces towards the DBE participation. The DBE's share of each of the following must be commensurate with its ownership interest in the joint venture: capital contribution, control, management, risks, and profits.

### Commercially Useful Function (CUF)

DBEs must perform a commercially useful function (CUF) under 49 CFR 26.55 when performing work or supplying materials listed on the DBE Commitment form. The DBE value of work will only count toward the DBE commitment if the DBE performs a CUF. A DBE performs a CUF when it is responsible for execution of the work on the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. Additionally, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material and installing (where applicable), and paying for the material itself.

A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, the LPA must examine similar transactions, particularly those in which DBEs do not participate.

If a DBE does not perform or exercise responsibility for at least 30% of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, one must presume that it is not performing a commercially useful function.

The prime contractor must perform CUF evaluation for each DBE working on a federal-aid contract, with or without a DBE goal. This also includes DBE truckers, suppliers, and other vendors where a subcontract is not required. For contracts between the first-tier DBE and the second-tier DBE, the first-tier DBE must perform the CUF evaluation on the second-tier DBE following the same procedure described in this section. Perform a CUF evaluation at the

beginning of the DBE's work and continue to monitor the performance of CUF for the duration of the project.

The prime contractor must provide written notification to the LPA at least 15 days in advance of each DBE's initial performance of work or supplying materials for the contract. The notification must include the DBE's name, work the DBE will perform on the contract, and the location, date, and time of where their work will take place.

Within 10 days of a DBE initially performing work or supplying materials on the contract, the contractor must submit to the LPA the initial evaluation and validation of DBE performance of a CUF using LAPM 9-J: Disadvantaged Business Enterprise Commercially Useful Function Evaluation. Include the following information with the submittal:

- Subcontract agreement with the DBE
- Purchase orders
- Bills of lading
- Invoices
- Proof of payment

The prime contractor must monitor all DBE's performance of CUF by conducting quarterly evaluations and validations throughout their duration of work on the contract using LAPM 9-J: DBE Commercially Useful Function Evaluation. The contractor must submit to the LPA these quarterly evaluations and validations by the 5th of the month for the previous three months of work.

The contractor must notify the LPA immediately if the contractor believes the DBE may not be performing a CUF.

The LPA will verify DBE's performance of CUF by reviewing the initial and quarterly submissions of LAPM 9-J: DBE Commercially Useful Function Evaluation, submitted supporting information, field observations, and through any additional LPA evaluations. The LPA must evaluate DBEs and their CUF performance throughout the duration of a Contract. The LPA will provide written notice to the contractor and DBE at least two (2) business days prior to any evaluation. The contractor and the DBE must participate in the evaluation. Upon completing the evaluation, the LPA must share the evaluation results with the contractor and the DBE. An evaluation could include items that must be remedied upon receipt. If the LPA determines the DBE is not performing a CUF, then the contractor must suspend performance of the noncompliant work.

The prime contractor and DBEs must submit any additional CUF related records and documents within five (5) business days of LPA's request such as:

- Proof of ownership or lease and rental agreements for equipment
- Tax records
- Employee rosters
- Certified payroll records
- Inventory rosters

Failure to submit required DBE CUF Evaluation forms or requested records and documents can result in withholding of payment for the value of work completed by the DBE.

If the contractor and/or the LPA determine that a listed DBE is not performing a CUF in performance of their DBE committed work, immediately suspend performance of the noncompliant portion of the work. The LPA may deny payment for the noncompliant portion of the work. The LPA will ask the contractor to submit a corrective action plan (CAP) to the LPA within five (5) days of the noncompliant CUF determination. The CAP must identify how the contractor will correct the noncompliance findings for the remaining portion of the DBE's work. The LPA has five (5) days to review the CAP in conjunction with the prime contractor's review. The contractor must implement the CAP within five (5) days of the LPA's approval. The LPA will then authorize the prior noncompliant portion of work for the DBE's committed work.

If corrective actions cannot be accomplished to ensure the DBE performs a CUF on the contract, then the contractor may have good cause to request termination and replacement of the DBE.

The LPA's decision on commercially useful function matters are subject to review by the DLAE. CUF determinations are not subject to administrative appeal to the LPA, Caltrans and USDOT.

### Use of Joint Checks

A joint check may be used between the contractor or lower-tier subcontractor and a DBE subcontractor purchasing materials from a material supplier if the contractor obtains prior approval from the LPA for the proposed use of joint check upon submittal of [LAPM 9-K: DLA Disadvantaged Business Enterprises \(DBE\) Joint Check Agreement Request](#).

To use a joint check, the following conditions must be met:

- All parties, including the contractor, must agree to the use of a joint check
- Entity issuing the joint check acts solely to guarantee payment
- DBE must release the check to the material supplier
- LPA must authorize the request before implementation
- Any party to the agreement must provide requested documentation within 10 days of the LPA's request for the documentation
- Agreement to use a joint check must be short-term, not to exceed 1 year, allowing sufficient time needed to establish or increase a credit line with the material supplier

A request for a joint check agreement may be initiated by any party.

If a joint check is used, the DBE remains responsible for all elements of 49 CFR 26.55(c)(1).

Failure to comply with the above requirements disqualifies DBE participation and results in no credit and no payment to the contractor for DBE participation.

A joint check may not be used between the contractor or subcontractor and a DBE regular dealer, bulk material supplier, manufacturer, wholesaler, broker, trucker, packager, manufacturer's representative, or other persons who arrange or expedite transactions.



## DBE Trucking

Use the following factors to determine if a DBE trucking company is performing a commercially useful function:

- The DBE must be responsible for the management and supervision of the entire trucking operation for which it is getting credit on a particular contract, and there cannot be a contrived arrangement for the purpose of counting DBE participation.
- The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
- The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
- The DBE may lease trucks from another DBE firm including an owner-operator, who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
- The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a DBE.
- A lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck.

## Materials and Supplies

Count expenditures with DBEs for materials or supplies toward DBE participation as provided in the following:

- If the materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies toward DBE participation.  
Note: For purposes of counting DBE participation, a manufacturer is a firm that operates or maintains a factory or establishment that produces on the premises, materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
- If the materials or supplies are purchased from a DBE regular dealer, count 60% of the cost of the materials or supplies toward DBE participation.  
Note: For purposes of counting DBE participation, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.
- To be a regular dealer, the firm must be an established business that regularly engages, as its principal business and under its own name in the purchase and sale or lease of the products in question.



- A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business, if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment must be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not considered regular dealers for purposes of counting DBE participation. With respect to materials or supplies purchased from a DBE, which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, fees or transportation charges for the delivery of materials or supplies required on a job site toward DBE participation, provided the LPA determines the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. However, do not count any portion of the cost of the materials and supplies themselves toward DBE participation.

### **DBE Participation Not Counted**

If a firm is not currently certified as a DBE at the time of the execution of the contract, do not count the firm's participation, except as provided for under Decertification of this section.

Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward the state-wide DBE goal. Do not count the participation of a DBE subcontractor toward the prime contractor's DBE achievements or the LPA's overall participation until the amount being counted toward the participation has been paid to the DBE.

### **Apparent Lack of Control**

In order for a firm to become a certified DBE, it should meet the various requirements prescribed in the CFR, as administered by the California Unified Certification Program (CUCP). The DBE must possess the power to direct or cause (49 CFR 26.71(d)).

Some situations may arise where the work to be performed by the DBE is being performed by someone else. The LPA will have to use discretion on when to investigate or report apparent cases of fraud to Caltrans. Caution is needed because those involved in performing the work may legitimately be doing so.

The three areas are as follow:

1. Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.
2. The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable. The socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be, such that the recipient can reasonably conclude that the socially and economically

disadvantaged owners actually exercise control over the firm's operations, management, and policy.

3. The socially and economically disadvantaged owners must have an overall understanding of, and managerial, technical competence and experience directly related to the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in each critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities; to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

### **DBE Eligibility**

The CUCP certifies and determines the eligibility of DBE consultant and contractor firms. The CUCP can also remove the eligibility of a firm and issue a written notice of ineligibility. A directory of certified DBE firms is available at: <https://caltrans.dbesystem.com/>.

### **Certification**

A potential DBE may request certification from Caltrans by requesting an application form by mail:

Department of Transportation  
Office of Civil Rights  
Certification Unit  
1823 14<sup>th</sup> Street, MS-79  
Sacramento, CA 95811

Or email: [DBE\\_Certification@dot.ca.gov](mailto:DBE_Certification@dot.ca.gov). The form may also be downloaded at: <https://dot.ca.gov/programs/civil-rights/dbe-certification-information>.

### **Decertification**

If a DBE firm becomes ineligible in the middle of a contract (i.e., due to decertification), the prime contractor may continue to use the DBE firm on the contract and may continue to receive credit toward its DBE goal for the DBE firms' work. In this case, or in a case where the DBE firm is already under contract prior to becoming ineligible, the portion of the ineligible DBE firm's performance of the contract remaining after the notice of its ineligibility must not count toward the state-wide DBE overall goal, but may count toward the contract goal.

If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, the LPA may continue to count its participation on that contract toward overall and contract participation.

## Appeal

When the CUCP makes an administratively final removal of a firm's eligibility, the firm may appeal the removal to the DOT under Section 26.89 of 49 CFR 26. Caltrans will provide information for an appeal with the removal of eligibility.

## 9.8 Good Faith Efforts

Note: For purposes of this section, bidder also includes proposer, contractor includes consultant, and subcontractor includes subconsultant.

When an LPA establishes a DBE contract goal on a federal-aid contract, a bidder must, in order to be responsive, make Good Faith Efforts (GFEs) to meet the DBE contract goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient to meet the goal. Second, if the bidder does not meet the goal, the bidder can provide documentation in support of their adequate GFEs. This means that the bidder must show that they took all necessary and reasonable measures to achieve the DBE contract goal. The bidder could reasonably be expected to obtain maximum possible DBE participation even if they were not fully successful in meeting the DBE contract goal. An LPA must require a bidder to meet the DBE contract goal or meet the burden of proof of GFEs in order to be awarded a contract. In any situation in which a DBE contract goal has been established, the use of GFEs must be allowed. The LPA can adopt a sample GFE procedure ([Exhibit 9-G](#)) to use verbatim or revise as necessary.

Each LPA must make a fair and reasonable judgment whether a bidder that did not meet the set goal made adequate GFEs. It is important to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere pro forma efforts are not GFEs to meet the DBE contract requirements. It is important to note that the LPA's determination concerning the sufficiency of the bidder's GFEs is a judgment call and the determination should not be made using quantitative formulas. Caltrans strongly cautions LPAs against requiring that a bidder meet a DBE contract goal in order to be awarded a contract, even though the bidder makes an adequate GFE showing. 49 CFR 26 specifically prohibits federal-aid recipients from ignoring bona fide GFEs.

### Anticipated Good Faith Efforts

The following types of actions should be considered by an LPA as part of the bidder's Good Faith Efforts (GFEs) to obtain DBE participation. It is not intended to be exclusive or exhaustive. Determining the adequacy of a bidder's GFEs to achieve DBE contract goals is a judgment call. Other factors or types of efforts may be relevant in appropriate cases.

- Soliciting through all reasonable and available means (e.g., attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs that are capable of performing the work of the contract. The bidder must solicit this interest by allowing the DBEs sufficient time to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up the initial solicitation to the DBEs.
- Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE contract goal will be achieved. This includes, where appropriate,

breaking 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 their own forces.

- Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.
- Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers, and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation.

Evidence of such negotiation includes: names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why agreements could not be reached with the DBEs who were not selected to perform the work.

- A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as the DBE contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the DBE contract goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make GFEs. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.
- Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations, and political or social affiliations (for example, union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids or proposals in the contractor's efforts to meet the DBE contract goal.
- Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.
- Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
- Effectively using the services of available minority or women community organizations; minority or women contractors or consulting groups; local, state, and Federal minority or women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

The above actions are typically documented by the bidder on [Exhibit 15-H: DBE Information - Good Faith Efforts](#), which is to be submitted no later than 4pm on the 5<sup>th</sup> day after bid opening. This information is used by the LPAs to determine if the GFE was adequate or not prior to awarding the contract. In determining whether a bidder has made GFEs, the LPA may take into account the performance of other bidders in meeting the DBE Contract Goal. The LPA should evaluate GFEs considering the DBE commitments of the 2<sup>nd</sup> and 3<sup>rd</sup> bidders. For example, when

the apparent successful bidder fails to meet the DBE contract goal, but the 2<sup>nd</sup> and 3<sup>rd</sup> bidders meet it, it may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the DBE participation obtained by the 2<sup>nd</sup> and the 3<sup>rd</sup> bidders, this along with other supporting factors may be viewed as evidence of the apparent successful bidder having met the burden of proof of GFEs. See the Civil Rights Disadvantaged Business Enterprise Evaluating Good Faith Efforts video on the FHWA Federal-aid Essentials for Local Public Agency [website](#).

The LPA should ensure that the following is included in the contract documents:

- The LPA may consider the DBE commitments of the 2<sup>nd</sup> and 3<sup>rd</sup> bidders when determining whether the low bidder made Good Faith Efforts to meet the DBE contract goal.
- For projects awarded based on a GFE, the LPAs must prepare and submit with the award package [Exhibit 9-E: Sample Evaluation of Good Faith Efforts](#), that cites reasons as to why the GFE is adequate. In addition, Exhibit 15-H without supporting documentation, should be included in the award package.

Note: Exhibit 15-H and Exhibit 9-E need not be submitted with the award package, if the low bidder has met the DBE contract goal. However, bidders should be encouraged to submit Exhibit 15-H with their bid package, even if they believe they have met the DBE contract goal, in case errors are found in the [Exhibit 15-G: Construction Contract DBE Commitment](#).

### **Bidder/Offeror's Requirements for Good Faith Efforts**

Good faith efforts documentation must include the following information, and supporting documents, as necessary:

1. The bidder/offeror's overall DBE commitment.
2. Items of work the bidder/offeror has made available to DBE firms. The bidder/offeror identifies and describes those items of work the bidder/offeror might otherwise perform with the bidder/offeror's own forces and those items that have been broken down into economically feasible units to facilitate DBE participation. For each item listed, the bidder/offeror must show the dollar value and percentage of the total contract. It is the bidder/offeror's responsibility to demonstrate that sufficient work to meet the goal was made available to DBE firms.
3. Names of certified DBEs and dates on which they were solicited to bid on the project. The bidder/offeror must include the items of work offered. The bidder/offeror must describe the methods used for following up initial solicitations to determine with certainty if the DBEs were interested, and the dates of the follow-up. The bidder/offeror must attach supporting documents such as copies of letters, memos, facsimiles sent, telephone logs, telephone billing statements, and other evidence of solicitation. The bidder/offeror is reminded to solicit certified DBEs through all reasonable and available means and provide sufficient time to allow DBEs to respond.
4. Name of selected firm and its status as a DBE for each item of work made available. The bidder/offeror must include name, address, and telephone number of each DBE that provided a quote and their price quote. If the firm selected for the item is not a DBE, the bidder/offeror must provide the reasons for the selection.

5. Name and date of each publication in which the bidder/offeror requested DBE participation for the project. The bidder/offeror must attach copies of the published advertisements.
6. Names of agencies and dates on which they were contacted to provide assistance in contacting, recruiting, and using DBE firms. If the agencies were contacted in writing, the bidder/offeror must provide copies of supporting documents.
7. List of efforts made to provide interested DBEs with adequate information about the plans, specifications, and requirements of the contract to assist them in responding to a solicitation. If the bidder/offeror has provided information, they must identify the name of the DBE assisted, the nature of the information provided, and date of contact. The bidder/offeror must provide copies of supporting documents, as appropriate.
8. List of efforts made to assist interested DBEs in obtaining bonding, lines of credit, insurance, necessary equipment, supplies, and materials, excluding supplies and equipment that the DBE subcontractor purchases or leases from the bidder/offeror or its affiliate. If such assistance is provided by the bidder/offeror, they must identify the name of the DBE assisted, nature of the assistance offered, and date assistance was provided. Provide copies of supporting documents, as appropriate.
9. Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal.
10. Written confirmation from each listed DBE firm that it is participating in the contract in the kind and amount of work provided in the bidder/offeror's commitment.
11. Written documentation of reason(s) for rejecting DBE quotes.
12. Any additional data to support demonstration of good faith efforts.

The LPA may consider DBE commitments from other bidders when determining whether the low bidder made good faith efforts to meet or exceed the DBE goal.

### **Administrative Review and Reconsideration**

An administrative review (49 CFR 26.53) and evaluation of the Good Faith Efforts (GFEs) should be made prior to award in each instance by the LPA. If the LPA determines that the apparent successful bidder has failed to meet the GFEs requirements, the LPA, before awarding the contract, must provide the apparent successful bidder the opportunity for administrative reconsideration in accordance with 49 CFR 26.53. A sample procedure for reconsideration hearing (Exhibit 9-H) can be found at the [LAPM Exhibits webpage](#).

### **Termination and Replacement of DBE Subcontractors**

A prime contractor cannot terminate or perform any work of a DBE listed on Exhibit 15-G: Construction Contract DBE Commitment or Exhibit 10-O2: Consultant Contract DBE Commitment; neither can it substitute any work for a DBE subcontractor without the written consent of the LPA prior to any replacement taking place. Unless the LPA provides prior written consent, the contractor is not entitled to any payment for work or material unless it is performed or supplied by the listed DBE on the Exhibit 15-G or Exhibit 10-O2. After affording the DBE due process (see Termination of DBE Subcontractors below), when a prime contractor receives written permission from the LPA to terminate it must then make adequate Good Faith Efforts (GFEs) for any necessary replacement of a DBE subcontractor to the extent needed to meet the DBE commitment.

### Termination of DBE Subcontractors

The LPA must include in each prime contract a provision stating that the contractor must utilize the specific DBEs listed to perform the work and supply the materials for each [item listed in the contract](#) unless the contractor obtains the LPA's written [permission](#).

[After a contract with a specified DBE goal has been executed, termination of a DBE may be allowed for the following, but not limited to, justifiable reasons with prior written authorization from the LPA:](#)

- The listed DBE subcontractor fails or refuses to execute a written contract
- The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards
- The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements
- The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness
- The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to 2 CFR Parts 180, 215 and 1,200 or applicable state law
- [Work requires a contractor's license and listed DBE does not have a valid license under Contractors License Law or is not properly registered with the California Department of Industrial Relations as a public works contractor.](#)
- The LPA has determined that the listed DBE subcontractor is not a responsible contractor
- The listed DBE subcontractor voluntarily withdraws from the project and provides written notice of its withdrawal
- The listed DBE is ineligible to receive DBE credit for the type of work required
- A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract
- Other documented good cause that the LPA determines compels the termination of the DBE subcontractor

[To terminate a DBE or to terminate a portion of a DBE's work, the contractor must use the following procedures:](#)

1. [Send a written notice to the DBE of the contractor's intent to use other forces or material sources and include one or more justifiable reasons listed above. Simultaneously send a copy of this written notice to the LPA. The written notice to the DBE must request they provide any response within five \(5\) business days to both the contractor and the LPA by either acknowledging their agreement or documenting their reasoning as to why the use of other forces or sources of materials should not occur.](#)
2. [If the DBE does not respond within five \(5\) business days, the contractor may move forward with the request as if the DBE had agreed to the contractor's written notice.](#)



3. Submit the DBE termination request by written letter to the LPA and include:
  - One or more above listed justifiable reasons along with supporting documentation.
  - The contractor's written notice to the DBE regarding the request, including proof of transmission and tracking documentation of the contractor's written notice
  - The DBE's response to the contractor's written notice, if received. If a written response was not provided, provide a statement to that effect.

The LPA must respond in writing to contractor's DBE termination request within five (5) business days.

### **Replacement of DBE Subcontractors**

After receiving the LPA's written authorization of DBE termination request, the contractor must obtain the LPA's written agreement for DBE replacement. The contractor must find or demonstrate GFEs to find qualified DBE replacement firms to perform the work to the extent needed to meet the DBE commitment.

The following procedures must be followed to request authorization to replace a DBE firm:

1. Submit a request to replace a DBE with other forces or material sources in writing to the LPA which must include:
  - a. Description of remaining uncommitted work item made available for replacement DBE solicitation and participation.
  - b. The proposed DBE replacement firm's business information, the work they have agreed to perform, and the following:
    - Quote for bid item work and description of work to be performed
    - Proposed subcontract agreement and written confirmation of agreement to perform on the Contract
    - Revised Subcontracting Request form
    - Revised Exhibit 10-O2: Consultant Contract DBE Commitment or a revised Exhibit 15-G: Construction Contract DBE Commitment
2. If contractor has not identified a DBE replacement firm, submit documentation of GFEs to use DBE replacement firms within seven (7) days of LPA's authorization to terminate the DBE. The contractor may request the LPA's approval to extend this submittal period to a total of 14 days. Submit documentation of actions taken to find a DBE replacement firm, such as:
  - Search results of certified DBEs available to perform the original DBE work identified and or other work the contractor had intended to self-perform, to the extent needed to meet the DBE commitment
  - Solicitations of DBEs for performance of work identified



- Correspondence with interested DBEs that may have included contract details and requirements
- Negotiation efforts with DBEs that reflect why an agreement was not reached
- If a DBE's quote was rejected, provide reasoning for the rejection, such as why the DBE was unqualified for the work, or why the price quote was unreasonable or excessive
- Copies of each DBE's and non-DBE's price quotes for work identified, as the LPA may contact the firms to verify solicitation efforts and determine if the DBE quotes are substantially higher
- Additional documentation that supports the good faith effort

The LPA must respond in writing to the contractor's DBE replacement request within five (5) business days. The Contractor must submit a revised Subcontracting Request form if the replacement plan is authorized by the LPA.

### **Monitoring and Enforcement Mechanism for DBE Termination and Replacement**

LPAs are required to implement appropriate mechanisms to ensure compliance with the requirements related to the termination and replacement of subcontractors by all program participants. The LPA needs to stipulate legal and contractual remedies available under federal, state and local law in the contract and must set forth these mechanisms in the LPA's DBE program.

The LPA's DBE program must also include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently (e.g., as the result of modification to the contract) is actually performed by the DBEs to which the work was committed. This mechanism must include a written certification that the LPA has reviewed contracting records and monitored work sites in the LPA's jurisdiction for this purpose (for example, a resident engineer certifies CUF in writing).

### **Noncompliance**

LPAs must include in each prime contract a provision for appropriate sanctions that will be involved if the prime contractor fails to fulfill the DBE commitments made at the time of execution of the contract. The LPA must deny payment to the prime contractor for the portion of the contract that was committed at the time of contract execution to be performed by a DBE subcontractor but was completed by the prime contractor or a substitute non-DBE subcontractor, unless agreed by the LPA in writing.

### **Submitting the GFE and Supporting Document for Review**

For construction contracts less than or equal to \$2 million and consultant contracts less than or equal to \$500,000, the agency must perform the GFE review if DBE goal is not met.

For construction contracts greater than \$2 million and consultant contracts greater than \$500,000 that had their DBE goal approved by Caltrans, if the low bidder or the most qualified consultant did not meet or exceed the DBE contract goal, the LPA must submit the GFE documentation to their DLAE for review.

The following are responsibilities and a flowchart on Good Faith Effort Review (see Figure 9-2) for LPAs, DLAEs, and DLA.

### Local Public Agency Responsibilities

- The LPA must obtain, complete, and review all of the following documentation prior to determining if the low bidder or the most qualified consultant made a GFE:
  - A bid tabulation summary sheet such as included in [Exhibit 15-D: Bid Tabulation Summary Sheet](#) or [Exhibit 10-O1: Consultant Proposal DBE Commitment](#).
  - All bidders' [Exhibit 15-G: Construction Contract DBE Commitment](#) or [Exhibit 10-O1: Consultant Proposal DBE Commitment](#).
  - All bidders' [Exhibit 15-H: Proposer/Bidder Good Faith Efforts](#) or other documentation that all bidders submit in lieu of Exhibit 15-H. If bidders did not submit GFE documentation within five (5) days after bid opening, it should be noted in [Exhibit 9-E: Sample Evaluation of Good Faith Effort](#).
  - [Exhibit 9-E: Sample Evaluation of Good Faith Effort](#).
- For construction contracts less than or equal to \$2 million and consultant contracts less than or equal to \$500,000, the agency has responsibility to perform the GFE review.
- For construction contracts greater than \$2 million and consultant contracts greater than \$500,000 that had their DBE goal approved by Caltrans, if the low bidder or the most qualified consultant did not meet or exceed the DBE contract goal, the LPA must submit the above GFE documentation to their DLAE **prior to awarding a contract or starting the negotiation**.
  - LPAs **may not** award a contract to the low bidder or negotiate with the most qualified consultant without first receiving a memorandum from their DLAE that Caltrans has determined that they made a GFE.
  - If Caltrans determines the GFE was inadequate, the LPA will take Caltrans feedback on GFE into consideration and re-evaluate the GFE. After the re-evaluation:
    - If the LPA still thinks the GFE is adequate, they can award the contract or start the negotiation process.
    - If the LPA concludes that the GFE is inadequate, they must invite the low bidder or the most qualified consultant to an Administrative Reconsideration.

### DLAE Responsibilities

- For construction contracts greater than \$2 million and consultant contracts greater than \$500,000 that had their DBE goal approved by Caltrans, e-mail all completed GFE documentation including the LPA's bid summary (Exhibit 15-D or Exhibit 10-O1), DBE commitments (Exhibit 15-G or Exhibit 10-O1), the bidders' GFEs (Exhibit 15-H), and the LPA's GFE evaluation (Exhibit 9-E) to [DBEgoal.GFE@dot.ca.gov](mailto:DBEgoal.GFE@dot.ca.gov).
- Communicate the outcome of Caltrans' GFE review to LPAs.

### DLA Responsibilities

The following applies to the GFE evaluation for construction contracts greater than \$2 million and consultant contracts greater than \$500,000 that had their DBE goal approved by Caltrans:

- After receiving a complete GFE package from the DLAE, reply to the DLAE when evaluation starts on the GFE review.
- Once the GFE review has been finished, reply to the DLAE with Caltrans' GFE review conclusion in a memorandum.

The process will not take more than 15 business days after receipt of the GFE package from the District. If there is no response from DLA after 15 business days, the DLAE has the discretion to move forward.

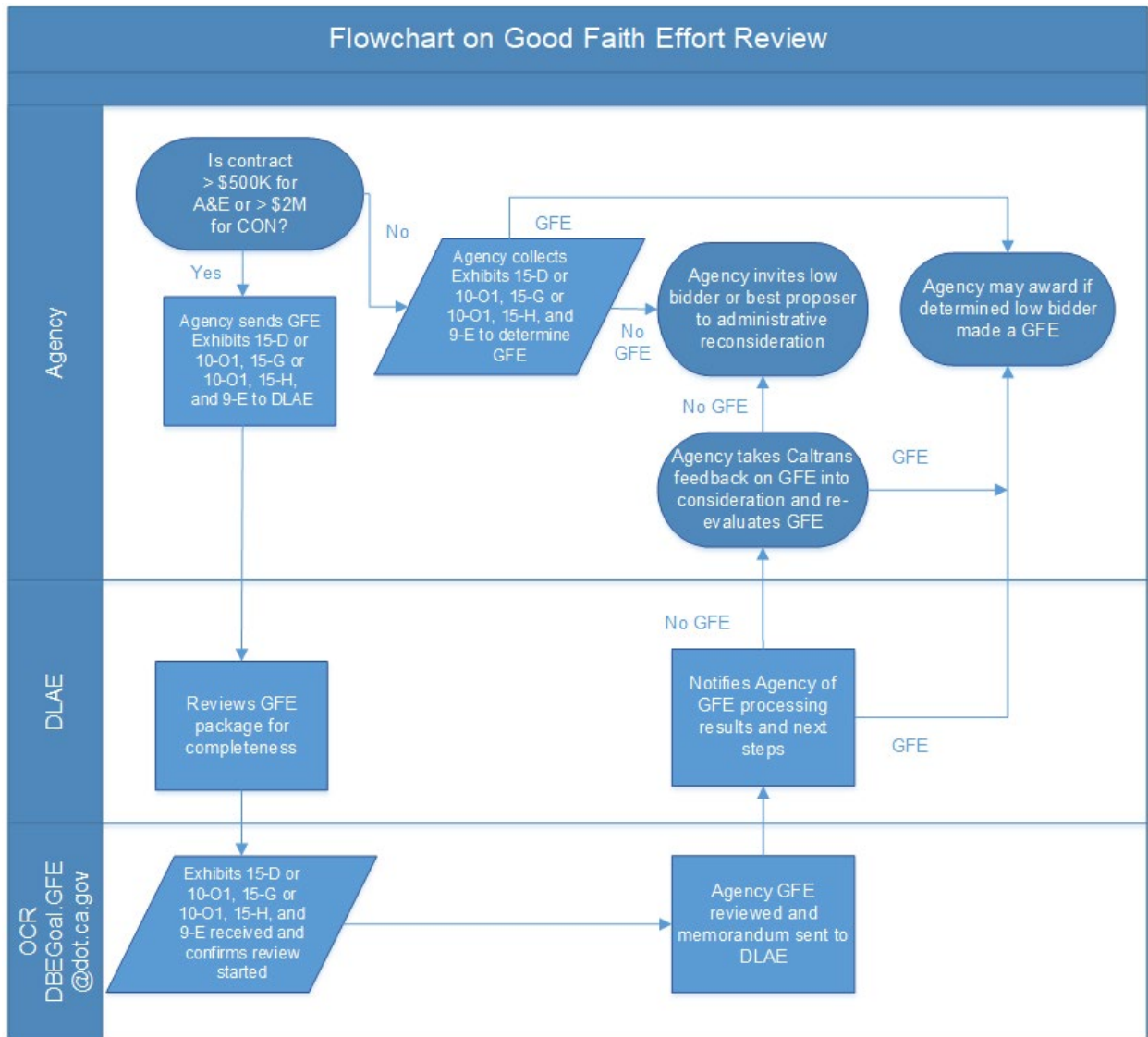


Figure 9-2: Good Faith Effort Review Flowchart

## 9.9 References

49 CFR 26 (DBE Regulations)

[http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title49/49cfr26\\_main\\_02.tpl](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title49/49cfr26_main_02.tpl)

49 CFR 21 (Title VI Regulations)

[http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title49/49cfr21\\_main\\_02.tpl](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title49/49cfr21_main_02.tpl)

49 CFR 27 (Accessibility)

[http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title49/49cfr27\\_main\\_02.tpl](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title49/49cfr27_main_02.tpl)

28 CFR 35 (Accessibility)

<https://www.ecfr.gov/current/title-28/chapter-I/part-35>

23 U.S.C. 140(a) (EEO Contractor Compliance)

<https://www.gpo.gov/fdsys/granule/USCODE-1995-title23/USCODE-1995-title23-chap1-sec140/content-detail.html>

29 U.S.C. 791 et. Seq. (Accessibility)

<https://www.gpo.gov/fdsys/granule/USCODE-2010-title29/USCODE-2010-title29-chap16-subchapV-sec791/content-detail.html>

42 U.S.C. 12101 et. Seq. (Accessibility)

<http://www.ada.gov/pubs/adastatute08.htm>

California Business and Professions Code, Section 7108.5 (Prompt Payment)

<http://law.onecle.com/california/business/7108.5.html>

Section 54 of the California Civil Code

[http://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=CIV&sectionNum=54](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CIV&sectionNum=54)