

7. Program Administration

- 7.1. General
- 7.2. External Affirmative Action
- 7.3. Labor Compliance
- 7.4. Buy American - FAA
- 7.5. Buy America - FHWA
- 7.6. Alaska Product Preferences
- 7.7. FHWA Stewardship Agreement

7.1. General

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

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

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

7.2. External Affirmative Action

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

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

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

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

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

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

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

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

Construction personnel must obtain concurrence from the Civil Rights Office prior to issuance and/or

approval of change documents involving DBE and OJT.

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

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

7.2.1 Equal Employment Opportunity (EEO)

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

7.2.2 Disadvantaged Business Enterprise (DBE) Program

The DBE Program is intended to provide the contracting opportunities on federally funded projects for DBE-owned firms in accordance with federal regulatory criteria. The Civil Rights office establishes a DBE utilization goal for each project, as a percentage of the total contract award amount. The Civil Rights office establishes the DBE project goal in accordance with federal guidelines based upon the subcontractable items for which there are certified DBEs to perform that type of work. Statewide Special

Provision, Section 120 explains in detail determination of DBE compliance.

7.2.3 On-the-Job Training (OJT) Program

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

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

7.2.4 Commercially Useful Function Monitoring and Verification

Commercially Useful Function Monitoring

Complete a DBE Commercially Useful Function Monitoring Report (Form 25A-298) for each DBE firm that works on each federally funded project. Reports are required regardless of whether the project or program is race-conscious or race-neutral, or the presence of DBE utilization goals.

Complete a CUF Monitoring Report within seven days of when each DBE first shows up on the job site. If the project extends for multiple seasons, complete a CUF Monitoring Report for each construction season the DBE is on-site.

A CUF Monitoring Report is completed by interviewing the DBE's On-Site Representative or other DBE staff who has technical knowledge and the ability to answer questions regarding the DBE's work being performed on the project. The CRO can provide

additional information if you are unsure of who is the on-site DBE representative. Only project personnel can complete the CUF Monitoring Report; it may not be filled out by the contractor or DBE.

The CUF Monitoring Report must be signed and dated by the project staff who performed the interview, and the DBE's On-Site Representative as defined in 120-1.04 of the *Standard Specifications for Highway Construction* or the *Statewide Special Provisions for Airport Construction*. Coordinate directly with the Statewide Civil Rights Office for any questions or assistance in completing the Monitoring Report.

Photograph and document DBE activities. Also note whenever there are significant changes to the DBE's day-to-day operations that may not be consistent with commercially useful work (see: "red flag issues"). Send each completed CUF Monitoring Report to the RCCL, for their acceptance.

CUF Monitoring Reports are not required on projects that have no federal funding.

Commercially Useful Function Verification

Complete a DBE Commercially Useful Function Verification Report (Form 25A-299) for each DBE firm that works on each federally funded project. Only the Project Engineer or designee can complete the CUF Verification Report; it may not be filled out by the contractor or DBE.

Coordinate directly with the Statewide Civil Rights Office for any questions or assistance in making the verification. Complete the CUF Verification Report after the DBE is substantially finished with their portion of the project work but before project final payment. Complete the report by reviewing project records. Send each completed CUF Verification Report to the RCCL, for their acceptance.

CUF Verification Reports are not required on projects that have no federal funding.

The RCCL or Project Engineer will verify that the DBE owner, or DBE On-Site Representative was at the worksite and responsible for the work. Immediately notify the RCCL if the interview reveals a potentially adverse finding. Discuss findings and significant changes with the RCCL. The Project Engineer or RCCL will notify the contractor of potentially adverse findings, and discuss ways to resolve issues. A copy of the reports may be provided to the contractor upon request.

The RCCL will coordinate potentially adverse findings with the CRO as appropriate. Again, the primary goal is to avoid contract compliance violations. Use the CRO as a resource for any questions about these requirements.

Send a copy of all CUF Monitoring and CUF Verification reports to the CRO consistent with regional policy. Copies may be in the form of an electronic PDF file.

7.3. Labor Compliance

7.3.1 Wages and Payroll Reporting

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

Both state-funded and federally funded contracts fall under the requirements of AS 36, which requires the payment of not less than the prevailing minimum wage rates contained in the latest wage rate decision published by the Alaska Department of Labor and Workforce Development (DOWLD). This decision is also included in the contract. On federally funded contracts, if there is a difference between the federal and the state minimum wage rates, the higher rate will govern. Both the federal and the state wage rate decisions also include minimum fringe benefit rates. The federal wage rates are established at the time of contract advertisement and remain in effect for the life of the contract. State wages are established ten days prior to bid opening and remain in effect for the life of the contract, or 24 months, whichever is less. The count of the 24-month period starts at award of the contract. Upon expiration of the initial 24-month period, the latest state wage rates issued by the DOWLD shall become effective for a subsequent 24-month period or until the original contract is completed, whichever occurs first. This process shall be repeated until the original contract is completed.

The contractor and each subcontractor are required to prepare a weekly payroll and statement of compliance (14 CFR 151.53, 23 CFR 635.118, and 29 CFR 3.4) and submit them to the Project Engineer and to DOLWD within seven days of the payroll ending date. The payrolls must be project specific, identify each employee by name and work classification, and must include the hour's worked and hourly rate(s), price extensions, and deductions. Bona fide truck owner-operators hauling materials for the project must appear on the certified payrolls (as owner-operators) of the prime Contractor or an approved subcontractor.

Check that the submitted certified payrolls have a statement of compliance that is signed by the contractor or subcontractor (or their agent) who submitted the payroll.

Store certified payrolls as per the record retention schedule in Section 16.15.

7.3.2 Labor Compliance Interviews

Labor compliance interviews must be conducted on federally funded (not required for state funded) projects by project staff or by the regional contract compliance liaison. Interviews are conducted to determine if contractor employees are receiving the wages and benefits they are entitled to (correct wages and classifications, fringe benefits, hours worked = hours paid).

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

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

No interviews are required during periods of seasonal shutdown. Conduct additional interviews if there are indications of possible noncompliance. Information given during the interview is confidential.

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

7.4. Buy American - FAA

The Buy American Preferences under 49 USC § 50101 require that all steel and manufactured goods used in AIP (Airport Improvement Program) funded projects be produced in the United States. The FAA is given the authority to waive these Buy American Preferences if certain market or product conditions exist.

A Buy American waiver may be requested from FAA based on the exceptions listed below. The Department must receive FAA approval for the requested waiver prior to issuing the Letter of Award. The four types of waivers to the Buy American requirement are:

1. **Type I.** The FAA can issue this type of waiver if the FAA determines that applying the Buy American requirements would be inconsistent with the public interest. (Department use only.)
2. **Type II.** The FAA can issue this type of waiver for equipment or construction material if the FAA determines that the goods are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality. Type II Waivers can only be issued on the equipment/construction material level and cannot be issued for a system and/or facility that is comprised of various pieces of equipment/construction material. (Department use only.)
3. **Type III.** The FAA can issue this type of waiver if the FAA determines that 60 percent or more of the components and subcomponents in the equipment/facility are of U.S. origin and their final assembly is in the United States. A Type III Waiver cannot be issued at the system level and must be issued for each piece of equipment; however, in the case of facilities (i.e. buildings) a Type III Waiver may be issued for the entire facility if all the construction materials when combined meet the 60 percent U.S. origin requirement. (The term "final assembly" for purposes of this provision should be substantial rather than a light bulb put in a vehicle.) The application of this type of waiver is determined after bid opening. (Bidder may apply before award.)

No exception is allowed for structural steel. The manufacturer must certify in writing that any major structural steel used in their equipment is of 100 percent U.S. origin. Small amounts of steel that are used in components and subcomponents,

that are not structural steel, may be of foreign origin. This would typically consist of nuts, bolts and clips. For these types of steel, the manufacturer must indicate the use of the steel (nuts, bolts, clips, etc.) and must count this steel as non-U.S. origin when completing the Content Percentage Calculation Form (Form 25D-155, Buy American Percentage).

4. **Type IV.** This type of waiver is not allowed under Alaska's standard contract language. However, the FAA can issue this type of waiver if the FAA determines that applying Buy American requirements increases the cost of the overall project by more than 25 percent. In order to issue this type of waiver, the FAA must determine that there is at least one bid from a Buy American compliant supplier to make the 25 percent cost increase determination.

FAA-funded projects require each bidder to submit a Certificate of Buy American Compliance (Form 25D-151 or 25D-152) with their bid. If the apparent low bidder indicates they will apply for a Type III waiver, then they must submit the waiver request, with documentation, before award to the Contracting Officer (section 3.4). The waiver request will be reviewed by local FAA office, and it may be approved or denied. If it is denied, the bidder is required to construct using all Buy American compliant products.

FAA-funded projects also have a list of items that have been determined nonavailable and according to 48 CFR § 25.1 are excluded from the Buy American preference requirements, and other products subject to a Nationwide Buy American Waiver, and other products subject to nationwide Buy American waivers. See web links:

https://www.faa.gov/airports/aip/buy_american/

A manufacturer or supplier of products must provide documentation to show they comply with Buy American provisions by completing a Material Submittal Form 25D-154 and associated material documentation for each product. The Contractor may sign Form 25D-154 if they have knowledge of the origins of the material and are the supplier or fabricator of the product.

7.5. Buy America - FHWA

Applicable only to FHWA-funded contracts, the terms of Public Law 98-229 require that under most conditions only certain domestic materials be

incorporated into the project (23 CFR 635.410). On FHWA-funded projects, this covers steel, steel-manufactured products, and iron and steel coatings. The contractor must provide a Buy America Material Origin Certificate (Form 25D-60) demonstrating compliance with the provisions of the Buy America Act prior to award of the contract. When the Contractor becomes aware of a change from or error in a previously submitted Material Origin Certificate (Form 25D-60), the Contractor is required to submit an updated Material Origin Certificate, Form 25D-60. The contractor may amend the certificate following award and only up to the limit specified in the contract.

The contract lists exceptions or waivers to the Buy America requirement, including minor amounts, raw materials such as pig iron, and temporary structures.

Minor amounts of foreign (or unknown origin) steel and iron materials is allowed, if the cost of such materials used does not exceed one-tenth of one percent (0.1 percent) of the total contract cost or \$2,500, whichever is greater. The cost is that shown to be the value of the steel and iron products as they are delivered to the project including freight. Contract specified steel or iron materials (or equal), which are subject to the Buy America Act but are not manufactured in the United States, are counted towards the project's total value of foreign steel.

The Contractor shall secure and provide a Certificate of Buy America Act Compliance (Form 25D-62) with the material documentation for each steel or iron product that is subject to the Buy America Act and incorporated in the project. The Contractor may sign Form 25D-62 if they have knowledge of the origins of the material and are the supplier or fabricator of the product.

If one contract is federal-aid funded, then Buy America applies to it and all other contracts regardless of funding sources, when those contracts are within the same scope of a finding, determination, or decision under NEPA. This also affects subcontracts with the contractor, third party agreements (like utilities or local government) and related work.

7.6. Alaska Product Preferences

Under the provisions of the Alaska Product Preferences chapter in the Alaska Statutes (AS 36.15.050), the use of Alaska agricultural and fisheries products, including Alaskan timber and

products manufactured in the state from timber and lumber, is required on state-funded contracts when the Alaskan items are priced no more than seven percent above similar outside products. Additionally, under AS 36.30.324, the Department encourages the use of Alaskan products and recycled Alaskan products in all Department procurements. Bidding preferences and monetary penalties for the use of or for the failure to use such products are established for all products except timber, lumber, and manufactured lumber products. The Alaska Product Preferences are not acceptable for FAA-funded or FHWA-funded projects.

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

7.7. FHWA Stewardship Agreement

Review the project stewardship and oversight agreement for responsibilities and oversight authority.

The Alaska Division of FHWA has signed a Stewardship and Oversight Agreement with DOT&PF. This agreement describes roles and responsibilities during financing, design and construction of projects that are funded by FHWA.

A copy of the current agreement is attached to the Chief Engineer's Directive dated November 20, 2015. See link:

http://dot.alaska.gov/stwddes/despubs/assets/pdf/directives/attach/2015/stewardship_agreement_attach.pdf

Attachment A of the Agreement lists project level activities for which the "STATE" has responsibility and approval authority. Attachment B lists program

level activities, roles and responsibilities. Attachment C lists DOT&PF manuals and operating agreements that are approved by FHWA.

FHWA has retained project financial approval authority. It is important that we preserve a working relationship with our funding partner by providing the information they need. The following documents are required based on language in the ACM or based on CFR and standard operating procedures with FHWA. Document submittals to FHWA are made by the regional construction engineer or their delegate.

Submit the following documents to FHWA as informational copies:

- Change Orders
- Progress Estimates
- Project Materials Certification and Memorandum of Exceptions (if necessary)
- Form FHWA 1446C – Final Inspection
- Final Construction Payment and Project History
- Letter of Project Completion
- Other documents as required by the PoDI Stewardship and Oversight Agreement.

Submit the following documents to FHWA for approval before described work begins:

- Supplemental Agreements

Project status reports must be available for FHWA review.

Projects of Division Interest

Each year the Alaska Division of FHWA conducts a risk based assessment of projects. They typically designate 10-20 projects to be Projects of Division Interest (PoDIs). FHWA may discuss potential PoDIs with the regions and headquarters in January or February before deciding on a final list.

PoDIs are chosen because they have elevated risk, contain elements of higher risk, or present a meaningful opportunity for FHWA involvement to enhance meeting program or project objectives. The FHWA risk based assessment may include:

1. Complexity
2. Cost
3. Schedule

4. Urgency
5. Environmental Considerations/Stakeholders, and
6. Other considerations.

Each PoDI has its own Stewardship and Oversight Agreement with authorities and responsibilities that may be different from the general agreement. Administer PoDI projects according to their project specific PoDI Stewardship and Oversight Agreement.

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