

**113.00 CONTRACT CIVIL RIGHTS****General**

Receipt of federal aid (FA) funds is contingent on implementing and monitoring for compliance several Civil Rights (CR) programs in the Department. Three of the five CR programs--the Contract Compliance Program, the Training Special Provisions (TSP) Program, and the Disadvantaged Business Enterprise (DBE) Program--require that FA construction contracts contain special provisions stipulating that Contractors provide equal employment opportunity (EEO).

Included in this is:

- Providing equal opportunity for the employment of minorities and women in the crafts utilized on the project (Contract Compliance Program).
- Providing equal opportunity and taking affirmative action steps in the employment of minority and women trainees in the crafts utilized on the project (TSP Program).
- Providing Good Faith Efforts in subcontracting a portion of the work to certified minority or women-owned businesses (DBE Program).
- Providing employment rights for Native Americans including the Tribal Employment Rights Ordinances, if applicable (TERO program).

The following information is to be used as a supplement and guide for construction personnel in administering the "Civil Rights Special Provisions" and "Training Special Provisions" of federal aid contracts. An explanation of these programs is contained in the EEO Contract Compliance Plan and the Disadvantaged Business Enterprise Plan, along with listings of authorities under which the programs are implemented and responsibilities of other Department personnel.

Construction personnel should refer to the EEO Contract Compliance Plan and the Disadvantaged Business Enterprise Plan for detail of actions to be taken when not specifically outlined within this supplemental guide. The plans may be found on the EEO office intranet home page.

**113.01 PRECONSTRUCTION MEETINGS**

The Resident/Regional Engineer (RE) or the District EEO/ST Coordinator presents the Contractor at the preconstruction conference with a package containing:

- A. All federally required job site posters. (List can be obtained from EEO/ST or ITD Headquarters EEO Office)
- B. Form FHWA-1391, "Federal-aid Highway Construction Contractors Annual EEO Report". See Exhibit 113-3A.

The basic elements of the Civil Rights Special Provisions to be emphasized at the preconstruction meeting have been extracted from the information that follows and placed in the Preconstruction Conference Outline located in Section 108.04 of this manual. The RE or the EEO/ST Coordinator is responsible for ensuring that the Contractor understands the commitments made when the contract was executed, and the consequences of failing to carry out those commitments. In order to have a more detailed understanding of the Civil Rights Special Provisions the RE and the EEO/ST Coordinator should refer to the EEO Contract Compliance Plan and the DBE Plan.

## 113.02 CONTRACT COMPLIANCE PROVISIONS

### General

Sections I, II, and III of the Civil Rights Special Provisions contain the commitments made by the Contractor to provide equal employment opportunity and practice affirmative action in hiring, training, and promoting women and minorities in the crafts and in their subcontracting opportunities. As with any other provision in the contract, the RE is responsible for monitoring, administering, and obtaining compliance with the “Civil Rights Special Provisions”.

The Contractor agrees to take the following action on the project:

- A. Prohibit discrimination based on race, sex, color, national origin, age, disability, or religion.
- B. Develop and post an Equal Employment Opportunity (EEO) policy statement which expresses the company’s commitment to affirmative action and equal employment opportunity. All Subcontractors must also develop, and post their policies.
- C. Display the Federally required posters, in a convenient, suitable place, readily accessible by employees and potential applicants.
- D. Designate by letter, before beginning any on-site work, an Equal Opportunity Officer who has the authority, position and experience to carry out an effective EEO program as the Project EEO Officer and make his/her identity known to all supervisors and employees. This letter must be placed in project files.
- E. Provide to the RE written verification that supervisors and employees have been advised of the company’s EEO Policy before starting the project. This documentation must be placed in the project files.
- F. Take affirmative actions to meet the goals for minority and female employment as specified in the Civil Rights Special Provisions. These goals are developed and enforced by the U.S. Department of Labor.
- G. Maintain employment records in a format that identifies employees by race, sex, craft and work status and the hours worked within each craft and apprentice/trainee level, if appropriate.
- H. Include in all subcontracts over \$10,000 the same Civil Rights Special Provisions as contained the Prime’s contract.

- I. Submit employment data reports (FHWA-1391) each July on all work performed under the contract by the Contractor and/or any covered Subcontractor.

#### **On-Site Inspections Form ITD 2674**

After each project is under way and the Contractor has employed at least two-thirds of the anticipated work force, the RE conducts on-site inspections and records the findings on Form ITD-2674.

If the RE finds minor items (e.g. EEO policy not posted), the RE requests that the Contractor take corrective action immediately. If the Contractor refuses or neglects to take the corrective action, the RE should request a Compliance Review by the EEO Contract Compliance Officer (CCO). Copies of all on-site inspections must be forwarded to the CCO.

- A. On-site inspections for EEO requirements will be conducted on:
  - All Prime Contractors.
  - All Subcontractors with subcontracts of \$10, 000 or more.
- B. The RE will complete the On-Site Inspection Form (Form ITD-2674) and distribute as indicated on the form. EEO on-site inspections determine whether the Contractor is meeting the basic intent of the Civil Rights Special Provisions in the contract. It can serve as a reminder to Contractors (who usually focus on completing the project) that ITD is also concerned about who is working on the project, and the environment in which they work.

In addition to routine contract monitoring by the RE, District EEO/ST Coordinators will randomly select current projects to determine:

- Whether the project file contains an ITD-2674 for the Prime and each Subcontractor that has been on the project.
- Whether the information provided on the ITD-2674 completed by the RE (or the RE's designee) correlates with the EEO/ST Coordinator's independently conducted investigation.

The EEO/ST Coordinators report their findings to the District Engineer (DE). Copies of all on-site inspections must be forwarded to the Contract Compliance Officer. In order to have a more detailed understanding of what is being monitored by the On-Site Inspection the RE and the EEO/ST Coordinator should refer to the EEO Contract Compliance Plan.

#### **Contract Compliance Review**

Each calendar year, Headquarters personnel (Civil Rights, Construction, Design) and District personnel coordinate selection of contracts for formal Compliance Reviews for the following construction season according to criteria established in the Contract Compliance Plan. The CCO advises Districts of those projects and contractors selected.

EEO/ST Coordinators, with the assistance of the Resident\Regional Engineer, should monitor employment trends as indicated on payrolls to determine the best time for conducting the review. Reviews should take place if possible after the Contractor has had hiring opportunities. The EEO/ST Coordinators or designated DRIs will schedule the review dates in coordination with the CCO, District personnel and the Contractor.

While the CCO is ultimately responsible for conducting the review, the District EEO/ST Coordinators or designated DRIs are responsible for initiating the review process, preliminary analysis of the documentation submitted, and preparation and distribution of all related letters and forms. The Contract Compliance Officer, representatives of FHWA, and appropriate District staff may accompany the District EEO/ST Coordinators or designated DRIs in the on-site portion of the review (i.e. evaluation of the job site and employee interviews).

At the conclusion of the review, an On-Site Conference is conducted with the Contractor's representatives to discuss the preliminary findings. The Contract Compliance Officer will conduct the On-Site Conference. Others attending the On-Site Conference will be the EEO/ST Coordinator or designated District Records Inspectors (DRIs), representatives of FHWA, appropriate District staff and the Contractor's representatives. The EEO/ST Coordinators or designated DRI's may be requested to conduct the On-Site Conference by the CCO or the EEO Manager (EEOM) if needed. FHWA representatives attending the On-Site Conference may ask questions regarding any aspect of the compliance review. The RE and other appropriate project personnel will attend this conference to assist in clarifying issues or documentation and to become familiar with additional requirements which may be placed on the Contractor if found to be out of compliance or deficient in some manner. For more detail on contract compliance reviews, refer to the Contract Compliance Plan.

### **Complaints**

The Idaho Transportation Department is committed to thoroughly and promptly investigating each complaint in a confidential manner employing a process that treats all parties involved with respect. Contractors who are found to have discriminated shall be deemed in noncompliance with the EEO contract requirements and shall be required to promptly take corrective action or be subject to contract sanctions.

Individuals who are eligible to file complaints include all employees and applicants of any prime and/or subcontractor possessing ITD federal and/or state contracts. Any employee of a contractor working on an ITD contract who believes they have been sexually harassed or discriminated against in their employment on the basis of race, color, national origin, religion, age, disability or sex may file a complaint. A complaint is filed by submitting a written statement outlining the basis of the complaint to the ITD's CCO or to any of ITD's six District EEO/ST Coordinators. The complaint must be filed no later than 180 days of the alleged event(s). A copy of these procedures as detailed in the ITD EEO Contract Compliance Plan shall be provided upon request.

Retaliatory actions are prohibited against a person(s) who has filed a complaint, testified, or in any way participated in reporting alleged discriminatory practices. The contractor/Respondent shall be advised that such retaliation and, if substantiated, shall constitute a violation of the EEO requirements of the contract and is subject to a finding of noncompliance and/or sanctions.

When a complaint is filed with ITD, against a contractor, regarding sexual harassment or discrimination based on race, color, national origin, religion, age, disability or sex, the RE notifies the District EEO/ST Coordinator or designated DRI and the EEOM. The EEOM notifies the Federal Highway Administration including a list of federal aid contracts the Contractor holds in Idaho and the value and location of each. At a minimum, the following information is compiled by the District EEO/ST Coordinator or designated DRI and included in each report of discrimination:

- Name, address and telephone of the complainant.
- Contractor involved and location where the complaint originated (project site, home office, etc.).
- Basis of complaint (i.e. race, color, religion, sex, national origin, age, and disability).
- Date(s) of alleged discriminatory act(s). (Complaints must be filed within 180 days of the last alleged discriminatory act.)
- Date complaint was received.
- A statement of the complaint and issues involved signed by the complainant.

The EEOM will assign an Investigator trained in performing Civil Rights fact-finding investigations who will promptly investigate each alleged act of discrimination. This investigation will be coordinated by the EEO Office to assure the necessary information is gathered and report to the EEOM. The EEOM will keep the Chief Engineer and the District Engineer informed of the status of the complaint during the investigation.

Based on the facts obtained in the investigator's report, the EEOM will determine if discrimination has or has not taken place. The EEOM will prepare an Investigative Summary and Recommendation Report showing the conclusions and recommendation and present the report to the Chief Engineer and the Administrative Services Division Administrator. The Administrative Services Division Administrator will review the report on the investigation and make a final determination of ITD's decision. The EEOM will prepare a Statement of the Department's Decision reflecting ITD's final determination.

The EEOM will inform the complainant and the respondent of the department's decision, in writing, and their right to appeal.

The EEOM will send copies of the complaint, Investigative Summary and Recommendations Report, and Statement of Agency Decision to FHWA within 60 days of receipt of the complaint.

When discrimination is determined, a "30-Day Show Cause Notice" will be issued and the Contractor will be required to take appropriate corrective or disciplinary action to eliminate the discrimination and/or correct inappropriate behavior, plus develop a Corrective Action Plan. If the Contractor fails to take the required steps identified, a formal hearing will be held as outlined in the EEO Contract Compliance Plan Section III Contract Sanctions.

**113.03 DISADVANTAGED BUSINESS ENTERPRISE (DBE)****General**

Part III of the "Civil Rights Special Provisions" contains the Contractor's commitment to ensure that Disadvantaged Business Enterprises (minority, woman, or otherwise disadvantaged-owned firms) have equal opportunity to participate in performance of the contract. If a goal is included in the contract the Contractor commits to making good faith efforts to seek out and consider DBE firms for work on the project.

**Establishing Contract Goals**

The Roadway Design Section and the EEO Office will review proposed projects to identify work that could be performed by DBEs and determine if a goal should be established. Items considered in establishing contract requirements include, but are not limited to the following:

- Project size, duration, and dollar value
- Number and size of contractible items in relation to DBE firms available to do the work
- Nature of the project
- Project location

DBE goals if established, are placed in "Notices to Contractors" and subsequent contract specifications.

**Award of Contract**

- A. The apparent successful bidder is the lowest qualified and responsible bidder who certifies that the firm will "perform the work" of the contract "in accordance with" various regulations and special provisions of the contract, including the Civil Rights Special Provisions.
- B. Within fifteen (15) days of receipt of the "Intent to Award" letter, the apparent low-bid Contractor must submit the names of all solicited Subcontractors, equipment lessors, manufacturers, delivery companies and suppliers on form ITD-2396, "DBE Commitments." The form must contain the following information:
  - Names of DBE and non-DBE firms contacted, or who volunteered quotations;
  - Description of the work that each DBE and non-DBE offered to perform;
  - Dollar amount of the work each DBE and non-DBE offered to perform;
  - Identification of DBE firms and non-DBE firms that the contractor intends to use in the execution of this contract. A YES entry in the "Commit to Use" column after a DBE firm constitutes a commitment to use that firm for the work items listed;

- Dollar amount of the participation of each DBE firm to be utilized and total DBE dollar participation anticipated;
- Signed commitment to use the DBE subcontractor(s) identified on the form – for the contract items specified – to meet the contract goal;
- Signed confirmation from the DBE(s) on the DBE(s) company letterhead stating that they are participating in the contract as specified in the prime contractor's commitment; and
- Documentation of good faith efforts if the goal cannot be met.

The information is evaluated by the CCO to determine whether the commitment meets the terms of the contract requirements and the DBE program and goals. Failure of the Contractor to submit DBE information accurately and in proper form may render the bid nonresponsive.

The apparent low bidder's commitment to meet the goals (or demonstration of good faith efforts) determines whether the contract will be awarded. If the Contractor commits to the use of DBEs, which meet or exceed the established goal, the Good Faith Effort Section on pages 5 and 6 of form ITD-2396 need not be filled out.

- C. If the apparent low bidder is unable to identify DBE Subcontractors in order to meet or exceed the goal, the bidder must document and submit justification of a "Good Faith Effort" on pages 5 and 6 of the ITD 2396 DBE Commitment form as to why the DBE goal could not be met. The CCO will review the documentation prior to award of the contract to determine if all of the good faith effort steps have been accomplished. To demonstrate good faith efforts, the bidder must document the steps taken to obtain DBE participation. As stated in the Civil Rights Special Provisions, this information should include, but is not limited to:
- Whether the Contractor advertised in general circulation, trade association, and minority-focus media concerning the subcontracting opportunities;
  - Whether the Contractor provided written notice to a reasonable number of specific DBEs that their interest in the contract was being solicited, in sufficient time to allow the DBEs to participate effectively;
  - Whether the Contractor followed up initial solicitations of interest by contacting DBEs to determine with certainty whether the DBEs were interested;
  - Whether the Contractor selected portions of the work to be performed by DBEs in order to increase the likelihood of meeting the DBE goals (including, where appropriate, breaking down contracts into economically feasible units to facilitate DBE participation);

- Whether the Contractor provided interested DBEs with adequate information about the plans, specifications and requirements of the contract;
- Whether the Contractor **negotiated** in good faith with interested DBEs, not rejecting DBEs as unqualified without sound reasons based on a thorough investigation of their capabilities;

NOTE: ITD defines the term "negotiate," as it relates to "DBE good-faith efforts," to mean that the Contractor will engage in discussions with DBEs related to:

- The content of bid items and possible adjustments thereto;
- The bid items to be included in a package and possible adjustments thereto;
- The terms and conditions of the subcontract, and possible adjustments thereto;
- Whether the Contractor made efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance required by the ITD or Contractor;
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- Whether the Contractor made efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services;
- Whether the Contractor used the services of available minority community organizations; minority Contractors' groups; local, state and federal minority business assistance offices; and other organizations that provide assistance in the recruitment and placement of DBEs; and
- Whether the Contractor was involved in any pre-solicitation or pre-bid meetings that were scheduled to inform DBEs of contracting and subcontracting opportunities.
- Whether any other actions were taken to meet the goal.

If the bidder to whom ITD proposes to award the contract fails to meet the DBE goal and is unable to demonstrate good-faith efforts, or efforts cannot be verified, that bidder may not be awarded the contract and may forfeit the proposal guarantee submitted with the bid. (Standard Specifications 103.06) The CCO, EEOM, and RDE will confer with the Chief Engineer to evaluate the information and determine disposition of the bid.

The apparent successful bidder's certification in the bid proposal indicating the DBE goal will be met or exceeded (or perform all good-faith efforts) is considered binding. Failure to abide by commitments in the certification may result in;

Withheld payments;

Suspending the contract in whole or in part until the Contractor is found to be in compliance (no progress payment will be made during the time and no time extension will be made);

Termination of the contract; and/or

Assessment of liquidated damages. (Contract Civil Rights Special Provisions)

### **Good Faith Efforts when Replacing DBES**

Contractors cannot terminate a DBE Subcontractor (either for their convenience or to replace a defaulting DBE) that has been selected in the ITD-2396 without the written consent of the RE. A DBE may only be replaced if the DBE is **unwilling or unable to perform**. The steps below must be followed for replacement.

1. The contractor notifies the RE. The RE forwards the request to the CCO with recommendation for approval or denial. The CCO then requests written release from the defaulting DBE and then notifies the RE on whether the commitment is or is not terminated.
2. The Contractor must replace the defaulting DBE with another DBE to the extent needed to meet the contract goal, or make and document good faith efforts (listed above) to do so.
3. The Contractor must obtain the approval of substitute DBE(s) from the RE and the CCO before signing and submitting copies of the revised or new subcontracts.
4. If the Contractor is unable to obtain substitute DBEs, he must submit documentation of good faith efforts (listed above) in soliciting substitute DBEs to complete the unfinished work, or break out other contract items to subcontract. ITD may waive or adjust the goal as appropriate, depending on the project circumstances.

### **Counting DBE Participation toward Contract Goals**

1. Only the value of the work actually **performed by and paid to** DBEs is creditable toward the DBE goal, including the cost of supplies and materials obtained by the DBE for work on the contract (except supplies and equipment purchases or leases from the Prime Contractor or their affiliate).
2. When a DBE that subcontracts part of the work of their contract to another firm, the value of the subcontracted work may be counted towards the DBE goals only if the DBE's subcontractor is also a DBE.
3. The DBE Plan and the Civil Rights Special Provisions state that credit toward meeting the contract goal varies with the type of function performed by the DBE firm as follows:
  - Joint Ventures between DBE and Non-DBE Firms – That 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 toward DBE goals. Joint venture agreements must be approved by the EEOM and the ITD Legal Counsel before contracts are signed. (Information to be submitted with ITD-646-B Information for Determining Joint Venture Eligibility)
  - Professional, Technical, Consultant, or Managerial, Bonding or Financial Services - (provided a determination is made that the fees are reasonable).....100%

- Construction Firms - (supply labor and materials to perform a discrete element of the work).....100%
- Manufacturers - (must operate a factory that produces, on the premises, the materials, supplies, articles or equipment required under the contract and of the general character described in the specifications).....100%
- Regular Dealers - (a firm that owns, operates, or maintains an establishment that regularly sells materials or supplies to the general public).....60%  
(NOTE: To be a regular dealer, the firm must be an established business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A regular dealer in bulk products (petroleum, steel, etc.) does not need to maintain a place of business, but must own and operate distribution equipment for the products. Any supplementing of a dealer's own distribution equipment shall be by a long-term lease agreement)
- Brokers, packagers, manufacturers' representatives - (No credit for materials or suppliers being provided).....Net Fee
- Trucking Firm -
  - Must own and operate at least one fully licensed, insured, and operational truck used on the contract;
  - Will receive credit for total value of transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs;
  - May lease trucks from another DBE firm, including an owner/operator who is certified as a DBE and receive credit for the total value of the transportation services; or
  - May lease trucks from a non-DBE firm, including an owner/operator. A DBE who leases trucks from a non-DBE is entitled to credit for the total value of the services provided by the non-DBE firm not to exceed the value of the services provided by the DBE-owned trucks. Additional participation by non-DBE firms receives credit only for fees or commission received.

*Example: DBE Firm X uses two of its own trucks on a contract It leases two trucks from DBE Firm Y and six trucks from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. In respect to the other two trucks provided by Firm Z, DBE credit could be awarded only for the fees or commissions pertaining to those trucks Firm X receives as a result of the lease with Firm Z*

A lease must indicate that the DBE has exclusive use of and control over the truck being leased. This does not preclude the lease 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. Leased trucks must display the name and identification number of the DBE.

When a certified DBE firm a Prime Contractor, the total dollar amount of the actual contract awarded may be counted toward the contract DBE goal attainment.

The Contractor may count toward its DBE goal only those expenditures to certified DBE firms that provide a "Commercially Useful Function" on the project. The DBE performs a "Commercially Useful Function" when it is responsible for execution of a distinct element of the work of a contract and carries out that responsibility by actually performing, managing and supervising the work involved. A subcontracting arrangement, which inflates DBE participation for the sole purpose of meeting contract goals, is not acceptable. A DBE firm acting as a middle person or passive conduit (where the activity is not standard industry practice) is essentially a "broker" and is not performing a Commercially Useful Function.

Second-tier DBE subcontracts (whether with a DBE or non-DBE Subcontractor) may be counted toward the Prime Contractor's DBE goal provided the arrangement is in accordance with standard industry practice. If the first-tier Subcontractor is unable or unwilling to perform for any reason, the Prime Contractor should be prepared to assume responsibility for utilizing the second-tier DBE Contractor if the second-tier DBE Contractor is listed on the ITD-2396 and the Prime Contractor has received credit toward the goal in the amount of the second-tier contract. However, a CUF must be performed.

If all or part of the work committed to a DBE Subcontractor is eliminated from the project, the CCO will determine, on a case-by-case basis whether the Contractor will be required to make up the deficiency of the creditable amount below the contract goal. The CCO's decision will be based on all the circumstances such as the amount of time left in the contract, the availability of DBE firms to do the remaining work, etc.

All subcontracts and second-tier contracts must be approved by the RE before work commences.

### **DBE Joint Ventures**

Minority or women-owned firms that are currently certified as DBEs in Idaho may enter into DBE joint ventures with non-DBEs to participate in highway construction projects. DBE Joint ventures seeking DBE credit are subject to the following requirements.

- Applicants, bidding as Primes, must complete ITD-646b, "Information for Determining Joint Venture Eligibility", and submit it with all accompanying documentation with their bid. DBE joint venture applicants submitting quotes as Subcontractors must complete an ITD-646b, which is submitted to the Prime Contractor. The Prime Contractor will submit the ITD-646b with their ITD-2396 DBE commitment form.
- **The DBE partner of the DBE joint venture must have a separate agreement showing the DBE partner's bid items, who will be supervising work, and dollar participation. The agreement must define the DBE partner's Distinct Elements of Work.**
- The EEOM will examine all information and, in coordination with Legal Counsel, determine whether all requirements have been met and documentation provided. The EEOM will submit the joint findings to the Roadway Design Engineer, along with a recommendation on the advisability of accepting or denying the DBE joint venture arrangement.

- Only that portion of the joint venture directly under the control and management of the participating DBE will be eligible for credit toward the DBE goal and will be identified on ITD-2396, DBE Commitment Form.
- DBE joint venture applications must be submitted and evaluated on a project-by-project basis. Approved joint venture arrangements are project-specific and will cease to exist (for ITD purposes) at the conclusion of the project.

### **Commercially Useful Function (CUF)**

The contract Civil Rights Special Provisions requires that the DBE(s) perform a Commercially Useful Function (CUF) on the project.

ITD will consider that a CUF has been performed when a DBE is responsible for the execution of a distinct element of the work by actually performing, managing, and supervising the work involved in accordance with industry practices (except where such practices are inconsistent with DBE regulations and requirements).

The DBE must be actively performing, managing and supervising the work. As such:

1. The DBE must be responsible for ordering its own materials and supplies, determining quantity and quality, negotiating price, installing (where applicable) and paying for the material itself;
2. The DBE must perform the work commensurate with the amount of its contract;
3. The DBE's contribution cannot be that of an extra participant or a conduit through which funds are passed in order to obtain the appearance of DBE participation;
4. The DBE must exercise responsibility for at least fifty (50) percent of the total cost of its contract with its own workforce;
5. None of the DBE's work can be subcontracted back to the prime contractor, nor can the DBE employ the prime's, or other subcontractor's supervisors currently working on the project;
6. The DBE's labor force must be separate and apart from that of the prime contractor or other subcontractors on the project. Transferring crews between primes, subcontractors, and DBE contractors is not allowed;
7. The DBE owner must hold a Public Works license and any other professional or craft licenses required for the type of work he/she performs on the projects;
8. The DBE may rent or lease, at competitive rates, equipment needed on the project from customary leasing sources or from other subcontractors on the project; and
9. The DBE trucking firm must be responsible for management and supervision of the entire trucking operation for which it is responsible. The following rules also apply to DBE trucking firms:

- a. Must own and operate at least one fully licensed, insured, and operational truck used on the contract. Owner/operators must have an agreement with the contractor or subcontractor that contains;
- Owner/operator's name
  - Social security number
  - Copy of vehicle registration receipt
  - Current vehicle license number
  - Vehicle identification number
  - Method of payment (hour, ton or load)
- b. Leases must indicate that the DBE has exclusive use of and control over the truck, but does not preclude the leased truck from working for others during the term of the lease with consent of the DBE, provided the lease gives the DBE absolute priority for the use of the leased truck.
- c. Leased trucks must display the name and identification number of the DBE.
- d. Lease/rental/contract agreements must be approved by the RE.

### **Monitoring Compliance**

As soon as the DBE Subcontractor commences work on a project, REs will review the DBE's operation based on the work items in the DBE's subcontract and complete ITD-1701, Commercially Useful Function Determination.

1. The RE should be able to distinguish the DBE owners, supervisory personnel and crew members from other personnel on the project to ensure that the DBE is operating in an independent manner.
2. If equipment is leased, the RE should obtain a copy of the lease agreement to determine whether the DBE has exceeded the limits established in the previous section, and to verify that prior approval by the RE was obtained.
3. If the RE determines that the DBE is not performing according to the terms of the contract, i.e., performing a CUF, the RE will notify the Prime Contractor in writing, according to instructions contained in the following section, giving the Prime Contractor five (5) days to eliminate the infraction. This action will be documented under questions 19 and 20 on Form ITD-1701. Copies of the ITD-1701 will be sent to the RE, District EEO/ST Coordinator and the Contract Compliance Officer.
4. If the Prime Contractor fails to remedy the violation, the RE shall impose one or more sanctions and the payments made to the DBE will not be credited towards the Prime Contractor's DBE requirement.
5. If the RE determines that the DBE's performance on the job contains a pattern of relationships with non-minority businesses that bring the DBE's independence and

control, and therefore its eligibility to participate, into question, the RE should advise the Contract Compliance Officer and request that an investigation be performed.

### **Record Keeping**

All records relating to the DBE program shall be maintained by the Prime Contractor and each Subcontractor during the course of the project and preserved for a period of 3 years from the date of completion of the contract.

The Prime Contractor or Subcontractor shall make records pertaining to the DBE program available for inspection, copying or transcription by authorized representatives of the ITD or the FHWA and shall permit such representatives to interview employees as necessary.

Failure to submit the required records upon request, to make such records available, or to permit representatives to interview employees may be grounds for sanctions.

### **Sanctions**

Whenever the RE believes that the Contractor or DBE Subcontractor is not operating in compliance with the terms of Part III, Disadvantaged Business Enterprise Requirements of the Civil Rights Special Provisions (based on an investigation and documentation of the circumstances), the RE will take the following action:

- Advise the Prime Contractor, in writing, of the specific infractions that have been observed and indicate the length of time (not to exceed five working days) that will be allowed in which the Prime Contractor must take corrective action. Further advise the Prime Contractor that all or part of progress payments will be withheld if the deficiencies are not corrected within the specified time period. Withhold payment if not corrected.
- If the Contractor subsequently fails to correct the deficiencies or fails to have the DBE correct the deficiencies, the RE may request direction from the District Engineer and CCO as to appropriate action under the circumstances. After consultation with the EEOM and Legal Counsel, the contract provisions permit the RE to take any of the following actions for any breach of the DBE provisions of the contract:
  - Withhold all or part of progress payments until it is determined the Contractor is in compliance.
  - Suspend the contract, in whole or in part, until the Contractor is found to be in compliance with no progress payment being made during this time, no time extension made and no reimbursement of any additional expenses including field and home office overhead.
  - Cancel or terminate the contract for cause as authorized under Section 108.08 of the Contract Specifications.

Assess against the contractor's final payment on this contract or any progress payments on current or future Idaho Federal-Aid projects an administrative remedy by reducing the final payment or future progress payment in an amount equal to 10% of this contract or \$7,700 whichever is less.

### **Payments to DBE Subcontractors**

To ensure that all obligations under contracts awarded to DBEs are met, the RE will review the Contractor's DBE involvement efforts during the performance of the contract. Contractors are required to pay each subcontractor for satisfactory performance of its contract items no later than twenty (20) calendar days from receipt of each payment the Contractor receives from ITD. The Contractor shall return retainage payments to each subcontractor within twenty (20) calendar days after the subcontractor's work is satisfactorily completed. The Contractor shall certify to the RE that payment to each subcontractor has been made on the certification forms provided by ITD.

The RE shall consider that a subcontractor's work is satisfactorily completed in accordance with 49 CFR 26.29, "a subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented."

## **113.04 TRAINING SPECIAL PROVISIONS (TSP)**

### **General**

The primary purpose of the Training Special Provisions Program is to train and upgrade minorities and women toward journey level status in crafts where they are under-represented. The contract specifies the number of training hours to be filled. The Contractor should assign training hours to crafts that are under utilized in minorities or women. Minorities and women in training positions can be counted toward the EEO goals. RE's should encourage Contractors to bring trainees into the work force early in the contract to provide adequate opportunity for trainees apprentices to complete their programs and to reduce the risk of being found in noncompliance with the training special provisions. Prior to commencing construction, the Contractor shall submit to the RE a plan showing how the Contractor will meet the TSP requirements. This plan will include the number of trainees to be trained, the crafts that the training will cover and the training programs to be used. This plan will also show the starting time for the training in each craft.

### **Establishing Project Training Goals**

The Roadway Design Engineer, in coordination with District personnel, and the Contract Compliance Officer, determines which construction contracts will contain Training Special Provisions and the number of training positions that can be accommodated on each project. Before and throughout the construction season, the Roadway Design Engineer and District Design personnel evaluate the potential availability of work under the contracts, the duration of the work (to ensure adequate time for completion of training) and the potential long-term benefits to the trainees. Assignment of training slots to specific contracts is based on:

- Availability of minorities, women and disadvantaged.
- Potential for effective training.
- Duration of the contract.

- Dollar amount of the contract.
- Total normal work force the average bidder is expected to use.
- Geographic location.
- Type of work.
- Need for additional journeymen in the area.
- Total training hours established and committed to FHWA.
- Ratio of journeymen to trainees during normal operations.

If it is determined that the crafts on a project are not under represented by minorities or women, then training requirements will be removed from the contract.

### **Placing Trainees**

The Contractor may use either Department of Labor or ITD/FHWA-approved programs to be eligible for reimbursement at the rate of \$.80 per hour under the TSP Program. Other programs may be submitted for approval by DOL or ITD/FHWA but, must be approved prior to the start of the training on the project. **Trainees or apprentices and their training programs must be approved by the RE before the trainees start work and the Contractor is eligible for reimbursement.** (RE's may refer to the EEO Contract Compliance Plan for further detail in this process.)

Prime Contractors may request additional training hours or may relinquish training requirements to Subcontractors. However, if the positions are relinquished to a Subcontractor, minority/women trainees in those positions cannot be counted toward the minority/women goals of the Prime Contractor - only toward the goals of the Subcontractor. Also, the Prime Contractor remains responsible for the TSP requirements being met.

The order of priority for filling training positions is as follows:

- Minorities and women receive first priority.
- Disadvantaged persons, as defined by the DOL (see Exhibit D of the EEO Contract Compliance Plan).
- Nondisadvantaged Caucasian males. The Contractor is allowed to accept nondisadvantaged Caucasian males into the TSP Program, only after the Contractor has made and documented a good faith effort to hire minorities, women, and the disadvantaged.

Contract provisions require that Contractors submit name, Social Security number, craft, ethnicity and sex of all proposed trainees along with copies of their training programs for approval by the RE. A copy of this information is also furnished to the EEO/ST Coordinator or

designed DRI. **(Information is required prior to the trainee starting work. No hours can be counted towards the TSP requirements until information is received.)**

When using ITD/FHWA, or Contractor programs, the above information is provided by using the ITD-2777 "On the Job Training Agreement." The Contractor must identify trainees/apprentices on payrolls by race, sex, crafts, status within the program and other relevant information, which may be requested.

Contractors may utilize programs approved by the U. S. Department of Labor or programs approved by ITD/FHWA. Contractors may also develop their own programs, but DOL or ITD/FHWA must approve them before training commences on the project. RE's may contact the Bureau of Apprenticeship and Training, USDOL, Boise, Idaho telephone (208) 334-1013, to verify DOL programs.

The following ITD/FHWA-approved programs may be utilized: (available from District EEO/ST Coordinators)

Heavy-duty Mechanic	2,080 hours
Equipment Operator	2,080 hours
Highway Construction Carpenter	2,080 hours
Truck Driver	1,040 hours
Highway Cement Finisher	1,040 hours
Highway Construction Laborer	1,040 hours

Contractors must make an effort to select training programs that address crafts that are under represented by minorities and women. There will be no Training Special Provisions requirement included in the contract if there is no under representation of minorities or women in any of the Contractor's work crafts, or in construction trades based on ITD's evaluation/analysis by geographic areas of the state.

From payroll information furnished by the Contractor, trainee/apprentice data and activity will be monitored by the Residency/Regional staff to ensure compliance with the provisions of the contract and the individual training programs.

Residency/Regional personnel will maintain information on each trainee/apprentice that contains the following:

- Name
- Social Security number
- Wage rate
- Training hours accumulated on previous jobs
- Job category (craft)
- Number of hours obtained in the approved training program
- Age
- Gender
- Ethnicity
- Hire date
- Name of Contractor

- Changes in work status
- Transfer to other project
- Termination reason

### **Monitoring the TSP Program**

The Contractor is responsible for identifying each trainee to the RE prior to the trainee's start of work and should be so advised at the preconstruction meeting.

All trainees will keep a record of their training activities -- either USDOL "Bureau of Apprenticeship and Training Monthly Progress Report" or ITD-2776 "Trainee's Monthly Progress Record." A completed copy of the Progress Record will be provided to the RE within seven (7) days after the last working day of the month.

Project inspectors must make a daily diary entry for each trainee observed on the job. The entry shall include the trainee's name and the work they were observed doing. Example: Trainee John Doe - operating roller. Entries are made during the Inspector's normal listing of the Contractor's personnel and equipment. If the RE observes:

- That the pay rate is not increased at time increments specified in the training program, or
- That training is not being given in the craft specified, or
- That not all phases of a training program are being incorporated into the work program of each employee, or
- Any other irregularities

The RE will take action as with any specification item.

Training programs approved for use under the Training Special Provision will include documentation similar to that used by the Bureau of Apprenticeship and Training, or as approved by the EEO Office. All Contractors are encouraged to register their programs with the "Bureau of Apprenticeships and Training with the Department of Labor."

All changes to an approved trainee's status shall be reported by the Contractor to the RE, using an ITD-2775 "Training Action Request."

When a trainee completes all requirements of a training program, the Contractor must furnish the trainee/apprentice evidence that the trainee has successfully completed the training. (e.g. letter, certificate, card, etc.) Documentation of the trainee/apprentice's graduation from a program shall be provided to the RE.

Reimbursement to the Contractor under the Training Special Provision is made at the rate of \$.80 per hour of acceptable training given each trainee under an approved program.

The EEO Office will report annually, in December, to FHWA on the progress of the TSP requirements within each federal-aid contract. This information will be obtained by the CCO from the REs.

The District EEO/ST Coordinator and the CCO will audit compliance with the Training Special Provisions Program through spot checks during the project and at the completion of the project. The audit shall determine compliance with the Training Special Provisions by the Contractor and ITD

### **113.05 TRIBAL EMPLOYMENT RIGHTS ORDINANCES (TERO)**

#### **General**

Projects located, in whole or in part, on or adjacent to Indian lands may be subject to tribal ordinances governing employment practices and fees. Such projects are identified in the contract proposal under the heading "Tribal Special Provisions."

Before commencing work on a project covered by Tribal Employment Rights Ordinances, the RE must have received a facsimile copy of the agreement between the Contractor and the Tribal Representative establishing preferential employment rights for Native Americans and the amount of the TERO fee, if applicable. The District Engineer, or designated representative must periodically (at least monthly) contact the appropriate TERO Representative for assurance that the agreement is being honored. A memo concerning the contact must be transmitted to the CCO with a copy to the Construction Engineer.

All forms identified within this Section can be found on the ITD Form Finders system. For a more detailed explanation of the use of the identified forms refer to the approved EEO Contract Compliance Plan and/or the approved DBE Plan.

**EXHIBITS**

113.1	Federal Aid Highway Construction Contractors Annual EEO Report	FHWA-1391
113.2A	Contractor EEO Compliance Report	ITD-0086
113.2B	Resident Engineer on Site Inspection Equal Employment Opportunity	ITD-2674
113.3A	DBE Commitments	ITD-2396
113.3B	Disadvantaged Business Enterprise Job Site Review Commercially Useful Function Determination	ITD-1701
113.4A	On the Job Training Agreement	ITD-2777
113.4B	Trainee Monthly Progress Record	ITD-2776
113.4C	Training Action Request	ITD-2775