

Subcontracts

As specified in Section 00180.21, the Contractor must obtain the consent of the Project Manager before allowing any contract work to be done by forces other than its own. If a subcontractor plans to have some of its work done by forces other than its own, the Contractor also must obtain the consent of the Project Manager before allowing that work to start.

If the Contractor modifies any of the work in a current subcontract, it must submit an amended subcontract to the Project Manager. The Project Manager must consent to the amended subcontract before any of the amended work can start.

Section 00180.20 specifies the minimum percentage of contract amount that must be performed by the prime Contractor's organization. This normally is 30% of the original contract amount.

Subcontracts are required for any work required by the contract, including materials testing and surveying, that will not be performed by the prime Contractor's organization and is not performed by rented operated equipment. See the exceptions in Section 00180.20(c) and discussed below.*

The Contractor must also obtain the consent of the Project Manager before renting operated equipment, as specified in Section 00180.20(c). The review and consent process is discussed below.

For all work that is included in the Contractor's DBE commitment for the project, the Contractor must submit a subcontract for review and consent by the Project Manager, whether or not the work is excepted by Section 00180.20(c)*.

Section 00120.40 requires the Contractor to submit, with its bid, a listing of certain subcontractors that it will use. The Construction Contracts Unit will send the Project Manager a copy of that listing at the time of Notice To Proceed.

Although ORS 279.027 requires the Contractor to submit that listing and states that the Contractor may only substitute from that listing for specified reasons, ODOT and the Project Manager have no responsibility to monitor the listing or any proposed substitutions from the listing. If the listing, however, shows that a portion of the work will be subcontracted and that work should start soon, the Project Manager should remind the Contractor of the need to submit a subcontract for consent before the work can start.

ORS 701 requires the Construction Contractors Board to maintain a listing of contractors and subcontractors who have been determined not to be qualified to

* **Revised July, 2001**

hold or participate in a public improvement contract. Before consenting to a subcontract, the Project Manager must access and check that listing, as described below, to determine that the proposed subcontractor is not on that listing.

If the Project Manager becomes aware that a subcontractor has been placed on the Construction Contractors Board listing of firms that are not qualified to hold or participate in public improvement contracts, the Project Manager must require the Contractor to substitute the unqualified subcontractor with a qualified one.

If the Contractor is placed on the Construction Contractors Board listing of firms that are not qualified to hold or participate in public improvement contracts, the Project Manager must suspend work and initiate termination proceedings as discussed in the Termination and Breach of Contract section (35) of this Manual.

Before consenting to a subcontract, the Project Manager should review the items required by the contract or discussed in this section of this Manual.*

Why must the Project Manager review subcontracts?

- Assure compliance with contract and Federal-Aid requirements on the value of work that the Contractor must accomplish with its own organization
- Determine that the proposed subcontractor (or owner of rented operated equipment) is not on the Construction Contractors Board listing of firms that are not qualified to hold or participate in public improvement contracts
- Assure that the subcontract includes the several statements required by contract or by law
- Prevent brokering that compromises Affirmative Action requirements
- Provide a method(s) to monitor DBE participation*
- Help to protect subcontractors
- Assure compliance with other contract requirements, such as use of Tribal Employment Rights Organization (TERO) firms

When is a subcontract not needed?

As stated above, a subcontract is needed for all work that is part of the DBE commitment for the project.

Section 00180.20(c) allows certain rental of operated equipment, without the need to have a subcontract unless that work is part of the DBE commitment for the project, including:

- Supplier
- Trucking

* Revised July, 2001

- Rental of operated equipment, short duration, under direction of the Contractor* or a subcontractor, such as:
 - Sawcutting
 - Crane for beam placement
 - Concrete pumping
 - Equipment that is temporarily unavailable to the Contractor or subcontractor*

A subcontract is needed for all other work that is not performed by the Contractor's own forces.

A subcontract is needed when an entity, other than the Contractor's own forces, is responsible for performing or completing the involved work, rather than just performing activities* under the direction and responsibility of the Contractor or appropriate subcontractor.

Although a subcontract is not needed for the work listed above, the Contractor must submit a written request to use the rented operated equipment.

The Project Manager must determine that the involved firm is not on the Construction Contractors Board listing of firms that are not qualified to hold or participate in public improvement contracts. The Project Manager may access that listing as described below.

The Project Manager must consent to the rental of operated equipment before the service is provided. The Project Manager does not need to send copies to the Construction Section or other sections. The value of the rented operated equipment is not included in the amount of subcontracted work.

Payrolls must be submitted for the person(s) operating the equipment if they spend more than 20% of their workweek at the project site. Refer to the Labor Compliance section (19) of this Manual.

Procedure for subcontract consent:

The Contractor completes and submits a "Contractor's Request for Subcontract Consent", form 734-1964, (original copy) (see example in Exhibit A) and 2 copies of the complete subcontract to the Project Manager.

As the Project Manager receives the subcontracts, the Project Manager assigns a number to each subcontract in the order of receipt—1, 2, 3, etc. If a subcontractor wishes to further subcontract its work, refer to the comments at the end of this section of this Manual.

* **Revised July, 2001**

The Project Manager reviews the submitted form and subcontract for the following and assures that:

- The subcontractor is not on the Construction Contractors Board listing of firms that are not qualified to hold or participate in public improvement contracts or is not debarred from performing work on public works or Federal Aid projects by other agencies. (Some also are debarred by BOLI or the FHWA.) Access the Construction Contractors Board listing through the its website at www.ccb.state.or.us/Public_Contracts/NotQ2bid.htm.
- The description of the work to be subcontracted is accurate, adequate, and complete and that it clearly defines the responsibility of the subcontractor. See discussion below if the subcontract involves a DBE.
- The statute mandated statements about prompt payment, ability to file a complaint with the Construction Contractors Board, interest penalty, and lower-tier clauses required by ORS 279.314(2) and (3), 279.445(4) and (5), and Section 00180.21 of the contract are included.
- The applicable documents are included or incorporated into the subcontract. These items must be referenced on form 734-1964, and may be actually attached to the subcontract or may be included by reference by a statement in the subcontract.
- Both the Contractor and the subcontractor have signed the documents.

Also see the example Subcontractor Consent Checklist in Exhibit B, that is used by some offices.

For any subcontracts involving a Disadvantaged Business Enterprise (DBE) firm on a Feder-aid project, also* verify the following and obtain approval from the Office of Civil Rights field representative (this would also apply to TERO requirements):

- If the DBE is part of the project DBE commitment, assure that the subcontract for the DBE includes all of the work listed in the Contractor's DBE commitment for the DBE. The subcontractor may perform more work than is shown in the DBE commitment.
- The DBE has full responsibility and control of performance of the work that is included in the subcontract.
- The subcontract does not contain clauses that negate the intent or purpose of the DBE program or that would hinder the DBE in performing a commercially useful function.

The Project Manager must calculate the amount subcontracted on a Report on Contractor's Request for Subcontract Consent, form 734-1395. See example in Exhibit C. The dollar amount of the subcontract is the actual amount expected to be paid to the subcontractor, as shown on form 734-1964. Refer to Section 00180.20(a).

* **Revised July, 2001**

The Project Manager must assure that the total percentage to be subcontracted does not exceed the percentage specified in Section 00180.20 of the contract. If the percentage specified in the contract differs from the percentage shown in form FHWA-1273, the percentage shown in Section 00180.20* will govern.

The Project Manager completes form 734-1395 and completes and signs form 734-1964, indicating consent to the subcontract.

The Subcontractor must not begin its work until the Project Manager has given consent to subcontract. Rental of operated equipment also must not commence until the Project Manager has consented to the request.

If, during the project, the Project Manager becomes aware that the subcontractor has been placed on the Construction Contractors Board listing of firms that are not qualified to hold or participate in public improvement contracts, the Project Manager must require the Contractor to substitute the subcontractor with a qualified firm.

It may be helpful to maintain a record of subcontracts. See Exhibit D(1) and D(2).

After the Project Manager consents to a subcontract, distribute copies as follows:

- 1 copy of form 734-1964 to the prime Contractor
- 1 copy of form 734-1964 to Region
- 1 copy of entire subcontract including forms 734-1964 and 734-1395, excluding any attached applicable documents, to the Construction Section
- For all Federal-Aid projects, 1 copy of entire subcontract including forms 734-1964 and 734-1395, excluding any attached applicable documents,** to the Office of Civil Rights field representative*
- For Non-Exempt Federal-Aid projects, 1 copy of form 734-1964 to the FHWA Local agencies and consultants should submit subcontracts through the Region liaison for review before the subcontract is submitted to the Construction Section.

If the subcontractor wishes to further subcontract its work, perform the same review plus the following with the sub-subcontracts:

- Number sub-subcontracts the same as the subcontract, followed by an alphabetical letter. For example, Prime Construction is the prime Contractor. Heavy Duty Construction is subcontract number 4. Heavy Duty sub-subcontracts part of its work to Light Duty Construction. Light Duty's subcontract number would be 4A. If Heavy Duty sub-subcontracts other work, the next company would be 4B, etc.

* Revised July, 2001

** Revised July, 2002

- On form 734-1395, no dollar amount should appear on lines 3 or 4 for sub-subcontracted work. The bid item, CCO, or EWO numbers should go on line 2.
- The dollar amounts and percentages on lines 5-7 would remain unchanged from the current subcontract (subcontract 4 in the above example).