DATE: August 20, 2014

TO: Region Engineers
    Region Associate Construction Engineers
    Region Construction Engineers
    TSC Managers
    TSC Construction Engineers

FROM: Gregory C. Johnson, P.E.
      Chief Operations Officer

      Randy R. Van Portfliet, P.E.
      Bureau Director of Field Services

SUBJECT: Bureau of Highway Instructional Memorandum 2014-09
         External Civil Rights Requirements, Equal Employment Opportunity (EEO),
         Title VI, On-The-Job Training (OJT), and Disadvantaged Business Enterprise
         (DBE) for Federal Aid Construction Projects.

This instructional memorandum sets forth changes and clarifications to the Michigan Department of Transportation’s (MDOT’s) external civil rights processes. The procedures in this BOHIM are effective immediately unless noted otherwise in other MDOT documentation and apply to all MDOT construction projects (MDOT and local agency) involving federal and/or state funding.

EQUAL EMPLOYMENT OPPORTUNITY (EEO)

MDOT must ensure that all federal-aid contractors, sub-contractors, vendors, and material suppliers do not discriminate in employment and contracting practices based on race, color, religion (in the context of employment), sex, national origin, age, or disability.

Any deficiencies noted in a contractor’s EEO program are to be provided to the MDOT Office of Business Development (OBD) at 866-323-1264 or MDOT-DBE@michigan.gov.

A contractor’s affirmative action plan is to be comprised of the following contractual requirements: EO provisions, training provisions, Federal Highway Administration (FHWA) Form 1273, Title VI (under Appendix C of the project proposal) and Disadvantaged Business Enterprise (DBE) goals and provisions.
Title VI Coordinator

Cheryl Hudson is MDOT’s Title VI Coordinator. She can be contacted at 517-373-0980 or at HudsonC1@michigan.gov for any issues related to civil rights.

Title VI Definition

No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity funded in whole or in part with federal funds.

Equal Opportunity (EO) Contract Compliance

MDOT’s OBD conducts federally-required EO and EEO compliance reviews as part of its monitoring responsibilities. OBD staff determines whether the contractor took all necessary and reasonable steps to comply with these requirements.

EO requirements in FHWA, Form 1273, Required Contract Provisions Federal-Aid Construction Contracts, apply to all contractors, subcontractors, vendors and suppliers on all federal-aid contracts of $10,000 or more. As specified in FHWA Form 1273, the contractor (or subcontractor) must include this form in each subcontract and further require its inclusion in all lower tier subcontracts (excluding purchase orders, rental agreements and other agreements for supplies or services).

FHWA Form 1273 is to be physically incorporated in each federal-aid highway construction contract and subcontract. Form 1273 may be bound electronically into an electronic contract/subcontract (PDF format) but may not be left out and only referenced (website location, etc.) as it must be physically included in every contract/subcontract. The construction/project engineer should discuss FHWA Form 1273 at the preconstruction meeting.

The construction/project engineer must ensure that contractors EO posters are in order and conspicuously placed on the project site as the FHWA requires contractors to prominently display posters in areas available to employees and applicants for employment during the life of the project. The poster display is to include the prime contractor’s EEO policy statement and the name and contact information of the prime’s EEO Officer. All notices and posters are to be legible, protected from the elements, and the dates must be shown. Mobile operations can have the posters located in a vehicle. Complete Form 1967, Jobsite Poster Inspection Checklist, at the start of construction operations and any time the poster display is moved. The form is an aid to make sure that the contractor is following the proper procedure and is to be placed in the project files after completion of the form.

Job site posters should be discussed at the preconstruction meeting. The required job site posting information can be found under Section C at the following MDOT website: http://www.michigan.gov/mdot/0,4616,7-151-9622_11044_11367-222170--,00.html.
If construction staff receives a complaint from the employee of a contractor or subcontractor they are to notify OBD at MDOT-DBE@michigan.gov or 866-323-1264 (all MDOT Regions except Metro) or 866-323-4009 (Metro Region).

If construction staff receives a complaint involving an MDOT employee or other persons who are not employees of contractors on a project, they are to contact the MDOT Title VI Coordinator.

Construction staff is to evaluate any problems or issues encountered with EEO, DBE or Title VI compliance when completing contractor performance evaluations.

ON-THE-JOB TRAINING (OJT)

MDOT’s OJT program is based on requirements of Appendix B to Subpart A of Title 23 Code of Federal Regulations Part 230 (23 CFR Part 230), which requires inclusion of training special provisions in federal-aid construction contracts. The OJT program provides opportunities for unskilled workers to acquire training in skilled construction trades. The primary objective of the OJT program is to train and upgrade minorities, women, and disadvantaged persons toward full journey-level status and to provide opportunities for trainees to become part of a contractor’s permanent workforce. OJT program details are available from MDOT’s OBD or on the web at http://michigan.gov/ojt.

DISADVANTAGED BUSINESS ENTERPRISES (DBE)

DBE companies are contractors (prime, sub, sub-sub, etc.), truckers, materials suppliers, consultants and other service providers who are certified as having met requirements of 49 CFR Part 26. A current list of all DBE companies certified to work in Michigan by work classification and work type is available at: http://www.michigan.gov/mucp

The document titled, 2013 DBE Program Procedures, is MDOT’s federally-approved plan for its DBE program. This document contains detailed information and is available at http://www.michigan.gov/mdotdbe under the Resources link.

DBE race-conscious (RC) participation goals are expressed as a percentage of work which must be contracted to DBE companies for applicable projects with a DBE goal. On RC projects the prime contractor is required to provide DBE commitment sheets (Form 0178, Disadvantaged Business Enterprise (DBE) Participation) prior to contract award. The construction/project engineer is notified via email (or file presence in ProjectWise) of the prime contractor DBE commitments on RC projects or when there are changes in the goal or DBE companies committed to the project. These notifications are to be provided to construction staff assigned to the project. DBE commitments, subcontracts, and the current DBE goal (when applicable) assigned to a project are posted on MDOT’s Construction Contract Inquiry website at http://mdotcf.state.mi.us/public/trnspor/.

The following tasks related to DBE oversight are to be completed on all federally funded projects. The task list provides guidance to project construction staff related to their
responsibilities for oversight of DBE compliance.

1. Collect all DBE subcontracts and purchase orders from prime contractor. Provide copies of purchase orders to OBD with the respective 4109 form submittal.
2. Review DBE commitment sheets (form 0178, also known as blue sheets) for awareness and knowledge.
3. Monitor and document DBE work operations.
4. Monitor and document Commercially Useful Function (CUF) compliance (form 4109) during construction operations and provide a copy of form 4109 to OBD as noted on the form.
5. Monitor compliance with DBE commitments (work type, amounts committed, DBE payments, etc.).
6. Monitor overall DBE participation percentage as construction work progresses.
7. Calculate the final overall DBE participation percentage to check for compliance with the contract requirements. Contact OBD with non-compliance issues.
8. Document all DBE contracting issues, concerns, problems, etc. and provide to OBD for discussion and resolution.
9. Provide all DBE substitution forms in accordance with form instructions and distribution lists.

When the construction/project engineer becomes aware that a DBE goal will not be met due to the inability of a DBE to perform work, changes in DBE subcontracting, reduced quantities, changes in the work, etc., the construction/project engineer must direct the contractor to submit a specific plan to address the goal deficiency to the engineer. The construction/project engineer will provide a copy of the submitted plan to OBD.

The contractor may, after award, request a waiver or modification of the DBE participation goal. The contractor must submit evidence of good faith efforts to meet the DBE participation goal. This includes documentation to support that the amount of contract work remaining was carefully reviewed to identify other work which could be subcontracted to DBE firms.

If the prime contractor is not meeting its RC DBE participation goal after project award, it must request a post award waiver or modification of the goal. These requests are to be submitted with Form 0188, Contractor Good Faith Effort Application. Requests for waiver or modification of a DBE participation goal must be submitted to OBD immediately upon awareness.

Contractors are not allowed to arbitrarily reduce the amount of work committed to DBE companies or terminate a DBE subcontractor without construction/project engineer approval, including the self performance of previously committed DBE work. The construction/project engineer is to be notified of a DBE company’s inability to perform work and the contractor’s intent to obtain a substitute DBE on projects with race-conscious (RC) DBE participation goals. A DBE who is unable to perform work must be given five business days written notice by the contractor of their intent to obtain a substitute DBE. The contractor is required to provide copies of the notice to the construction/project engineer and OBD. To substitute DBE companies, the prime contractor must then submit Form 0196, Request to Replace Disadvantaged Business Enterprise. The construction/project engineer must review and approve (in consultation with
OBD) any DBE substitutions before submitting the approved form to the MDOT Contract Services Division.

Work items, if applicable and available, must be properly assigned in FieldManager to the respective DBE company. Construction staff must document work done by all DBE companies, including truckers, suppliers, service providers, and subcontractors. Documentation is to occur on the Inspector Daily Reports (IDR) or the Commercially Useful Function Form 4109 submittal and should include any concerns or problems. All potential field concerns are to be discussed with OBD staff.

**DBE Construction Engineers and Technicians**

MDOT has assigned construction engineers and technicians by region to help DBE companies bidding or working on construction contracts. The DBE Technician list is available at: [http://www.michigan.gov/mdotdbe](http://www.michigan.gov/mdotdbe) under the contacts heading.

**Third Party Complaints**

Any person may file a written complaint alleging that a currently certified firm is in violation of DBE regulations. Complaints must be filed with OBD in writing no later than 180 days after the date of an alleged violation. For further information, refer to the DBE Program Procedures as discussed previously.

**DBE Commercially Useful Function (CUF) Requirements**

Field direction on this issue can be reviewed with Bureau of Highway Instructional Memorandum, 2013-12, Disadvantaged Business Enterprise (DBE) Commercially Useful Function (CUF) Compliance or any applicable superseding BOHIM.

**Joint Checks**

A joint check is a two party check between a subcontractor, a prime contractor, and a materials supplier. Joint check arrangements must be approved by OBD and the Contract Services Division in advance of use. MDOT Form 0183, Application to Use Joint Checks, is included in project proposals and must be submitted to the OBD for approval at least two weeks in advance of use of any joint checks.

**DBE Documentation**

The construction/project engineer should compare names of DBE companies and payments listed via submittal of form 2124A with the following items to check for discrepancies or compliance issues:

- DBE companies listed on MDOT Form 0178, Disadvantaged Business Enterprise (DBE) Participation.
- The types of work listed on forms 0178 or 0182 with the services/work classification listed
on form 2124A.
  o Project scheduling and anticipated work presence by DBE companies.
  o Any reports of non-compliance with prompt payment requirements.

Construction/Project engineers should question any deductions shown on form 2124A. Contractors are not permitted to hold any type of retainage per MDOT policy. Holding of retainage or making partial payment to subcontractors for work that was approved and paid by MDOT is to be reported to the Construction Field Services Division.

Questions

OBD can be contacted at MDOT-DBE@michigan.gov with any DBE related questions or concerns. Messages can be left at 866-323-1264 or 866-323-4009 and an OBD staff person will respond.

Please share this information with consultants and local agencies in your area. If you have any questions, please contact Jason Gutting, Engineer of Construction Operations, at guttingj@michigan.gov or 517-636-6334.

Construction Manual

The contents of this BOHIM will be placed and maintained in the MDOT Construction Manual. After incorporation the BOHIM will sunset and link directly to the Construction Manual.